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§ 734.1 INTRODUCTION

(a) In this part, references to the Export Administration Regulations (EAR) are references to 15 CFR chapter VII, subchapter C. This part describes the scope of the Export Administration Regulations (EAR) and explains certain key terms and principles used in the EAR. This part provides the rules you need to use to determine whether items and activities are subject to the EAR. This part is the first step in determining your obligations under the EAR. If neither your item nor activity is subject to the EAR, then you do not have *any* obligations under the EAR and you do not need to review other parts of the EAR. If you already know that your item or activity is subject to the EAR, you do not need to review this part and you can go on to review other parts of the EAR to determine your obligations. This part also describes certain key terms and principles used in the EAR. Specifically, it includes the following terms: “subject to the EAR”, “items subject to the EAR”, “export”, and “reexport”. These and other terms are also included in part 772 of the EAR, Definitions of Terms, and you should consult part 772 of the EAR for the

meaning of terms used in the EAR. Finally, this part makes clear that compliance with the EAR does not relieve any obligations imposed under foreign laws.

(b) This part does not address any of the provisions set forth in part 760 of the EAR, Restrictive Trade Practices or Boycotts.

(c) This part does not define the scope of legal authority to regulate exports, including reexports, or activities found in the Export Administration Act and other statutes. What this part does do is set forth the extent to which such legal authority has been exercised through the EAR.

§ 734.2 SUBJECT TO THE EAR

(a) *Subject to the EAR - Definition*

(1) “Subject to the EAR” is a term used in the EAR to describe those items and activities over which BIS exercises regulatory jurisdiction under the EAR. Conversely, items and activities that are *not* subject to the EAR are outside the regulatory jurisdiction of the EAR and are not affected by these regulations. The items and activities subject to the EAR are described in §734.2 through §734.5 of this part. You should review the Commerce Control List (CCL) and any applicable parts of the EAR to determine whether an item or activity is subject to the EAR. However, if you need help in determining whether an item or activity is subject to the EAR, see §734.6 of this part. Publicly available technology and software not subject to the EAR are described in §734.7 through §734.11 and Supplement No. 1 to this part.

(2) Items and activities subject to the EAR may also be controlled under export-related programs administered by other agencies. Items and activities subject to the EAR are

not necessarily exempted from the control programs of other agencies. Although BIS and other agencies that maintain controls for national security and foreign policy reasons try to minimize overlapping jurisdiction, you should be aware that in some instances you may have to comply with more than one regulatory program.

(3) The term “subject to the EAR” should not be confused with licensing or other requirements imposed in other parts of the EAR. Just because an item or activity is subject to the EAR does not mean that a license or other requirement automatically applies. A license or other requirement applies only in those cases where other parts of the EAR impose a licensing or other requirement on such items or activities.

(b) *[Reserved]*

§ 734.3 ITEMS SUBJECT TO THE EAR

(a) Except for items excluded in paragraph (b) of this section, the following items are subject to the EAR:

(1) All items in the United States, including in a U.S. Foreign Trade Zone or moving intransit through the United States from one foreign country to another;

(2) All U.S. origin items wherever located;

(3) Foreign-made commodities that incorporate controlled U.S.-origin commodities, foreign-made commodities that are ‘bundled’ with controlled U.S.-origin software, foreign-made software that is commingled with controlled U.S.-origin software, and foreign-made technology that is commingled with controlled U.S.-origin technology:

(i) In any quantity, as described in § 734.4(a) of this part; or

(ii) In quantities exceeding the *de minimis* levels, as described in §§ 734.4(c) or 734.4(d) of this part;

(4) Certain foreign-made direct products of U.S. origin technology or software, as described in §736.2(b)(3) of the EAR. The term “direct product” means the immediate product (including processes and services) produced directly by the use of technology or software; and

NOTE to paragraph (a)(4): *Certain foreign-manufactured items developed or produced from U.S.-origin encryption items exported pursuant to License Exception ENC are subject to the EAR. See § 740.17(a) of the EAR.*

(5) Certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S.-origin technology or software, as described in §736.2(b)(3) of the EAR.

(b) The following are not subject to the EAR:

(1) Items that are exclusively controlled for export or reexport by the following departments and agencies of the U.S. Government which regulate exports or reexports for national security or foreign policy purposes:

(i) *Department of State.* The International Traffic in Arms Regulations (22 CFR part 121) administered by the Directorate of Defense Trade Controls relate to defense articles and defense services on the U.S. Munitions List (22 CFR part 121). Section 38 of the Arms Export Control Act (22 U.S.C. 2778). (Also see paragraph (b)(1)(vi) of this section).

Note to paragraph (b)(1)(i): *If a defense article or service is controlled by the U.S. Munitions List set forth in the International Traffic in Arms Regulations, its export and temporary import is regulated by the Department of State. The President has delegated the authority to control defense articles and services for purposes of permanent*

import to the Attorney General. The defense articles and services controlled by the Secretary of State and the Attorney General collectively comprise the U.S. Munitions List under the Arms Export Control Act (AECA). As the Attorney General exercises independent delegated authority to designate defense articles and services for purposes of permanent import controls, the permanent import control list administered by the Department of Justice has been separately labeled the U.S. Munitions Import List (27 CFR Part 447) to distinguish it from the list set out in the International Traffic in Arms Regulations. In carrying out the functions delegated to the Attorney General pursuant to the AECA, the Attorney General shall be guided by the views of the Secretary of State on matters affecting world peace, and the external security and foreign policy of the United States.

