

SLIDE CITATIONS FOR THIS TRANSCRIPT ARE FOR THE PRESENTATION VERSION OF THE SLIDES

Welcome to the Department of Commerce Bureau of Industry and Security export regulations training webinar series. Today's topic is de minimis and direct product rules. In just a moment we'll be turning you over to export policy analysts Sharron Cook and Nancy Kook. If you're watching live, you'll have the opportunity to ask questions directly using the "ask a question" button just below the video window. And we hope you enjoy the view overlooking Connecticut Avenue and K Streets in Washington, only a couple of blocks from the White House. And this is a live broadcast, so don't be surprised if you hear a motorcade pass by in the background. Again, thank you for attending. Now let's turn it over to our presenters.

Sharron: Thank you for joining us on our first ever de minimis and direct product webinar. I'm Sharron Cook, and this is Nancy Kook. We're from the Regulatory Policy Division of BIS. De minimis and direct product are the most complex policies within the EAR, the Export Administration Regulation. Nancy will go over the de minimis rules, and then I will go over the direct product rules, and then we'll do three scenarios. Also with us in the studio are Hillary Hess, the director of the Regulatory Policy Division; William Arvin, and Timothy Mooney. They are standing by to answer your questions as we go through the presentation. As your questions come in, they will answer the questions. We may not get to all of your questions, but we will take them back to the office and we'll have an FAQ that will be posted along with this presentation. When we have gone through Nancy's de minimis presentation, I will go through some review questions. So pay attention, because I am going to ask those review questions and I expect your answers to be correct. Take it away, Nancy.

Nancy: Hi everyone, thanks for joining us this morning. There's a materials link located in the presentation webinar, and the materials link will take you to the following documents: PDF versions of the BIS guidance on de minimis and direct products. These files can also be found on the BIS website. There's also Supplement No. 1 to Part 740 which describes the country groups. The country groups are important to know when actually determining [based on the direct product and de minimis rules] whether your item is subject to the EAR. There's also three flow charts, and these three flow charts outline [the logic followed by] the updated de minimis and direct product decision tool that is online on the BIS website. The scenarios that Sharon mentioned, there's three total, and you have a document version of those scenarios as well as four additional ones. And finally, there's a PDF version of this presentation you're about to see. I recommend that you follow along with the presentation, not the PDF version, because some of the page numbers don't quite match up. And you'll also see some of the answers you're not supposed to see first.

Slide 2

The purpose of this presentation is to discuss the de minimis and direct product rules found in the Export Administration Regulations. Please keep in mind that these rules exist to determine if your non-U.S. made item is subject to the EAR. If you determine that your non-U.S. made item is subject to the EAR, then you must then determine what the license requirements would be for your non-U.S. made item.

Slide 3

Also, these rules only -- I'm sorry -- yes. These rules should only be applied to non-U.S. made items located outside of the United States. Again, the de minimis rules and the direct product rules we're about to cover only apply to non-U.S. made commodities, technology and software located outside of the U.S. and that is to be exported to another destination.

Slide 4

During the first part of this presentation I'll be going over de minimis, as Sharron mentioned. I'll be discussing some key concepts which include U.S. controlled content, incorporation, and whether the U.S. content is subject to the EAR. I'll then go over the de minimis rules that are found in the EAR, and run through some sample calculations of de minimis. I'll then hand the presentation over to Sharron, who will talk about second incorporation, and follow that with the discussion of the direct product rules.

Slide 5

U.S. content in non-U.S. made items is treated in different ways depending on the sensitivity of the U.S. content. The International Traffic in Arms Regulations have a see-through rule. The ITAR tends to control more militarily sensitive items and exports. The see-through rule basically states that if you have an ITAR controlled item, and ~~it's really~~ [even if it is] a small and noncritical part that is then incorporated or integrated into a larger system or item that may be non-U.S. made, that ITAR part will remain controlled by the ITAR, regardless of the value of that small noncritical part, and regardless of whether the non-U.S. made item is then integrated into subsequent systems or items. The EAR does not follow the see-through rule. Instead, it follows a series of de minimis rules which are based on the percentage by value of the U.S. origin content in a non-U.S. made item.

Slide 6

If your non-U.S. made item incorporates controlled U.S. origin content, and that percentage exceeds the de minimis percentage for the particular country that you're exporting to, then your non-U.S. made item is subject to the EAR.

Slide 7

If the non-U.S. made item that incorporates the controlled U.S. origin content does not exceed, that is, it meets or is less than the de minimis percentage for the country that you're exporting to, then that non-U.S. made item is not subject to the EAR.

So some of the key things we're talking about here are: what is controlled content; whether it's incorporated into a non-U.S. made item; and then what country you're actually exporting your item into.

Slide 8

We're going to first talk about incorporation and de minimis -- sorry, incorporation and U.S. controlled content. The concept of incorporation is defined in Supplement No 2 to Part 734 note to paragraph (a)(1). This note states that U.S. items are incorporated when the following three bullet points are all true.

So take the example of a steering wheel in a car. A steering wheel is essential to the functioning of a car. It will be sold along with the car; it would never really be sold separately because the car would be useless at that point. And then if you ever resold that car, then the steering wheel would be included in that resale. So for the purposes of the regulations, that steering wheel is incorporated into the car.

