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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 IMPORTANT EAR TERMS AND PRINCIPLES

(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) Export and reexport

(1) Definition of export. "Export" means an actual shipment or transmission of items subject to the EAR out of the United States, or release of technology or software subject to the EAR to a foreign national in the United States, as described in paragraph (b)(2)(ii) of this section. See paragraph (b)(9) of this section for the definition that applies to exports of encryption source code and object code software subject to the EAR.

(2) Export of technology or software. (See paragraph (b)(9) for provisions that apply to encryption source code and object code software.) "Export" of technology or software, excluding encryption software subject to "EI" controls, includes:

(i) Any release of technology or software subject to the EAR in a foreign country; or

(ii) Any release of technology or source code subject to the EAR to a foreign national. Such release is deemed to be an export to the home country or countries of the foreign national. This deemed export rule does not apply to persons lawfully admitted for permanent residence in the United States and does not apply to persons who are protected individuals under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)). Note that the release of any item to any party with knowledge a violation is about to occur is prohibited by §736.2(b)(10) of the EAR.

(3) Definition of "release" of technology or software. Technology or software is "released" for export through:

(i) Visual inspection by foreign nationals of U.S.-origin equipment and facilities;

(ii) Oral exchanges of information in the United States or abroad; or

(iii) The application to situations abroad of personal knowledge or technical experience acquired in the United States.

(4) Definition of reexport. "Reexport" means an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country; or release of technology or software subject to the EAR to a foreign national outside the United States, as described in paragraph (b)(5) of this section.

(5) Reexport of technology or software. Any release of technology or source code subject to the EAR to a foreign national of another country is a deemed reexport to the home country or countries of the foreign national. However, this deemed reexport definition does not apply to persons lawfully admitted for permanent residence. The term "release" is defined in paragraph (b)(3) of this section. Note that the release of any item to any party with knowledge or reason to know a violation is about to occur is prohibited by §736.2(b)(10) of the EAR.

(6) For purposes of the EAR, the export or reexport of items subject to the EAR that will transit through a country or countries or be transshipped in a country or countries to a new country or are intended for reexport to the new country, are deemed to be exports to the new country.

(7) If a territory, possession, or department of a foreign country is not listed on the Country Chart in Supplement No. 1 to part 738 of the EAR, the export or reexport of items subject to the EAR to such destination is deemed under the EAR to be an export to the foreign country. For example, a shipment to the Cayman Islands, a dependent territory of the United Kingdom, is deemed to be a shipment to the United Kingdom.

(8) Export or reexport of items subject to the EAR does *not* include shipments among any of the states of the United States, the Commonwealth of Puerto Rico, or the Commonwealth of the Northern Mariana Islands or any territory, dependency, or possession of the United States. These destinations are listed in Schedule C, Classification Codes and Descriptions for U.S. Export Statistics, issued by the Bureau of the Census.

(9) Export of encryption source code and object code software.

(i) For purposes of the EAR, the export of encryption source code and object code software means:

(A) An actual shipment, transfer, or transmission out of the United States (see also paragraph (b)(9)(ii) of this section); or

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

(ii) 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 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 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 §740.13(e) of the EAR for notification requirements for exports or reexports of encryption source code software considered to be publicly available consistent with the provisions of §734.3(b)(3) of the EAR. Publicly available encryption software in object code that corresponds to encryption source code made eligible for License Exception TSU under section 740.13(e) is not subject to the EAR.

(iii) 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:

(A) 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);

(B) 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

(C) 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, 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.

§ 734.3 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 sections 740.17(a) and 740.17(b)(4)(ii) 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 items are <u>not</u> 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 <u>*not*</u> "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) Publicly available technology and software, except software classified under ECCN 5D002 on the Commerce Control List, that:

(i) Are already published or will be published as described in §734.7 of this part;

(ii) Arise during, or result from, fundamental research, as described in §734.8 of this part;

(iii) Are educational, as described in §734.9 of this part;

(iv) Are included in certain patent applications, as described in §734.10 of this part.