(ii) *Treasury Department, Office of Foreign Assets Control (OFAC).* Regulations administered by OFAC implement broad controls and embargo transactions with certain foreign countries. These regulations include controls on exports and reexports to certain countries (31 CFR chapter V). Trading with the Enemy Act (50 U.S.C. app. section 1 *et seq.*), and International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*)

(iii) *U.S. Nuclear Regulatory Commission (NRC).* Regulations administered by NRC control the export and reexport of commodities related to nuclear reactor vessels (10 CFR part 110). Atomic Energy Act of 1954, as amended (42 U.S.C. part 2011 *et seq.*).

(iv) *Department of Energy (DOE).* Regulations administered by DOE control the export and reexport of technology related to the production of special nuclear materials (10 CFR part 810). Atomic Energy Act of 1954, as amended (42 U.S.C. section 2011 *et seq.*).

(v) *Patent and Trademark Office (PTO).* Regulations administered by PTO provide for the export to a foreign country of unclassified technology in the form of a patent application or

an amendment, modification, or supplement thereto or division thereof (37 CFR part 5). BIS has delegated authority under the Export Administration Act to the PTO to approve exports and reexports of such technology which is subject to the EAR. Exports and reexports of such technology not approved under PTO regulations must comply with the EAR.

(vi) *Department of Defense (DoD) and Department of State Foreign Military Sales (FMS) Program.* Items that are subject to the EAR that are sold, leased or loaned by the Department of Defense to a foreign country or international organization under the FMS Program of the Arms Export Control Act pursuant to a Letter of Offer and Acceptance (LOA) authorizing such transfers are *not* “subject to the EAR,” but rather, are subject to the authority of the Arms Export Control Act.

(2) Prerecorded phonograph records reproducing in whole or in part, the content of printed books, pamphlets, and miscellaneous publications, including newspapers and periodicals; printed books, pamphlets, and miscellaneous publications including bound newspapers and periodicals; children's picture and painting books; newspaper and periodicals, unbound, excluding waste; music books; sheet music; calendars and calendar blocks, paper; maps, hydrographical charts, atlases, gazetteers, globe covers, and globes (terrestrial and celestial); exposed and developed microfilm reproducing, in whole or in part, the content of any of the above; exposed and developed motion picture film and soundtrack; and advertising printed matter exclusively related thereto.

(3) Information and “software” that:

- (i) Are published, as described in § 734.7;
- (ii) Arise during, or result from, fundamental research, as described in § 734.8;
- (iii) Are released by instruction in a catalog course or associated teaching laboratory of an academic institution;

(iv) Appear in patents or open (published) patent applications available from or at any patent office, unless covered by an invention secrecy order, or are otherwise patent information as described in § 734.10;

(v) Are non-proprietary system descriptions; or

(vi) Are telemetry data as defined in Note 2 to Category 9, Product Group E (see Supplement No. 1 to part 774 of the EAR).

NOTE TO PARAGRAPHS (b)(2) AND (b)(3): *A printed book or other printed material setting forth encryption source code is not itself subject to the EAR (see § 734.3(b)(2)). However, notwithstanding § 734.3(b)(2), encryption source code in electronic form or media (e.g., computer diskette or CD ROM) remains subject to the EAR (see § 734.17)). Publicly available encryption object code “software” classified under ECCN 5D002 is not subject to the EAR when the corresponding source code meets the criteria specified in § 742.15(b) of the EAR.*

NOTE TO PARAGRAPH (b)(3): *Except as set forth in part 760 of this title, information that is not within the scope of the definition of “technology” (see § 772.1 of the EAR) is not subject to the EAR.*

(c) “Items subject to the EAR” consist of the items listed on the Commerce Control List (CCL) in part 774 of the EAR and all other items which meet the definition of that term. For ease of reference and classification purposes, items subject to the EAR which are not listed on the CCL are designated as “EAR99.” Items subject to temporary CCL controls are classified under the ECCN 0Y521 series (i.e., 0A521, 0B521, 0C521, 0D521, and 0E521) pursuant to § 42.6(a)(7) of the EAR, while a determination is made as to whether classification under a revised or new ECCN, or an EAR99 designation, is appropriate.

(d) Commodity classification determinations and advisory opinions issued by BIS are not, and may not be relied upon as, determinations that the items in question are “subject to the EAR,”

as described in §748.3 of the EAR.

(e) Items subject to the EAR may be exported, reexported, or transferred in country under licenses, agreements, or other approvals from the Department of State's Directorate of Defense Trade Controls pursuant to §§ 120.5(b) and 126.6(c) of the International Traffic in Arms Regulations (ITAR) (22 CFR 120.5(b) and 126.6(c)). Exports, reexports, or in-country transfers not in accordance with the terms and conditions of a license, agreement, or other approval under § 120.5(b) of the ITAR requires separate authorization from BIS. Exports, reexports, or in-country transfers of items subject to the EAR under a Foreign Military Sales case that exceed the scope of § 126.6(c) of the ITAR or the scope of actions made by the Department of State's Office of Regional Security and Arms Transfers require separate authorization from BIS.

§ 734.4 DE MINIMIS U.S. CONTENT

(a) *Items for which there is no de minimis level*

(1) There is no *de minimis* level for the export from a foreign country of a foreign-made computer with an Adjusted Peak Performance (APP) exceeding that listed in ECCN 4A003.b and containing U.S.-origin controlled semiconductors (other than memory circuits) classified under ECCN 3A001 to Computer Tier 3 destinations; or exceeding an APP listed in ECCN 4A994.b and containing U.S.-origin controlled semiconductors (other than memory circuits) classified under ECCN 3A001 or high speed interconnect devices (ECCN 4A994.j) to Cuba, Iran, North Korea, Sudan, and Syria.

