

(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.

[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; 76 FR 1062, Jan. 7, 2011]

§ 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 in transit 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 soft-

ware, 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 exports or reexports for national security or foreign policy purposes:

(i) *Department of State.* The International Traffic in Arms Regulations (22 CFR parts 120–130) 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

§ 734.3

of State on matters affecting world peace, and the external security and foreign policy of the United States.

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

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

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

(v) *Patent and Trademark Office (PTO)*. Regulations administered by PTO provide for the export to a foreign country of unclassified technology in the form of a patent application or an amendment, modification, or supplement thereto or division thereof (37 CFR part 5). BIS has delegated authority under the Export Administration Act to the PTO to approve exports and reexports of such technology which is subject to the EAR. Exports and reexports of such technology not approved under PTO regulations must comply with the EAR.

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

(2) Prerecorded phonograph records reproducing in whole or in part, the content of printed books, pamphlets,

15 CFR Ch. VII (1–1–14 Edition)

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 § 742.6(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.

[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; 76 FR 1062, Jan. 7, 2011; 77 FR 22198, Apr. 13, 2012; 78 FR 22707, Apr. 16, 2013; 78 FR 61744, Oct. 3, 2013; 78 FR 61900, Oct. 4, 2013]

§ 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 3.0 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 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 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 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 U.S.C. Parts 120–130).