

Table of Contents

§ 734.1 INTRODUCTION 1

§ 734.2 SUBJECT TO THE EAR 2

§ 734.3 ITEMS SUBJECT TO THE EAR.. 2

§ 734.4 *DE MINIMIS* U.S. CONTENT 5

§ 734.5 ACTIVITIES OF U.S. AND FOREIGN PERSONS SUBJECT TO THE EAR..... 7

§ 734.6 ASSISTANCE AVAILABLE FROM BIS FOR DETERMINING LICENSING AND OTHER REQUIREMENTS..... 7

§ 734.7 PUBLISHED..... 8

§ 734.8 “TECHNOLOGY” OR “SOFTWARE” THAT ARISES DURING, OR RESULTS FROM, FUNDAMENTAL RESEARCH..... 8

§ 734.9 FOREIGN-DIRECT PRODUCT (FDP) RULES..... 10

§ 734.10 PATENTS 16

§ 734.11 BIS ACTIVITIES CONDUCTED OUTSIDE THE UNITED STATES 17

§ 734.12 EFFECT ON FOREIGN LAWS AND REGULATIONS..... 17

§ 734.13 EXPORT 17

§ 734.14 REEXPORT..... 17

§ 734.15 RELEASE..... 18

§ 734.16 TRANSFER (IN-COUNTRY).. 18

§ 734.17 EXPORT OF ENCRYPTION SOURCE CODE AND OBJECT CODE SOFTWARE..... 18

§ 734.18 ACTIVITIES THAT ARE NOT EXPORTS, REEXPORTS, OR TRANSFERS 19

§ 734.19 TRANSFER OF ACCESS INFORMATION..... 20

§ 734.20 ACTIVITIES THAT ARE NOT DEEMED REEXPORTS 20

SUPPLEMENT NO. 1 TO PART 734—MODEL CERTIFICATION FOR PURPOSES OF ADVANCED COMPUTING FDP RULE..... 1

SUPPLEMENT NO. 2 TO PART 734 - GUIDELINES FOR *DE MINIMIS* RULES 1

§ 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 and 734.9 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, 734.8, 734.10, 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-produced “direct products” of specified “technology” and “software,” as described in § 736.2(b)(3) of the EAR; 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 foreign-produced “direct products” of a complete plant or any major component of a plant 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) Pre-recorded 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 § 742.6(a)(8) 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, 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 .k, 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 Category 5, Part 2 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" or digital forensics items (investigative tools)

classified under ECCN 5A004 or 5D002, must have been:

(i) Publicly available encryption source code classified under ECCN 5D002 that has met the criteria specified in § 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 or E:2 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) Specific activities of “U.S. persons,” wherever located, related to the proliferation of nuclear explosive devices, “missiles,” chemical or biological weapons, whole plants for chemical weapons precursors, and certain military-intelligence end uses and end users as described in § 744.6 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 paragraphs (b) and (c) 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.

(c) The following remains subject to the EAR: “software” or “technology” for the production of a firearm, or firearm frame or receiver, controlled under ECCN 0A501, that is made available by posting on the internet in an electronic format, such as AMF or G-code, and is ready for insertion into a computer numerically controlled machine tool, additive manufacturing equipment, or any other equipment that makes use of the “software” or “technology” to produce the firearm frame or receiver or complete firearm.

§ 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 FOREIGN-DIRECT PRODUCT (FDP) RULES

Foreign-produced items located outside the United States are subject to the EAR when they are a “direct product” of specified “technology” or “software,” or are produced by a plant or ‘major component’ of a plant that itself is a “direct product” of specified “technology” or “software.” If a foreign-produced item is subject to the EAR, then you should separately determine the license requirements that apply to that foreign-produced item (e.g., by assessing the item classification, destination, end-use, and end-user in the relevant transaction). Not all transactions involving foreign-produced items that are subject to the EAR require a license. Those transactions that do require a license may be eligible for a license exception.

(a) Definitions

The terms defined in this paragraph are specific to § 734.9 of the EAR. These terms are indicated by single quotation marks. Terms that are in double quotation marks are defined in part 772 of the EAR.

Major Component: A major component of a plant located outside the United States means “equipment” that is essential to the “production” of an item, including testing “equipment.”