Slide 9

Now let's take a look at controlled content for de minimis purposes. Controlled content for de minimis purposes is the U.S. origin items that would require a license to the ultimate destination of the non-U.S. made item. Guidelines for U.S. controlled content are also found in Supplement No. 2 to Part 734, paragraph (a)(1). To determine U.S. controlled content, you have to look at the ECCN of all the U.S. origin items in your non-U.S. made item, and then identify whether a license or license requirements are required from BIS to export that to another destination. A few things to keep in mind. In general, EAR99

items are not controlled content unless they're going to certain destinations. And these destinations include Iran, N. Korea, [the Crimea region of the Ukraine,] Syria and Cuba. And when calculating your controlled content, you do not count commodities eligible for license exception GBS; commodities, technology and software that are NLR, no license required; and commodities that are only controlled for short supply reasons.

So let's go back to the example of the steering wheel in the car. So say you have a U.S. origin steering wheel that is being incorporated into a German made car, and that German made car is then sent to Russia. If your U.S. origin steering wheel would have required a license if being originally sent to Russia, then your U.S. steering wheel that has been incorporated into the German car would be controlled content for de minimis purposes if it's being sent to Russia.

Slide 10

We've discussed how the EAR is less restrictive than the ITAR, but in general, regardless of whether the non-U.S. made item is military or commercial, if the item is ITAR controlled, the see-through rule will apply, except for certain exceptions. And this exception occurs when the ITAR category includes a see-through carve-out note, and this carve-out note states that the "articles described in this paragraph are subject to the EAR when, prior to export, reexport, retransfer or temporary import, they are integrated into and included as an integral part of an item subject to the EAR."

Slide 11

This see-through carve-out note can be found in two categories of the USML currently. They are Category 8, the aircraft and related articles; and Category 15, spacecraft and related articles. As the carve-out note states, the ITAR articles do not become subject to the EAR until they've been integrated or incorporated into an item subject to the EAR. Once that ITAR article has been incorporated into the item subject to the EAR, it is carved out of control from the ITAR and then must always be counted as U.S. controlled content for the de minimis purposes. These items are also referred to as the see-through carve-out items.

Slide 12

Let's look at Category 15, and see how it kind of works there. In Category 15, the see-through carve-out note references paragraph (c)(3) and paragraph (e). If your ITAR content in your non-U.S. made item or any item is a Category 15(c)(3), or (e) and is incorporated into a 9A515 satellite or system, then the ITAR content has been carved out of ITAR control and is subject to the EAR, and must be counted as U.S. controlled content for de minimis purposes.

Slide 13

On the other hand, if your 9A515 satellite, foreign or domestic, contains a Category 15 item that is not in paragraphs (c)(3) or (e), then your ITAR controlled item remains ITAR controlled, and you would have to get export or reexport authorization from the DDTC, the Directorate of Defense Trade Controls. In this case, your satellite would remain subject to the EAR as a 9A515 satellite, and only the ITAR part, again that Category 15 part that is not in items paragraph (c)(3) and (e), that would require a DDTC authorization. You would list the satellite as a paragraph (x) item in your ITAR application.

Slide 14

As I mentioned earlier, there are a few things that must be considered when looking at the de minimis calculations, and these are the U.S. controlled content that's been incorporated into a non-U.S. made item, as well as the ultimate destination of export. In the case of spacecrafts, you have potentially two countries of ultimate destination. The first is the country where the space launch actually occurs, and

the second is the country that actually takes control of the spacecraft after the launch. If either of these countries fall within the D:5 country group, then there's a 0% de minimis and it would be subject to the EAR.

Slide 15

The de minimis rules themselves are found in Section, 734.4, and the calculation guidance for de minimis is found in Supplement No. 2 to Part 734. Basically, there are three de minimis levels: 0%, 10%, and 25%. They're based on the type of U.S. controlled content being reexported or transferred, as well as the country of destination.

Slide 16

We're going to first discuss the ones that have a 0% de minimis; i.e., they're ineligible for de minimis. Some non-U.S. made items that incorporate U.S. controlled content have 0% de minimis to all locations. This occurs when the U.S. controlled content falls under one of these bullet points, and it includes certain 9E003 technology, as well as encryption technology that's controlled under 5E002. In most cases, however, your de minimis levels are based on the destination of reexport as well as the content that's being controlled.

Slide 17

The EAR gives lower de minimis percentages to countries of concern, and these countries are categorized in country groups D and E. There are tighter restrictions to certain country groups based on the type of the U.S. controlled content in the item being reexported. This slide outlines the reasons for concern for the different country groups. A complete list of countries and the consolidated country groups can be found in Supplement No.1 to Part 740. It's also included in the link for the materials of this presentation. The next three slides are going to spell out the de minimis rules for U.S. controlled content in non-U.S. made items. Whether a non-U.S. made item is subject to the EAR or not depends on the type of U.S.-controlled content and the destination, as I've mentioned several times.

