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§ 732.1 STEPS OVERVIEW

(a)(1) Introduction

In this part, references to the EAR are references to 15 CFR chapter VII, subchapter C. This part is intended to help you determine your obligations under the EAR by listing logical steps in §732.2 through §732.5 of this part that you can take in reviewing these regulations. A flow chart describing these steps is contained in Supplement No. 1 to part 732. By cross-references to the relevant provisions of the EAR, this part describes the suggested steps for you to determine applicability of the following:

- (i) The scope of the EAR (part 734 of the EAR);

- (ii) Each of the general prohibitions (part 736 of the EAR);

- (iii) The License Exceptions (part 740 of the EAR); and

- (iv) Other requirements such as clearing your export with the U.S. Customs Service, keeping records, and completing and documenting license applications.

(2) These steps describe the organization of the EAR, the relationship among the provisions of the EAR, and the appropriate order for you to consider the various provisions of the EAR.

(3) The general information in this part is intended to provide an overview of the steps to be taken for certain requirements in the EAR, though not all of them. Nothing in this part shall be construed as altering or affecting any other authority, regulation, investigation or other enforcement measure provided by or established under any other provision of federal law, including provisions of the EAR.

(b) Facts about your transaction

The following five types of facts determine your obligations under the EAR and will be of help to you in reviewing these steps:

(1) **What is it?** What an item is, for export control purposes, depends on its *classification*, which is its place on the Commerce Control List (see part 774 of the EAR).

(2) **Where is it going?** The *country of ultimate destination* for an export or reexport also determines licensing requirements (see parts 738 and 774 of the EAR concerning the Country Chart and the Commerce Control List).

(3) **Who will receive it?** The *ultimate end-user* of your item cannot be a bad end-user. See General Prohibition Four (Denial Orders) in

§736.2(b)(4) and parts 744 and 764 of the EAR for a reference to the list of persons you may not deal with.

(4) What will they do with it? The *ultimate end-use* of your item cannot be a bad end-use. See General Prohibition Five (End-Use End-User) in §736.2(b)(5) and part 744 of the EAR for general end-use and end-user restrictions.

(5) What else do they do? *Conduct* such as contracting, financing, and freight forwarding in support of a proliferation project (as described in §744.6 of the EAR) may prevent you from dealing with someone.

(c) Are your items and activities subject to the EAR?

You should first determine whether your commodity, software, or technology is subject to the EAR (see part 734 of the EAR concerning scope), and Steps 1 through 6 help you do that. For exports from the United States, only Steps 1 and 2 are relevant. If you already know that your item or activity is subject to the EAR, you should go on to consider the ten general prohibitions in part 736 of the EAR. If your item or activity is not subject to the EAR, you have no obligations under the EAR and may skip the remaining steps.

(d) Does your item or activity require a license under one or more of the ten general prohibitions?

(1) Brief summary of the ten general prohibitions. The general prohibitions are found in part 736 of the EAR and referred to in these steps. They consist, very briefly, of the following:

(i) General Prohibition One (Exports and Reexports): Export and reexport of controlled items to listed countries.

(ii) General Prohibition Two (Parts and Components Reexports): Reexport and export from abroad of foreign-made items incorporating more than a de minimis amount of controlled U.S. content.

(iii) General Prohibition Three (Foreign-produced Direct Product Reexports): Reexport and export from abroad of the foreign-produced direct product of U.S. technology and software.

(iv) General Prohibition Four (Denial Orders): Engaging in actions prohibited by a denial order.

(v) General Prohibition Five (End-Uses End-Users): Export or reexport to prohibited end uses or end users.

(vi) General Prohibition Six (Embargo): Export or reexport to embargoed destinations.

(vii) General Prohibition Seven (U.S. Person Proliferation Activity): Support of proliferation activities.

(viii) General Prohibition Eight (In-Transit): In-transit shipments and items to be unladen from vessels and aircraft.

(ix) General Prohibition Nine (Orders, Terms and Conditions): Violation of any orders, terms, or conditions.

(x) General Prohibition Ten (Knowledge Violation to Occur): Proceeding with transactions with knowledge that a violation has occurred or is about to occur.

(2) Controls on items on the Commerce Control List (CCL). If your item or activity is subject to the EAR, you should determine whether any one or more of the ten general prohibitions require a license for your export, reexport, or activity. Steps 7 through 11 refer to classification of your item on the Commerce Control List (CCL) (part

774 of the EAR) and how to use the Country Chart (Supplement No. 1 to part 738 of the EAR) to determine whether a license is required based upon the classification of your item. These steps refer to General Prohibitions One (Exports and Reexports), Two (Parts and Components Reexports), and Three (Foreign-Produced Direct Product Reexports) for all countries except: Cuba, Iran, North Korea, and Syria. For these countries, you may skip Steps 7 through 11 and go directly to Step 12.

(3) Controls on activities. Steps 12 through 18 refer to General Prohibitions Four through Ten. Those general prohibitions apply to all items subject to the EAR, not merely those items listed on the CCL in part 774 of the EAR. For example, they refer to the general prohibitions for persons denied export privileges, prohibited end-uses and end-users, countries subject to a comprehensive embargo (e.g., Cuba, Iran, North Korea and Syria), prohibited activities of U.S. persons in support of proliferation of weapons of mass destruction, prohibited unloading of shipments, compliance with orders, terms and conditions, and activities when a violation has occurred or is about to occur.

(4) General prohibitions. If none of the ten general prohibitions applies, you should skip the steps concerning License Exceptions and for exports from the United States, review Steps 27 through 29 concerning Shipper's Export Declarations to be filed with the U.S. Customs Service, Destination Control Statements for export control documents, and recordkeeping requirements.

(e) Is a License Exception available to overcome the license requirement?