(b) National Security FDP rule

A foreign-produced item is subject to the EAR if it meets both the product scope in paragraph (b)(1) of this section and the country scope in paragraph (b)(2) of this section.

(1) Product scope of National Security FDP rule. The product scope applies if a foreign-produced item meets the conditions of either paragraph (b)(1)(i) or (ii) of this section.

(i) “Direct product” of “technology” or “software.” A foreign-produced item meets the

product scope of this paragraph if it meets both of the following conditions:

(A) The foreign-produced item is the “direct product” of U.S.-origin “technology” or “software” that requires a written assurance as a supporting document for a license, as defined in paragraph (o)(3)(i) of supplement no. 2 to part 748 of the EAR, or as a precondition for the use of License Exception TSR at §740.6 of the EAR; and

(B) The foreign-produced item is subject to national security controls as designated in the applicable ECCN of the Commerce Control List in part 774 of the EAR.

(ii) “Direct product” of a complete plant or ‘major component’ of a plant. A foreign-produced item meets the product scope of this paragraph if it meets both of the following conditions:

(A) The foreign-produced item is a “direct product” of a complete plant or ‘major component’ of a plant that itself is the “direct product” of U.S.-origin “technology” that requires a written assurance as a supporting document for a license or as a precondition for the use of License Exception TSR in §740.6 of the EAR; and

(B) The foreign-produced item is subject to national security controls as designated on the applicable ECCN of the Commerce Control List at part 774 of the EAR.

(2) Country scope of National Security FDP rule. A foreign-produced item meets the country scope of this paragraph if its destination is listed in Country Group D:1, E:1, or E:2 (See supplement no.1 to part 740 of the EAR).

(c) 9x515 FDP rule

A foreign-produced item is subject to the EAR if it meets both the product scope in paragraph (c)(1) of this section and the country scope in paragraph (c)(2) of this section.

(1) Product scope of 9x515 FDP rule. The product scope applies if a foreign-produced item

meets the conditions of either paragraph (c)(1)(i) or (ii) of this section.

(i) “Direct product” of “technology” or “software.” A foreign-produced item meets the product scope of this paragraph if it meets both of the following conditions:

(A) The foreign-produced item is the “direct product” of U.S.-origin “technology” or “software” that is specified in ECCN 9D515 or 9E515; *and*

(B) The foreign-produced item is specified in a 9x515 ECCN.

(ii) “Direct product” of a complete plant or ‘major component’ of a plant. A foreign-produced item meets the product scope of this paragraph if it meets both of the following conditions:

(A) The foreign-produced item is a “direct product” of a complete plant or any ‘major component’ of a plant that itself is the “direct product” of U.S.-origin “technology” specified in ECCN 9E515; *and*

(B) The foreign-produced item is specified in a 9x515 ECCN.

(2) Country scope of 9x515 FDP rule. A foreign produced item meets the country scope of this paragraph if its destination is listed in Country Group D:5, E:1, or E:2 (see supplement no.1 to part 740 of the EAR).

(d) “600 series” FDP rule

A foreign-produced item is subject to the EAR if it meets both the product scope in paragraph (d)(1) of this section and the country scope in paragraph (d)(2) of this section.

Note to introductory paragraph (d): As described in the CCL, ECCN 0A919 is included in this paragraph because it includes the “direct product” of “600 series” “technology” or “software”.

(1) Product scope of “600 series” FDP rule. The product scope applies if a foreign-produced

item meets the conditions of either paragraph (d)(1)(i) or (ii) of this section.

(i) “Direct product” of “technology” or “software.” A foreign-produced item meets the product scope of this paragraph if it meets both of the following conditions:

(A) The foreign-produced item is the “direct product” of U.S.-origin “technology” or “software” that is specified in a “600 series” ECCN; *and*

(B) The foreign-produced item is specified in a “600 series” ECCN or ECCN 0A919.

(ii) “Direct product” of a complete plant or ‘major component’ of a plant. Foreign-produced items meet the product scope of this paragraph if they meet both of the following conditions:

(A) The foreign-produced item is the “direct product” of a complete plant or ‘major component’ of a plant that itself is the “direct product” of U.S.-origin “technology” that is specified in a “600 series” ECCN; *and*

(B) The foreign produced item is specified in a “600 series” ECCN.

