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Kevin Hull,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 730, 732, 734, 736, 762 and 774

[Docket No. 071204798–81254–01]

RIN 0694–AC17

De Minimis U.S. Content in Foreign Made Items

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Interim final rule.

SUMMARY: The Department of Commerce is revising the provisions of the Export Administration Regulations (EAR) that pertain to foreign-made items that incorporate controlled U.S.-origin items, *i.e.*, the EAR's ''*de minimis*'' rules. This rule amends the EAR to change the *de minimis* calculation for foreign produced hardware that is bundled with U.S.-origin software. This rule also clarifies the definition of 'incorporate' as it is applied to the *de minimis* rules and to the medical statement of understanding. This rule also removes the requirement to submit a one-time report to the Bureau of Industry and Security for foreign-made software that incorporates U.S.-origin software. In addition, this rule revises the ''Steps for Using the EAR'' and General Prohibition Two with regard to the *de minimis* rules in order to reduce redundancies in the EAR and harmonize the provisions with other revisions made by this rule.

DATES: This rule is effective: October 1, 2008. Comments must be received by December 1, 2008.

ADDRESSES: Comments on this rule may be submitted to the Federal eRulemaking Portal at *http://www.regulations.gov* (follow the instructions for submitting comments), by e-mail directly to BIS at *publiccomments@bis.doc.gov* (refer to regulatory identification number 0694–AC17 in the subject line), by fax at (202) 482–3355, or on paper to Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, Room H2705, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230. Refer to Regulatory Identification Number (RIN) 0694–AC17 in all comments.

FOR FURTHER INFORMATION CONTACT: Sharron Cook, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce at (202) 482–2440 or *E-mail: scook@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The term ''*de minimis*'' generally refers to matters that are of minor significance. The *de minimis* provisions of the EAR promote U.S. export control objectives as set forth in the Export Administration Act of 1979, as amended, while limiting U.S. jurisdiction over non-U.S. products containing a *de minimis* percentage, by value, of sensitive U.S. components. To prevent the diversion of controlled U.S. items and foreign made items incorporating a significant amount of U.S.-origin controlled content, a foreign-made item that contains more than the *de minimis* amount of controlled U.S.-origin content value is subject to the EAR, *i.e.*, a license may be required from BIS for the export abroad to another foreign country or in-country transfer of the foreign-made item. Prior to March 1987, the EAR set no *de minimis* levels for U.S. content in foreign made items; foreign-made items were subject to the EAR if they contained any amount of U.S.-origin content, no matter how small. A rule published March 23, 1987 (52 FR 9147) revised what were then called the ''parts and components'' provisions to establish thresholds at which the amount of U.S.-origin commodities in foreign-made items would warrant exercise of U.S. jurisdiction over the foreign-made item when located outside the United States. The rule was established to alleviate a major trade dispute with allies who strenuously objected to U.S. assertion of jurisdiction over all reexports of non-U.S. items that contained even trivial amounts of U.S. content. A major revision of the EAR in 1996 (61 FR 12714) introduced the term ''*de minimis*'' and established *de minimis* thresholds for software and technology. The 1996 rule required a one-time report for software and technology, which had to be submitted before reexporters relied on the *de minimis* rules for such items, and it made no provision for the ''incorporation'' of software into commodities. These provisions have not been significantly revised since 1996.

The interested public has consistently expressed concerns about *de minimis* calculations and reporting requirements in requests for advisory opinions, industry meetings, Technical Advisory Committee (TAC) meetings, seminars (especially overseas), and at the annual Bureau of Industry and Security (BIS) Update conference. Both U.S. exporters and the foreign manufacturers who are their customers have said that determining the applicability of the *de minimis* rules is complicated and cumbersome. BIS recognizes that the export control objectives of the *de minimis* rules will be best served if those rules are clarified to facilitate compliance with them.