If you decide by reviewing the CCL in combination with the Country Chart that a license is required for your destination, you should determine whether a License Exception will exempt you from that requirement. Steps 20

through 24 help you determine whether a License Exception is available. Note that generally License Exceptions are not available to overcome General Prohibitions Four through Ten. However, selected License Exceptions for embargoed destinations are specified in part 746 of the EAR and License Exceptions for short supply controls are specified in part 754 of the EAR. If a License Exception is available and the export is from the United States, you should review Steps 26 through 28 concerning Shipper's Export Declarations to be filed with the U.S. Customs Service, Destination Control Statements for export control documents and recordkeeping requirements. If a License Exception is not available, go on to Steps 25 through 29.

(f) How do you apply for a license?

If you must file a license application, you should review the requirements of part 748 of the EAR as suggested by Step 26. Then you should review Steps 27 through 29 concerning Shipper's Export Declarations to be filed with the U.S. Customs Service, Destination Control Statements for export control documents, and record keeping requirements.

§ 732.2 STEPS REGARDING SCOPE OF THE EAR

Steps 1 through 6 are designed to aid you in determining the scope of the EAR. A flow chart describing these Steps is contained in Supplement No. 2 to part 732.

(a) Step 1: Items subject to the exclusive jurisdiction of another Federal agency

This step is relevant for both exports and reexports. Determine whether your item is subject to the exclusive jurisdiction of another Federal Agency as provided in §734.3 of the EAR.

(1) If your item is subject to the exclusive jurisdiction of another federal agency, comply with the regulations of that agency. You need not comply with the EAR and may skip the remaining steps.

(2) If your item is not subject to the exclusive jurisdiction of another federal agency, then proceed to Step 2 in paragraph (b) of this section.

(b) Step 2: Publicly available technology and software

This step is relevant for both exports and reexports. Determine if your technology or software is publicly available as defined and explained at part 734 of the EAR. Supplement No. 1 to part 734 of the EAR contains several practical examples describing publicly available technology and software that are outside the scope of the EAR. The examples are illustrative, not comprehensive. Note that encryption software classified under ECCN 5D002 on the Commerce Control List (refer to Supplement No.1 to Part 774 of the EAR) is subject to the EAR even if publicly available, except for publicly available encryption object code software classified under ECCN 5D002 when the corresponding source code meets the criteria specified in § 740.13(e) of the EAR. The following also remains subject to the EAR: “software” or “technology” for the production of a firearm, or firearm frame or receiver, controlled under ECCN 0A501, as referenced in § 734.7(c) of the EAR).

(1) If your technology or software is publicly available, and therefore outside the scope of the EAR, you may proceed with the export or reexport if you are not a U.S. person subject to General Prohibition Seven. If you are a U.S. person, go to Step 15 at §732.3(j) of this part. If you are a U.S. person and General Prohibition Seven concerning proliferation activity of U.S. persons does not apply, then you may proceed with the export or reexport of your publicly

available technology or software. Note that all U.S. persons are subject to the provisions of General Prohibition Seven.

(2) If your technology or software is not publicly available and you are exporting from the United States, skip to the Step 7 in §732.3(b) of this part concerning the general prohibitions.

(3) If you are exporting items from a foreign country, you should then proceed Step 3 in paragraph (c) of this section and the other steps concerning the scope of the EAR.

(c) Step 3: Reexport of U.S.-origin items

This step is appropriate only for reexporters. For an item in a foreign country, you should determine whether the item is of U.S.-origin. If it is of U.S.-origin, skip to Step 7 in §732.3(b) of this part. If it is not of U.S.-origin, then proceed to Step 4 in paragraph (d) of this section.

(d) Step 4: Foreign-made items incorporating controlled U.S.-origin items

This step is appropriate only for items that are made outside the United States and not currently located in the United States. Special requirements and restrictions apply to foreign-made items that incorporate U.S.-origin encryption items (see §734.4(a)(2), (b), and (g) of the EAR).

(1) Determining whether your foreign made item is subject to the EAR. Using the guidance provided in Supplement No. 2 to part 734 of the EAR, determine whether controlled U.S.-origin items are incorporated into the foreign-made item and are above the *de minimis* level set forth in §734.4 of the EAR

(2) If no U.S.-origin controlled items are incorporated or if the percentage of incorporated U.S.-origin controlled items are equal to or below the *de minimis* level described in § 734.4 of the

EAR, then the foreign-made item is not subject to the EAR by reason of the *de minimis* rules, and you should go on to consider Step 6 regarding the foreign-produced direct product rule.

(3) If the foreign-made item incorporates more than the *de minimis* level of U.S.-origin items, then that item is subject to the EAR and you should skip to Step 7 at § 732.3 of this part and consider the steps regarding all other general prohibitions, license exceptions, and other requirements to determine applicability of these provisions to the foreign-made item.

(e) [RESERVED]

(f) *Step 6: Direct product rule.*

Foreign items that are the direct product of U.S. technology, software, or plant or major component of a plant made from U.S. technology or software may be subject to the EAR if they meet the conditions of General Prohibition Three in § 736.2(b)(3) of the EAR. Direct products that are subject to the EAR may require a license to be exported from abroad or reexported to certain countries.

(1) Subject to the EAR. If your foreign item is captured by the direct product rule (General Prohibition Three), then the item is subject to the EAR and its export from abroad or reexport may require a license. You should next consider the steps regarding all other general prohibitions, license exceptions, and other requirements. If the item is not captured by General Prohibition Three, then you have completed the steps necessary to determine whether the item is subject to the EAR, and you may skip the remaining steps. As described in part 734 of the EAR, items outside the U.S. are subject to the EAR when they are:

(i) U.S.-origin commodities, software, or technology, unless controlled for export exclusively by another U.S. Federal agency or

unless publicly available;

(ii) Foreign-origin commodities, software, or technology that are within the scope of General Prohibition Two (*De minimis* rules), or General Prohibition Three (Direct Product rule). However, such foreign-origin items are also outside the scope of the EAR if they are controlled for export exclusively by another U.S. Federal Agency or, if technology or software, are publicly available as described in paragraph (b) of this section.