Note to Paragraphs (b)(2) and (b)(3) of this Section: *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 §734.3(b)(3)). 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 § 740.13(e) of 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 8.0 Weighted TeraFLOPS (WT) containing U.S.-origin controlled semiconductors (other than memory circuits) classified under ECCN 3A001 to Computer Tier 3; or exceeding an APP of 0.002 WT 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) There is no *de minimis* level for foreign-made:

(i) Commercial primary or standby instrument systems of the type described in ECCN 7A994 on the Commerce Control List (Supplement No. 1 to part 774 the EAR) when the systems integrate QRS11-00100-100/101 Micromachined Angular Rate Sensors;

(ii) Commercial automatic flight control systems when the systems integrate QRS11-00050-443/569 Micromachined Angular Rate Sensors; and

(iii) Aircraft of the type described in ECCN 9A991 when such aircraft incorporate a primary or standby instrument system integrating a QRS11-00100-100/101 sensor or an automatic flight control system integrating a QRS11-00050-443/569 sensor.

Note to Paragraph (a)(3): *QRS11 Micromachined Angular Rate Sensors are "subject ITAR", (see 22 CFR parts 120 through 130) except when the QRS11-00100-100/101 version of the sensor is integrated into and included as an integral part of a commercial primary or standby instrument system of the type described in ECCN 7A994, or aircraft of the type described in ECCN 9A991 that incorporates a commercial primary or standby instrument that has such a sensor integrated, or is exported solely for integration into such systems; or when the QRS11-00050-443/569 is integrated into a commercial automatic flight control system of the type described in ECCN 7A994, or aircraft of the type described in ECCN 9A991 that incorporates an automatic flight control system that has such a sensor integrated, or is exported solely for integration into such a system.*

(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 that incorporate cameras classified under ECCN 6A003.b.4.b if such cameras would be subject to the EAR as separate items and if the foreign made military commodity is not subject to the International Traffic in Arms Regulations (22 USC Parts 120 - 130).

(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.

Foreign 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 ECCNs 5A002.a.1, .a.2, .a.5, .a.6, .a.9, .b, or 5D002, must have been:

(i) Authorized for license exception TSU because of having met the notification

requirements of § 740.13(e) of the EAR (ECCN 5D002 only);

(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 foreign made product will not be sent to any destination in Country Group E:1 in Supplement No. 1 to part 740 of the EAR;

(iv) Authorized for License Exception ENC pursuant to § 740.17(b)(4) of the EAR; *or*

(v) Authorized for License Exception ENC after submission of an encryption registration pursuant to § 740.17(b)(1) of the EAR.

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

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 INFORMATION AND SOFTWARE

(a) Information is "published" when it becomes generally accessible to the interested public in any form, including:

(1) Publication in periodicals, books, print, electronic, or any other media available for general distribution to any member of the public or to a community of persons interested in the subject matter, such as those in a scientific or engineering discipline, either free or at a price that does not exceed the cost of reproduction and distribution (See Supplement No. 1 to this part, Questions A(1) through A(6));

(2) Ready availability at libraries open to the public or at university libraries (See Supplement No. 1 to this part, Question A(6));

(3) Patents and open (published) patent applications available at any patent office; and

(4) Release at an open conference, meeting, seminar, trade show, or other open gathering.

(i) A conference or gathering is "open" if all technically qualified members of the public are eligible to attend and attendees are permitted to take notes or otherwise make a personal record (not necessarily a recording) of the proceedings and presentations.

(ii) All technically qualified members of the public may be considered eligible to attend a conference or other gathering notwithstanding a registration fee reasonably related to cost and reflecting an intention that all interested and technically qualified persons be able to attend, or a limitation on actual attendance, as long as attendees either are the first who have applied or are selected on the basis of relevant scientific or technical competence, experience, or responsibility (See Supplement No. 1 to this part, Questions B(1) through B(6)).

(iii) "Publication" includes submission of papers to domestic or foreign editors or reviewers of journals, or to organizers of open conferences or other open gatherings, with the understanding that the papers will be made publicly available if favorably received. (See Supplement No. 1 to this part, Questions A(1) and A(3)).

(b) Software and information is published when it is available for general distribution either for free or at a price that does not exceed the cost of reproduction and distribution. See Supplement No. 1 to this part, Questions G(1) through G(3).

(c) Notwithstanding paragraphs (a) and (b) of this section, note that published encryption software classified under ECCN 5D002 on the Commerce Control List (Supplement No. 1 to part 774 of the EAR) remains subject to the EAR, except publicly available encryption object code software classified under ECCN 5D002 when the corresponding source code meets the criteria specified in § 740.13(e) of the EAR. *See* § 740.13(e) of the EAR for eligibility requirements for exports and reexports of publicly available encryption source code under License Exception TSU.

