

### § 734.3

are adequate to assure legal undertakings similar to written acknowledgments.

[61 FR 12746, Mar. 25, 1996, as amended at 61 FR 68578, Dec. 30, 1996; 63 FR 50520, Sept. 22, 1998; 64 FR 13339, Mar. 18, 1999; 65 FR 2496, Jan. 14, 2000; 67 FR 38860, June 6, 2002; 72 FR 3945, Jan. 29, 2007]

#### § 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 not subject to the EAR:

(1) Items that are exclusively controlled for export or reexport by the following departments and agencies of the U.S. Government which regulate

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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. Section 38 of the Arms Export Control Act (22 U.S.C. 2778).

(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.

(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 controlled for "EI" reasons under ECCN 5D002 on the Commerce Control List and mass market encryption software with symmetric key length exceeding 64-bits controlled under ECCN 5D992, 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)).

(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."

(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.

[61 FR 12746, Mar. 25, 1996, as amended at 61 FR 65464, Dec. 13, 1996; 61 FR 68578, Dec. 30, 1996; 62 FR 25456, May 9, 1997; 67 FR 38860, June 6, 2002; 69 FR 5690, Feb. 6, 2004; 69 FR 5929, Feb. 9, 2004; 73 FR 56968, Oct. 1, 2008; 73 FR 57503, Oct. 3, 2008; 75 FR 31680, June 4, 2010; 75 FR 45054, Aug. 2, 2010]

#### § 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 0.75 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 Micro-machined Angular Rate Sensors;

(ii) Commercial automatic flight control systems when the systems integrate QRS11-00050-443/569 Micro-machined 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 Micro-machined Angular Rate Sensors are subject to the export licensing jurisdiction of the U.S. Department of State, Directorate of Defense Trade Controls, except when the QRS11-00100-100/101 version of the sensor is integrated into and included as an integral