(2) Foreign produced encryption technology that incorporates U.S. origin encryption technology controlled by ECCN 5E002 is subject to the EAR regardless of the amount of U.S. origin content

(3) [RESERVED]

(4) There is no *de minimis* level for U.S.-origin

technology controlled by ECCN 9E003.a.1 through a.8, .h, .i, and .j. when redrawn, used, consulted, or otherwise commingled abroad.

(5) There is no *de minimis* level for foreign-made "military commodities" incorporating one or more of the commodities described in ECCN 0A919.a.1 when destined for a country listed in Country Group D:5 of Supplement No. 1 to part 740 of the EAR.

(6) 9x515 and "600 series"

(i) There is no *de minimis* level for foreign-made items that incorporate U.S.-origin 9x515 or "600 series" items enumerated or otherwise described in paragraphs .a through .x of a 9x515 or "600 series" ECCN when destined for a country listed in Country Group D:5 of Supplement No. 1 to part 740 of the EAR.

(ii) There is no *de minimis* level for foreign-made items that incorporate U.S.-origin 9x515 or "600 series" .y items when destined for a country listed in Country Group E:1 or E:2 of Supplement No. 1 to part 740 of the EAR or for the People's Republic of China (PRC).

(7) Under certain rules issued by the Office of Foreign Assets Control, certain exports from abroad by U.S.-owned or controlled entities may be prohibited notwithstanding the *de minimis* provisions of the EAR. In addition, the *de minimis* rules do not relieve U.S. persons of the obligation to refrain from supporting the proliferation of weapons of mass-destruction and missiles as provided in § 744.6 of the EAR.

(b) *Special requirements for certain encryption items*

Non-U.S.-made items that incorporate U.S.-origin items that are listed in this paragraph are subject to the EAR unless they meet the *de minimis* level and destination requirements of paragraph (c) or (d) of this section and the requirements of this paragraph.

(1) The U.S.-origin commodities or software, if controlled under ECCN 5A002, ECCN 5B002,

equivalent or related software therefor classified under ECCN 5D002, and “cryptanalytic items” classified under ECCN 5A004 or 5D002, must have been:

(i) Publicly available encryption source code classified under ECCN 5D002 that has met the notification requirement of § 742.15(b), see § 734.3(b)(3) of the EAR. Such source code does not have to be counted as controlled U.S.-origin content in a *de minimis* calculation;

(ii) Authorized for License Exception ENC by BIS after classification pursuant to § 740.17(b)(3) of the EAR;

(iii) Authorized for License Exception ENC by BIS after classification pursuant to § 740.17(b)(2) of the EAR, and the non-U.S.-made product will not be sent to any destination in Country Groups E:1 and E:2 in Supplement No. 1 to part 740 of the EAR; or

(iv) Authorized for License Exception ENC pursuant to § 740.17(b)(1) of the EAR.

(2) U.S.-origin encryption items classified under ECCNs 5A992.c, 5D992.c, or 5E992.b.

NOTE to paragraph (b): See Supplement No. 2 to this part for *de minimis* calculation procedures and reporting requirements.

(c) 10% De Minimis Rule

Except as provided in paragraphs (a) and (b)(1)(iii) of this section and subject to the provisions of paragraphs (b)(1)(i), (b)(1)(ii) and (b)(2) of this section, the following reexports are not subject to the EAR when made to any country in the world. See Supplement No. 2 of this part for guidance on calculating values.

(1) Reexports of a foreign-made commodity incorporating controlled U.S.-origin commodities or ‘bundled’ with U.S.-origin software valued at 10% or less of the total value of the foreign-made commodity;

NOTES to paragraph (c)(1):

(1) *U.S.-origin software is not eligible for the de minimis exclusion and is subject to the EAR when exported or reexported separately from (i.e., not bundled or incorporated with) the foreign-made item.*

(2) *For the purposes of this section, ‘bundled’ means software that is reexported together with the item and is configured for the item, but is not necessarily physically integrated into the item.*

(3) *The de minimis exclusion under paragraph (c)(1) only applies to software that is listed on the Commerce Control List (CCL) and has a reason for control of anti-terrorism (AT) only or software that is designated as EAR99 (subject to the EAR, but not listed on the CCL). For all other software, an independent assessment of whether the software by itself is subject to the EAR must be performed.*

(2) Reexports of foreign-made software incorporating controlled U.S.-origin software valued at 10% or less of the total value of the foreign-made software; or

(3) Reexports of foreign technology commingled with or drawn from controlled U.S.-origin technology valued at 10% or less of the total value of the foreign technology. Before you may rely upon the *de minimis* exclusion for foreign-made technology commingled with controlled U.S.-origin technology, you must file a one-time report. See Supplement No. 2 to part 734 for submission requirements.

(d) 25% De Minimis Rule

Except as provided in paragraph (a) of this section and subject to the provisions of paragraph (b) of this section, the following reexports are not subject to the EAR when made to countries other than those listed in Country Group E:1 of Supplement No. 1 to part 740 of the EAR. See Supplement No. 2 to this part for guidance on calculating values.