Accordingly, BIS intends this revision of the EAR to facilitate compliance efforts by foreign manufacturers and respond to both advances in technology and how products are manufactured and sold in practice. Foreign manufacturers incorporating U.S. content must determine their obligations under U.S. export controls, in addition to those of their own countries, in order to prevent the diversion of controlled U.S. items to destinations and end-users that would be inimical to the national security or foreign policy interests of the United States. BIS recognizes that the heavier the compliance burden is, the greater the incentive to purchase content elsewhere. Modifying U.S. rules may reduce the pressure to ''design out'' U.S. origin items from foreign products, and thereby provide significant benefit to U.S. businesses while enabling BIS to continue exercising appropriate jurisdiction over foreign-made items incorporating controlled U.S. content.

Paperwork Reduction Act Collection 0694–0101

This rule revises the title of Supplement No. 1 to part 730, as well as the entry for Paperwork Reduction Act collection number 0694–0101. The title corresponding to collection number 0694–0101 is changed from ''One-Time Report for Foreign Software or Technology Eligible for *De Minimis* Exclusion'' to ''One-Time Report for Foreign Technology Eligible for *De Minimis* Exclusion'', because this rule removes the requirement to submit a one-time report on *de minimis* calculations for foreign software, but retains the requirement for foreign technology. The entry for 0694–0101 in the table is amended by adding Supplement No. 2 to part 734 to the related citation for this collection, because much of the detail about the required report is in Supplement No. 2 to part 734 of the EAR.

Part 732 ''Steps for Using the EAR''

This rule amends § 732.2 ''Steps regarding scope of the EAR'' by revising

paragraph (d) ''Step 4: Foreign-made items incorporating less than the *de minimis* level of U.S.-origin items'' (revised title) and removing and reserving paragraph (e) ''Step 5: Foreign-made items incorporating more than the *de minimis* level of U.S. parts, components, or materials.'' Paragraph (d) is revised to avoid redundancies in the EAR by eliminating instructions, otherwise described in the newly modified Supplement No. 2 to part 734, for calculating the value of U.S.-origin content in a foreign item. Paragraph (d) is also revised to clarify instructions and modernize terminology regarding foreign-made items that incorporate U.S.-origin content. Paragraph (e) is removed and reserved, because Steps 4 and 5 have been combined.

This rule amends § 732.3 ''Steps regarding the ten general prohibitions'' by revising paragraph (e) ''Step 10: Foreign-made items incorporating controlled U.S.-origin items and the *de minimis* rules.'' This paragraph is revised to eliminate instructions, otherwise described in the newly modified Supplement No. 2 to part 734, for determining what constitutes 'controlled' U.S.-origin content. This paragraph also clarifies instructions and modernizes terminology regarding foreign-made items that incorporate more than the *de minimis* level of U.S. content. This section has also been modified to reflect the fact that there are actually two *de minimis* rules described in part 734 of the EAR (rather than a single *de minimis* rule).

Foreign-Made Items That Incorporate Controlled U.S.-Origin Items

This rule amends § 734.3 ''Items subject to the EAR'' by revising paragraph (a)(3) regarding foreign-made items that incorporate controlled U.S.-origin items. The revisions to this section clarify which foreign produced items that incorporate controlled U.S.-origin items are subject to the EAR. This rule clarifies that foreign produced commodities that incorporate controlled U.S.-origin commodities, foreign produced commodities that are 'bundled' with controlled U.S.-origin software, foreign produced software that is commingled with controlled U.S.-origin software, and foreign produced technology that is commingled with controlled U.S.-origin technology are subject to the EAR if the incorporated controlled U.S.-origin content exceeds the *de minimis* levels as defined in § 734.4 of the EAR. Prior to the publication of this rule, the *de minimis* rules in the EAR did not allow U.S.-origin software to be counted as a part of a foreign commodity it was bundled with. Rather, calculations of U.S. content value were required to be performed separately for commodities, software, and technology. This change is in response to the way that systems and software are now being developed and delivered to customers. Furthermore, this change is necessary because software is such an integral part of the system in which the hardware and software work and is generally customized to work with a specific hardware product.