Slide 18

First we're going to look at the 600 series 9x515 items as well as see-through carve-out items. Non-U.S. made items with U.S. origin controlled content that falls in the .a through .x paragraphs of 600 series of 9x515 ECCNs have a 25% de minimis rule when exported to all countries except for D:5, E:1 and E:2 countries. The D:5 are the U.S. arms embargoed; E:1 is terrorist supporting countries; and E:2 is the unilateral embargo, which is Cuba right now. If your non-U.S. made item includes these .a through .x paragraph items, and is not going to D:5, E:1 -- it is going to D:5, E:1 or E:2 -- again, if they include these .a through .x paragraph items and is going to D:5, E:1 or E:2, then there is a 0% de minimis, and it would be subject to the EAR.

Slide 19

There's one additional requirement when looking at the 600 series items, and this is if your item falls within the .y paragraph of the 600 series. If your item has .y controlled content, if your non-U.S. made item has .y controlled content, then there is a 0% de minimis when it's being exported to E:1, the terrorist supporting countries; E:2, the unilateral embargo; as well as China. For all other locations the .y content is not considered controlled content and would not be used in your de minimis calculations.

Slide 20

The other scenario that you're looking at is when you have U.S. content that is not 600 series, not 9x515, and not see-through carve-out. In that case, you have a 25% de minimis rule to all locations except for

the E:1 countries. And again, the E:1 countries are the terrorist supporting countries. If you're sending to an E:1 country, there's a 10% de minimis rule. So if your non-600 series, non-9x515, non-see-through carve-out, has a de minimis calculation of more than 10%, then it will be subject to the EAR if being sent to country group E:1.

Slide 21

We've gone over the key concepts of de minimis and also looked at the de minimis rules themselves, so now we'll look into actually doing the calculations for de minimis. The calculation for de minimis is a relatively simple equation, you're looking at the fair market value of your U.S. controlled content and dividing that by the total fair market value of the non-U.S. made product. You ~~divide~~ [multiply] that by 100 to get the actual percentage. In general, you would be comparing commodity values to the commodity values, software to software, and the technology to the technology. There is one instance, though, when for commodities you might be calculating some software into your de minimis calculations. And this is where you have bundled software with your commodities.

Slide 22

The concept of bundling is covered in Part 734.4, notes to paragraph (c)(1) and (d)(1). Bundled means that your software is to be exported together with the non-U.S. made item, and is configured for that non-U.S. made item, but is not necessarily physically integrated into that item. For the most part, U.S. origin software that would be lower level software listed on the CCL, the Commerce Control List, and controlled for the reasons of AT only, or are EAR99, would be eligible to be bundled with commodities. So the simple example of this would be a printer and a CD. The printer has a CD, and the CD has software which you actually need to have to use your printer. The low level software on that CD would most likely be EAR99, and would be considered U.S. controlled content in terms of the de minimis calculation for your printer. Another example would be a non-U.S. made computer which has been bundled with U.S. origin software, which could be the operating system. If this operating system is mass market under the EAR guidelines, it would be controlled at the AT level (for anti-terrorism reasons). This AT controlled software is a lower level software which would be bundled with the computer and subsequently used in the de minimis calculations of the computer.

Slide 23

Let's do a sample calculation for de minimis purposes. Say you have a U.S. origin field programmable gate array, an FPGA, that's classified in 3A001.a.7 and has a fair market value of \$600. This FPGA is then integrated into a German Trout acoustic towed hydrophone array that has a fair market value of \$6,000. So what would be your de minimis calculation?

Slide 24

It's a relatively easy equation for this example. Your U.S. origin controlled content, the FPGA, has a fair market value of \$600. The German hydrophone has a total fair market value of \$6,000 so your de minimis percentage calculated would be 10%.

Slide 25

Let's talk briefly about fair market value. What happens if there are different types of prices associated with a single item? What if your buyer of the FPGA is a subsidiary or a regular customer, and the price to them has been reduced by 50%, so their price for this FPGA is \$300? Can that \$300 be used as your fair market value?

Slide 26

And the answer to this is no. You must use the fair market value of \$600. This is because the \$300 could be considered a "buddy buddy price" to the regular customer, and the fair market value has to be an arm's length fair market price, and it can't be a price point specifically geared to one of your customers.

Slide 27

What if you have a regional price for the FPGA of \$500 to Australia? Can that \$500 be like a fair market value for this item?

Slide 28

And the answer is yes, you may use its regional price. The \$500 can be used as a fair market value because the price point is provided to the whole region and not a specific customer or two.

Slide 29

Another scenario. What if your hydrophone is still in research and development and has never been sold, and has no fair market value, what is the company supposed to do.

Slide 30

Well, you can use the comparable fair market value for a similar product, or you can just use a production cost for that item as your fair market value.

Slide 31

We're going to do a couple more de minimis calculations, looking at what is controlled content for different areas. So the first example: What if your hydrophone costs \$2,000, what would be the calculated de minimis percentage of U.S. controlled content if the hydrophone were destined to Australia.

Slide 32

So this is slightly a trick question, unless you're really knowledgeable about the ECCNs and the information here. The FPGA falls under 3A001.a.7, and this EECN has a license exception GBS. Australia falls within country group B, so you could use license exception GBS when exporting to them. As I mentioned during the controlled content discussion, commodities that are eligible for license exception GBS are not controlled, they're not counted for U.S. controlled content and the answer would be you would have 0% controlled content in your non-U.S. made item.

Slide 33

What if this hydrophone cost \$2,400 and was being sent to Russia, what would be your calculated de minimis percentage.