§ 734.8 INFORMATION RESULTING FROM FUNDAMENTAL RESEARCH

(a) Fundamental research

Paragraphs (b) through (d) of this section and §734.11 of this part provide specific rules that will be used to determine whether research in particular institutional contexts qualifies as "fundamental research". The intent behind these rules is to identify as "fundamental research" basic and applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community. Such research can be distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons or specific national security reasons as defined in §734.11(b) of this part. (See Supplement No. 1 to this part, Question D(8)). Note that the provisions of this section do not apply to encryption software classified under ECCN 5D002 on the Commerce Control List (Supplement No. 1 to part 774 of the EAR), except publicly available encryption object code software classified under ECCN 5D002 when the corresponding source code meets the criteria specified in § 740.13(e) of the EAR. *See* §740.13(e) of the EAR for eligibility requirements for exports and reexports of publicly available encryption source code under License Exception TSU.

(b) University based research

(1) Research conducted by scientists, engineers, or students at a university normally will be considered fundamental research, as described in paragraphs (b)(2) through (6) of this section. ("University" means any accredited institution of higher education located in the United States.)

(2) Prepublication review by a sponsor of university research solely to insure that the publication would not inadvertently divulge proprietary information that the sponsor has furnished to the researchers does not change the status of the research as fundamental research. However, release of information from a corporate sponsor to university researchers where the research results are subject to prepublication review, is subject to the EAR. (See Supplement No. 1 to this part, Questions D(7), D(9), and D(10)).

(3) Prepublication review by a sponsor of university research solely to ensure that publication would not compromise patent rights does not change the status of fundamental research, so long as the review causes no more than a temporary delay in publication of the research results.

(4) The initial transfer of information from an industry sponsor to university researchers is subject to the EAR where the parties have agreed that the sponsor may withhold from publication some or all of the information so provided. (See Supplement No. 1 to this part, Question D(2)).

(5) University based research is not considered "fundamental research" if the university or its researchers accept (at the request, for example, of an industrial sponsor) other restrictions on publication of scientific and technical information resulting from the project or activity. Scientific and technical information resulting from the research will nonetheless qualify as fundamental research once all such restrictions have expired or have been removed. (See Supplement No. 1 to this part, Question D(7) and D(9)).

(6) The provisions of §734.11 of this part will apply if a university or its researchers accept specific national security controls (as defined in §734.11 of this part) on a research project or activity sponsored by the U.S. Government. (See Supplement No. 1 to this part, Questions E(1) and E(2)).

(c) Research based at Federal agencies or FFRDCs

Research conducted by scientists or engineers working for a Federal agency or a Federally

Funded Research and Development Center (FFRDC) may be designated as "fundamental research" within any appropriate system devised by the agency or the FFRDC to control the release of information by such scientists and engineers. (See Supplement No. 1 to this part, Questions D(8) and D(11)).

(d) Corporate research

(1) Research conducted by scientists or engineers working for a business entity will be considered "fundamental research" at such time and to the extent that the researchers are free to make scientific and technical information resulting from the research publicly available without restriction or delay based on proprietary concerns or specific national security controls as defined in §734.11(b) of this part.

(2) Prepublication review by the company solely to ensure that the publication would compromise no proprietary information provided by the company to the researchers is not considered to be a proprietary restriction under paragraph (d)(1) of this section. However, paragraph (d)(1) of this section does not authorize the release of information to university researchers where the research results are subject to prepublication review. (See Supplement No. 1 to this part, Questions D(8), D(9), and D(10)).

(3) Prepublication review by the company solely to ensure that publication would compromise no patent rights will not be considered a proprietary restriction for this purpose, so long as the review causes no more than a temporary delay in publication of the research results.

(4) However, the initial transfer of information from a business entity to researchers is not authorized under the "fundamental research" provision where the parties have agreed that the business entity may withhold from publication some or all of the information so provided.

(e) Research based elsewhere

Research conducted by scientists or engineers who are not working for any of the institutions described in paragraphs (b) through (d) of this section will be treated as corporate research, as described in paragraph (d) of this section. (See Supplement No. 1 to this part, Question D(8)).