This rule amends § 734.4 of the EAR to clarify the scope of the *de minimis* rules by adding the title ''10% *De Minimis* Rule'' to paragraph (c), and the title ''25% *De Minimis* Rule'' to paragraph (d). These two paragraphs, together with the exceptions they cross-reference, encapsulate the ''*de minimis* rules'' that are referenced elsewhere in the EAR. This rule also amends paragraphs 734.4(c)(3) and 734.4(d)(3) of the EAR to clarify that there is a reporting requirement that must be fulfilled before the *de minimis* rules are relied upon for technology. The details of that reporting requirement are in Supplement No. 2 to part 734 of the EAR. As stated in more detail below, this reporting requirement previously existed for software and technology, but now only exists for technology. This requirement is more properly stated in the text of the *de minimis* rules rather than in the guidelines in Supplement No. 2 to part 734, where it was previously found. This rule also moves a caution regarding the applicability of Department of the Treasury, Office of Foreign Assets Control regulations to certain exports from abroad by persons subject to the jurisdiction of the United States (as defined therein) regardless of the *de minimis* rules in the EAR, from § 732.3 of the EAR to a new subparagraph (a)(5) of § 734.4 of the EAR. This caution is also reworded slightly to adopt the term ''persons subject to the jurisdiction of the United States'', which is a defined term in the Foreign Assets Control Regulations, 31 CFR. 500.329.

In § 734.4 of the EAR, this rule removes paragraph (e) and (h), redesignates paragraphs (f) and (g) as paragraphs (e) and (f), respectively, and adds a new paragraph (g). Paragraph (e) was removed because the provisions in that paragraph were moved to Supplement No. 1 to part 734. Paragraph (h) was removed because the provisions in that paragraph were either moved to other paragraphs, or were otherwise redundant or outdated. The prior restriction on hot section technology that was in paragraph (h) is moved to paragraph (a) and amended to more clearly express BIS's intent with regard to this restriction. This rule also corrects the citation in § 734.4 for hot section technology, which is covered by ECCN 9E003.a.1 through a.11 and .h instead of ECCN 9E003.a.1 through a.12 and .f. The prior *de minimis* restriction on encryption software under ECCN 5D002 in paragraph (h) contradicted the special provisions for this software found in paragraph (b), and was thus outdated. The prior *de minimis* restriction in paragraph (h) concerning encryption technology under ECCN 5E002 repeated the restriction on the same technology in paragraph (a), and was therefore redundant. Only certain encryption items are eligible for *de minimis* treatment, and this rule does not change the scope of eligible encryption items nor the special requirements set forth in § 734.4(b) of the EAR for the application of *de minimis* to those items. As a reminder to the public, § 734.4(b)(1)(iii) of the EAR restricts foreign products that incorporate § 740.17(b)(2) EI software or hardware, or are bundled with § 740.17(b)(2) EI software, from being exported from abroad to E:1 countries (see Supplement No. 1 to part 740 of the EAR). The new paragraph (g) sets forth a recordkeeping requirement for the method used to determine the percentage of U.S. content in foreign software or technology. This change is described in more detail below.

Bundled Software

The amendment to § 734.3 of the EAR described above introduces the concept of 'bundled' software, which will require *de minimis* calculations to include certain software within the calculated value of U.S. origin content in a foreign made commodity. Previously, calculations of U.S. content value were required to be performed separately for commodities, software, and technology. This interim rule will allow foreign made commodities 'bundled' with *de minimis* amounts of U.S. origin software to become not subject to the EAR in many instances.

This rule adds three notes to paragraph (c)(1) and to paragraph (d)(1) of § 734.4 of the EAR. The notes are substantively identical for each paragraph. The first note explains that U.S.-origin software (like hardware components) remains subject to the EAR when exported or reexported separately from (i.e., not incorporated or bundled with) a foreign-made commodity. Exports or reexports of software for additional users and upgrades of the software are considered separate exports or reexports of the software.