(2) [RESERVED]

§ 732.3 STEPS REGARDING THE TEN GENERAL PROHIBITIONS

(a) *Introduction*

If your item or activity is subject to the scope of the EAR, you should then consider each of the ten general prohibitions listed in part 736 of the EAR. General Prohibitions One (Exports and Reexports), Two (Parts and Components Reexports), and Three (Foreign-Produced Direct Product Reexports) (§736.2(b)(1), (2), and (3) of the EAR) are product controls that are shaped and limited by parameters specified on the CCL and Country Chart. General Prohibitions Four through Ten are prohibitions on certain activities that are not allowed without authorization from BIS, and these prohibitions apply to all items subject to the EAR unless otherwise specified (§736.2(b)(4) through (10) of the EAR).

(b) *Step 7: Classification*

(1) You should classify your items “subject to the EAR” in the relevant entry on the CCL, and you may do so on your own without BIS assistance. The CCL includes a Supplement No.

4 to part 774 – Commerce Control List Order of Review. This supplement establishes the steps (i.e., the order of review) that should be followed in classifying items that are “subject to the EAR.” The exporter, reexporter, or transferor is responsible for correctly classifying the items in a transaction, which may involve submitting a classification request to BIS. Failure to classify or have classified the item correctly does not relieve the person of the obligation to obtain a license when one is required by the EAR.

(2) You have a right to request the applicable classification of your item from BIS, and BIS has a duty to provide that classification to you. For further information on how to obtain classification assistance from BIS, see part 748 of the EAR.

(3) For items subject to the EAR but not listed on the CCL, the proper classification is EAR99. This number is a “basket” for items not specified under any CCL entry and appears at the end of each Category on the CCL.

(4) 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)(8) of the EAR while a determination is being made as to whether classification under a revised or new ECCN or EAR99 designation is appropriate .

(c) Step 8: Country of ultimate destination

You should determine the country of ultimate destination. The country of destination determines the applicability of several general prohibitions, License Exceptions, and other requirements. Note that part 754 of the EAR concerning short supply controls is self-contained and is the only location in the EAR that contains both the prohibitions and exceptions applicable to short supply controls.

(d) Step 9: Reason for control and the Country Chart

(1) Reason for control and column identifier within the Export Control Classification Number (ECCN). Once you have determined that your item is controlled by a specific ECCN, you must use information contained in the “License Requirements” section of that ECCN in combination with the Country Chart to decide whether a license is required under General Prohibitions One, Two, or Three to a particular destination. The CCL and the Country Chart are taken together to define these license requirements. The applicable ECCN will indicate the reason or reasons for control for items within that ECCN. For example, ECCN 6A007 is controlled for national security, missile technology, and anti-terrorism reasons.

(2) *Reason for control within the Country Chart.* With each of the applicable Country Chart column identifiers noted in the correct ECCN, turn to the Country Chart. Locate the correct Country Chart column identifier on the horizontal axis, and determine whether an “X” is marked in the cell next to the destination in question. Consult §738.4 of the EAR for comprehensive instructions on using the Country Chart and a detailed example.

(i) An “X” in the cell or cells for the relevant country and reason(s) for control column indicates that a license is required for General Prohibitions One (Exports and Reexports in the Form Received), Two (Parts and Components Reexports), and Three (Foreign-Produced Direct Product Reexports). (See §736.2(b)(1), (b)(2), and (b)(3) of the EAR).

(ii) If one or more cells have an “X” in the relevant column, a license is required unless you qualify for a License Exception described in part 740 of the EAR. If a cell does not contain an “X” for your destination in one or more relevant

columns, a license is not required under the CCL and the Country Chart.

(iii) Additional controls may apply to your export. You must go on to steps 12 through 18 described in paragraphs (g) to (m) of this section to determine whether additional limits described in General Prohibition Two (Parts and Components Reexports) and General Prohibition Three (Foreign-Produced Direct Product Reexports) apply to your proposed transaction. If you are exporting an item from the United States, you should skip Step 10 and Step 11. Proceed directly to Step 12 in paragraph (g) of this section.

(3) License requirements not on the Country Chart. There are two instances where the Country Chart cannot be used to determine if a license is required. Items controlled for short supply reasons are not governed by the Country Chart. Part 754 of the EAR contains license requirements and License Exceptions for items subject to short supply controls. A limited number of ECCNs contained on the CCL do not identify a Country Chart column identifier. In these instances, the ECCN states whether a license is required and for which destinations. See §738.3(a) of the EAR for a list of the ECCNs for which you do not need to consult the Country Chart to determine licensing requirements.

(4) Destinations subject to embargo and other special controls provisions. The Country Chart does not apply to Cuba, Iran, North Korea, and Syria. For those countries you should review the provisions at part 746 of the EAR and may skip this step concerning the Country Chart. For Iraq and Russia, the Country Chart provides for certain license requirements, and part 746 of the EAR provides additional requirements.

(5) Items subject to the EAR but not on the CCL. Items subject to the EAR that are not on the CCL are properly classified EAR99. For such items,

you may skip this step and proceed directly with Step 12 in paragraph (g) of this section.

(e) Step 10: Foreign-made items incorporating U.S.-origin items and the de minimis rules

(1) De minimis rules. If your foreign-made item abroad is a foreign-made commodity that incorporates controlled U.S.-origin commodities, a foreign-made commodity that is ‘bundled’ with controlled U.S.-origin software, foreign-made software that is commingled with controlled U.S.-origin software, or foreign-made technology that is commingled with controlled U.S.-origin technology, then it is subject to the EAR if the U.S.-origin controlled content exceeds the *de minimis* levels described in Sec. 734.4 of the EAR.

(2) Guidance for calculations. For guidance on how to calculate the U.S.-controlled content, refer to Supplement No. 2 to part 734 of the EAR. Note, U.S.-origin technology controlled by ECCN 9E003.a.1 through a.11, and .h, and related controls, and encryption software controlled for “EI” reasons under ECCN 5D002 (not eligible for *de minimis* treatment pursuant to § 734.4(b) of the EAR) or encryption technology controlled for “EI” reasons under ECCN 5E002 (not eligible for *de minimis* treatment pursuant to § 734.4(a)(2) of the EAR) do not lose their U.S.-origin when redrawn, used, consulted, or otherwise commingled abroad in any respect with other software or technology of any other origin. Therefore, any subsequent or similar software or technology prepared or engineered abroad for the design, construction, operation, or maintenance of any plant or equipment, or part thereof, which is based on or uses any such U.S.-origin software or technology is subject to the EAR.

