

§ 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]

§ 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) U.S. origin parts, components, materials or other commodities incorporated abroad into foreign-made products, U.S. origin software commingled with foreign software, and U.S. origin technology commingled with foreign technology, in quantities exceeding *de minimis* levels as described in § 734.4 and Supplement No. 2 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

(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 part 121) administered by the Office 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

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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) Precoded 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)).

(4) Foreign made items that have greater than the *de minimis* U.S. content based on the principles described in § 734.4 of this part.

(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."

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§ 734.4 De minimis U.S. content.

(a) There is no *de minimis* level for the export from a foreign country of a foreign-made computer exceeding 190,000 MTOPS containing U.S.-origin controlled semiconductors (other than memory circuits) classified under ECCN 3A001 to Computer Tier 3; or exceeding 28,000 MTOPS containing U.S.-origin controlled semiconductors (other than memory circuits) classified under ECCN 3A001 or high speed inter-

connect devices (ECCN 4A994.j) to Computer Tier 4 countries described in § 742.12 of the EAR.

(b) There is no *de minimis* level for foreign-made items that incorporate U.S.-origin items controlled for "EI" reasons under ECCN 5A002, 5D002 or 5E002 on the Commerce Control List (Supplement No. 1 to part 774 the EAR). However, exporters may, as part of an encryption review request, ask that software controlled for EI reasons under ECCN 5D002 and eligible for export under the "retail" or "source code" provisions of license exception ENC, and parts and components controlled under ECCN 5A002, be made eligible for *de minimis* treatment. The review of *de minimis* eligibility will take U.S. national security interests into account. Other encryption items controlled for NS or AT reasons under ECCNs 5D002, 5A992, 5D992, and 5E992 are not eligible for *de minimis* treatment, unless exporters have complied with the applicable notification or review requirements described in § 740.13(e), § 742.15(b)(1), and § 742.15(b)(2) of the EAR. Encryption items controlled by ECCN 5A992, 5D992, or 5E992 and described in § 742.15(b)(3) of the EAR are not subject to these notification or review requirements.

(c) Except as provided in paragraph (a) and (b) of this section for certain computers and items controlled for EI reasons, the following reexports are *not* subject to the EAR when made to either an embargoed country listed in part 746 of the EAR or to a terrorist-supporting country listed in Country Group E:1 (see Supplement No. 1 to part 740 of the EAR):

(1) Reexports of a foreign-made commodity incorporating controlled U.S.-origin commodities valued at 10% or less of the total value of the foreign-made commodity;

(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.