(1) Reexports of a foreign-made commodity incorporating controlled U.S.-origin

commodities or ‘bundled’ with U.S.-origin software valued at 25% or less of the total value of the foreign-made commodity;

NOTES to paragraph (d)(1):

(1) *U.S.-origin software is not eligible for the de minimis exclusion and is subject to the EAR when exported or reexported separately from (i.e., not bundled or incorporated with) the foreign-made item.*

(2) *For the purposes of this section, ‘bundled’ means software that is reexported together with the item and is configured for the item, but is not necessarily physically integrated into the item.*

(3) *The de minimis exclusion under paragraph (d)(1) only applies to software that is listed on the Commerce Control List (CCL) and has a reason for control of anti-terrorism (AT) only or software that is classified as EAR99 (subject to the EAR, but not listed on the CCL). For all other software, an independent assessment of whether the software by itself is subject to the EAR must be performed.*

(2) Reexports of foreign-made software incorporating controlled U.S.-origin software valued at 25% or less of the total value of the foreign-made software; or

(3) Reexports of foreign technology commingled with or drawn from controlled U.S.-origin technology valued at 25% or less of the total value of the foreign technology. Before you may rely upon the *de minimis* exclusion for foreign-made technology commingled with controlled U.S.-origin technology, you must file a one-time report. See Supplement No. 2 to part 734 for submission requirements.

(e) You are responsible for making the necessary calculations to determine whether the *de minimis* provisions apply to your situation. See Supplement No. 2 to part 734 for guidance regarding calculation of U.S. controlled content.

(f) See §770.3 of the EAR for principles that apply to commingled U.S.-origin technology and

software.

(g) Recordkeeping requirement

The method by which you determined the percentage of U.S. content in foreign software or technology must be documented and retained in your records in accordance with the recordkeeping requirements in part 762 of the EAR. Your records should indicate whether the values you used in your calculations are actual arms-length market prices or prices derived from comparable transactions or costs of production, overhead, and profit.

§ 734.5 ACTIVITIES OF U.S. AND FOREIGN PERSONS SUBJECT TO THE EAR

The following kinds of activities are subject to the EAR:

(a) Certain activities of U.S. persons related to the proliferation of nuclear explosive devices, chemical or biological weapons, missile technology as described in §744.6 of the EAR, and the proliferation of chemical weapons as described in part 745 of the EAR.

(b) Activities of U.S. or foreign persons prohibited by any order issued under the EAR, including a Denial Order issued pursuant to part 766 of the EAR.

§ 734.6 ASSISTANCE AVAILABLE FROM BIS FOR DETERMINING LICENSING AND OTHER REQUIREMENTS

(a) If you are not sure whether a commodity, software, technology, or activity “subject to the EAR” is subject to licensing or other requirements under the EAR, you may ask BIS for an advisory opinion or a commodity classification determination. In order to determine whether an item is “subject to the ITAR,” you should review the ITAR’s United States Munitions List (see 22 CFR §§ 120.3,

120.6 and 121.1). You may also submit a request to the Department of State, Directorate of Defense Trade Controls, for a formal jurisdictional determination regarding the commodity, software, technology, or activity at issue; or in ITAR terms, the defense article, technical data or defense service at issue (see 22 CFR 120.4).

(b) As the agency responsible for administering the EAR, BIS is the only agency that has the responsibility for determining whether an item or activity is subject to the EAR and, if so, what licensing or other requirements apply under the EAR. Such a determination only affects EAR requirements, and does not affect the applicability of any other regulatory programs.

(c) If you need help in determining BIS licensing or other requirements, you may ask BIS for help by following the procedures described in §748.3 of the EAR.

§ 734.7 PUBLISHED

(a) Except as set forth in paragraph (b) of this section, unclassified “technology” or “software” is “published,” and is thus not “technology” or “software” subject to the EAR, when it has been made available to the public without restrictions upon its further dissemination such as through any of the following:

- (1) Subscriptions available without restriction to any individual who desires to obtain or purchase the published information;
- (2) Libraries or other public collections that are open and available to the public, and from which the public can obtain tangible or intangible documents;
- (3) Unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the interested public;
- (4) Public dissemination (*i.e.*, unlimited distribution) in any form (e.g., not necessarily in published form), including posting on the

Internet on sites available to the public; or

(5) Submission of a written composition, manuscript, presentation, computer-readable dataset, formula, imagery, algorithms, or some other representation of knowledge with the intention that such information will be made publicly available if accepted for publication or presentation:

(i) To domestic or foreign co-authors, editors, or reviewers of journals, magazines, newspapers or trade publications;

(ii) To researchers conducting fundamental research; or

(iii) To organizers of open conferences or other open gatherings.

(b) Published encryption software classified under ECCN 5D002 remains subject to the EAR unless it is publicly available encryption object code software classified under ECCN 5D002 and the corresponding source code meets the criteria specified in § 742.15(b) of the EAR.

§ 734.8 “TECHNOLOGY” OR “SOFTWARE” THAT ARISES DURING, OR RESULTS FROM, FUNDAMENTAL RESEARCH.

(a) *Fundamental research*

“Technology” or “software” that arises during, or results from, fundamental research and is intended to be published is not subject to the EAR.

NOTE 1 TO PARAGRAPH (a): *This paragraph does not apply to “technology” or “software” subject to the EAR that is released to conduct fundamental research. (See § 734.7(a)(5)(ii) for information released to researchers that is “published.”)*

NOTE 2 TO PARAGRAPH (a): *There are instances in the conduct of research where a*

researcher, institution or company may decide to restrict or protect the release or publication of “technology” or “software” contained in research results. Once a decision is made to maintain such “technology” or “software” as restricted or proprietary, the “technology” or “software,” if within the scope of § 734.3(a), becomes subject to the EAR.