The second note explains the meaning of 'bundled'. The term 'bundled' refers to software that is configured for a specific commodity, but is not necessarily physically integrated into the commodity. For instance, printer driver software is generally not incorporated into a printer but is customarily delivered with the printer so that it may be loaded onto the computer to which it will be connected.

The third note provides the scope of software that may be bundled with foreign-made commodities for the purposes of the *de minimis* rules set forth in §§ 734.4(c)(1) and 734.4(d)(1) of the EAR. Eligible software is software that is listed on the Commerce Control List (CCL) and is controlled for anti-terrorism (AT) reasons or software that is designated EAR99 (subject to the EAR, but not listed on the CCL). Software that is listed on the CCL and does not require a license to the destination of a given foreign-made commodity is not considered ''controlled'' for purposes of the shipment of that commodity and should not be included in *de minimis* calculations for that shipment. Software that does not meet these criteria will not be considered to be 'bundled' with any commodity for purposes of the *de minimis* rules. BIS is limiting bundling for software to that which is controlled for AT reasons because some software controlled for non-proliferation or national security reasons can be used to enhance the capabilities of equipment controlled for the same reasons.

Supplement No. 2 to Part 734—Calculation of Values for *De Minimis* Rules

Supplement No. 2 to part 734 is amended to clarify the guidelines for 'controlled' U.S.-origin content and for determining content values for purposes of the *de minimis* rules. The supplement also is amended to clarify the definition of the term 'incorporate', and remove the reporting requirement for foreign-made software that incorporates a *de minimis* level of controlled U.S.-origin software. Further, this supplement will now be the sole reference point for persons seeking details on how to determine whether their foreign-made item is subject to the EAR on the basis of the *de minimis* rules in § 734.4. Previously, guidance on performing *de minimis* calculations, and specifically on identifying 'controlled' U.S.-origin content, was also contained in part 732 of the EAR.

This rule revises the term 'controlled' for the purpose of determining if the U.S.-origin content value should be counted in the *de minimis* percentage calculation. This explanation is a clarification of BIS's existing interpretation. U.S.-origin content is considered controlled for the purpose of the *de minimis* rules when it requires a license to the intended ultimate country of destination of the foreign-made item. When making this license determination you should only use the Export Control Classification Number (ECCN) based on the Commerce Control List in Supplement No. 1 to part 774 of the EAR, the Commerce Country Chart in Supplement No. 1 to part 738 of the EAR, License Exception GBS (if applicable), and the special controls and embargo provisions in part 746 of the EAR. Note that items classified as EAR99 may be controlled content when going to some destinations. End-user and end-use provisions in part 744 of the EAR are not to be considered when determining if U.S.-origin content in a foreign-made item is controlled. This is because the *de minimis* rules are not intended to identify licensing requirements for the foreign-made item, but rather to identify whether the foreign-made item is subject to the EAR because it contains an amount of U.S. content that is significant not only in value, but also due to its sensitivity with regard to the intended ultimate country of destination. If it is determined the foreign-made item is subject to the EAR because of the percentage of controlled U.S.-origin content it contains, then the relevant provisions of the EAR (including end-use and end-user requirements) must be applied to the foreign-made item to make a license requirement determination.

This rule clarifies the definition of ''incorporated'' to be consistent with common business practices concerning the way equipment and systems are being sold today. In addition, the new definition is consistent with the way that classifications are performed in BIS and the way BIS interprets the export of a commodity. Previously, Supplement No. 2 to part 734 of the EAR stated only that the term ''incorporated'' did not include peripheral or accessory devices that were merely rack mounted with or cable connected into foreign equipment, even though intended for use with products made abroad. Under this new rule, U.S. items are ''incorporated'' when all of the following conditions are met: (1) They are essential to the functioning of the foreign equipment, (2) they are customarily included in the sale of foreign-made items, and (3) they are reexported with the foreign produced item.

