(h) Shipments of foreign-made products that incorporate U.S.-origin components may be accompanied by U.S.-origin controlled spare parts, provided that they do not exceed 10 percent of the value of the foreign-made product, subject to the restrictions in §734.4 of the EAR.

(i) Reexports to Sudan of items controlled by ECCNs 2A994; 3A992.a; 5A 991.g; 5A 992; 6A 991; 6A 998; 7A 994; 8A 992.d, e, f, and g; 9A 990.a and .b; and 9A 991.d and .e. In addition, items in these ECCNs are not counted as controlled U.S. content for purposes of determining license requirements for U.S. parts, components, and materials incorporated in foreign-made products. However, the export from the United States to any destination with knowledge that they will be reexported directly or indirectly, in whole or in part to Sudan is prohibited without a license.

(j) Reexports of items controlled by NP Column 1 (see Supplement No. 1 to part 774 of the EAR) to, among, and from countries described in Country Group A:4 (see Supplement No. 1 to part 740), except:

(1) Reexports from countries that are not identified in Country Group A:1 of items that are controlled for NS reasons to destinations in Country Group D:1; and

(2) Reexports to destinations in Country Group E:2 and Country Group D:2.

§740.17 Encryption commodities, software and technology (ENC).

License Exception ENC authorizes export and reexport of software and commodities and components therefor that are classified under ECCNs 5A 002.a.1, a.2, a.5, a.6 or a.9, 5B 002, 5D 002, and technology that is classified under ECCN 5E 002. This License Exception ENC does not authorize export or reexport to, or provision of any service in any country listed in Country Group E:1 in Supplement No. 1 to part 740 of the EAR, or release of source code or technology to any national of a country listed in Country Group E:1. Reexports and transfers under License Exception ENC are subject to the criteria set forth in paragraph (c) of this section. Paragraph (d) of this section sets forth information about review requests required by this section. Paragraph (e) sets forth reporting required by this section.

(a) No prior review or post export reporting required—(1) Internal “development” or “production” of new products. License Exception ENC authorizes exports and reexports of items described in paragraph (a)(1)(i) of this section, to end-users described in paragraph (a)(2) of this section, for the intended end-use described in paragraph (a)(1)(ii) of this section without prior review by the U.S. Government.

(i) Eligible items. Eligible items are those classified under ECCNs 5A 002.a.1, a.2, a.5, a.6, or a.9, 5B 002, 5D 002, or 5E 002.

(ii) Eligible end-users. Eligible end-users are “private sector end-users” wherever located, except to countries listed in Country Group E:1 (see Supplement No. 1 to part 740 of the EAR) that are headquartered in a country listed in Supplement No. 3 of this part.

NOTE TO PARAGRAPH (a)(1)(ii): A “private sector end-user” is:

(1) An individual who is not acting on behalf of any foreign government; or

(2) A commercial firm (including its subsidiary and parent firms, and other subsidiaries of the same parent) that is not wholly owned by, or otherwise controlled by or acting on behalf of, any foreign government.

(iii) Eligible end-use. The eligible end-use is internal “development” or “production” of new products by those end-users.

NOTE TO PARAGRAPH (a)(1)(iii): All items produced or developed with items exported or reexported under this paragraph (a)(1) are subject to the EAR. These items may require review and authorization before sale, reexport or transfer, unless otherwise authorized by license or license exception.

(2) Exports and reexports to “U.S. Subsidiaries.” License Exception ENC authorizes export and reexport of items classified under ECCNs 5A 002.a.1, a.2, a.5, a.6, or a.9, 5B 002, 5D 002, or 5E 002.
to any "U.S. subsidiary," wherever located, except to countries listed in Country Group E:1 (see Supplement No. 1 to part 740 of the EAR), without prior review by the U.S. Government. License Exception ENC also authorizes export or reexport of such items by a U.S. company and its subsidiaries to foreign nationals who are employees, contractors or interns of a U.S. company or its subsidiaries if the items are for internal company use, including the "development" or "production" of new products, without prior review by the U.S. Government.