Slide 34

Again, in this example you're going to start with the original FPGA at fair market value of \$600, divide that by the total cost of the hydrophone, which is \$2,400, multiply by 100, and you get a 25% de minimis percentage.

Slide 35

So is this hydrophone that's being exported to Russia subject to the EAR because of your FPGA, U.S. origin FPGA?

Slide 36

And the answer is no. To be subject, you have to be above the de minimis level. If you're at the level or below, you are not subject to the EAR. You would be able to send this hydrophone to Russia without being subject to the EAR. I'm now going to hand over the presentation to Sharron, who will talk about direct -- sorry, second incorporation, and de minimis.

Slide 37

Sharron: Okay, hello again. We're going to talk about de minimis, and one specific concept within de minimis. It's called the second incorporation rule. And so you're going to have to excuse me for my crude props, but I've got crude props up here. Let's say that we have a French test stand, okay, and this French test stand has some U.S. content. Now, the French people have built this test stand, and they sell it by catalog, they have it in their warehouse, they sell it online, it's their product. Their pride and joy. They get an order from Germany, and they send the test stand to Germany, and Germany then incorporates it into their product. At that point a second incorporation has taken place. Now, this is the policy determination of the BIS. The second incorporation rule cannot be applied to 600 series U.S. origin content or U.S. origin see-through carve-out items. It can only be applied if the first incorporation results in a non-U.S. made discrete product.

Slide 38

Now, you ask yourself, well, what's a discrete product? I'm glad you asked. The first incorporation must be complete and result in a discrete product. So for our example, we have the German product, we have the French test stand, and the French are thinking to themselves, okay, I've got some U.S. content, but I know that it's going over to Germany, and it's going to be incorporated into a product. And then the U.S. product, the U.S. content will disappear, okay? It doesn't need to be counted, it's not subject anymore because of the second incorporation rule. Love that second incorporation rule. But they're thinking that, and they think, well, I'm just going to put this U.S. content into my test stand, and I'm not going to count it when I send it off to Germany. But they cannot do that. This has to be incorporated into the German product, and once it is incorporated, then it can be not counted, and only then.

Slide 39

Evidence of a discrete product. The non-U.S. product is regularly sold as stand-alone product or as an identifiable replacement component or assembly. Evidence that the non-U.S. made product is not a discrete product would be if the purchaser is involved in the design of the non-U.S. made product. For instance, let's say that Germany says, well, I think we need this special part for our product. They call the French company and they say look, we need this special part. It has to be square, it has to have a green lid, and it has to have two U.S. components. They've talked about the design, and they've designed and custom-made a part for them. In that instance, this would not be considered a discrete product any longer. Now, the French company has been pulled into the manufacturing line of this German product. When it's in this line, then it is not a discrete product. They're not selling this to everybody, they're only making it for the German end user.

Slide 40

All right, let's do a second incorporation example. You have a U.S. origin microprocessor chip, 3A001.a.3. The chip is then incorporated into a non-U.S. central processing unit, and is subject to the EAR because of the de minimis rule. Now, the CPU is sold from stock outside the United States, let's say we're in France, and they've made this CPU, and the non-U.S. made CPU is then incorporated into a

computer. Now a second incorporation has taken place, and the chip is no longer seen. This chip would not be subject or make the laptop subject at this point.

Polling questions for the audience

All right, now we're at the halfway point, and I want to see how well you have listened. We're going to ask you some polling questions.

Okay, first polling question. *What is the de minimis percentage for a standard ECCN going to a destination listed in country group E:1?* And by standard, I mean not a 600 series, a 9x515, or a see-through carve-out item. What would be the percentage? 0, 10%, or 25% going to E:1? Plug in your answers in your polling section. And the majority of you said 10%. And you would be correct. Very good.

Okay, second polling question. *What is the de minimis percentage for a 600 series ECCN going to Cuba?* Now, remember Cuba is E:2. Would it be 0, 10%, or 25%? And 56% of you have said that it is 0%. And you would be correct. Very good, I'm glad you all are following along, that encourages me that you will continue to follow along and you're getting this very complex policy.

What is -- all right, we'll go on to our next polling question. *What is the de minimis percentage for a 9x515.a through .x going to a destination in the United Kingdom?* 0, 10%, or 25%? And the answer is 86% of you said it's 25%, and we're doing much better. 86%. I can almost give you guys a B. Okay, let's see if we can get it up into the 90 percentile. I have two more questions for you to improve on your test. Okay, here we go.

What is the de minimis percentage for a standard ECCN going to Japan? Turn in your answers, please. And we've improved, we've gotten up to 89%. Well done.

Okay, last question. *Okay, what is the de minimis percentage for a 600 series ECCN going to a destination in country group D:5?* 600 series going to a D:5 country, that would be our U.S. arms embargoed countries. Would it be 0%, 10%, or 25%? Let's see how you did. 76% of you said 0. And you would be correct. Very good. Okay, the rest of you, you're going to have to go back to the materials and you're going to have to relearn this stuff and go over it and over it again until you can get these percentages in your head.

Slide 41

Okay, now we will go on to the direct product rules.

Slide 42

In the direct product segment of this webinar I'm going to discuss the direct product rules for a 600 series, the 9x515, the non-600 series/non-9x515/non-0A919, and we're going to talk about classifying your non-U.S. made item that is not subject to the EAR because of de minimis or the direct product rules. We will also discuss ECCN 0A919.