This rule removes the one-time reporting requirement for foreign-made software that incorporates controlled U.S.-origin software. From its inception, the one-time report was intended to be a temporary measure to verify that industry understood how to perform the *de minimis* calculation. BIS, as well as the Departments of Defense and State, have reviewed numerous one-time reports for foreign-made software, and have concluded that industry is performing the *de minimis* calculation correctly. Therefore, the one-time reporting requirement for foreign-made software is removed. However, the requirement for one-time reports for foreign-made technology that incorporate controlled U.S.-origin technology will not be removed at this time, because there has not been a sufficient number of these reports to verify that industry is performing these correctly and the scope and value of technology is more difficult to calculate.

As stated above, the recordkeeping requirement for the method by which you determined the percentage of U.S. content in foreign software or technology is moved from Supplement No. 2 to part 734 to a new paragraph (g) in § 734.4 of the EAR, as requirements should be found in the main body related to *de minimis* rather than in the guidance for *de minimis* calculations found in Supplement No. 2 to part 734 of the EAR. The recordkeeping requirement is also more clearly stated, explicitly cross-referencing the EAR's general recordkeeping provision in part 762. In addition, this rule adds a reference to § 734.4(g) in § 762.2(b) because this paragraph lists references to record retention requirements in the EAR.

General Prohibition Two

This rule amends General Prohibition two in part 736 of the EAR by revising the title, harmonizing the text with § 734.4, and clarifying that foreign-made items that incorporate more than the *de minimis* amount of controlled U.S.-origin items are subject to all the provisions of the EAR and not just the license requirements indicated by the ECCN and the Commerce Country Chart. The title of General Prohibition two is amended to revise the parenthetical short title from ''parts and components reexports'' to ''U.S.-content reexports,'' in order to clarify that the *de minimis* rules apply to technology and software reexports, in addition to commodity reexports.

Statement of Understanding—Medical Equipment

This rule amends guidance on the Wassenaar Arrangement statement of understanding on medical equipment in Supplement No. 3 to part 774 by

revising the note defining ''incorporate.'' The revision harmonizes the definition of ''incorporate'' as it relates to U.S. commodities and software incorporated into medical equipment with the definition of ''incorporate'' as it is applied to the *de minimis* rules in part 734 of the EAR. This new definition is consistent with common business practices concerning the way equipment and systems are being sold today.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as extended by the Notice of July 23, 2008, 73 FR 43603 (July 25, 2008), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act.

Rulemaking Requirements

1. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule involves a collection of information that has been approved by the OMB under control number 0694–0088, ''Multi-Purpose Application,'' which carries a burden hour estimate of 58 minutes to prepare and submit form BIS–748. Miscellaneous and recordkeeping activities account for 12 minutes per submission. This rule contains a collection that has been approved by the Office of Management and Budget under control number 0694–0101, which carries a burden hour estimate of 25 hours. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to Jasmeet Seehra, OMB Desk Officer, by e-mail at *jseehra@omb.eop.gov* or by fax to (202) 395–7285; and to the Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, 14th & Pennsylvania Ave., NW., Room 2705, Washington, DC 20230.

3. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

4. Pursuant to 5 U.S.C. 553(a)(1), this rule is exempt from the provision of the Administrative Procedure Act (5 U.S.C. 553) (APA) requiring notice and an opportunity for public comment because this regulation involves a military and foreign affairs function of the United States. For the same reason, good cause exists to waive the 30-day delay in effectiveness otherwise required by the APA. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this interim final rule. Accordingly, no regulatory flexibility analysis is required and none has been prepared. Although notice and opportunity for comment are not required, BIS is issuing this rule in interim final form and is seeking public comments on these revisions. The period for submission of comments will close December 1, 2008. BIS will consider all comments received before the close of the comment period in developing a final rule. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. BIS will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. BIS will return such comments and materials to the persons submitting the comments and will not consider them in the development of the final rule. All public comments on this interim rule must be in writing (including fax or e-mail) and will be a matter of public record, available for public inspection and copying. The Office of Administration, Bureau of Industry and Security, U.S. Department of Commerce, displays these public comments on BIS's Freedom of Information Act (FOIA) Web site at *http://www.bis.doc.gov/foia*. This office does not maintain a separate public inspection facility. If you have technical difficulties accessing this Web site, please call BIS's Office of Administration at (202) 482–0953 for assistance.