(f) Step 11: Direct product rule - General Prohibition Three.

Foreign-produced items located outside the U.S. that are the direct product of “technology” or “software” subject to the EAR or produced by a plant or major component of a plant located outside the United States that is a direct product of U.S.-origin “technology” or “software” subject to the EAR, whether made in the U.S. or a foreign country, may be subject to the EAR if they meet the conditions of General Prohibition Three in §736.2(b)(3). Direct products that are subject to the EAR may require a license to be exported from abroad, transferred (in-country), or reexported to specified countries or end users. If your foreign item meets the conditions of the foreign-produced direct product rule (General Prohibition Three), then your export from abroad, transfer (in-country), or reexport is subject to the EAR. You should next consider the steps regarding all other general prohibitions, license exceptions, and other requirements. If your item does not meet the conditions of General Prohibition Three, then your export from abroad, transfer (in-country), or reexport is not subject to the EAR. You have completed the steps necessary to determine whether your transaction is subject to the EAR, and you may skip the remaining steps.

(g) Step 12: *Persons denied export privileges*

(1) Determine whether your transferee, ultimate end-user, any intermediate consignee, or any other party to a transaction is a person denied export privileges. (See part 764 of the EAR). It is a violation of the EAR to engage in any activity that violates the terms or conditions of a denial order. General Prohibition Four (Denial Orders) applies to all items subject to the EAR, *i.e.* both items on the CCL and within EAR99.

(2) There are no License Exceptions to General Prohibition Four (Denial Orders). The prohibition concerning persons denied export privileges may be overcome only by a specific authorization from BIS, something that is rarely granted.

(h) Step 13: *Prohibited end-uses and end-users*

(1) Review the end-uses and end-users prohibited under General Prohibition Five (End-Use End-User) (§736.2(b)(5) of the EAR) described in part 744 of the EAR. Part 744 of the EAR contains all the end-use and end-user license requirements, and those are in addition to the license requirements under General Prohibitions One (Exports and Reexports), Two (Parts and Components Reexports), and Three (Foreign-produced Direct Product Reexports). Unless otherwise indicated, the license requirements of General Prohibition Five (End-Use End-User) described in part 744 of the EAR apply to all items subject to the EAR, *i.e.* both items on the CCL and within EAR99. Moreover, the requirements of General Prohibition Five (End-Use and End-User) are in addition to various end-use and end-user limitations placed on certain License Exceptions.

(2) Under License Exception TSU (§740.13 of the EAR), operation technology and software, sales technology, and software updates overcome General Prohibition Five (End-Use and End-User) (§736.2(b)(5) of the EAR) if all terms and conditions of these provisions are met by the exporter or reexporter.

(i) Step 14: *Embargoed countries and special destinations*

If your destination for any item is Cuba, Iran, Iraq, North Korea, or Syria, you must consider the requirements of parts 742 and 746 of the EAR. Unless otherwise indicated, General Prohibition Six (Embargo) applies to all items subject to the EAR, *i.e.* both items on the CCL and within EAR99. See §746.1(b) for destinations subject to limited sanctions under United Nations Security Council arms embargoes. See § 746.5 for Russian Industry Sector Sanctions. You may not make an export or reexport contrary to the

provisions of part 746 of the EAR without a license unless:

(1) You are exporting or reexporting only publicly available technology or software or other items outside the scope of the EAR, or

(2) You qualify for a License Exception referenced in part 746 of the EAR concerning embargoed destinations. You may not use a License Exception described in part 740 of the EAR to overcome General Prohibition Six (Embargo) (§736.2(b)(6) of the EAR) unless it is specifically authorized in part 746 of the EAR. Note that part 754 of the EAR concerning short supply controls is self-contained and is the only location in the EAR for both the prohibitions and exceptions applicable to short supply controls.

(j) Step 15: Restrictions on specific activities of “U.S. persons”

(1) Review the scope of activity prohibited by General Prohibition Seven (“U.S. person” activities) (§ 736.2(b)(7) of the EAR) as that activity is described in § 744.6 of the EAR. Keep in mind that such activity is not limited to exports, reexports, or transfers (in-country). “U.S. person” activities extend to services and shipping or transmitting certain wholly foreign-origin items, or facilitating such shipments or transmissions, in ‘support’ of the specified weapons of mass destruction and military-intelligence-related end uses and end users and is not limited to items listed on the CCL or designated EAR99. See § 744.6(b)(6) of the EAR for the full definition of ‘support,’ which includes ordering, storing, using, selling, loaning, disposing, servicing, financing, transporting, freight forwarding, or conducting negotiations in furtherance of.

(2) Review the definition of “U.S. person” in § 772.1 of the EAR.

(k) Step 16: In-transit

Shippers and operators of vessels or aircraft should review General Prohibition Eight (In-Transit) to determine the countries in which you may not unladen or ship certain items in-transit. General Prohibition Eight applies to all items subject to the EAR, i.e. both items on the CCL and within EAR99.

(l) Step 17: Review orders, terms, and conditions

Review the orders, terms, and conditions applicable to your transaction. General Prohibition Nine (Orders, Terms, and Conditions) prohibits the violation of any orders, terms, and conditions imposed under the EAR. Terms and conditions are frequently contained in licenses. In addition, the ten general prohibitions (part 736 of the EAR) and the License Exceptions (part 740 of the EAR) impose terms and conditions or limitations on your proposed transactions and use of License Exceptions. A given license or License Exception may not be used unless each relevant term or condition is met.