NOTE TO PARAGRAPH (a)(2): All items produced or developed with items exported or reexported under this paragraph (a)(2) are subject to the EAR. These items may require review and authorization before sale, reexport or transfer, unless otherwise authorized by license or license exception.

(b) Prior review required. License Exception ENC authorizes the export and reexport of commodities and software that require a license under ECCNs 5A002.a.1, a.2, a.3, a.6, or a.9, 5B002, or 5D002. Paragraph (b)(1)(i) of this section also authorizes the export and reexport of "technology" controlled for E1 reasons under ECCN 5E002 to the end-users indicated in paragraph (b)(1)(i). Exports and reexports authorized under this paragraph (b) of License Exception ENC require submission of a review request in accordance with paragraph (d) of this section. License Exception ENC does not authorize the export or reexport of cryptanalytic items to any "government end-user". Export or reexport of items that provide an "open cryptographic interface" is only authorized under paragraph (b)(1)(i) of this section. Exports and reexports authorized under paragraph (b) of this section are subject to reporting requirements in accordance with paragraph (e) of this section.

(1) Review required without waiting period. Once your review request is registered with BIS in accordance with paragraph (d) of this section, License Exception ENC authorizes the exports or reexports (except to countries listed in Country Group E:1 of Supplement No. 1 to part 740 of the EAR) to the following destinations:

(i) Export and reexport to countries listed in Supplement No. 3 of this part. License Exception ENC authorizes the export and reexport of encryption items, including E1 controlled commodities or software that are pending review for mass market treatment (under §742.15(b) of the EAR), to "government end-users" and non-"government end-users" located in countries listed in Supplement 3 of this part, as well as to foreign subsidiaries or offices of firms, organizations and governments headquartered in countries listed in Supplement 3 of this part.

(ii) Export and reexport to countries not listed in Supplement No. 3 of this part. License Exception ENC authorizes the export and reexport of the following commodities and software (except certain exports and reexports to "government end-users" as further described in paragraph (b)(2) of this section, or any "open cryptographic interface" item):

(A) Encryption commodities and software (including key management products), as follows: for symmetric algorithms with key lengths not exceeding 80 bits; for asymmetric algorithms with key lengths not exceeding 1,024 bits; and for elliptic curve algorithms with key lengths not exceeding 160 bits. (After review has been completed, the issued Commodity Classification Automated Tracking System (CCATS) document will indicate authorization is under paragraph (b)(2) of this section, whichever paragraph is appropriate.)

(B) Encryption source code that would not be eligible for export or reexport under License Exception TSU, provided that a copy of the source code is included in the review request, to non-"government end-users" located in any country except a country listed in Country Group E:1 of Supplement No. 1 to part 740 of the EAR. (After the review has been completed, the issued Commodity Classification Automated Tracking System (CCATS) document will indicate authorization is under paragraph (b)(2) of this section.)

(2) Review required with 30 day wait (non-"government end-users" only). Thirty (30) days after your review request is registered with BIS in accordance with paragraph (d) of this section and subject to the reporting requirements in paragraph (e) of this section, License Exception ENC authorizes the
export or reexport of the following commodities and software to "government end-users" located or headquartered in a country listed in Supplement 3 to this part, and also to non-"government end-users" located in a country not listed in Country Group E:1 of Supplement No. 1 to part 740 of the EAR:

(i) Network infrastructure software and commodities and components thereof (including commodities and software necessary to activate or enable cryptographic functionality in network infrastructure products) providing secure Wide Area Network (WAN), Metropolitan Area Network (MAN), Virtual Private Network (VPN), satellite, digital packet telephony/media (voice, video, data) over internet protocol, cellular or trunked communications meeting any of the following with key lengths exceeding 80-bits for symmetric algorithms:

(A) Aggregate encrypted WAN, MAN, VPN or backhaul throughput (includes communications through wireless network elements such as gateways, mobile switches, controllers, etc) greater than 90 Mbps;