List of Subjects

15 CFR Part 730

Administrative practice and procedure, Advisory committees, Exports, Reporting and recordkeeping requirements, Strategic and critical materials.

15 CFR Part 732

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 734

Administrative practice and procedure, Exports, Inventions and patents, Research Science and technology.

15 CFR Part 736

Exports.

15 CFR Part 762

Administrative practice and procedure, Business and industry, Confidential business information, Exports, Reporting and recordkeeping requirements.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

■ Accordingly, parts 730, 732, 734, 736, 762 and 774 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 730—[AMENDED]

■ 1. The authority citation for 15 CFR part 730 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c; 22 U.S.C. 2151 note; 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 11912, 41 FR 15825, 3 CFR, 1976 Comp., p. 114; E.O. 12002, 42 FR 35623, 3 CFR, 1977 Comp., p. 133; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12214, 45 FR 29783, 3 CFR, 1980 Comp., p. 256; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 179; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 12981, 60 FR 62981, 3 CFR, 1995 Comp., p. 419; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp. p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; E.O. 13338, 69 FR 26751, May 13, 2004; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008); Notice of November 8, 2007, 72 FR 63963 (November 13, 2007).

Supplement No. 1 to Part 730 [Amended]

■ 2. Supplement No. 1 to part 730 is amended by:

■ a. Revising the title for Collection Number 0694–0101 to read ''One-Time Report For Foreign Technology Eligible For *De Minimis* Exclusion''; and

■ b. Revising the Reference in the EAR for Collection Number 0694–0101 to read ''§ 734.4 and Supp. No. 2 to part 734''.

PART 732—[AMENDED]

■ 3. The authority citation for 15 CFR part 732 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

■ 4. Section 732.2 is amended by:
■ a. Revising paragraph (d), as set forth below; and
■ b. Removing and reserving paragraph (e).

§ 732.2 Steps Regarding Scope of the EAR.

* * * * *

(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.

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■ 5. Section 732.3 is amended by revising paragraph (e), to read as follows:

§ 732.3 Steps regarding the ten general prohibitions.

* * * * *

(e) *Step 10: Foreign-made items incorporating controlled 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.

PART 734—[AMENDED]

■ 6. The authority citation for 15 CFR part 734 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp. p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008); Notice of November 8, 2007, 72 FR 63963 (November 13, 2007).

■ 7–8. Section 734.3 is amended by revising paragraph (a)(3) to read as follows:

§ 734.3 Items subject to the EAR.

* * * * *

(a) * * *

(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;

* * * * *

■ 9. Section 734.4 is amended by:
■ a. Adding new paragraphs (a)(4) and (a)(5);
■ b. Revising the introductory text of paragraph (c);
■ c. Revising paragraph (c)(1) and adding notes to paragraph (c)(1);
■ d. Adding a sentence to the end of paragraph (c)(3);
■ e. Revising the introductory text of paragraph (d);
■ f. Revising paragraph (d)(1) and adding notes to paragraph (d)(1); and
■ g. Adding a sentence to the end of paragraph (d)(3);
■ h. Removing paragraph (e);
■ i Redesignating paragraphs (f) and (g) as paragraphs (e) and (f);
■ j. Adding new paragraph (g); and
■ k. Removing paragraph (h).

The revisions and additions read as follows:

§ 734.4 de minimis U.S. content.

(a) * * *

(4) There is no *de minimis* level for U.S.-origin technology controlled by ECCN 9E003a.1 through a.11, and .h. when redrawn, used, consulted, or otherwise commingled abroad.