(2) Country scope of “600 series” FDP rule. A foreign-produced item meets the country scope of this paragraph if it is destined to a country listed in Country Group D:1, D:3, D:4, D:5, E:1, or E:2 (see supplement no.1 to part 740 of the EAR).

(e) Entity List FDP rule

A foreign-produced item is subject to the EAR if it meets the product scope and end-user scope in either Entity List FDP rule Footnote 1 provision in paragraph (e)(1) of this section or the Entity List FDP rule Footnote 4 provision in paragraph (e)(2) of this section.

(1) Entity List FDP rule: Footnote 1. A foreign-produced item is subject to the EAR if it meets both the product scope in paragraph (e)(1)(i) of this section and the end-user scope in paragraph (e)(1)(ii) of this section. See § 744.11(a)(2)(i) of the EAR for license requirements, license review policy, and license exceptions applicable to

foreign-produced items that are subject to the EAR pursuant to this paragraph (e)(1).

(i) Product Scope Entity List FDP rule: Footnote 1. The product scope applies if a foreign-produced item meets the conditions of either paragraph (e)(1)(i)(A) or (B) of this section.

(A) “Direct product” of “technology” or “software.” A foreign-produced item meets the product scope of this paragraph if the foreign-produced item is a “direct product” of “technology” or “software” subject to the EAR and specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the Commerce Control List (CCL) in supplement no. 1 to part 774 of the EAR; or

(B) Product of a complete plant or ‘major component’ of a plant that is a “direct product.” A foreign-produced item meets the product scope of this paragraph if the foreign-produced item is produced by any plant or ‘major component’ of a plant that is located outside the United States, when the plant or ‘major component’ of a plant, whether made in the U.S. or a foreign country, itself is a “direct product” of U.S.-origin “technology” or “software” that is specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the CCL.

Note 2 to paragraph (e)(1)(i): A foreign-produced item includes any foreign-produced wafer whether finished or unfinished.

(ii) End-user scope of the Entity List FDP rule: Footnote 1. A foreign-produced item meets the end-user scope of this paragraph if there is “knowledge” that:

(A) Activities involving Footnote 1 designated entities. The foreign-produced item will be incorporated into, or will be used in the “production” or “development” of any “part,” “component,” or “equipment” produced, purchased, or ordered by any entity with a footnote 1 designation in the license requirement

column of the Entity List in Supplement No. 4 to part 744 of the EAR; or

(B) Footnote 1 designated entities as transaction parties. Any entity with a footnote 1 designation in the license requirement column of the Entity List in Supplement No. 4 to part 744 of the EAR is a party to any transaction involving the foreign-produced item, e.g., as a “purchaser,” “intermediate consignee,” “ultimate consignee,” or “end-user.”

(2) Entity List FDP rule: Footnote 4. A foreign-produced item is subject to the EAR if it meets both the product scope in paragraph (e)(2)(i) of this section and the end-user scope in paragraph (e)(2)(ii) of this section. See § 744.11(a)(2)(ii) of the EAR for license requirements, license review policy, and license exceptions applicable to foreign-produced items that are subject to the EAR pursuant to this paragraph (e)(2).

(i) Product Scope Entity List FDP rule: Footnote 4. The product scope applies if a foreign-produced item meets the conditions of either paragraph (e)(2)(i)(A) or (B) of this section.

(A) “Direct product” of “technology” or “software.” The foreign-produced item is a “direct product” of “technology” or “software” subject to the EAR and specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D002, 5D991, 5E001, 5E002, or 5E991 of the CCL; or

(B) Product of plant or ‘major component’ that is a “direct product.” The foreign-produced item is produced by any plant or ‘major component’ of a plant when the plant or ‘major component’ of a plant, whether made in the U.S. or a foreign country, itself is a “direct product” of U.S.-origin “technology” or “software” that is specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, 5E991, 5D002, or 5E002 of the CCL.