(B) Wire (line), cable or fiber-optic WAN, MAN or VPN single-channel input data rate exceeding 154 Mbps;

(C) Media (voice/video/data) encryption or centralized key management supporting more than 250 concurrent encrypted data channels, or encrypted signaling to more than 1,000 endpoints, for digital packet telephony/media (voice/video/data) over internet protocol communications;

(D) Air-interface coverage (e.g., through base stations, access points to mesh networks, bridges, etc.) exceeding 1,000 meters, where any of the following applies:

(1) Maximum transmission data rates exceeding 10 Mbps (at operating ranges beyond 1,000 meters);

(2) Maximum number of concurrent full-duplex voice channels exceeding 30;

or

(3) Substantial support is required for installation or use;

(ii) Encryption source code that would not be eligible for export or reexport under License Exception TSU because it is not publicly available as that term is used in § 740.13(e)(1) of the EAR, and the export or reexport of the encryption source code is not otherwise eligible for License Exception ENC under paragraph (b)(1)(ii)(B) of this section;

(iii) Encryption software, commodities or components thereof, that have any of the following:

(A) Been designed, modified, adapted or customized for "government end-user(s)" or government end-use (e.g., to secure police, state security, or emergency response communications), including encryption commodities and software for external security operations center (SOC)/network operations center (NOC) command and infrastructure, public safety radio, and digital forensics/computer forensics;

(B) Cryptographic functionality that has been modified or customized to customer specification;

or

(C) Cryptographic functionality or "encryption component" (except encryption software that would be considered publicly available, as that term is used in § 740.13(e)(1) of the EAR) that is user-accessible and can be easily changed by the user;

(iv) "Cryptanalytic items";

(v) Encryption commodities and software that provide functions necessary for quantum cryptography, as defined in ECCN 5A002 of the Commerce Control List;

(vi) Encryption commodities and software that have been modified or customized for computers classified under ECCN 4A003.

(3) Review required with 30 day waiting period ("government end-users" or non-"government end-users"). Thirty days after your review request is registered with BIS in accordance with paragraph (d) of this section, License Exception ENC authorizes the export and reexport of software and commodities and components not listed in paragraph (b)(2) of this section to either "government end-users" or non-"government end-users" located in a country not listed in Country Group E:1 of Supplement No. 1 to part 740 of the EAR.

(4) Items excluded from review requirements. License Exception ENC authorizes the export and reexport of the commodities and software described in this paragraph (b)(4) without review (for encryption reasons) by BIS, except
that paragraph (b)(4)(ii) of this section does not authorize exports from the United States of foreign products developed with or incorporating U.S.-origin encryption source code, components, or toolkits.

(i) Short-range wireless encryption functions. Commodities and software not otherwise controlled in Category 5, but that are classified under ECCN 5A002, 5B002 or 5D002 only because they incorporate components or software that provide short-range wireless encryption functions (e.g., with a nominal operating range not exceeding 100 meters according to the manufacturer's specifications). Commodities and software included in this description include those designed to comply with the Institute of Electrical and Electronic Engineers (IEEE) 802.11 wireless LAN standard (35 meters) for short-range use and those designed to comply with the IEEE 802.15.1 standard that provide only the short-range wireless encryption functionality, and would not be classified under Category 5, part 1 of the CCL (telecommunications) absent this encryption functionality. Certain items excluded from review by this paragraph may also be excluded from review under paragraph (b)(4)(iv) of this section (commodities and software that provide "ancillary cryptography").

(ii) Foreign products developed with or incorporating U.S.-origin encryption source code, components, or toolkits. Foreign products developed with or incorporating U.S.-origin encryption source code, components or toolkits that are subject to the EAR, provided that the U.S.-origin encryption items have previously been reviewed and authorized by BIS (or else authorized for export under License Exception TSU upon meeting the notification requirements of section 740.13(e) of the EAR, without need for further review) and the cryptographic functionality has not been changed. Such products include foreign-developed products that are designed to operate with U.S. products through a cryptographic interface.