§ 734.9 EDUCATIONAL INFORMATION

"Educational information" referred to in §734.3(b)(3)(iii) of this part is not subject to the EAR if it is released by instruction in catalog courses and associated teaching laboratories of academic institutions. Dissertation research is discussed in §734.8(b) of this part. (Refer to Supplement No. 1 to this part, Question C(1) through C(6)). Note that the provisions of this section do not apply to encryption software classified under ECCN 5D002 on the Commerce Control List, except publicly available encryption object code software classified under ECCN 5D002 when the corresponding source code meets the criteria specified in § 740.13(e) of the EAR. *See* §740.13(e) of the EAR for eligibility requirements for exports and reexports of publicly available encryption source code under License Exception TSU.

§ 734.10 PATENT APPLICATIONS

The information referred to in §734.3(b)(3)(iv) of this part is:

(a) Information contained in a patent application prepared wholly from foreign-origin technical data 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;

(b) Information contained in 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;[1] or

(c) Information contained in 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 GOVERNMENT-SPONSORED RESEARCH COVERED BY CONTRACT CONTROLS

(a) If research is funded by the U.S. Government, and specific national security controls are agreed on to protect information resulting from the research, §734.3(b)(3) of this part will not apply to any export or reexport of such information in violation of such controls. However, any export or reexport of information resulting from the research that is consistent with the specific controls may nonetheless be made under this provision.

(b) 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". (See Supplement No. 1 to this part, Questions E(1) and E(2).)

[1] Regulations issued by the Patent and Trademark Office in 37 CFR part 5 provide for the export to a foreign country of unclassified technical data in the form of a patent application or an amendment, modification, or supplement thereto or division thereof.

§ 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.

SUPPLEMENT NO. 1 TO PART 734 - QUESTIONS AND ANSWERS - TECHNOLOGY AND SOFTWARE SUBJECT TO THE EAR

This Supplement No. 1 contains explanatory questions and answers relating to technology and software that is subject to the EAR. It is intended to give the public guidance in understanding how BIS interprets this part, but is only illustrative, not comprehensive. In addition, facts or circumstances that differ in any material way from those set forth in the questions or answers will be considered under the applicable provisions of the EAR. Exporters should note that the provisions of this supplement do not apply to encryption software classified under ECCN 5D002 for "EI" reasons on the Commerce Control List or to mass market encryption software with symmetric key length exceeding 64-bits classified under ECCN 5D992. This Supplement is divided into nine sections according to topic as follows:

Section A: Publication of technology and exports and reexports of technology that has been or will be published.

Section B: Release of technology at conferences.

Section C: Educational instruction.

Section D: Research, correspondence, and informal scientific exchanges.

Section E: Federal contract controls.

Section F: Commercial consulting.

Section G: Software.

Section H: Availability in a public library.

Section I: Miscellaneous.

Section A: Publication

Question A(1): I plan to publish in a foreign journal a scientific paper describing the results of my research, which is in an area listed in the EAR as requiring a license to all countries except Canada. Do I need a license to send a copy to my publisher abroad?

Answer: No. This export transaction is not subject to the EAR. The EAR do not cover technology that is already publicly available, as well as technology that is made public by the transaction in question (§§734.3 and 734.7 of this part). Your research results would be made public by the planned publication. You would not need a license.

Question A(2): Would the answer differ depending on where I work or where I performed the research?

Answer: No. Of course, the result would be different if your employer or another sponsor of your research imposed restrictions on its publication (§734.8 of this part).

Question (A)3: Would I need a license to send the paper to the editors of a foreign journal for review to determine whether it will be accepted for publication?

Answer: No. This export transaction is not subject to the EAR because you are submitting the paper to the editors with the intention that the paper will be published if favorably received (§734.7(a)(4)(iii) of this part).

Question A(4): The research on which I will be reporting in my paper is supported by a grant from the Department of Energy (DOE). The grant requires prepublication clearance by DOE. Does that make any difference under the Export Administration Regulations?

Answer: No, the transaction is not subject to the EAR. But if you published in violation of any Department of Energy controls you have accepted in the grant, you may be subject to appropriate administrative, civil, or criminal sanctions under other laws.