(m) Step 18: Review the “Know Your Customer” Guidance and General Prohibition Ten (Knowledge Violation to Occur)

License requirements under the EAR are determined solely by the classification, end-use, end-user, ultimate destination, and conduct of U.S. persons. Supplement No. 1 to part 732 of the EAR is intended to provide helpful guidance regarding the process for the evaluation of information about customers, end-uses, and end-users. General Prohibition Ten (Knowledge Violation to Occur) prohibits anyone from proceeding with a transaction with knowledge that a violation of the EAR has occurred or is about to occur. It also prohibits related shipping, financing, and other services. General Prohibition Ten applies to all items subject to the

EAR, i.e. both items on the CCL and within EAR99.

(n) Step 19: Complete the review of the general prohibitions

After completion of Steps described in this section and review of all ten general prohibitions in part 736 of the EAR, including cross-referenced regulations in the EAR, you will know which, if any, of the ten general prohibitions of the EAR apply to you and your contemplated transaction or activity.

(1) If none of the ten general prohibitions is applicable to your export from the United States, no license from BIS is required, you do not need to qualify for a License Exception under part 740 of the EAR. You should skip the Steps in §732.4 of this part regarding License Exceptions and proceed directly to the Steps in §732.5 of this part regarding recordkeeping, clearing the Bureau of Customs and Border Protection with the appropriate Shipper's Export Declaration or Automated Export System Record, and using the required Destination Control Statement.

(2) If none of the ten general prohibitions is applicable to your reexport or export from abroad, no license is required and you should skip all remaining Steps.

(3) If one or more of the ten general prohibitions are applicable, continue with the remaining steps.

§ 732.4 STEPS REGARDING LICENSE EXCEPTIONS

(a) Introduction to Steps for License Exceptions

If your export or reexport is subject to the EAR and is subject to General Prohibitions One (Exports and Reexports), Two (Parts and Components Reexports), or Three (Foreign-

Produced Direct Product Reexports), consider the steps listed in paragraph (b) of this section. If your export or reexport is subject to General Prohibitions Four (Denial Orders), Seven (U.S. Person Proliferation Activity), Eight (In-Transit), Nine (Orders, Terms, and Conditions), or Ten (Knowledge Violation to Occur), there are no License Exceptions available for your export or reexport. If your export is subject to General Prohibition Five (End-Use End-User), consult part 744 of the EAR. If your export or reexport is subject to General Prohibition Six (Embargo), consult part 746 of the EAR for applicable License Exceptions.

(b) Steps for License Exceptions

(1) **Step 20: Applicability of General Prohibitions.** Determine whether any one or more of the general prohibitions described in §736.2(b) of the EAR apply to your export or reexport. If no general prohibition applies to your export or reexport, then you may proceed with your export or reexport and need not review part 740 of the EAR regarding License Exceptions. You are reminded of your recordkeeping obligations related to the clearance of the U.S. Customs Service provided in parts 762 and 758 of the EAR.

(2) **Step 21: Applicability of restrictions on all License Exceptions.** Determine whether any one or more of the restrictions in §740.2 of the EAR applies to your export or reexport. If any one or more of these restrictions apply, there are no License Exceptions available to you, and you must either obtain a license or refrain from the export or reexport.

(3) **Step 22: Terms and conditions of the License Exceptions.**

(i) If none of the restrictions in §740.2 of the EAR applies, then review each of the License Exceptions to determine whether any one of them authorizes your export or reexport. Eligibility

for License Exceptions is based on the item, the country of ultimate destination, the end-use, and the end-user, along with any special conditions imposed within a specific License Exception.

(ii) You may meet the conditions for more than one License Exception. Moreover, although you may not qualify for some License Exceptions you may qualify for others. Review the broadest License Exceptions first, and use any License Exception available to you. You are not required to use the most restrictive applicable License Exception. If you fail to qualify for the License Exception that you first consider, you may consider any other License Exception until you have determined that no License Exception is available.

(iii) License Exceptions TMP, RPL, BAG, AVS, GOV, and TSU authorize exports notwithstanding the provisions of the CCL. List-based License Exceptions (LVS, GBS, CIV, TSR, and APP) are available only to the extent specified on the CCL. Some ECCNs contain License Exception STA exclusion paragraphs. Those paragraphs delineate items excluded from the License Exception STA provisions in § 740.20(c)(2) of the EAR. Part 740 of the EAR provides authorization for reexports only to the extent each License Exception expressly authorizes reexports. License Exception APR authorizes reexports only.

(iv) If you are exporting under License Exceptions GBS, CIV, LVS, STA, APP, TSR, or GOV, you should review §743.1 of the EAR to determine the applicability of certain reporting requirements. If you are exporting under License Exceptions LVS, TMP, RPL, STA, or GOV and your item is classified in the “600 series,” you should review § 743.4 of the EAR to determine the applicability of certain reporting requirements for conventional arms exports.

(4) Step 23: Scope of License Exceptions. Some License Exceptions are limited by country or by type of item.

(i) Countries are arranged in country groups for ease of reference. For a listing of country groups, please refer to Supplement No. 1 to part 740 of the EAR. Unless otherwise indicated in a License Exception, License Exceptions do not apply to any exports or reexports to embargoed destinations. If your export or reexport is subject to General Prohibition Six (Embargo) for embargoed destinations, License Exceptions are only available to the extent specifically provided in part 746 of the EAR concerning embargoed destinations.

(ii) Special commodity controls apply to short supply items. No License Exceptions described in part 740 of the EAR may be used for items listed on the CCL as controlled for Short Supply reasons. License Exceptions for short supply items are found in part 754 of the EAR.

(5) Step 24: Compliance with all terms and conditions. If a License Exception is available, you may proceed with your export or reexport. However, you must meet all the terms and conditions required by the License Exception that you determined authorized your export or reexport. You must also consult part 758 and 762 of the EAR to determine your recordkeeping and documentation requirements.

(6) Step 25: License requirements. If no License Exception is available, then you must either obtain a license before proceeding with your export or reexport or you must refrain from the proposed export or reexport.

(7) Step 26: License applications.

(i) If you are going to file a license application with BIS, you should first review the requirements in part 748 of the EAR. Exporters, reexporters, and transferors should review the instructions

concerning applications and required support documents prior to submitting an application for a license.