Slide 43

First off, we're going to compare how the ITAR treats direct products versus how the EAR treats direct products. Now, under the EAR, any defense article produced or manufactured from the ITAR technical data or defense services requires DDTC approval prior to transfer to any non-U.S. person. While under the EAR, *certain* non-U.S. made items located outside the United States, that are the direct product of *certain* U.S. controlled technology or software, are subject to EAR when exported from abroad to *certain* countries. Now, each time I use the word certain, that was a narrowing of the scope. We have some outs or some exits for you to go through. Now let's get to our direct product rules.

Slide 44

This is the direct product rule for the 600 series. There are three questions that you see in front of you. The answers -- if the answers to these three questions are all yes, then your non-U.S. product is subject to the EAR. The first question is: Is the non-U.S. direct product of U.S. controlled 600 series technology or software, or a plant or major component of a plant that is the direct product of U.S. origin 600 series technology or software? Second question: Is the non-U.S. made direct product a 600 series or 0A919 item? Last question: Is the 600 series or 0A919 non-U.S. made direct product being reexported or exported from abroad to a destination listed in -- hold your hats -- country group D:1, D:3, D:4, D:5, E:1, and E:2? There's a huge country scope there for 600 series, very sensitive items. If the answer to all three of those questions was yes, then your non-U.S. made product is subject to the EAR.

Slide 45

Next we'll talk about the 9x515 direct product rule. Now, it's very similar to the 600 series rule, except the country scope is a bit smaller. Is the non-U.S. made direct product of U.S. controlled 9x515 technology or software, or a plant or major component of a plant that is the direct product of U.S. controlled 9x515 technology or software? Second, is the non-U.S. made direct product a 9x515 item? Lastly, is the 9x515 non-U.S. made direct product being reexported or exported from abroad to a destination in country group D:5, which are our U.S. arms embargoed countries; E:1, our terrorist supporting countries; or E:2, Cuba? If the answer to all three of those questions was yes, then your non-U.S. made product is subject to the EAR.

Slide 46

Lastly, we're going to go over our standard or non-600 series 0A919, 9x515, or see-through carve-out direct product rule. This is the one that you've all known and loved and have worked with since about 1949. Is the non-U.S. made direct product of U.S. controlled technology or software that requires a written assurance as support document for a license? Now, this written assurance can be found in Supplement No. 2 to Part 748 paragraph (o)(3)(i). Or as a precondition for the U.S. License Exception TSR, which can be found in 740.6. Or is it a plant or major component of a plant that is the direct product of U.S. controlled technology or software that also meets that criteria of the written assurance? Now, this written assurance basically says that -- well, let me get a prop for you, so I can demonstrate. Here you have U.S. national security controlled technology that has been exported to France. Now, when it's exported under license, you are going to be required to get a written letter of assurance from the end user. And this assurance will say that they will not ship this U.S. national security technology to a D:1, E:1 or E:2 country. Nor will they export the widget or the product that they make from this technology to a D:1, E:1 or E:2 country. And that's basically what the assurance says. But all those words basically say that is the non-U.S. made product a direct product of U.S. national security technology or software. The second question is, is the national security -- is national security listed under the reason for a control paragraph of the ECCN for the non-U.S. made direct product? In this instance, we'll use the French test stand. The French test stand will have an ECCN, or an Export Control Classification Number, on the commerce control list. Now, you'll look at that ECCN, and down below the heading you'll see a paragraph called reason for control. Now, in that reason for control paragraph, is NS listed, which stands for national security? That's the question that we're asking you. Is the non-U.S. made direct product being reexported or exported from abroad to a destination listed in country group D:1, E:1 or E:2? If the answer to all three of these questions is yes, then your non-U.S. made item is subject to the EAR.

Slide 47

Now, when an export from abroad -- when exporting from abroad non-U.S. made items that are subject to the EAR under de minimis or the direct product rules, if your item is made subject to the EAR because of those rules, the next step is to determine the license requirement for the non-U.S. made item. Just because an item is subject does not mean that a license is required. In fact, most of our items that are subject to the EAR go under license exceptions. License exception, we have 20 of them, they're all found in Part 740, and most of the exports or reexports will go under that. It's only a very small percentage that would actually require you to submit a license.

Now, when a non-U.S. made item contains an ITAR item -- [demonstrating with props] we have our ITAR item inside of our test stand. When that happens, then the State Department will see through your test stand, your French made test stand, to their component, their ITAR component. That ITAR component will stay subject to the ITAR. But the test stand is not subject. But in reality, it kind of is. But if you have a U.S. part, and just a U.S. origin controlled part that is subject to the EAR inside your test stand, then we do not see through to the components at that point. What we'll do is we'll ask you to do the calculation, and if it is over the de minimis, then we will make the entire test stand subject to the EAR at that point.