(iii) Wireless "personal area network" items. Wireless "personal area network" items that implement only published or commercial cryptographic standards and where the cryptographic capability is limited to a nominal operating range not exceeding 30 meters according to the manufacturer's specifications. See Nota Bene of the definition for "personal area network" in § 772.1 of the EAR.

(iv) [Reserved]

Note to paragraph (b): A new product review is required if a change is made to the cryptographic functionality (e.g., algorithms) or other technical characteristics affecting License Exception ENC eligibility (e.g., encrypted throughput) of the originally reviewed product. However, a new product review is not required when a change involves: The subsequent bundling, patches, upgrades or releases of a product; name changes; or changes to a previously reviewed encryption product where the change is limited to updates of encryption software components where the product is otherwise unchanged.

(c) Reexport and transfer. U.S. or foreign distributors, resellers or other entities who are not original manufacturers of encryption commodities and software are permitted to use License Exception ENC only in instances where the export or reexport meets the applicable terms and conditions of this section. Transfers of encryption items listed in paragraph (b)(2) of this section to "government end-users," or for government end-uses, within the same country are prohibited, unless otherwise authorized by license or license exception.

(d) Review request procedures—(1) Instructions for requesting review. Review requests submitted to BIS must be submitted as described in §§748.1 and 748.3 of the EAR. See paragraph (e)(5)(ii) of this section for the mailing address for the ENC Encryption Request Coordinator. To ensure that your review request is properly routed, insert the phrase "License Exception ENC" in Block 9 (Special Purpose) of the application. Also, place an "X" in the box marked "Classification Request" in Block 5 (Type of Application) of Form BIS-748P or select "Commodity Classification" if filing electronically. Neither the electronic nor paper forms provide a separate block to check for the submission of encryption review requests. Failure to properly complete these items may delay consideration of your review request.
(2) Action by BIS—(i) Notification. Upon completion of its review, BIS will send you written notice of the provisions of this section, if any, under which your items may be exported or reexported.

(ii) After 30 days. If BIS has not, within 30 days of registration of a complete review request from you, informed you that your item is not authorized for License Exception ENC, you may export or reexport under the applicable provisions of License Exception ENC.

(iii) Hold Without Action (HWA). BIS may hold your review request without action if necessary to obtain additional information or for any other reason necessary to ensure an accurate determination with respect to ENC eligibility. Time on such “hold without action” status shall not be counted towards fulfilling the 30 day waiting period specified in this paragraph and in paragraphs (b)(2) and (b)(3) of this section. If you do not supply such information within 14 days after receiving a request for it from BIS, BIS may return your review request(s) without action or otherwise suspend or revoke your eligibility to use License Exception ENC for that item(s). At your request, BIS may grant you up to an additional 14 days to provide the requested information. Any request for such an additional number of days must be made prior to the date by which the information was otherwise due to be provided to BIS, and may be approved if BIS concludes that additional time is necessary.

(e) Reporting requirements—(1) Semi-annual reporting requirement. Semi-annual reporting is required for exports to all destinations other than Canada, and for reexports from Canada, under this license exception. Certain encryption items and transactions are excluded from this reporting requirement, see paragraphs (e)(1)(ii) and (e)(1)(iii) of this section. For information about what must be included in the report and submission requirements, see paragraphs (e)(1)(ii) and (e)(1)(iii) of this section respectively.

(i) Information required. Exporters must include for each item, the Commodity Classification Automated Tracking System (CCATS) number and the name of the item(s) exported or reexported from Canada, and the following information in their reports:

(A) Distributors or resellers. For items exported (or reexported from Canada) to a distributor or other reseller, including subsidiaries of U.S. firms, the name and address of the distributor or reseller, the item and the quantity exported or reexported and, if collected by the exporter as part of the distribution process, the end-user’s name and address;

(B) Individual consumers. For items exported (or reexported from Canada) to individual consumers through direct sale, the name and address of the recipient, the item, and the quantity exported;