Question A(5): We provide consulting services on the design, layout, and construction of integrated circuit plants and production lines. A major part of our business is the publication for sale to clients of detailed handbooks and reference manuals on key aspects on the design and manufacturing processes. A typical cost of publishing such a handbook and manual might be $500; the typical sales price is

about $15,000. Is the publication and sale of such handbooks or manuals subject to the EAR?

Answer: Yes. The price is above the cost of reproduction and distribution (§734.7(a)(1) of this part). Thus, you would need to obtain a license or qualify for a License Exception before you could export or reexport any of these handbooks or manuals.

Question A(6): My Ph.D. thesis is on technology, listed in the EAR as requiring a license to all destinations except Canada, which has never been published for general distribution. However, the thesis is available at the institution from which I took the degree. Do I need a license to send another copy to a colleague overseas?

Answer: That may depend on where in the institution it is available. If it is not readily available in the university library (e.g., by filing in open stacks with a reference in the catalog), it is not "publicly available" and the export or reexport would be subject to the EAR on that ground. The export or reexport would not be subject to the EAR if your Ph.D. research qualified as “fundamental research” under §734.8 of this part. If not, however, you will need to obtain a license or qualify for a License Exception before you can send a copy out of the country.

Question A(7): We sell electronically recorded information, including software and databases, at wholesale and retail. Our products are available by mail order to any member of the public, though intended for specialists in various fields. They are priced to maximize sales to persons in those fields. Do we need a license to sell our products to foreign customers?

Answer: You would not need a license for otherwise controlled technology or software if the technology and software are made publicly available at a price that does not exceed the cost of production and distribution to the technical community. Even if priced at a higher level, the export or reexport of the technology or software source code in a library accessible to the public is not subject to the EAR (§734.7(a) of this part).

Section B: Conferences

Question B(1): I have been invited to give a paper at a prestigious international scientific conference on a subject listed as requiring a license under the EAR to all countries, except Canada. Scientists in the field are given an opportunity to submit applications to attend. Invitations are given to those judged to be the leading researchers in the field, and attendance is by invitation only. Attendees will be free to take notes, but not make electronic or verbatim recordings of the presentations or discussions. Some of the attendees will be foreigners. Do I need a license to give my paper?

Answer: No. Release of information at an open conference and information that has been released at an open conference is not subject to the EAR. The conference you describe fits the definition of an open conference (§734.7(a) of this part).

Question B(2): Would it make any difference if there were a prohibition on making any notes or other personal record of what transpires at the conference?

Answer: Yes. To qualify as an "open" conference, attendees must be permitted to take notes or otherwise make a personal record (although not necessarily a recording). If note taking or the making of personal records is altogether prohibited, the conference would not be considered “open”.

Question B(3): Would it make any difference if there were also a registration fee?

Answer: That would depend on whether the fee is reasonably related to costs and reflects an intention that all interested and technically qualified persons should be able to attend (§734.7(a)(4)(ii) of this part).

Question B(4): Would it make any difference if the conference were to take place in another country?

Answer: No.

Question B(5): Must I have a license to send the paper I propose to present at such a foreign conference to the conference organizer for review?

Answer: No. A license is not required under the EAR to submit papers to foreign organizers of open

conferences or other open gatherings with the intention that the papers will be delivered at the conference, and so made publicly available, if favorably received. The submission of the papers is not subject to the EAR (§734.7(a)(4)(iii) of this part).

Question B(6): Would the answers to any of the foregoing questions be different if my work were supported by the Federal Government?

Answer: No. You may export and reexport the papers, even if the release of the paper violates any agreements you have made with your government sponsor. However, nothing in the EAR relieves you of responsibility for conforming to any controls you have agreed to in your Federal grant or contract.

Section C: Educational Instruction

Question C(1): I teach a university graduate course on design and manufacture of very high-speed integrated circuitry. Many of the students are foreigners. Do I need a license to teach this course?

Answer: No. Release of information by instruction in catalog courses and associated teaching laboratories of academic institutions is not subject to the EAR (§734.9 of this part).

Question C(2): Would it make any difference if some of the students were from countries to which export licenses are required?

Answer: No.

Question C(3): Would it make any difference if I talk about recent and as yet unpublished results from my laboratory research?

Answer: No.

Question C(4): Even if that research is funded by the Government?

Answer: Even then, but you would not be released from any separate obligations you have accepted in your grant or contract.

Question C(5): Would it make any difference if I were teaching at a foreign university?

Answer: No.