Slide 48

Let's talk about 0A919, non-U.S. made military commodities located outside the United States that are not subject to the ITAR and have one or more of the following: It incorporates a camera controlled under 6A003, which are low light level cameras; it incorporates more than the de minimis amount of 600 series content; or are direct products of U.S. origin 600 series technology or software. So if you have a German product, and it's a military commodity, and it incorporates a low light level 600, 6A003 camera listed there. Then it becomes subject to the EAR, and the ECCN for that product would be 0A919 on the commerce control list. Now let's say that you have some 600 series part, that is in your German product, and this is a German military commodity. Those single quotes around military commodity means that there is a local definition for military commodity within that ECCN. You'll want to look for that to see if this German product meets that military commodity definition. Now, you have your 600 part inside your German product, military commodity, and it is more than the de minimis amount. That would make this German product an 0A919 product. Now, if you have 600 series technology being shipped to Germany, they make a German product, and this product happens to be a military commodity, then that commodity would be considered an 0A919 item. However, we don't believe that this would happen very often. Because let's say that I send you my very famous recipe for chocolate chip cookies. When I give you that, you are only going to get chocolate chip cookies, you're not going to get brownies out of it. So just like the 600 series technology, when I send this to you [600 series technology], you're going to get a 600 series product. That 600 series product will have a 600 series ECCN in the CCL and that is the ECCN that we want you to use, not 0A919. But if for whatever reason you cannot find that 600 series ECCN, then you will fall back to the 0A919 ECCN.

Slide 49

Here is our contact information, if you have any questions regarding this presentation or other presentations. We have a west coast regional office and an east coast office in Washington, D.C., where we work out of. Those two top email and phone numbers can reach the regulatory policy division where myself and Nancy work, as well as Hillary Hess and Bill Arvin and Tim Mooney who are also with us in the studio today. We're now going to go over to our scenarios, and Nancy is going to do scenario 1.

Slide 50

NANCY: So for this first scenario -- and these can also be found in the scenarios document that is in the materials link that are part of the presentation. This first scenario has a U.S. company exporting

technology for the production of an emergency oxygen system, an EOS, that's classified under 9E610.a. This U.S. company sells the technology to the Israeli Ministry of Defense and exports it using a BIS license. The Israeli MoD then produces an EOS that falls under ECCN 9A610, and has a fair market value of \$300. They make this EOS in Israel using all Israeli parts except for a U.S. high/low pressure valve specially designed for the system, and classified under ECCN 9A610.x. It has a fair market value of \$60.

Slide 51

So in this scenario the Israelis then make a sale of the system, that EOS, to Jordan. Is this Israeli aircraft onboard oxygen generating system subject to the EAR when being sent to Jordan? So the questions we're asking right now are the questions that you'll be seeing when you use actual de minimis direct product decision tool online, so we'll show you some of the reasoning and why we have the answers that we do for the questions.

Slide 52

First question: Is the non-U.S. made item produced from U.S. 600 series or 9x515 technology or software, or from a non-U.S. made manufacturing plant or major plant component, made from U.S. 600 series or 9x515 technology.

Slide 53

And in this example, the U.S. company exported technology under a BIS license for a 9E610, and that was used to make the Israeli-made EOS. So yes, the non-U.S. made item is made from 600 series technology.

Slide 54

Are either of the following questions -- statements true: The non-U.S. made item is a direct product -- the non-U.S. made direct product is classified under a 600 series ECCN and is destined to a country listed in country groups D:1, D:3, D: 4, D:5, E:1 or E:2; or the non-U.S. made direct product is classified under a 9x515 ECCN. Not the case in this question. So the question is: Is your non-U.S. made direct product classified 600 series?

Slide 55

Yes, it is, because it is the 9A610.a, and it's destined to Jordan, which falls under countries of D:3 and D:4. So based on the 600 series direct product guidelines, your non-U.S. made item, the Israeli EOS, is subject to the EAR and may require a license prior to export.

Slide 56

A nice thing about the tool you can find online is that once you've answered the questions and you get this conclusion, you can actually click on the summary button on the bottom of the tool, and you can actually get all your responses at the conclusion of the session.

Slide 57

It has the answers -- the questions, the answers, as well as key terms. For any decision tool session you use, you can print this out for your own records.

Slide 58

The second scenario has similar information as the first, except that in addition to the high/low pressure valve that's classified under 9A610.x, now there's a mask hose that's being exported as well to the Israeli Ministry of Defense. And that falls under 1A004.a. The Israeli Ministry of Defense then makes a sale of

their system to India. So now is this Israeli aircraft onboard oxygen generating system being sold to India subject to the EAR?

Slide 59

We ask ourselves the first question again, and the answer is yes, the EOS that the Israelis are producing was produced from the U.S. exported technology of 9E610.a.

Slide 60

Are either of the following true: Is your U.S. made direct product is classified under 600 series ECCN, it is the 9E610.a. but the country listed is not actually in country groups D:1, D:3, D:4, D:5, E:1 or E:2. [So the answer to this question is no,] because India is not in country group D or E.

Slide 61

Does your Israeli made EOS contain U.S. origin see-through carve-out, 600 series, or 9x515 items?

Slide 62

And the answer to this question is yes. You've incorporated a U.S. origin high/low pressure valve which is specially designed for the system and it's classified under 9A610.x. So yes, you do have 600 series items in your non-U.S. made item.

Slide 63

Are all of your U.S. origin or items .y items of a 600 series?

Slide 64

The answer is no, your U.S. valve is 9A610.x. It is 600 series, but it is not in the .y paragraphs of the 600 series ECCN.

Slide 65

Question 5: Is the non-U.S. made item destined to a country group listed in country groups D:5, E:1 or E:2?