(C) Foreign manufacturers and products that use encryption items. For exports (i.e., from the United States) or direct transfers (e.g. by a “U.S. subsidiary” located outside the United States) of encryption components, source code, general purpose toolkits, equipment controlled under ECCN 5B002, technology, or items that provide an “open cryptographic interface” exported to a foreign developer or manufacturer headquartered in a country not listed in Supplement No. 3 to this part when intended for use in foreign products developed for commercial sale, the names and addresses of the manufacturers using these encryption items and, if known, when the product is made available for commercial sale, a nonproprietary technical description of the foreign products for which these encryption items are being used (e.g., brochures, other documentation, descriptions or other identifiers of the final foreign product; the algorithm and key lengths used; general programming interfaces to the product, if known; any standards or protocols that the foreign product adheres to; and source code, if available).

(ii) Submission requirements. For exports occurring between January 1 and June 30, a report is due no later than
August 1 of that year. For exports occurring between July 1 and December 31, a report is due no later than February 1 the following year. These reports must be provided in electronic form. Recommended file formats for electronic submission include spreadsheets, tabular text or structured text. Exporters may request other reporting arrangements with BIS to better reflect their business models. Reports may be sent electronically to BIS at crypt@bis.doc.gov and to the ENC Encryption Request Coordinator at enc@nsa.gov, or disks and CDs containing the reports may be sent to the following addresses:

(A) Department of Commerce, Bureau of Industry and Security, Office of National Security and Technology Transfer Controls, 14th Street and Pennsylvania Ave., NW., Room 2705, Washington, DC 20230, Attn: Encryption Reports, and

(B) Attn: ENC Encryption Request Coordinator, 9800 Savage Road, Suite 6940, Ft. Meade, MD 20755–6000.

(iii) Exclusions from reporting requirement. Reporting is not required for the following items and transactions:

(A) Any encryption item exported (or reexported from Canada) under paragraph (a) of this section;

(B) Encryption commodities or software with a symmetric key length not exceeding 64 bits;

(C) Encryption commodities or software authorized under paragraph (b)(3) of this section, exported (or reexported from Canada) to individual consumers;

(D) Encryption items exported (or reexported from Canada) via free and anonymous download;

(E) Encryption items from or to a U.S. bank, financial institution or its subsidiaries, affiliates, customers or contractors for banking or financial operations;

(F) Items listed in (b)(4) of this section, unless it is a foreign item described in (b)(4)(ii) that has entered the United States;

(G) Foreign products developed by bundling or compiling of source code;

(H) General purpose operating systems, or desktop applications (e.g., e-mail, browsers, games, word processing, data base, financial applications or utilities) authorized under paragraph (b)(3) of this section;

(i) Client Internet appliance and client wireless LAN cards; or

(j) Other items as determined on a case-by-case basis.

(2) Reporting key length increases. Reporting is required for commodities and software that, after having been reviewed and authorized for License Exception ENC by BIS, are modified only to upgrade the key length used for confidentiality or key exchange algorithms. Such items may be exported or reexported under the previously authorized provision of License Exception ENC without further review.

(i) Information required. (A) A certification that no change to the encryption functionality has been made other than to upgrade the key length for confidentiality or key exchange algorithms.

(B) The original Commodity Classification Automated Tracking System (CCATS) authorization number issued by BIS and the date of issuance.

(C) The new key length.

(ii) Submission requirements. (A) The report must be received by BIS and the ENC Encryption Request Coordinator before the export or reexport of the upgraded product; and

(B) The report is e-mailed to crypt@bis.doc.gov and enc@nsa.gov.

§ 740.18 Agricultural commodities (AGR).

(a) Eligibility requirements. License Exception AGR permits the export of agricultural commodities to Cuba, as well as the reexport of U.S. origin agricultural commodities to Cuba, provided your transaction meets all of the following criteria:

(1) The commodity meets the definition of “agricultural commodities” in part 772 of the EAR;

(2) The commodity is EAR99. You must have an official commodity classification of EAR99 from BIS for fertilizers, western red cedar and live horses before you submit a notification under this license exception. See § 746.3 of the EAR for information on how to