(ii) End user scope of the Entity List FDP rule: Footnote 4. A foreign-produced item meets

the end-user scope of this paragraph if there is “knowledge” that:

(A) *Activities involving Footnote 4 designated entities.* The foreign-produced item will be incorporated into, or will be used in the “production” or “development” of any “part,” “component,” or “equipment” produced, purchased, or ordered by any entity with a footnote 4 designation in the license requirement column of the Entity List in supplement no. 4 to part 744 of the EAR; *or*

(B) *Footnote 4 designated entities as transaction parties.* Any entity with a footnote 4 designation in the license requirement column of the Entity List in supplement no. 4 to part 744 of the EAR is a party to any transaction involving the foreign-produced item, *e.g.*, as a “purchaser,” “intermediate consignee,” “ultimate consignee,” or “end-user.”

(f) Russia/Belarus/Temporarily occupied Crimea region of Ukraine FDP rule

A foreign-produced item is subject to the EAR if it meets both the product scope in paragraph (f)(1) of this section and the destination scope in paragraph (f)(2) of this section. See § 746.8 of the EAR for license requirements, license review policy, and license exceptions applicable to foreign-produced items that are subject to the EAR pursuant to this paragraph (f).

(1) Product scope of Russia/Belarus/Temporarily occupied Crimea region of Ukraine FDP rule. The product scope applies if a foreign-produced item meets the conditions of either paragraph (f)(1)(i) or (ii) of this section.

(i) “Direct product” of “technology” or “software.” A foreign-produced item meets the product scope of this paragraph (f)(1)(i) if the foreign-produced item meets both of the following conditions:

(A) The foreign-produced item is the “direct product” of U.S.-origin “technology” or “software” subject to the EAR that is specified in

any ECCN in product groups D or E of the CCL; and

(B) The foreign-produced item is specified in any ECCN on the CCL or in supplement no. 6 or 7 to part 746 of the EAR; or

(ii) “Direct product” of a complete plant or ‘major component’ of a plant. A foreign-produced item meets the product scope of this paragraph (f)(1)(ii) if it meets both of the following conditions:

(A) The foreign-produced item is produced by any plant or ‘major component’ of a plant that is located outside the United States, when the plant or ‘major component’ of a plant, whether made in the United States or a foreign country, itself is a “direct product” of U.S.-origin “technology” or “software” subject to the EAR that is specified in any ECCN in product groups D or E of the CCL; and

(B) The foreign-produced item is specified in any ECCN on the CCL or in supplement no. 6 or 7 to part 746 of the EAR.

(2) Destination scope of the Russia/Belarus/Temporarily occupied Crimea region of Ukraine FDP rule. A foreign-produced item meets the destination scope of this paragraph (f)(2) if there is “knowledge” that the foreign-produced item is destined to Russia, Belarus, or the temporarily occupied Crimea region of Ukraine or will be incorporated into or used in the “production” or “development” of any “part,” “component,” or “equipment” specified in any ECCN on the CCL or in supplement no. 6 or 7 to part 746 of the EAR and produced in or destined to Russia, Belarus, or the temporarily occupied Crimea region of Ukraine.

(g) Russia/Belarus-Military End User FDP rule

A foreign-produced item is subject to the EAR if it meets both the product scope in paragraph (g)(1) of this section and the end-user scope in paragraph (g)(2) of this section. See § 746.8 of the EAR for license requirements, license review

policy, and license exceptions applicable to foreign-produced items that are subject to the EAR pursuant to this paragraph (g).

(1) Product Scope of Russia/Belarus-Military End User FDP rule. The product scope applies if a foreign-produced item meets the conditions of either paragraph (g)(1)(i) or (ii) of this section.

(i) “Direct product” of “technology” or “software.” A foreign-produced item meets the product scope of this paragraph (g)(1)(i) if the foreign-produced item is a “direct product” of “technology” or “software” subject to the EAR and specified in any ECCN in product groups D or E in any categories of the CCL; or

(ii) “Direct product” of a complete plant or ‘major component’ of a plant. A foreign-produced item meets the product scope of this paragraph (g)(1)(ii) if the foreign-produced item is produced by any plant or ‘major component’ of a plant that is located outside the United States, when the plant or ‘major component’ of a plant, whether made in the United States or a foreign country, itself is a “direct product” of U.S.-origin “technology” or “software” subject to the EAR that is specified in any ECCN in product groups D or E in any categories of the CCL.