(ii) If you are going to file a license application with BIS for the export, reexport, or in-country transfer for aircraft or military vessels controlled under ECCNs 0A606.a, 8A609.a, 8A620.a, 8A620.b, certain “spacecraft” controlled under ECCN subparagraphs 9A515.a.1, a.2, a.3, a.4 or 9A515.g, , ECCN 9A610.a, or technology under ECCNs 9E515.b, .d, .e, or .f, §740.20(g) permits you to request in the application that subsequent exports of the type of aircraft, spacecraft, military vessels, or technology at issue be eligible for export under License Exception STA. The types of “items” controlled under ECCNs 0A606.a, 8A609.a, 8A620.a, 8A620.b, certain spacecraft controlled under ECCN subparagraphs 9A515.a.1, a.2, a.3, a.4 or 9A515.g, ECCN 9A610.a, and technology ECCNs 9E515.b, .d, .e, or .f, that have been determined to be eligible for License Exception STA pursuant to §740.20(g) are identified in the License Exceptions paragraphs of ECCNs 0A606, 8A609, 8A620, 9A610, 9A515, and 9E515. Supplement No. 2 to part 748, paragraph (w) (License Exception STA eligibility requests), contains the instructions for such applications.

Note 1 to paragraph (b)(7)(ii): If you intend to use License Exception STA, return to paragraphs (a) and then (b) of this section to review the Steps regarding the use of license exceptions.

**§ 732.5 STEPS REGARDING
ELECTRONIC EXPORT
INFORMATION (EEI)
REQUIREMENTS, DESTINATION
CONTROL STATEMENTS, AND
RECORDKEEPING.**

(a) Step 27: Electronic Export Information (EEI) filing requirements

Exporters or agents authorized to file EEI to the Automated Export System (AES), should review § 758.1 of the EAR to determine when the EAR requires EEI to be filed and what EEI data elements the EAR requires to be included. More detailed information about EEI filing procedures and requirements may be found in the Bureau of Census Foreign Trade Regulations (FTR) at 15 CFR Part 30. Reexporters and firms exporting from abroad may skip Steps 27 through 29 and proceed directly to § 732.6 of the EAR.

(1) License code/license exception code (license code). You must report the correct license code that corresponds with your license authority (license or license exception) or designation (No License Required (NLR)) for your export on the EEI filing, as appropriate. See § 758.1(g) of the EAR and 15 CFR 30.6(a)(23) and Part III of Appendix B to 15 CFR Part 30 of the FTR. Generally, conflicts of data elements with license exception criteria, e.g., ECCN or destination, will result in a fatal error in the AES system. By reporting a license code for a license exception on an EEI filing you are certifying that your transaction meets the criteria of that license exception. By reporting a license code of NLR you are certifying that no license is required for your export.

(2) License number. If you are exporting under the authority of a license, you must report the license number on the EEI filing. See 15 CFR 30.6(b)(5) of the FTR.

(3) Item description. You must report an item description identical to the item description on the license when a license is required, or report an item description sufficient in detail to permit review by the U.S. Government and verification of the Schedule B Number or the Harmonized Tariff Schedule of the United States (HTS) for license exception exports or exports for which No License is Required (NLR). See § 758.1(g) of the EAR; and 15 CFR 30.6(a)(13) of the FTR.

(4) Entering the ECCN. You must report the correct Export Control Classification Number (ECCN) or “EAR99” for items that are not classified under an ECCN on the EEI filing for all licensed and license exception exports, and “No License Required” (NLR) exports of items having a reason for control other than or in addition to anti-terrorism (AT). The only exception to this requirement would be the return of unwanted foreign origin items, meeting the provisions of License Exception TMP, under § 740.9(b)(3) of the EAR. See § 758.1(g) of the EAR and 15 CFR 30.6(b)(6) of the FTR.

(b) Step 28: Destination Control Statement

The Destination Control Statement (DCS) must be entered on the invoice and on the bill of lading, air waybill, or other export control document that accompanies the shipment from its point of origin in the United States to the ultimate consignee or end-user abroad. The person responsible for preparation of those documents is responsible for entry of the DCS. The DCS is required for all exports from the United States of items on the Commerce Control List and is not required for items classified as EAR99, unless the export may be made under License Exception BAG or GFT (see part 740 of the EAR). DCS requirements do not apply to reexports. See § 758.6 of the EAR.

(c) Step 29: Recordkeeping

Records of transactions subject to the EAR must be maintained for five years in accordance with the recordkeeping provisions of part 762 of the EAR.

§ 732.6 STEPS FOR OTHER

REQUIREMENTS

Sections 732.1 through 732.4 of this part are useful in determining the license requirements that apply to you. Other portions of the EAR impose other obligations and requirements. Some of them are:

(a) Requirements relating to the use of a license in §758.4 of the EAR.

(b) Obligations of carriers, forwarders, exporters and others to take specific steps and prepare and deliver certain documents to assure that items subject to the EAR are delivered to the destination to which they are licensed or authorized by a License Exception or some other provision of the regulations in §758.1 through §758.6 of the EAR.

(c) Duty of carriers to return or unload shipments at the direction of U.S. Government officials (see §758.8 of the EAR).

(d) [RESERVED]

(e) Recordkeeping requirements imposed in part 762 of the EAR.

