§ 734.17 Export of encryption source code and object code software.

(a) For purposes of the EAR, the *Export of encryption source code and object code ''software''* means:

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

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

(b) The *export of encryption source code and object code ''software''* controlled for ''EI'' reasons under ECCN 5D002 on the Commerce Control List (see supplement no. 1 to part 774 of the EAR) includes:

(1) Downloading, or causing the downloading of, such ''software'' to locations (including electronic bulletin boards, Internet file transfer protocol, and World Wide Web sites) outside the U.S., or

(2) Making such ''software'' available for transfer outside the United States, over wire, cable, radio, electromagnetic, photo optical, photoelectric or other comparable communications facilities accessible to persons outside the United States, including transfers from electronic bulletin boards, internet file transfer protocol and World Wide websites, unless the person making the ''software'' available takes precautions adequate to prevent unauthorized transfer of such code. See § 742.15(b) of the EAR for additional requirements pursuant to which exports or reexports of encryption source code ''software'' are considered to be publicly available consistent with the provisions of § 734.3(b)(3). Publicly available encryption source code ''software'' and corresponding object code are not subject to the EAR, when the encryption source code ''software'' meets the additional requirements in § 742.15(b) of the EAR.

(c) Subject to the General Prohibitions described in part 736 of the EAR, such precautions for Internet transfers of products eligible for export under § 740.17(b)(2) of the EAR (encryption ''software'' products, certain encryption source code and general purpose encryption toolkits) shall include such measures as:

(1) The access control system, either through automated means or human intervention, checks the address of every system outside of the U.S. or Canada requesting or receiving a transfer and verifies such systems do not have a domain name or Internet address of a foreign government end-user (*e.g.*, ''.gov,'' ''.gouv,'' ''.mil'' or similar addresses);

(2) The access control system provides every requesting or receiving party with notice that the transfer includes or would include cryptographic ''software'' subject to export controls under the Export Administration Regulations, and anyone receiving such a transfer cannot export the ''software'' without a license or other authorization; and

(3) Every party requesting or receiving a transfer of such ''software'' must acknowledge affirmatively that the ''software'' is not intended for use by a government end user, as defined in part 772 of the EAR, and he or she understands the cryptographic ''software'' is subject to export controls under the Export Administration Regulations and anyone receiving the transfer cannot export the ''software'' without a license or other authorization. BIS will consider acknowledgments in electronic form provided they are adequate to assure legal undertakings similar to written acknowledgments.

[81 FR 35604, June 3, 2016, as amended at 81 FR 64668, Sept. 20, 2016; 86 FR 16487, Mar. 29, 2021]

§ 734.18 Activities that are not exports, reexports, or transfers.

(a) *Activities that are not exports, reexports, or transfers.* The following activities are not exports, reexports, or transfers:

(1) Launching a spacecraft, launch vehicle, payload, or other item into space.

(2) Transmitting or otherwise transferring ''technology'' or ''software'' to a person in the United States who is not a foreign person from another person in the United States.

(3) Transmitting or otherwise making a transfer (in-country) within the same foreign country of ''technology'' or ''software'' between or among only persons who are not ''foreign persons,''

so long as the transmission or transfer does not result in a release to a foreign person or to a person prohibited from receiving the ''technology'' or ''software.''

(4) Shipping, moving, or transferring items between or among the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Commonwealth of the Northern Mariana Islands or any territory, dependency, or possession of the United States as listed in Schedule C, Classification Codes and Descriptions for U.S. Export Statistics, issued by the Bureau of the Census.

(5) Sending, taking, or storing ''technology'' or ''software'' that is:

(i) Unclassified;

(ii) Secured using 'end-to-end encryption;'

(iii) Secured using cryptographic modules (hardware or ''software'') compliant with Federal Information Processing Standards Publication 140–2 (FIPS 140–2) or its successors, supplemented by ''software'' implementation, cryptographic key management and other procedures and controls that are in accordance with guidance provided in current U.S. National Institute for Standards and Technology publications, or other equally or more effective cryptographic means; and

(iv) Not intentionally stored in a country listed in Country Group D:5 (*see* supplement no. 1 to part 740 of the EAR) or in the Russian Federation.

NOTE 1 TO PARAGRAPH (a)(5)(iv): Data in-transit via the Internet is not deemed to be stored.

(b) *Definitions.* For purposes of this section, *End-to-end encryption* means (i) the provision of cryptographic protection of data such that the data is not in unencrypted form between an originator (or the originator's in-country security boundary) and an intended recipient (or the recipient's in-country security boundary), and (ii) the means of decryption are not provided to any third party. The originator and the recipient may be the same person.

(c) *Ability to access ''technology'' or ''software'' in encrypted form.* The ability to access ''technology'' or ''software'' in encrypted form that satisfies the criteria set forth in paragraph (a)(5) of this section does not con-

stitute the release or export of such ''technology'' or ''software.''

[81 FR 35604, June 3, 2016, as amended at 82 FR 61156, Dec. 27, 2017]

§ 734.19 Transfer of access information.

To the extent an authorization would be required to transfer ''technology'' or ''software,'' a comparable authorization is required to transfer access information if done with ''knowledge'' that such transfer would result in the release of such ''technology'' or ''software'' without a required authorization.

[81 FR 35605, June 3, 2016]

§ 734.20 Activities that are not deemed reexports.

The following activities are not deemed reexports (see ''deemed reexport'' definition in § 734.14(b)):

(a) *Authorized Release of ''technology'' or source code.* Release of ''technology'' or source code by an entity outside the United States to a foreign person of a country other than the foreign country where the release takes place if:

(1) The entity is authorized to receive the ''technology'' or source code at issue, whether by a license, license exception, or situation where no license is required under the EAR for such ''technology'' or source code; and

(2) The entity has ''knowledge'' that the foreign national's most recent country of citizenship or permanent residency is that of a country to which export from the United States of the ''technology'' or source code at issue would be authorized by the EAR either under a license exception or in situations where no license under the EAR would be required.

(b) *Release to Country Group A:5 nationals.* Without limiting the scope of paragraph (a), release of ''technology'' or source code by an entity outside the United States to a foreign person of a country other than the foreign country where the release takes place if:

(1) The entity is authorized to receive the ''technology'' or source code at issue, whether by a license, license exception, or through situations where no license is required under the EAR;