(b) Prepublication review

“Technology” or “software” that arises during, or results, from fundamental research is intended to be published to the extent that the researchers are free to publish the “technology” or “software” contained in the research without restriction. “Technology” or “software” that arises during or results from fundamental research subject to prepublication review is still intended to be published when:

- (1) Prepublication review is conducted solely to ensure that publication would not compromise patent rights, so long as the review causes no more than a temporary delay in publication of the research results;
- (2) Prepublication review is conducted by a sponsor of research solely to insure that the publication would not inadvertently divulge proprietary information that the sponsor has furnished to the researchers; or
- (3) With respect to research conducted by scientists or engineers working for a Federal agency or a Federally Funded Research and Development Center (FFRDC), the review is conducted within any appropriate system devised by the agency or the FFRDC to control the release of information by such scientists and engineers.

NOTE 1 TO PARAGRAPH (b): Although “technology” or “software” arising during or resulting from fundamental research is not considered intended to be published if researchers accept restrictions on its publication, such “technology” or “software” will nonetheless qualify as “technology” or “software” arising during or resulting from

fundamental research once all such restrictions have expired or have been removed.

NOTE 2 TO PARAGRAPH (b): Research that is voluntarily subjected to U.S. government prepublication review is considered “intended to be published” when the research is released consistent with the prepublication review and any resulting controls.

NOTE 3 TO PARAGRAPH (b): “Technology” or “software” resulting from U.S. government funded research that is subject to government-imposed access and dissemination or other specific national security controls qualifies as “technology” or “software” resulting from fundamental research, provided that all government-imposed national security controls have been satisfied and the researchers are free to publish the “technology” or “software” contained in the research without restriction. Examples of specific national security controls include requirements for prepublication review by the Government, with right to withhold permission for publication; restrictions on prepublication dissemination of information to non-U.S. citizens or other categories of persons; or restrictions on participation of non-U.S. citizens or other categories of persons in the research. A general reference to one or more export control laws or regulations or a general reminder that the Government retains the right to classify is not a specific national security control.

(c) Fundamental research definition

Fundamental research means research in science, engineering, or mathematics, the results of which ordinarily are published and shared broadly within the research community, and for which the researchers have not accepted restrictions for proprietary or national security reasons.

§ 734.9 [RESERVED]**§ 734.10 PATENTS**

“Technology” is not subject to the EAR if it is contained in any of the following:

(a) A patent or an open (published) patent application available from or at any patent office;

(b) A published patent or patent application prepared wholly from foreign-origin “technology” where the application is being sent to the foreign inventor to be executed and returned to the United States for subsequent filing in the U.S. Patent and Trademark Office;

(c) A patent application, or an amendment, modification, supplement or division of an application, and authorized for filing in a foreign country in accordance with the regulations of the Patent and Trademark Office, 37 CFR part 5; or

(d) A patent application when sent to a foreign country before or within six months after the filing of a United States patent application for the purpose of obtaining the signature of an inventor who was in the United States when the invention was made or who is a co-inventor with a person residing in the United States.

§ 734.11 [RESERVED]**§ 734.12 EFFECT ON FOREIGN LAWS AND REGULATIONS**

Any person who complies with any of the license or other requirements of the EAR is not relieved of the responsibility of complying with applicable foreign laws and regulations. Conversely, any person who complies with the license or other requirements of a foreign law or regulation is not relieved of the responsibility of complying with U.S. laws and regulations, including the EAR.

§ 734.13 EXPORT

(a) Except as set forth in §§ 734.17 or 734.18, Export means:

(1) An actual shipment or transmission out of the United States, including the sending or taking of an item out of the United States, in any manner;

(2) Releasing or otherwise transferring “technology” or source code (but not object code) to a foreign person in the United States (a “deemed export”);

(3) Transferring by a person in the United States of registration, control, or ownership of:

(i) A spacecraft subject to the EAR that is not eligible for export under License Exception STA (*i.e.*, spacecraft that provide space-based logistics, assembly or servicing of any spacecraft) to a person in or a national of any other country; or

(ii) Any other spacecraft subject to the EAR to a person in or a national of a Country Group D:5 country.

(b) Any release in the United States of “technology” or source code to a foreign person is a deemed export to the foreign person's most recent country of citizenship or permanent residency.

(c) The export of an item that will transit through a country or countries to a destination identified in the EAR is deemed to be an export to that destination.

§ 734.14 REEXPORT

(a) Except as set forth in §§ 734.18 and 734.20, Reexport means:

(1) An actual shipment or transmission of an item subject to the EAR from one foreign country to another foreign country, including the sending or taking of an item to or from such

countries in any manner;

(2) Releasing or otherwise transferring “technology” or source code subject to the EAR to a foreign person of a country other than the foreign country where the release or transfer takes place (a deemed reexport);

(3) Transferring by a person outside the United States of registration, control, or ownership of:

(i) A spacecraft subject to the EAR that is not eligible for reexport under License Exception STA (i.e., spacecraft that provide space-based logistics, assembly or servicing of any spacecraft) to a person in or a national of any other country; or

(ii) Any other spacecraft subject to the EAR to a person in or a national of a Country Group D:5 country.

(b) Any release outside of the United States of “technology” or source code subject to the EAR to a foreign person of another country is a deemed reexport to the foreign person's most recent country of citizenship or permanent residency, except as described in § 734.20.

(c) The reexport of an item subject to the EAR that will transit through a country or countries to a destination identified in the EAR is deemed to be a reexport to that destination.

§ 734.15 RELEASE

(a) Except as set forth in § 734.18, “technology” and “software” are “released” through:

(1) Visual or other inspection by a foreign person of items that reveals “technology” or source code subject to the EAR to a foreign person; or

(2) Oral or written exchanges with a foreign person of “technology” or source code in the United States or abroad.

(b) Any act causing the “release” of

“technology” or “software,” through use of “access information” or otherwise, to yourself or another person requires an authorization to the same extent an authorization would be required to export or reexport such “technology” or “software” to that person.