Question C(6): We teach proprietary courses on design and manufacture of high-performance machine tools. Is the instruction in our classes subject to the EAR?

Answer: Yes. That instruction would not qualify as "release of educational information" under §734.9 of this part because your proprietary business does not qualify as an "academic institution" within the meaning of §734.9 of this part. Conceivably, however, the instruction might qualify as "release at an open seminar, or other open gathering" under §734.7(a) of this part. The conditions for qualification of such a seminar or gathering as "open", including a fee "reasonably related to costs (of the conference, not of producing the data) and reflecting an intention that all interested and technically qualified persons be able to attend," would have to be satisfied.

Section D: Research, Correspondence, and Informal Scientific Exchanges

Question D(1): Do I need a license in order for a foreign graduate student to work in my laboratory?

Answer: Not if the research on which the foreign student is working qualifies as "fundamental research" under §734.8 of this part. In that case, the research is not subject to the EAR.

Question D(2): Our company has entered into a cooperative research arrangement with a research group at a university. One of the researchers in that group is a PRC national. We would like to share some of our proprietary information with the university research group. We have no way of guaranteeing that this information will not get into the hands of the PRC scientist. Do we need to obtain a license to protect against that possibility?

Answer: No. The EAR do not cover the disclosure of information to any scientists, engineers, or students at a U.S. university in the course of industry-university research collaboration under specific arrangements between the firm and the university, provided these arrangements do not permit the sponsor to withhold from publication any of the information that he provides to the researchers. However, if your company and the

researchers have agreed to a prohibition on publication, then you must obtain a license or qualify for a License Exception before transferring the information to the university. It is important that you as the corporate sponsor and the university get together to discuss whether foreign nationals will have access to the information, so that you may obtain any necessary authorization prior to transferring the information to the research team.

Question D(3): My university will host a prominent scientist from the PRC who is an expert on research in engineered ceramics and composite materials. Do I require a license before telling our visitor about my latest, as yet unpublished, research results in those fields?

Answer: Probably not. If you performed your research at the university, and you were subject to no contract controls on release of the research, your research would qualify as "fundamental research" (§734.8(a) of this part). Information arising during or resulting from such research is not subject to the EAR (§734.3(b)(3) of this part).

You should probably assume, however, that your visitor will be debriefed later about anything of potential military value he learns from you. If you are concerned that giving such information to him, even though permitted, could jeopardize U.S. security interests, the Commerce Department can put you in touch with appropriate Government scientists who can advise you. Send written communications, via courier, to:

Department of Commerce
Bureau of Industry and Security
Room 2099B
14th Street and Pennsylvania Ave., NW.
Washington, DC 20230

Question D(4): Would it make any difference if I were proposing to talk with a PRC expert in China?

Answer: No, if the information in question arose during or resulted from the same "fundamental research."

Question D(5): Could I properly do some work with him in his research laboratory inside China?

Answer: Application abroad of personal knowledge or technical experience acquired in the United States constitutes an export of that knowledge and experience, and such an export may be subject to the EAR. If any of the knowledge or experience you export in this way requires a license under the EAR, you must obtain such a license or qualify for a License Exception.

Question D(6): I would like to correspond and share research results with an Iranian expert in my field, which deals with technology that requires a license to all destinations except Canada. Do I need a license to do so?

Answer: Not as long as we are still talking about information that arose during or resulted from research that qualifies as "fundamental" under the rules spelled out in §734.8(a) of this part.

Question D(7): Suppose the research in question were funded by a corporate sponsor and I had agreed to prepublication review of any paper arising from the research?

Answer: Whether your research would still qualify as "fundamental" would depend on the nature and purpose of the prepublication review. If the review is intended solely to ensure that your publications will neither compromise patent rights nor inadvertently divulge proprietary information that the sponsor has furnished to you, the research could still qualify as "fundamental." But if the sponsor will consider as part of its prepublication review whether it wants to hold your new research results as trade secrets or otherwise proprietary information (even if your voluntary cooperation would be needed for it to do so), your research would no longer qualify as "fundamental." As used in these regulations it is the actual and intended openness of research results that primarily determines whether the research counts as "fundamental" and so is not subject to the EAR.

Question D(8): In determining whether research is thus open and therefore counts as "fundamental," does it matter where or in what sort of institution the research is performed?