(2) End-user scope of the Russia/Belarus-‘Military End User’ FDP rule. A foreign-produced item meets the end-user scope of this paragraph (g)(2) if there is “knowledge” that:

(i) Activities involving footnote 3 designated entities. The foreign-produced item will be incorporated into, or used in the “production” or “development” of any “part,” “component,” or “equipment” produced, purchased, or ordered by any entity with a footnote 3 designation in the license requirement column of the Entity List in Supplement No. 4 to part 744 of the EAR; or

(ii) Footnote 3 designated entities as transaction parties. Any entity with a footnote 3 designation in the license requirement column of the Entity List in Supplement No. 4 to part 744 of the EAR is a party to any transaction involving the foreign-produced item, e.g., as a “purchaser,” “intermediate consignee,” “ultimate consignee,” or “end-user.”

Note 3 to paragraph (g). A ‘military end user’ for purposes of paragraph (g) is any entity listed on the Entity List in supplement no. 4 to part 744 of the EAR with a footnote 3 designation.

(h) Advanced computing FDP rule

A foreign-produced item is subject to the EAR if it meets both the product scope in paragraph (h)(1) of this section and the destination scope in paragraph (h)(2) of this section. See § 742.6(a)(6) of the EAR for license requirements and license exceptions and § 742.6(b)(10) for license review policy applicable to foreign-produced items that are subject to the EAR under this paragraph (h).

(1) Product scope of advanced computing FDP Rule. The product scope applies if a foreign-produced item meets the conditions of either paragraph (h)(1)(i) or (ii) of this section.

(i) “Direct product” of “technology” or “software.” A foreign-produced item meets the product scope of this paragraph if it meets both the following conditions:

(A) The foreign-produced item is the “direct product” of “technology” or “software” subject to the EAR and specified in 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D090, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D002, 5D991, 5E001, 5E991, or 5E002 of the CCL; and

(B) The foreign-produced item is:

(1) Specified in ECCN 3A090, 3E001 (for 3A090), 4A090, or 4E001 (for 4A090) of the CCL; or

(2) An integrated circuit, computer, “electronic assembly,” or “component” specified elsewhere on the CCL and meets the performance parameters of ECCN 3A090 or 4A090.

(ii) Product of a complete plant or ‘major component’ of a plant that is a “direct product.” A foreign-produced item meets the product scope of this paragraph if it meets both of the following conditions:

(A) The foreign-produced item is produced by any complete plant or ‘major component’ of a

plant that is located outside the United States, when the plant or ‘major component’ of a plant, whether made in the United States or a foreign country, itself is a “direct product” of U.S.-origin “technology” or “software” that is specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D090, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, 5E991, 5D002, or 5E002 of the CCL; and

(B) The foreign-produced item is:

(1) Specified in ECCN 3A090, 3E001 (for 3A090), 4A090, or 4E001 (for 4A090) of the CCL; or

(2) An integrated circuit, computer, “electronic assembly,” or “component” specified elsewhere on the CCL and meets the performance parameters of ECCN 3A090 or 4A090.

(2) Destination or end use scope of the advanced computing FDP rule. A foreign-produced item meets the destination scope of this paragraph (h)(2) if there is “knowledge” that the foreign-produced item is:

(i) Destined to the PRC or Macau or will be incorporated into any “part,” “component,” “computer,” or “equipment” not designated EAR99 that is destined to the PRC or Macau; or

(ii) Technology developed by an entity headquartered in the PRC or Macau for the “production” of a mask or an integrated circuit wafer or die.

(3) Certification. Exporters, reexporters, and transferors may obtain a written certification from a supplier that asserts an item being provided would be subject to the EAR if future transaction meet the destination scope in § 734.9(h)(2)(i) or (ii). The model certificate provided by BIS in supplement no. 1 to part 734 is not required under the EAR, but through its provision, the certificate may assist exporters, reexporters, and transferors with the process of resolving potential red flags regarding whether an item is subject to the EAR based on § 734.9(h). The model certificate provided by BIS contemplates signature by an official or designated employee of the certifying company

and inclusion of all the information described in paragraph (b) of supplement no. 1 to part 734. If the exporter, reexporter or transferors has not obtained such a certification, due diligence needs to be conducted to determine if the items meets the scope in this paragraph (h). While this certificate is expected to be useful for a company to understand the application of the EAR to an item, BIS does not view this as the only step to be completed during a company’s due diligence process. See supplement no. 1 to part 734 and supplement no. 3 to part 732 of the EAR.