Slide 66

We already know the answer to this question, because India is not in country groups D or E. So no, your item is not destined to those countries.

Slide 67

Question 6: Does the non-U.S. made item contain non-600 series, non-9x515, non-see-through carve-out items?

Slide 68

And the answer is yes. You now have that U.S. mask hose with a fair market value of \$50 that is being sent, in the non-U.S. made item. And that mask hose is classified under 1A004.a.

Slide 69

Question 7: Are any of the U.S. origin non-600 series, non-9x515, non-see-through carve-out U.S. origin items ineligible for de minimis treatment? So is your mask hose ineligible for de minimis?

Slide70

If you look at 734.4(a), which details what is ineligible for de minimis, this U.S. origin mask hose does not fall under those categories.

Slide 71

Basically, we have six questions asking if your mask hose requires authorization from BIS if exported from the U.S. to the destination country of the non-U.S. made item.

Slide 72

And the answer is yes, the mask hose is controlled under 1A004.a and has a reason for control of national security, which would require a license to India.

Slide 73

Question 9 asks: Are all of the non-600 series, non-9x515, non-see-through carve-out U.S. origin items -- again, the U.S. mask hose -- eligible for license exception GBS if reexported in the form received to the destination country of the non-U.S. made item?

Slide 74

And no, the U.S. mask hose is controlled under 1A004.a, as I mentioned before, and that ECCN is not eligible for license exception GBS.

Slide 75

The final question we're looking at is: Is the percentage of the dollar value of the U.S. origin controlled content greater than 25%? And it's 25% because it's going to India, which is not a D:5 or E:1, E:2 country. And the controlled content you have in there now is the 600 series U.S. valve, as well as a U.S. mask hose.

Slide 76

So when you're doing the calculations, your U.S. origin valve and your U.S. origin hose are both controlled content, for these reasons displayed on the screen. The \$60 value of the valve plus the \$50 of the hose divided by the total value of the EOS, which is \$300, comes out to a 36% de minimis calculation. 36% is greater than 25% threshold for India, so the answer to question 10 is yes, you are above 25%.

Slide 77

And your final conclusion is that your non-U.S. made item, the Israeli made EOS, is subject to the EAR when being sent to India and having these components. I'm now going to pass off the final scenario for Sharron to explain to you guys.

Slide 78

Sharron: Okay, scenario 3. This is a direct product non-600 series technology and de minimis non-600 series item. The U.S. company exports the following to a French company under a BIS license: Technology exported under ECCN 1E001, which would be a national security technology -- because you can tell that from the third digit in the ECCN, which is zero, which indicates that it is controlled for national security. So you have your technology exported under 1E001 for the production of a superconducted composite conductor. So for today, here's our conductor, and it is 1C005. And from the third digit of that ECCN you can tell that this is also controlled for national security reasons. So now we

have two-thirds of our direct product equation. Hmm. We'll have to keep that in the back of our heads as we're doing this.

Then today we also have ball bearings, and [showing props] we have these for our ball bearings today. And we have electric cooling fluid, which is 1C006.d.

Slide 79

Now, the French company uses the technology to build their conductor. The French company produces an electric test stand incorporating the conductor which they built -- it's French made, from U.S. technology -- the ball bearings, and the cooling fluid. Along with a lot of other French made parts.

Slide 80

Now, the question is: Is the French made test stand subject to the EAR? Now, look at all the U.S. content we have in this French stand. So let's find out.

Let's take a poll question. How many of you think that this test stand, French made test stand, would be subject to the EAR? Okay, so 80% of you think no, because you know I'm a tricky person and I'm asking you a trick question. Well, let's just find out the reasons why it would be no. All right. Okay, here we go.

Slide 81

Question number 1. Is the non-U.S. made item produced from U.S. 600 series or 9x515 technology or software, or from a non-U.S. made manufacturing plant or major plant component made from U.S. 600 series or 9x515 technology? Now, remember, this is the technology that was involved in the shipment. Was it 600 series? Or would it even have to be considered? Let's find out.

Slide 82

No. While the U.S. company did export technology to the French company, it was not used to build the test stand. It was used to build a part in the test stand: A superconductor.

Slide 83

Next. Does the non-U.S. made item contain U.S. origin see-through carve-out 600 series or 9x515 items?

Slide 84

No. We have our superconductor, which is not; our fluid, which is not; and our ball bearings. Not any of that. So no. Only U.S. commodities exported fall under 1C006.d and 2A001.a. Now, this is an important point here. You only see two ECCNs when there are three U.S. -- or three pieces of content in here. So we know that our cooling fluid was U.S. origin. We know that our ball bearings were U.S. origin. But this superconductor was not U.S. origin. It is French made, from U.S. origin technology. So for a de minimis situation and calculation, you would not count the conductor, because it is not U.S. origin.

Slide 85

Is the non-U.S. made item produced from non-600 series, non-9x515 U.S. technology or software, or from a non-U.S. made manufacturing plant or major plant component made from non-600 series or non-9x515 U.S. technology? That's a mouthful.

Slide 86

No. Another -- although technology to produce a superconductive composite conductor was exported to the French company and is used in the production of a part that goes into the electric test stand, the technology used to produce this test stand, being exported to Brazil, is French.