Answer: In principle, no. "Fundamental research" is performed in industry, Federal laboratories, or other types of institutions, as well as in universities. The regulations introduce some operational

presumptions and procedures that can be used both by those subject to the regulations and by those who administer them to determine with some precision whether a particular research activity is covered. Recognizing that common and predictable norms operate in different types of institutions, the regulations use the institutional locus of the research as a starting point for these presumptions and procedures. Nonetheless, it remains the type of research, and particularly the intent and freedom to publish, that identifies "fundamental research," not the institutional locus (§734.8(a) of this part).

Question D(9): I am doing research on high-powered lasers in the central basic-research laboratory of an industrial corporation. I am required to submit the results of my research for prepublication review before I can publish them or otherwise make them public. I would like to compare research results with a scientific colleague from Vietnam and discuss the results of the research with her when she visits the United States. Do I need a license to do so?

Answer: You probably do need a license (§734.8(d) of this part). However, if the only restriction on your publishing any of that information is a prepublication review solely to ensure that publication would compromise no patent rights or proprietary information provided by the company to the researcher your research may be considered "fundamental research," in which case you may be able to share information because it is not subject to the EAR. Note that the information will be subject to the EAR if the prepublication review is intended to withhold the results of the research from publication.

Question D(10): Suppose I have already cleared my company's review process and am free to publish all the information I intend to share with my colleague, though I have not yet published?

Answer: If the clearance from your company means that you are free to make all the information publicly available without restriction or delay, the information is not subject to the EAR. (§734.8(d) of this part)

Question D(11): I work as a researcher at a Government-owned, contractor-operated research center. May I share the results of my unpublished research with foreign nationals without concern for export controls under the EAR?

Answer: That is up to the sponsoring agency and the center's management. If your research is designated "fundamental research" within any appropriate system devised by them to control release of information by scientists and engineers at the center, it will be treated as such by the Commerce Department, and the research will not be subject to the EAR. Otherwise, you would need to obtain a license or qualify for a License Exception, except to publish or otherwise make the information public (§734.8(c) of this part).

Section E: Federal Contract Controls

Question E(1): In a contract for performance of research entered into with the Department of Defense (DOD), we have agreed to certain national security controls. DOD is to have ninety days to review any papers we proposed before they are published and must approve assignment of any foreign nationals to the project. The work in question would otherwise qualify as "fundamental research" section under §734.8 of this part. Is the information arising during or resulting from this sponsored research subject to the EAR?

Answer: Under §734.11 of this part, any export or reexport of information resulting from government-sponsored research that is inconsistent with contract controls you have agreed to will not qualify as "fundamental research" and any such export or reexport would be subject to the EAR. Any such export or reexport that is consistent with the controls will continue to be eligible for export and reexport under the "fundamental research" rule set forth in §734.8(a) of this part. Thus, if you abide by the specific controls you have agreed to, you need not be concerned about violating the EAR. If you violate those controls and export or reexport information as "fundamental research" under §734.8(a) of this part, you may subject yourself to the sanctions provided for under the EAR, including criminal sanctions, in addition to administrative and civil penalties for breach of contract under other law.

Question E(2): Do the Export Administration Regulations restrict my ability to publish the results of my research?

Answer: The Export Administration Regulations are not the means for enforcing the national security controls you have agreed to. If such a publication violates the contract, you would be subject to administrative, civil, and possible criminal penalties under other law.

Section F: Commercial Consulting

Question F(1): I am a professor at a U.S. university, with expertise in design and creation of submicron devices. I have been asked to be a consultant for a "third-world" company that wishes to manufacture such devices. Do I need a license to do so?

Answer: Quite possibly you do. Application abroad of personal knowledge or technical experience acquired in the United States constitutes an export of that knowledge and experience that is subject to the Export Administration Regulations. If any part of the knowledge or experience your export or reexport deals with technology that requires a license under the EAR, you will need to obtain a license or qualify for a License Exception.

Section G: Software[2]

Question G(1): Is the export or reexport of software in machine readable code subject to the EAR when the source code for such software is publicly available?

Answer: If the source code of a software program is publicly available, then the machine readable code compiled from the source code is software that is publicly available and therefore not subject to the EAR.

Question G(2): Is the export or reexport of software sold at a price that does not exceed the cost of reproduction and distribution subject to the EAR?