(i) “Supercomputer” FDP rule

A foreign-produced item is subject to the EAR if it meets both the product scope in paragraph (i)(1) of this section and the country and end-use scope in paragraph (i)(2) of this section. See § 744.23 of the EAR for license requirement, license review policy, and license exceptions applicable to foreign-produced items that are subject to the EAR pursuant to this paragraph (i).

(1) Product scope. The product scope applies if a foreign-produced item meets the conditions of either paragraphs (i)(1)(i) or (ii) of this section.

(i) **“Direct product” of “technology” or “software.”** The foreign-produced item meets the product scope of this paragraph (i)(1)(i) if the foreign-produced item is a “direct product” of “technology” or “software” subject to the EAR and specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, 5E991, 5D002, or 5E002 of the CCL; or

(ii) **Product of a complete plant or ‘major component’ of a plant that is a “direct product.”** A foreign-produced item meets the product scope of this paragraph (i)(1)(ii) if the foreign-produced item is produced by any plant or ‘major component’ of a plant that is located outside the United States, when the plant or ‘major component’ of a plant, whether made in the United States or a foreign country, itself is a “direct product” of U.S.-origin “technology” or “software” that is specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001,

4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, 5E991, 5D002, or 5E002 of the CCL.

(2) Country and end-use scope. A foreign-produced item meets the country and end-use scope of this paragraph (i)(2) if there is “knowledge” that the foreign produced item will be:

(i) Used in the design, “development,” “production,” operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of, a “supercomputer” located in or destined to the PRC or Macau; or

(ii) Incorporated into, or used in the “development,” or “production,” of any “part,” “component,” or “equipment” that will be used in a “supercomputer” located in or destined to the PRC or Macau.

(j) Iran FDP rule

A foreign-produced item is subject to the EAR if it meets both the product scope in paragraph (j)(1) of this section and the destination scope in paragraph (j)(2) of this section. See § 746.7 of the EAR for license requirements, license review policy, and license exceptions applicable to foreign-produced items that are subject to the EAR pursuant to this paragraph (j).

(1) Product scope of Iran FDP rule. The product scope applies if a foreign-produced item meets the conditions of either paragraph (j)(1)(i) or (ii) of this section.

(i) **“Direct product” of “technology” or “software.”** A foreign-produced item meets the product scope of this paragraph (j)(1)(i) if the foreign-produced item meets both of the following conditions:

(A) The foreign-produced item is the “direct product” of U.S.-origin “technology” or “software” subject to the EAR that is specified in any ECCN in product groups D or E in Categories 3 through 5 or 7 of the CCL; and

(B) The foreign-produced item is identified in supplement no. 7 to part 746 of the EAR or is specified in any ECCN on the CCL in Categories 3 through 5 or 7 of the CCL; or

(ii) **Product of a complete plant or ‘major component’ of a plant that is a “direct product.”** A foreign-produced item meets the product scope of this paragraph (j)(1)(ii) if it meets both of the following conditions:

(A) The foreign-produced item is produced by any plant or ‘major component’ of a plant that is located outside the United States, when the plant or ‘major component’ of a plant, whether made in the United States or a foreign country, itself is a “direct product” of U.S.-origin “technology” or “software” subject to the EAR that is specified in any ECCN in product groups D or E in Categories 3 through 5 or 7 of the CCL; and

(B) The foreign-produced item is identified in supplement no. 7 to part 746 of the EAR or is specified in any ECCN on the CCL in Categories 3 through 5 or 7 of the CCL.