(5) Under certain rules issued by the Office of Foreign Assets Control, certain exports from abroad by U.S.-owned or controlled entities may be prohibited notwithstanding the *de minimis* provisions of the EAR. In addition, the *de minimis* rules do not relieve U.S. persons of the obligation to refrain from supporting the proliferation of weapons of mass-destruction and missiles as provided in § 744.6 of the EAR.

* * * * *

(c) *10% De Minimis Rule.* Except as provided in paragraphs (a) and (b)(1)(iii) of this section and subject to the provisions of paragraphs (b)(1)(i), (b)(1)(ii) and (b)(2) of this section, the following reexports are not subject to the EAR when made to any country in the world. See Supplement No. 2 of this part for guidance on calculating values.

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

NOTES to paragraph (c)(1): (1) U.S.-origin software is not eligible for the *de minimis* exclusion and is subject to the EAR when

exported or reexported separately from (i.e., not bundled or incorporated with) the foreign-made item.

(2) For the purposes of this section, 'bundled' means software that is reexported together with the item and is configured for the item, but is not necessarily physically integrated into the item.

(3) The *de minimis* exclusion under paragraph (c)(1) only applies to software that is listed on the Commerce Control List (CCL) and has a reason for control of anti-terrorism (AT) only or software that is designated as EAR99 (subject to the EAR, but not listed on the CCL). For all other software, an independent assessment of whether the software by itself is subject to the EAR must be performed.

* * * * *

(3) * * * Before you may rely upon the *de minimis* exclusion for foreign-made technology commingled with controlled U.S.-origin technology, you must file a one-time report. See Supplement No. 2 to part 734 for submission requirements.

* * * * *

(d) *25% De Minimis Rule.* Except as provided in paragraph (a) of this section and subject to the provisions of paragraph (b) of this section, the following reexports are not subject to the EAR when made to countries other than those listed in Country Group E:1 of Supplement No. 1 to part 740 of the EAR. See Supplement No. 2 to this part for guidance on calculating values.

(1) Reexports of a foreign-made commodity incorporating controlled U.S.-origin commodities or ''bundled'' with U.S.-origin software valued at 25% or less of the total value of the foreign-made commodity;

NOTES to paragraph (d)(1): (1) U.S.-origin software is not eligible for the *de minimis* exclusion and is subject to the EAR when exported or reexported separately from (i.e., not bundled or incorporated with) the foreign-made item.

(2) For the purposes of this section, ''bundled'' means software that is reexported together with the item and is configured for the item, but is not necessarily physically integrated into the item.

(3) The *de minimis* exclusion under paragraph (d)(1) only applies to software that is listed on the Commerce Control List (CCL) and has a reason for control of anti-terrorism (AT) only or software that is classified as EAR99 (subject to the EAR, but not listed on the CCL). For all other software, an independent assessment of whether the software by itself is subject to the EAR must be performed.

* * * * *

(3) * * * Before you may rely upon the *de minimis* exclusion for foreign-made technology commingled with controlled U.S.-origin technology, you must file a one-time report. See Supplement No. 2 to part 734 for submission requirements.

* * * * *

(g) *Recordkeeping requirement.* The method by which you determined the percentage of U.S. content in foreign software or technology must be documented and retained in your records in accordance with the recordkeeping requirements in part 762 of the EAR. Your records should indicate whether the values you used in your calculations are actual arms-length market prices or prices derived from comparable transactions or costs of production, overhead, and profit.