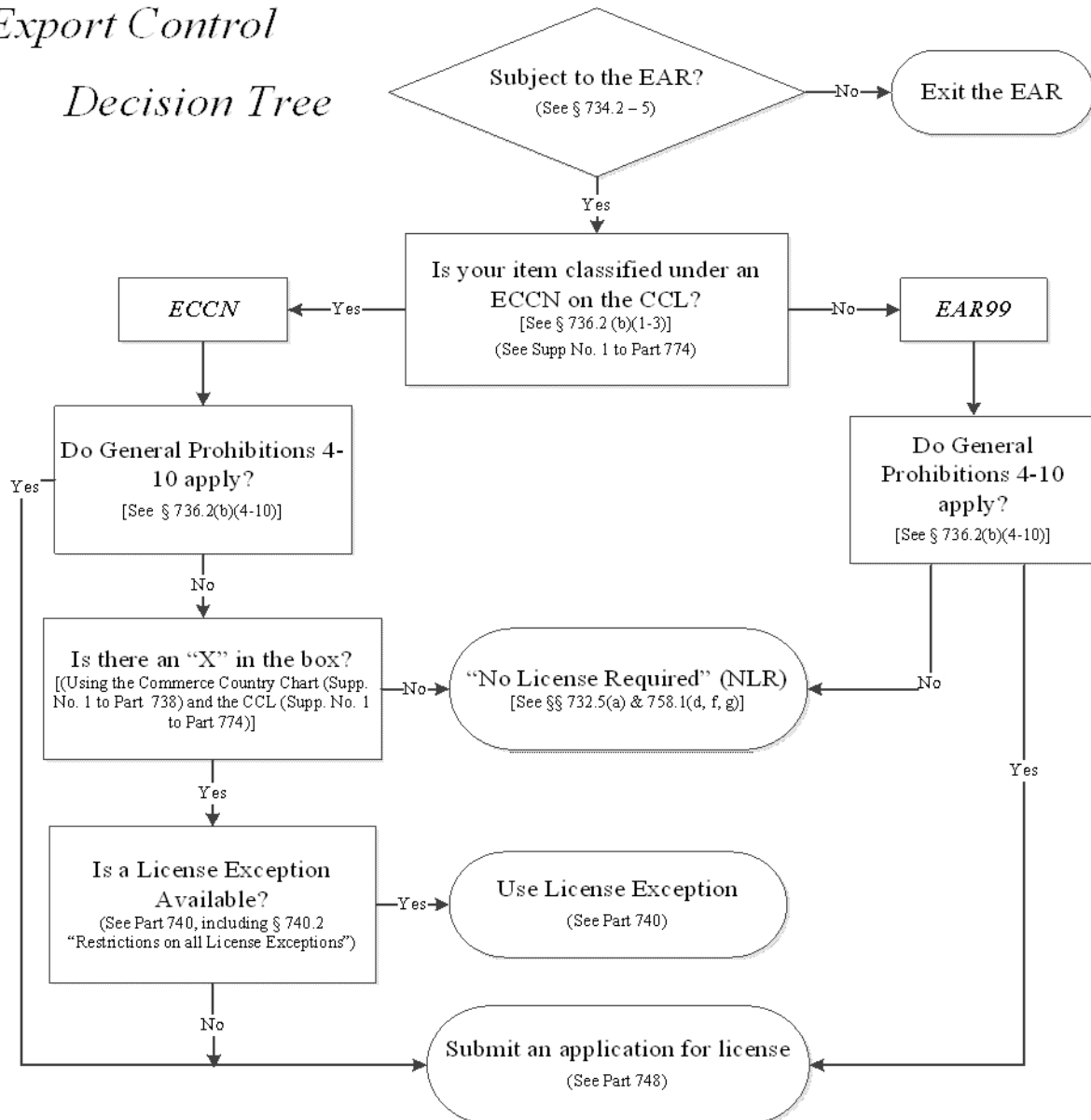
(f) Requirements of part 764 of the EAR to disclose facts that may come to your attention after you file a license application or make other statements to the government concerning a transaction or proposed transaction that is subject to the EAR.

(g) Certain obligations imposed by part 760 of the EAR on parties who receive requests to take actions related to foreign boycotts and prohibits certain actions relating to those boycotts.

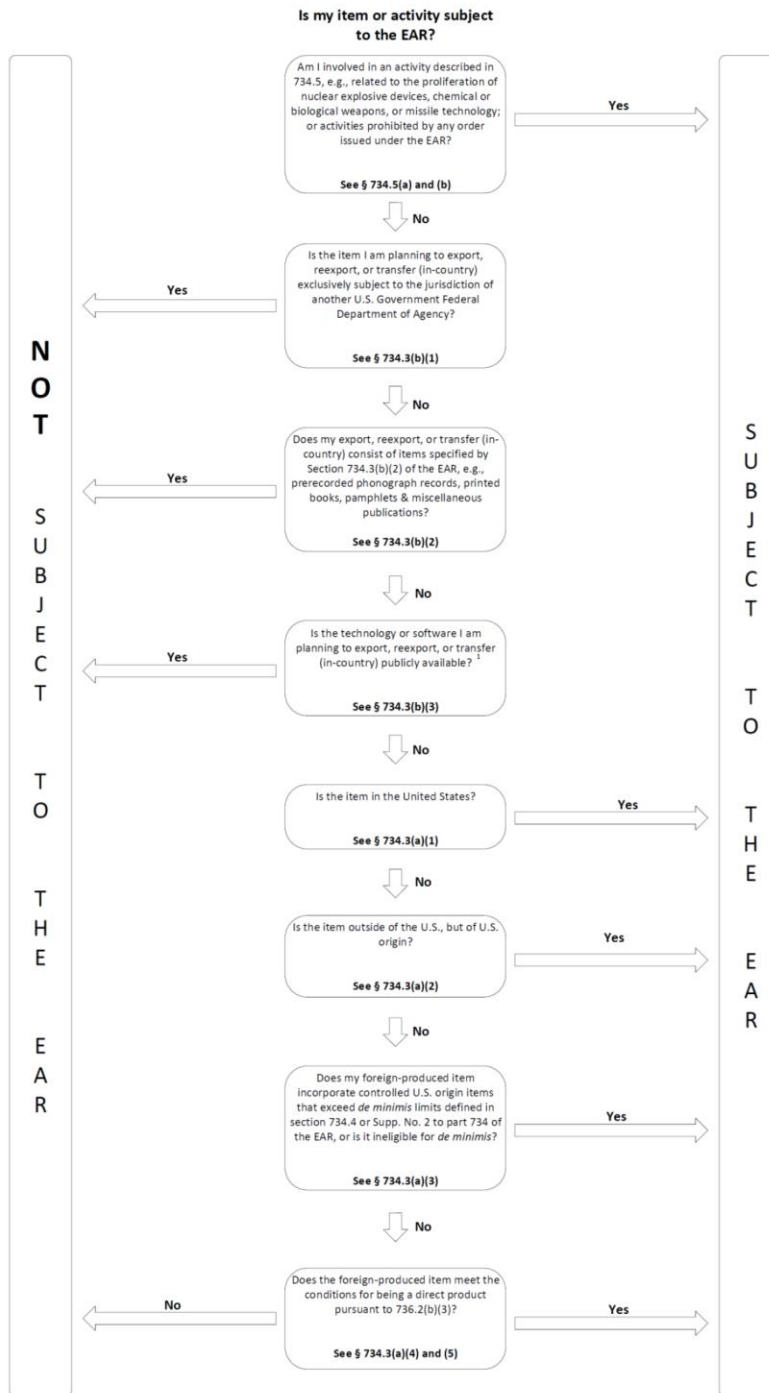
SUPPLEMENT NO. 1 TO PART 732 – EXPORT CONTROL DECISION TREE