(2) Destination scope of the Iran FDP rule. A foreign-produced item meets the destination scope of this paragraph (j)(2) if there is “knowledge” that the foreign-produced item is destined to Iran or will be incorporated into or used in the “production” or “development” of any “part,” “component,” or “equipment,” including any modified or designed “components,” “parts,” “accessories,” and “attachments” therefor, identified in supplement no. 7 to part 746 of the EAR or is specified in any ECCN on the CCL in Categories 3 through 5 or 7 of the CCL that is located in or destined to Iran.

§ 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 BIS ACTIVITIES CONDUCTED OUTSIDE THE UNITED STATES

The Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801-4852) authorizes the Secretary of Commerce, in carrying out its provisions, to undertake activities outside the United States, including, but not limited to, conducting investigations; requiring and obtaining information from persons; and conducting pre-license checks and post-shipment verifications. BIS officials will act with due care in the jurisdiction of a foreign nation and, to the extent possible, consistent with the applicable host nation government’s laws. For any action taken outside the United States, BIS officials will consult and coordinate with the appropriate U.S. Government agencies and act in a manner consistent with the United States’ international commitments and international agreements to which the United States is a party.

§ 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 additional requirements pursuant to which exports or reexports of encryption source code “software” are considered to be publicly available 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 additional 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—MODEL CERTIFICATION FOR PURPOSES OF
ADVANCED COMPUTING FDP RULE**

a) General

This supplement is included in the EAR to assist exporters, reexporters, and transferors in determining whether the items being exported, reexported, or transferred (in-country) are subject to the EAR based on the advanced computing FDP rule under § 734.9(h). The model certificate provided by BIS in supplement no. 1 to this part is not required under the EAR, but through its provision, the certificate may assist exporters, reexporters, and transferors with the process of resolving potential red flags regarding whether an item is subject to the EAR based on § 734.9(h). The model certificate provided in this supplement by BIS contemplates signature by an official or designated employee of the certifying company and inclusion of all the information described in paragraph (b) of this supplement. Any certification relied on for this part must be retained pursuant to part 762.

Obtaining the certification set forth in this supplement no. 1 to part 734 does not relieve exporters, reexporters, and transferors of their obligation to exercise due diligence in determining whether items are subject to the EAR, including by following the “Know Your Customer” guidance in supplement no. 3 to part 732 of the EAR.

b) Model Criteria

A certification meets the criteria described in this supplement if it contains at least the following information:

- (1) The certification must be signed by an organization official specifically authorized to certify the document as being accurate and complete. The undersigned certifies that the information herein supplied in response to this paragraph is complete and correct to the best of his/her knowledge. By signing the certification below, I attest that:
- (2) My organization is aware that the items, [INSERT A DESCRIPTION OF THE ITEMS], provided to this exporter, reexporter, or transferor, [INSERT NAME OF EXPORTER, REEXPORTER, OR TRANSFEROR], could be subject to the U.S. Export Administration Regulations (EAR) (15 CFR 730-774) if future transactions are within the destination scope of § 734.9(h)(2)(i) or (ii) and exported or reexported to or transferred within the People’s Republic of China (China) or Macau;
- (3) My organization has reviewed the criteria for the advanced computing Foreign Direct Product (FDP) rule under § 734.9(h) and attests that from my organization’s “knowledge” of the item, it would be subject to the EAR if the destination criteria are met in § 734.9(h)(2)(i) or (ii); and
- (4) My organization affirms its commitment to apply with all applicable requirements under the EAR.

[INSERT NAME(S) OF CONSIGNEE(S)]

[INSERT DATE(S) SIGNED]

Note 1 to paragraph (b): When multiple consignees who form a network engaged in a production process (or other type of collaborative activity, such as joint development) will be receiving items under the EAR, a single model certification statement for multiple consignees may be used for any export, reexport, or transfer (in-country) under the EAR.

c) Additional Information

Because this is only a model certification, exporters, reexporters, or transferors may add additional elements to the certification and/or use it for multiple purposes as part of their compliance program. For example, if a company has ten affiliated companies in a multi-step supply chain, instead of obtaining a model certification for each export, reexport, or transfer (in-country), the initial exporter, reexporter, or transferor may get all ten parties to sign the certification, which may further reduce the burden on parties participating in the supply chain.

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 (excluding U.S.-origin content that meets the criteria in §§ 746.5(a)(3), 746.7(a)(1)(v), or 746.8(a)(5)). 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.