§ 734.16 TRANSFER (IN-COUNTRY)

Except as set forth in § 734.18(a)(3), a Transfer (in-country) is a change in end use or end user of an item within the same foreign country. Transfer (in-country) is synonymous with In-country transfer.

§ 734.17 EXPORT OF ENCRYPTION SOURCE CODE AND OBJECT CODE SOFTWARE

(a) For purposes of the EAR, the Export of encryption source code and object code “software” means:

(1) An actual shipment, transfer, or transmission out of the United States (see also paragraph (b) of this section); or

(2) A transfer of such “software” in the United States to an embassy or affiliate of a foreign country.

(b) The export of encryption source code and object code “software” controlled for “EI” reasons under ECCN 5D002 on the Commerce Control List (see Supplement No. 1 to part 774 of the EAR) includes:

(1) Downloading, or causing the downloading of, such “software” to locations (including electronic bulletin boards, Internet file transfer protocol, and World Wide Web sites) outside the U.S., or

(2) Making such “software” available for transfer outside the United States, over wire, cable, radio, electromagnetic, photo optical, photoelectric or other comparable communications facilities accessible to persons

outside the United States, including transfers from electronic bulletin boards, Internet file transfer protocol and World Wide Web sites, unless the person making the “software” available takes precautions adequate to prevent unauthorized transfer of such code. See § 742.15(b) of the EAR for notification requirements for export or reexports of encryption source code “software” considered to be publicly available or published consistent with the provisions of § 734.3(b)(3). Publicly available encryption source code “software” and corresponding object code are not subject to the EAR, when the encryption source code “software” meets the notification requirements in § 742.15(b) of the EAR.

(c) Subject to the General Prohibitions described in part 736 of the EAR, such precautions for Internet transfers of products eligible for export under § 740.17(b)(2) of the EAR (encryption “software” products, certain encryption source code and general purpose encryption toolkits) shall include such measures as:

(1) The access control system, either through automated means or human intervention, checks the address of every system outside of the U.S. or Canada requesting or receiving a transfer and verifies such systems do not have a domain name or Internet address of a foreign government end-user (e.g., “.gov,” “.gouv,” “.mil” or similar addresses);

(2) The access control system provides every requesting or receiving party with notice that the transfer includes or would include cryptographic “software” subject to export controls under the Export Administration Regulations, and anyone receiving such a transfer cannot export the “software” without a license or other authorization; and

(3) Every party requesting or receiving a transfer of such “software” must acknowledge affirmatively that the “software” is not intended for use by a government end user, as defined in part 772 of the EAR, and he or she understands the cryptographic “software” is subject to export controls under the Export Administration

Regulations and anyone receiving the transfer cannot export the “software” without a license or other authorization. BIS will consider acknowledgments in electronic form provided they are adequate to assure legal undertakings similar to written acknowledgments.

§ 734.18 ACTIVITIES THAT ARE NOT EXPORTS, REEXPORTS, OR TRANSFERS

(a) The following activities are not exports, reexports, or transfers:

(1) Launching a spacecraft, launch vehicle, payload, or other item into space.

(2) Transmitting or otherwise transferring “technology” or “software” to a person in the United States who is not a foreign person from another person in the United States.

(3) Transmitting or otherwise making a transfer (in-country) within the same foreign country of “technology” or “software” between or among only persons who are not “foreign persons,” so long as the transmission or transfer does not result in a release to a foreign person or to a person prohibited from receiving the “technology” or “software.”

(4) Shipping, moving, or transferring items between or among the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Commonwealth of the Northern Mariana Islands or any territory, dependency, or possession of the United States as listed in Schedule C, Classification Codes and Descriptions for U.S. Export Statistics, issued by the Bureau of the Census.

(5) Sending, taking, or storing “technology” or “software” that is:

(i) Unclassified;

(ii) Secured using 'end-to-end encryption;'

(iii) Secured using cryptographic modules (hardware or “software”) compliant with Federal Information Processing Standards Publication 140-2 (FIPS 140-2) or its successors, supplemented by “software” implementation, cryptographic key management and other procedures and controls that are in accordance with guidance provided in current U.S. National Institute for Standards and Technology publications, or other equally or more effective cryptographic means; and

(iv) Not intentionally stored in a country listed in Country Group D:5 (see Supplement No. 1 to part 740 of the EAR) or in the Russian Federation.

Note 1 to paragraph (a)(5)(iv): Data in-transit via the Internet is not deemed to be stored.

(b) Definitions

For purposes of this section, **End-to-end encryption** means (i) the provision of cryptographic protection of data such that the data is not in unencrypted form between an originator (or the originator's in-country security boundary) and an intended recipient (or the recipient's in-country security boundary), and (ii) the means of decryption are not provided to any third party. The originator and the recipient may be the same person.

(c) The ability to access “technology” or “software” in encrypted form that satisfies the criteria set forth in paragraph (a)(5) of this section does not constitute the release or export of such “technology” or “software.”

§ 734.19 TRANSFER OF ACCESS INFORMATION

To the extent an authorization would be required to transfer “technology” or “software,” a comparable authorization is required to transfer access information if done with “knowledge” that such transfer would result in the release of such “technology” or “software” without a

required authorization.

