which the product is being shipped. For example, semiconductor manufacturing equipment would be of little use in a country without an electronics industry.

4. The customer has little or no business background.

5. The customer is willing to pay cash for a very expensive item when the terms of the sale call for financing.

6. The customer is unfamiliar with the product’s performance characteristics but still wants the product.

7. Routine installation, training or maintenance services are declined by the customer.

8. Delivery dates are vague, or deliveries are planned for out-of-the-way destinations.

9. A freight forwarding firm is listed as the product’s final destination.

10. The shipping route is abnormal for the product and destination.

11. Packaging is inconsistent with the stated method of shipment or destination.

12. When questioned, the buyer is evasive or unclear about whether the purchased product is for domestic use, export or reexport.


PART 734—SCOPE OF THE EXPORT ADMINISTRATION REGULATIONS

Sec.
734.1 Introduction.
734.2 Important EAR terms and principles.
734.3 Items subject to the EAR.
734.4 De minimis U.S. content.
734.5 Activities of U.S. and foreign persons subject to the EAR.
734.6 Assistance available from BIS for determining licensing and other requirements.
734.7 Published information and software.
734.8 Information resulting from fundamental research.
734.9 Educational information.
734.10 Patent applications.
734.11 Government-sponsored research covered by contract controls.
734.12 Effect on foreign laws and regulations.

SUPPLEMENT NO. 1 TO PART 734—QUESTIONS AND ANSWERS—TECHNOLOGY AND SOFTWARE SUBJECT TO THE EAR

SUPPLEMENT NO. 2 TO PART 734—GUIDELINES FOR DE MINIMIS RULES


§ 734.1 Introduction.

(a) In this part, references to the Export Administration Regulations (EAR) are references to 15 CFR chapter VII, subchapter C. This part describes the scope of the Export Administration Regulations (EAR) and explains certain key terms and principles used in the EAR. This part provides the rules you need to use to determine whether items and activities are subject to the EAR. This part is the first step in determining your obligations under the EAR. If neither your item nor your activity is subject to the EAR, then you do not have any obligations under the EAR and you do not need to review other parts of the EAR. If you already know that your item or activity is subject to the EAR, then you do not need to review this part and you can go on to review other parts of the EAR to determine your obligations. This part also describes certain key terms and principles used in the EAR. Specifically, it includes the following terms: “subject to the EAR,” “items subject to the EAR,” “export,” and “reexport.” These and other terms are also included in part 772 of the EAR. Definitions of Terms, and you should consult part 772 of the EAR for the meaning of terms used in the EAR. Finally, this part makes clear that compliance with the EAR does not relieve any obligations imposed under foreign laws.

(b) This part does not address any of the provisions set forth in part 760 of the EAR, Restrictive Trade Practices or Boycotts.

(c) This part does not define the scope of legal authority to regulate exports, including reexports, or activities found in the Export Administration Act and other statutes. What this part does do is set forth the extent to which such legal authority has been exercised through the EAR.


§ 734.2 Important EAR terms and principles.

(a) Subject to the EAR—Definition. (1) “Subject to the EAR” is a term used in the EAR to describe those items and activities over which BIS exercises regulatory jurisdiction under the EAR.
Conversely, items and activities that are not subject to the EAR are outside the regulatory jurisdiction of the EAR and are not affected by these regulations. The items and activities subject to the EAR are described in §§734.2 through 734.5 of this part. You should review the Commerce Control List (CCL) and any applicable parts of the EAR to determine whether an item or activity is subject to the EAR. However, if you need help in determining whether an item or activity is subject to the EAR, see §734.6 of this part. Publicly available technology and software not subject to the EAR are described in §§734.7 through 734.11 and supplement no. 1 to this part.

(2) Items and activities subject to the EAR may also be controlled under export-related programs administered by other agencies. Items and activities subject to the EAR are not necessarily exempted from the control programs of other agencies. Although BIS and other agencies that maintain controls for national security and foreign policy reasons try to minimize overlapping jurisdiction, you should be aware that in some instances you may have to comply with more than one regulatory program.

(3) The term “subject to the EAR” should not be confused with licensing or other requirements imposed in other parts of the EAR. Just because an item or activity is subject to the EAR does not mean that a license or other requirement automatically applies. A license or other requirement applies only in those cases where other parts of the EAR impose a licensing or other requirement on such items or activities.