Answer: Software in machine readable code is publicly available if it is available to a community at a price that does not exceed the cost of reproduction and distribution. Such reproduction and distribution costs may include variable and fixed allocations of overhead and normal profit for the reproduction and distribution functions either in your company or in a third party distribution system. In your company, such costs may not include recovery for development, design, or acquisition. In this case, the provider of the software does not receive a fee for the inherent value of the software.

Section H: Available in a Public Library

Question H(1): Is the export or reexport of information subject to the EAR if it is available in a library and sold through an electronic or print service?

Answer: Electronic and print services for the distribution of information may be relatively expensive in the marketplace because of the value vendors add in retrieving and organizing information in a useful way. If such information is also available in a library -- itself accessible to the public -- or has been published in any way, that information is "publicly available" for those reasons, and the information itself continues not to be subject to the EAR even though you access the information through an electronic or print service for which you or your employer pay a substantial fee.

Question H(2): Is the export or reexport of information subject to the EAR if the information is available in an electronic form in a library at no charge to the library patron?

Answer: Information available in an electronic form at no charge to the library patron in a library accessible to the public is information publicly available even though the library pays a substantial subscription fee for the electronic retrieval service.

Question H(3): Is the export or reexport of information subject to the EAR if the information is available in a library and sold for more than the cost of reproduction and distribution?

Answer: Information from books, magazines,

[2] Exporters should note that these provisions do not apply to software controlled under the International Traffic in Arms Regulations (e.g., certain encryption software).

dissertations, papers, electronic data bases, and other information available in a library that is accessible to the public is not subject to the EAR. This is true even if you purchase such a book at more than the cost of reproduction and distribution. In other words, such information is "publicly available" even though the author makes a profit on your particular purchase for the inherent value of the information.

Section I: Miscellaneous

Question I(1): The manufacturing plant that I work at is planning to begin admitting groups of the general public to tour the plant facilities. We are concerned that a license might be required if the tour groups include foreign nationals. Would such a tour constitute an export? If so, is the export subject to the EAR?

Answer: The EAR define exports and reexports of technology to include release through visual inspection by foreign nationals of U.S.-origin equipment and facilities. Such an export or reexport qualifies under the "publicly available" provision and would not be subject to the EAR so long as the tour is truly open to all members of the public, including your competitors, and you do not charge a fee that is not reasonably related to the cost of conducting the tours. Otherwise, you will have to obtain a license, or qualify for a License Exception, prior to permitting foreign nationals to tour your facilities (§734.7 of this part).

Question I(2): Is the export or reexport of information subject to the EAR if the information is not in a library or published, but sold at a price that does not exceed the cost of reproduction and distribution?

Answer: Information that is not in a library accessible to the public and that has not been published in any way, may nonetheless become "publicly available" if you make it both available to a community of persons and if you sell it at no more than the cost of reproduction and distribution. Such reproduction and distribution costs may include variable and fixed cost allocations of overhead and normal profit for the reproduction and distribution functions either in your company or in a third party distribution system. In your company, such costs may not include recovery for development, design, or acquisition costs of the technology or software. The reason for this conclusion is that the provider of the information receives nothing for the inherent value of the information.

Question I(3): Is the export or reexport of information contributed to an electronic bulletin board subject to the EAR?

Answer: Assume each of the following:

1. Information is uploaded to an electronic bulletin board by a person that is the owner or originator of the information;

2. That person does not charge a fee to the bulletin board administrator or the subscribers of the bulletin board; and

3. The bulletin board is available for subscription to any subscriber in a given community regardless of the cost of subscription.

Such information is "publicly available" and therefore not subject to the EAR even if it is not elsewhere published and is not in a library. The reason for this conclusion is that the bulletin board subscription charges or line charges are for distribution exclusively, and the provider of the information receives nothing for the inherent value of the information.

Question I(4): Is the export or reexport of patented information fully disclosed on the public record subject to the EAR?

Answer: Information to the extent it is disclosed on the patent record open to the public is not subject to the EAR even though you may use such information only after paying a fee in excess of the costs of reproduction and distribution. In this case the seller does receive a fee for the inherent value of the technical data; however, the export or reexport of the information is nonetheless not subject to the EAR because any person can obtain the technology from the public record and further disclose or publish the information. For that reason, it is impossible to impose export controls that deny access to the information.

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.