§ 734.20 ACTIVITIES THAT ARE NOT DEEMED REEXPORTS

The following activities are not deemed reexports (see “deemed reexport” definition in § 734.14(b)):

(a) Authorized Release of “technology” or source code

Release of “technology” or source code by an entity outside the United States to a foreign person of a country other than the foreign country where the release takes place if:

(1) The entity is authorized to receive the “technology” or source code at issue, whether by a license, license exception, or situation where no license is required under the EAR for such “technology” or source code; and

(2) The entity has “knowledge” that the foreign national's most recent country of citizenship or permanent residency is that of a country to which export from the United States of the “technology” or source code at issue would be authorized by the EAR either under a license exception or in situations where no license under the EAR would be required.

(b) Release to Country Group A:5 nationals

Without limiting the scope of paragraph (a), release of “technology” or source code by an entity outside the United States to a foreign person of a country other than the foreign country where the release takes place if:

(1) The entity is authorized to receive the “technology” or source code at issue, whether by a license, license exception, or through situations where no license is required under the EAR;

(2) The foreign person is a bona fide ‘permanent and regular employee’ of the entity and is not a

proscribed person (see § 772.1 for definition of proscribed person);

(3) Such employee is a national exclusively of a country in Country Group A:5; and

(4) The release of “technology” or source code takes place entirely within the physical territory of any such country, or within the United States.

(c) Release to other than Country Group A:5 nationals

Without limiting the scope of paragraph (a), release of “technology” or source code by an entity outside the United States to a foreign person of a country other than the foreign country where the release takes place if:

(1) The entity is authorized to receive the “technology” or source code at issue, whether by a license, license exception, or situations where no license is required under the EAR;

(2) The foreign person is a bona fide ‘permanent and regular employee’ of the entity and is not a proscribed person (see § 772.1 for definition of proscribed person);

(3) The release takes place entirely within the physical territory of the country where the entity is located, conducts official business, or operates, or within the United States;

(4) The entity has effective procedures to prevent diversion to destinations, entities, end users, and end uses contrary to the EAR; and

(5) Any one of the following six (i.e., paragraphs (c)(5)(i), (ii), (iii), (iv), (v), or (vi) of this section) situations is applicable:

(i) The foreign person has a security clearance approved by the host nation government of the entity outside the United States;

(ii) The entity outside the United States:

(A) Has in place a process to screen the foreign person employee and to have the

employee execute a non-disclosure agreement that provides assurances that the employee will not disclose, transfer, or reexport controlled “technology” contrary to the EAR;

(B) Screens the employee for substantive contacts with countries listed in Country Group D:5 (see Supplement No. 1 to part 740 of the EAR). Although nationality does not, in and of itself, prohibit access to “technology” or source code subject to the EAR, an employee who has substantive contacts with foreign persons from countries listed in Country Group D:5 shall be presumed to raise a risk of diversion, unless BIS determines otherwise;

(C) Maintains a technology security or clearance plan that includes procedures for screening employees for such substantive contacts;

(D) Maintains records of such screenings for the longer of five years or the duration of the individual's employment with the entity; and

(E) Will make such plans and records available to BIS or its agents for civil and criminal law enforcement purposes upon request;

(iii) The entity is a U.K. entity implementing § 126.18 of the ITAR (22 CFR 126.18) pursuant to the U.S.-U.K. Exchange of Notes regarding § 126.18 of the ITAR for which the U.K. has provided appropriate implementation guidance;

(iv) The entity is a Canadian entity implementing § 126.18 of the ITAR pursuant to the U.S.-Canadian Exchange of Letters regarding § 126.18 of the ITAR for which Canada has provided appropriate implementation guidance;

(v) The entity is an Australian entity implementing the exemption at paragraph 3.7b of the ITAR Agreements Guidelines; or

(vi) The entity is a Dutch entity implementing the exemption at paragraph 3.7c of the ITAR Agreements Guidelines.

(d) Definitions

(1) *Substantive contacts* include regular travel to countries in Country Group D:5; recent or continuing contact with agents, brokers, and nationals of such countries; continued demonstrated allegiance to such countries; maintenance of business relationships with persons from such countries; maintenance of a residence in such countries; receiving salary or other continuing monetary compensation from such countries; or acts otherwise indicating a risk of diversion.

(2) *Permanent and regular employee* is an individual who:

(i) Is permanently (i.e., for not less than a year) employed by an entity, or

(ii) Is a contract employee who:

(A) Is in a long-term contractual relationship with the company where the individual works at the entity's facilities or at locations assigned by the entity (such as a remote site or on travel);

(B) Works under the entity's direction and control such that the company must determine the individual's work schedule and duties;

(C) Works full time and exclusively for the entity; and

(D) Executes a nondisclosure certification for the company that he or she will not disclose confidential information received as part of his or her work for the entity.

NOTE TO PARAGRAPH (d)(2): *If the contract employee has been seconded to the entity by a staffing agency, then the staffing agency must not have any role in the work the individual performs other than to provide the individual for that work. The staffing agency also must not have access to any controlled "technology" or source code other than that authorized by the applicable regulations or a license.*

SUPPLEMENT NO. 1 TO PART 734 – [RESERVED]

SUPPLEMENT NO. 2 TO PART 734 - GUIDELINES FOR *DE MINIMIS* RULES

(a) Calculation of the value of controlled U.S. origin content in foreign-made items is to be performed for the purposes of § 734.4 of this part, to determine whether the percentage of U.S. origin content is *de minimis*. (Note that you do not need to make these calculations if the foreign made item does not require a license to the destination in question.) Use the following guidelines to perform such calculations:

(1) U.S.-origin controlled content. To identify U.S.-origin controlled content for purposes of the *de minimis* rules, you must determine the Export Control Classification Number (ECCN) of each U.S.-origin item incorporated into a foreign-made product. Then, you must identify which, if any, of those U.S.-origin items would require a license from BIS if they were to be exported or reexported (in the form in which you received them) to the foreign-made product's country of destination. For purposes of identifying U.S.-origin controlled content, you should consult the Commerce Country Chart in Supplement No. 1 to part 738 of the EAR and controls described in part 746 of the EAR. Part 744 of the EAR should not be used to identify controlled U.S. content for purposes of determining the applicability of the *de minimis* rules. In identifying U.S.-origin controlled content, do not take account of commodities, software, or technology that could be exported or reexported to the country of destination without a license (designated as "NLR") or under License Exception GBS (see part 740 of the EAR). Commodities subject only to short supply controls are not included in calculating U.S. content.