(b) Export and reexport—(1) Definition of export. “Export” means an actual shipment or transmission of items subject to the EAR out of the United States, or release of technology or software subject to the EAR to a foreign national in the United States, as described in paragraph (b)(2)(ii) of this section. See paragraph (b)(9) of this section for the definition that applies to exports of encryption source code and object code software subject to “EI” controls, includes:

(i) Any release of technology or software subject to the EAR in a foreign country; or

(ii) Any release of technology or source code subject to the EAR to a foreign national. Such release is deemed to be an export to the home country or countries of the foreign national. This deemed export rule does not apply to persons lawfully admitted for permanent residence in the United States and does not apply to persons who are protected individuals under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)). Note that the release of any item to any party with knowledge a violation is about to occur is prohibited by §736.2(b)(10) of the EAR.

(3) Definition of “release” of technology or software. Technology or software is “released” for export through:

(i) Visual inspection by foreign nationals of U.S.-origin equipment and facilities;

(ii) Oral exchanges of information in the United States or abroad; or

(iii) The application to situations abroad of personal knowledge or technical experience acquired in the United States.

(4) Definition of reexport. “Reexport” means an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country; or release of technology or software subject to the EAR to a foreign national outside the United States, as described in paragraph (b)(5) of this section.

(5) Reexport of technology or software. Any release of technology or source code subject to the EAR to a foreign national of another country is a deemed reexport to the home country or countries of the foreign national. However, this deemed reexport definition does not apply to persons lawfully admitted for permanent residence. The term “release” is defined in paragraph (b)(3) of this section. Note that the release of any item to any party with
knowledge or reason to know a violation is about to occur is prohibited by §736.2(b)(10) of the EAR.

(6) For purposes of the EAR, the export or reexport of items subject to the EAR that will transit through a country or countries or be transshipped in a country or countries to a new country or are intended for reexport to the new country, are deemed to be exports to the new country.

(7) If a territory, possession, or department of a foreign country is not listed on the Country Chart in Supplement No. 1 to part 738 of the EAR, the export or reexport of items subject to the EAR to such destination is deemed under the EAR to be an export to the foreign country. For example, a shipment to the Cayman Islands, a dependent territory of the United Kingdom, is deemed to be a shipment to the United Kingdom.

(8) Export or reexport of items subject to the EAR does not include shipments among any of the states of the United States, the Commonwealth of Puerto Rico, or the Commonwealth of the Northern Mariana Islands or any territory, dependency, or possession of the United States. These destinations are listed in Schedule C, Classification Codes and Descriptions for U.S. Export Statistics, issued by the Bureau of the Census.

(9) Export of encryption source code and object code software. (i) For purposes of the EAR, the export of encryption source code and object code software means:

(A) An actual shipment, transfer, or transmission out of the United States (see also paragraph (b)(9)(ii) of this section); or

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

(ii) 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 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 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 Web sites, unless the person making the software available takes precautions adequate to prevent unauthorized transfer of such code. See §740.13(e) of the EAR for notification requirements for exports or reexports of encryption source code software considered to be publicly available consistent with the provisions of §734.3(b)(3) of the EAR. Publicly available encryption software in object code that corresponds to encryption source code made eligible for License Exception TSU under section 740.13(e) is not subject to the EAR.

(iii) 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:

(A) 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);

(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 authoriza-
tion. BIS will consider acknowledgments in electronic form provided they
are adequate to assure legal undertakings similar to written acknowledg-
ments.

§ 734.3 Items subject to the EAR.

(a) Except for items excluded in para-
graph (b) of this section, the following
items are subject to the EAR:

(1) All items in the United States, in-
cluding in a U.S. Foreign Trade Zone
or moving intransit through the United
States from one foreign country to an-
other;

(2) All U.S. origin items wherever lo-
cated;

(3) Foreign-made commodities that
incorporate controlled U.S.-origin com-
modities, 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 prod-
ucts 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 proc-
cesses 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 sub-
ject 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 sub-
ject to the EAR:

(1) Items that are exclusively con-
trolled for export or reexport by the
following departments and agencies of
the U.S. Government which regulate
exports or reexports for national secu-


rity or foreign policy purposes:

(i) Department of State. The Inter-
national 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 For-


eign Assets Control (OFAC). Regulations
administered by OFAC implement
broad controls and embargo trans-
actions with certain foreign countries.
These regulations include controls on
exports and reexports to certain coun-
tries (31 CFR chapter V). Trading with
the Enemy Act (50 U.S.C. app. section 1
et seq.), and International Emergency
seq.)

(iii) U.S. Nuclear Regulatory Commis-


sion (NRC). Regulations administered
by NRC control the export and reex-
port 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). Reg-


ulations administered by DOE control
the export and reexport of technology
related to the production of special nu-
clear 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 supple-
ment thereto or division thereof (37
CFR part 5). BIS has delegated author-
ity under the Export Administration
Act to the PTO to approve exports and
reexports of such technology which is
subject to the EAR. Exports and reex-
ports of such technology not approved
under PTO regulations must comply
with the EAR.

(2) Prerecorded phonograph records
reproducing in whole or in part, the