Slide 87

So does the non-U.S. made item contain non-600 series, non-9x515, or non-see-through carve-out origin items? What do you think?

Slide 88

Yes, it does. The U.S. company is exporting ball bearings and the fluid, the cooling fluid, to France for incorporation into the French test stand. The supercomposite conductor, even though it is based on U.S. technology and may be subject to the EAR, is not U.S. origin. Only parts that are both U.S. origin and controlled to the destination of the non-U.S. made item must be counted in a de minimis calculation.

Slide 89

So are any of the U.S. origin items eligible for de minimis -- ineligible for de minimis treatment?

Slide 90

No, they're all eligible.

Slide 91

Would any of the U.S. origin items require authorization from BIS if exported from the U.S. to the destination country of the non-U.S. made item? Which would be Brazil. And so would any of the fluid or the ball bearings require license?

Slide 92

Yes. They are both controlled under NS:2, and when you go to our commerce country chart you will see that there is an X under the box when you look under Brazil, and the intersection of Brazil and NS:2. And that would indicate a license requirement, making these items controlled content.

Slide 93

Are all U.S. origin items eligible for license exception GBS, if exported in the form received to the destination of the non-U.S. made item?

Slide 94

Again, you'd have to look at the ECCNs for the ball bearings and the fluid and look under the license exception section under GBS paragraph. If it says yes, and these are commodities, and they're NS controlled only -- which they are -- then they would be eligible for license exception GBS. And in this instance, they are both eligible. So because these are eligible for GBS, they would not be counted in the de minimis calculation. Nor would the superconductor, which is not U.S. origin.

Slide 95

So our conclusion is that in the French stand we have a lot of things that came from the U.S. either directly or indirectly, but there's no U.S. content that we have to count. In fact, if you were to do this calculation, there would be 0% de minimis. So the item is not subject.

Slide 96

Q&A with questions submitted during the presentation

Okay, now we are going to answer some questions, I believe, that came in through our webinar that you guys have been busily typing in. And so Nancy, do you want to start with the questions?

Nancy: *Okay, so someone submitted the question: How should the value of U.S. technology be determined for de minimis calculations? It is not clear to me how technology overall can be valued, or how U.S. technology can be distinguished from non-U.S. technology.*

The difficulty of determining these values is one reason that the EAR requires submission of a one-time report before determining that a non-U.S. technology has de minimis U.S. content. For example, there may be an approximation of fair market value if the U.S. technology is purchased by a customer abroad. The overall value of the non-U.S. technology may be determined by tying it to the cost of developing the non-U.S. product. Because the determination is strongly tied to the facts of the transaction, your one-time report should clearly explain the methods and assumptions assumed.

Sharron:

Can you please discuss the analysis to conduct when a 600 series item is incorporated into a non-600 series EAR item.

This should rarely occur. Items in 600 series should not be in normal commercial use [items]. Also note, vast majority of these parts and components in 600 series are classified under a 600 series X paragraph. Meaning if the 600 series component was incorporated in an NS only ECCN or EAR99 item, such as incorporated into a civil aircraft classified under 9A991.b in production, in this case the component would no longer be a 600 series 9A610 component, but rather a 9A991.d component. So note, if 600 series component is incorporated into any other ECCN, i.e, in an ECCN other than NS only or EAR99, then [the] content [would be] treated as 600 series and 0% de minimis rule for D:5 and E:1 countries.

Nancy:

Okay, so someone asks: Can you please give a general description of what is included in the 600 series or 9x515?

So 9x515 is basically items that are satellite related, so that's an easy question. The 600 series items are military items that are subject to the EAR because they do not provide a critical military advantage or warrant control on the ITAR for other reasons. 600 series is also a defined term in Part 772 of the EAR.

Sharron:

There's a follow-up question I just sent, the analysis to conduct on 600 series item incorporated into a U.S. -- into non-600 series item, not a foreign de minimis question but a question about whether there is a see-through rule within the EAR for 600 series items.

The follow-up question does not change the previous answer. Yes, if a 600 series item is incorporated into a non-600 series item, the de minimis provisions for 600 series apply unless part or a component after incorporation is no longer a 600 series because it is no longer specially designed for a 600 series item. Note, the foreign made end item or a higher level assembly is still what is being classified, even when 600 series content is incorporated. More likely scenario is an ECCN 0A919 where a 600 series incorporated into a military item that if the U.S. would be subject to the EAR -- that is subject to the EAR.

Nancy:

There have been a couple of questions asking about whether you can get a copy of this PowerPoint presentation.

And yes, you can. As I mentioned at the beginning, on your actual webinar presentation screen there's a materials link, and if you click that materials link you'll find a copy of this PowerPoint presentation as well as a bunch of other documents that are helpful for direct product and de minimis evaluations.

That's all the questions we have for now, I think we're there.

Sharron:

So for any questions that you turned in where the answer was not addressed today, we will have a FAQ for this seminar that will go along with this webinar when we post it onto the BIS website. When we address your questions we'll type them out, we'll type out answers, and we'll post all of the question and answers along with the webinar on our BIS website.

So I think that we are done for today. Thank you for joining us today and taking time out to try to understand these two complex issues. I hope this webinar deepens your understanding of the de minimis and direct product rules. We'll see you next time on our next webinar. Thank you.