Note to paragraph (a)(1): U.S.-origin controlled content is considered 'incorporated' for de minimis purposes if the U.S.-origin controlled item is: essential to the functioning of the foreign equipment; customarily included in sales of the foreign equipment; and reexported with the foreign produced item. U.S.-origin software may be 'bundled' with foreign produced commodities; see § 734.4 of this part. For purposes of determining de minimis levels, technology and source code used to design or produce foreign-made commodities or software are not considered to be incorporated into such foreign-made commodities or software.

(2) Value of U.S.-origin controlled content. The value of the U.S.-origin controlled content shall reflect the fair market price of such content in the market where the foreign product is being produced. In most cases, this value will be the same as the actual cost to the foreign manufacturer of the U.S.-origin commodity, technology, or software. When the foreign manufacturer and the U.S. supplier are affiliated and have special arrangements that result in below-market pricing, the value of the U.S.-origin controlled content should reflect fair market prices that would normally be charged to unaffiliated customers in the same foreign market. If fair market value cannot be determined based upon actual arms-length transaction data for the U.S.-origin controlled content in question, then you must determine another reliable valuation method to calculate or derive the fair market value. Such methods may include the use of comparable market prices or costs of production and distribution. The EAR do not require calculations based upon any one accounting system or U.S. accounting standards. However, the method you use must be consistent with your business practice.

(3) Foreign-made product value.

(i) General. The value of the foreign-made product shall reflect the fair market price of such product in the market where the foreign product is sold. In most cases, this value will be the same as the actual cost to a buyer of the foreign-made product. When the foreign manufacturer and the buyer of their product are affiliated and have special arrangements that result in below-market pricing, the value of the foreign-made product should reflect fair market prices that would normally be charged to unaffiliated customers in the same foreign market. If fair market value cannot be determined based upon actual arms-length transaction data for the foreign-made product in question, then you must determine another reliable valuation method to calculate or derive the fair market value. Such methods may include the use of comparable market prices or costs of production and distribution. The EAR do not require calculations based upon any one accounting system or U.S. accounting standards. However, the method you use must be

consistent with your business practice.

(ii) Foreign-Made Software. In calculating the value of foreign-made software for purposes of the *de minimis* rules, you may make an estimate of future sales of that foreign software. The total value of foreign-made software will be the sum of: the value of actual sales of that software based on orders received at the time the foreign software incorporates U.S.-origin content and, if applicable; and an estimate of all future sales of that software.

Note to paragraph (a)(3): Regardless of the accounting systems, standard, or conventions you use in the operation of your business, you may not depreciate reported fair market values or otherwise reduce fair market values through related accounting conventions. Values may be historic or projected. However, you may rely on projected values only to the extent that they remain consistent with your documentation.

(4) Calculating percentage value of U.S.--origin items. To determine the percentage value of U.S.-origin controlled content incorporated in, commingled with, or ‘bundled’ with the foreign produced item, divide the total value of the U.S.-origin controlled content by the foreign-made item value, then multiply the resulting number times 100. If the percentage value of incorporated U.S.-origin items is equal to or less than the *de minimis* level described in § 734.4 of the EAR, then the foreign-made item is not subject to the EAR.

(b) One-time report

As stated in paragraphs (c) and (d) of § 734.4, a one-time report is required before reliance on the *de minimis* rules for technology. The purpose of the report is solely to permit the U.S. Government to evaluate whether U.S. content calculations were performed correctly.

(1) Contents of report. You must include in your report a description of the scope and nature of the foreign technology that is the subject of the report and a description of its fair market value, along with the rationale and basis for the valuation of such foreign technology. Your report must indicate the country of destination for the foreign technology

reexports when the U.S.-origin controlled content exceeds 10%, so that BIS can evaluate whether the U.S.-origin controlled content was correctly identified based on paragraph (a)(1) of this Supplement. The report does not require information regarding the end-use or end-users of the reexported foreign technology. You must include in your report the name, title, address, telephone number, E-mail address, and facsimile number of the person BIS may contact concerning your report.

(2) Submission of report. You must submit your report to BIS using one of the following Regulatory Policy Division, methods:

- (i) E-mail: rpd2@bis.doc.gov;
- (ii) Fax: (202) 482-3355; or
- (iii) Mail or Hand Delivery/Courier:

U.S. Department of Commerce,
Bureau of Industry and Security,
Regulatory Policy Division,
14th and Pennsylvania Avenue, N.W.,
Room 2099B,
Washington, D.C. 20230.

(3) Report and wait. If you have not been contacted by BIS concerning your report within thirty days after filing the report with BIS, you may rely upon the calculations described in the report unless and until BIS contacts you and instructs you otherwise. BIS may contact you with questions concerning your report or to indicate that BIS does not accept the assumptions or rationale for your calculations. If you receive such a contact or communication from BIS within thirty days after filing the report with BIS, you may not rely upon the calculations described in the report, and may not use the *de minimis* rules for technology that are described in § 734.4 of this part, until BIS has indicated that such calculations were performed correctly.