SUPPLEMENT NO. 1 TO PART 732 – EXPORT CONTROL DECISION TREE

*Export Control
Decision Tree*



SUPPLEMENT NO. 2 TO PART 732 – SUBJECT TO THE EAR?



¹ Encryption source code in electronic form or media (e.g., computer diskette or CD ROM) remains subject to the EAR (see § 734.17). 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 § 742.15(b) of the EAR.

SUPPLEMENT NO. 3 TO PART 732 - BIS's "KNOW YOUR CUSTOMER" GUIDANCE AND RED FLAGS**"KNOW YOUR CUSTOMER" GUIDANCE**

Various requirements of the EAR are dependent upon a person's knowledge of the end-use, end-user, ultimate destination, or other facts relating to a transaction or activity. These provisions include the nonproliferation-related "catch-all" sections and the prohibition against proceeding with a transaction with knowledge that a violation of the EAR has occurred or is about to occur.

(a) BIS provides the following guidance on how individuals and firms should act under this knowledge standard. This guidance does not change or interpret the EAR.

(1) *Decide whether there are "red flags"*. Take into account any abnormal circumstances in a transaction that indicate that the export may be destined for an inappropriate end-use, end-user, or destination. Such circumstances are referred to as "red flags". Included among examples of red flags are orders for items that are inconsistent with the needs of the purchaser, a customer declining installation and testing when included in the sales price or when normally requested, or requests for equipment configurations that are incompatible with the stated destination (e.g., 120 volts in a country with 220 volts). Commerce has developed lists of such red flags that are not all-inclusive but are intended to illustrate the types of circumstances that should cause reasonable suspicion that a transaction will violate the EAR.

(2) *If there are "red flags", inquire*. If there are no "red flags" in the information that comes to your firm, you should be able to proceed with a transaction in reliance on information you have received. That is, absent "red flags" (or an express requirement in the EAR), there is no affirmative duty upon exporters to inquire, verify, or otherwise "go behind" the customer's

representations. However, when "red flags" are raised in information that comes to your firm, you have a duty to check out the suspicious circumstances and inquire about the end-use, end-user, or ultimate country of destination. The duty to check out "red flags" is not confined to the use of License Exceptions affected by the "know" or "reason to know" language in the EAR. Applicants for licenses are required by part 748 of the EAR to obtain documentary evidence concerning the transaction, and misrepresentation or concealment of material facts is prohibited, both in the licensing process and in all export control documents. You can rely upon representations from your customer and repeat them in the documents you file unless red flags oblige you to take verification steps.

(3) *Do not self-blind*. Do not cut off the flow of information that comes to your firm in the normal course of business. For example, do not instruct the sales force to tell potential customers to refrain from discussing the actual end-use, end-user, and ultimate country of destination for the product your firm is seeking to sell. Do not put on blinders that prevent the learning of relevant information. An affirmative policy of steps to avoid "bad" information would not insulate a company from liability, and it would usually be considered an aggravating factor in an enforcement proceeding.

(4) *Employees need to know how to handle "red flags"*. Knowledge possessed by an employee of a company can be imputed to a firm so as to make it liable for a violation. This makes it important for firms to establish clear policies and effective compliance procedures to ensure that such knowledge about transactions can be evaluated by responsible senior officials. Failure to do so could be regarded as a form of self-blinding.

(5) *Reevaluate all the information after the inquiry.* The purpose of this inquiry and reevaluation is to determine whether the "red flags" can be explained or justified. If they can, you may proceed with the transaction. If the "red flags" cannot be explained or justified and you proceed, you run the risk of having had "knowledge" that would make your action a violation of the EAR.

(6) *Refrain from the transaction or advise BIS and wait.* If you continue to have reasons for concern after your inquiry, then you should either refrain from the transaction or submit all the relevant information to BIS in the form of an application for a license or in such other form as BIS may specify.

(b) Industry has an important role to play in preventing exports and reexports contrary to the national security and foreign policy interests of the United States. BIS will continue to work in partnership with industry to make this front line of defense effective, while minimizing the regulatory burden on exporters. If you have any question about whether you have encountered a "red flag", you may contact: Office of Export Enforcement; (800) 424-2980 or Office of Exporter Services; (202) 482-4532.

RED FLAGS

Possible indicators that an unlawful diversion might be planned by your customer include the following:

1. The customer or purchasing agent is reluctant to offer information about the end-use of a product.
2. The product's capabilities do not fit the buyer's line of business; for example, a small bakery places an order for several sophisticated lasers.

3. The product ordered is incompatible with the technical level of the country to 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.
13. You receive an order for "parts" or "components" for an end item in 9x515 or the "600 series." The requested "parts" or "components" may be eligible for License Exception STA, another authorization, or may not require a destination-based license requirement for the country in question. However, the requested "parts" or "components" would be sufficient to service

one hundred of the 9x515 or “600 series” end items, but you “know” the country does not have those types of end items or only has two of those end items.

14. The customer indicates or the facts pertaining to the proposed export suggest that a 9x515 or “600 series” item may be reexported to a destination listed in Country Group D:5 (see Supplement No. 1 to part 740 of the EAR).