■ 10. Supplement No. 2 to part 734 is revised to read as follows:

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

(a) Calculation of the value of controlled U.S.-origin content in foreign-made items is to be performed for the purposes of § 734.4 of this part, to determine whether the percentage of U.S.-origin content is *de minimis.* (Note that you do not need to make these calculations if the foreign made item does not require a license to the destination in question.) Use the following guidelines to perform such calculations:

(1) *U.S.-origin controlled content.* To identify U.S.-origin controlled content for purposes of the *de minimis* rules, you must determine the Export Control Classification Number (ECCN) of each U.S.-origin item incorporated into a foreign-made product. Then, you must identify which, if any, of those U.S.-origin items would require a license from BIS if they were to be exported or reexported (in the form in which you received them) to the foreign-made product's country of destination. For purposes of identifying U.S.-origin controlled content, you should consult the Commerce Country Chart in Supplement No. 1 to part 738 of the EAR and controls described in part 746 of the EAR. Part 744 of the EAR should not be used to identify controlled U.S. content for purposes of determining the applicability of the *de minimis* rules. In identifying U.S.-origin controlled content, do not take account of commodities, software, or technology that could be exported or reexported to the country of destination without a license (designated as ''NLR'') or under License Exception GBS (see part 740 of the EAR). Commodities subject only to short supply controls are not included in calculating U.S. content.

Note to paragraph (a)(1): U.S.-origin controlled content is considered 'incorporated' for *de minimis* purposes if the U.S.-origin controlled item is: Essential to the functioning of the foreign equipment; customarily included in sales of the foreign equipment; and reexported with the foreign produced item. U.S.-origin software may be 'bundled' with foreign produced commodities; see § 734.4 of this part. For purposes of determining *de minimis* levels, technology and source code used to design or produce foreign-made commodities or software are not considered to be incorporated into such foreign-made commodities or software.

(2) *Value of U.S.-origin controlled content.* The value of the U.S.-origin controlled content shall reflect the fair market price of such content in the market where the foreign product is being produced. In most cases, this value will be the same as the actual cost to the foreign manufacturer of the U.S.-origin commodity, technology, or software. When the foreign manufacturer and the U.S. supplier are affiliated and have special arrangements that result in below-market pricing, the value of the U.S.-origin controlled content should reflect fair market prices that would normally be charged to unaffiliated customers in the same foreign market. If fair market value cannot be determined based upon actual arms-length transaction data for the U.S.-origin controlled content in question, then you must determine another reliable valuation method to calculate or derive the fair market value. Such methods may include the use of comparable market prices or costs of production and distribution. The EAR do not require calculations based upon any one accounting system or U.S. accounting standards. However, the method you use must be consistent with your business practice.

(3) *Foreign-made product value— (i) General.* The value of the foreign-made product shall reflect the fair market price of such product in the market where the foreign product is sold. In most cases, this value will be the same as the actual cost to a buyer of the foreign-made product. When the foreign manufacturer and the buyer of their product are affiliated and have special arrangements that result in below-market pricing, the value of the foreign-made product should reflect fair market prices that would normally be charged to unaffiliated customers in the same foreign market. If fair market value cannot be determined based upon actual arms-length transaction data for the foreign-made product in question, then you must determine another reliable valuation method to calculate or derive the fair market value. Such methods may include the use of comparable market prices or costs of production and distribution. The EAR do not require calculations based upon any one accounting system or U.S. accounting standards. However, the method you use must be consistent with your business practice.

(ii) *Foreign-Made Software.* In calculating the value of foreign-made software for purposes of the *de minimis* rules, you may make an estimate of future sales of that foreign software. The total value of foreign-made software will be the sum of: The value of actual sales of that software based on orders received at the time the foreign software incorporates U.S.-origin content and, if applicable; and an estimate of all future sales of that software.

Note to paragraph (a)(3): Regardless of the accounting systems, standard, or conventions you use in the operation of your business, you may not depreciate reported fair market values or otherwise reduce fair market values

through related accounting conventions. Values may be historic or projected. However, you may rely on projected values only to the extent that they remain consistent with your documentation.

(4) *Calculating percentage value of U.S.-origin items.* To determine the percentage value of U.S-origin controlled content incorporated in, commingled with, or ''bundled'' with the foreign produced item, divide the total value of the U.S.-origin controlled content by the foreign-made item value, then multiply the resulting number times 100. If the percentage value of incorporated U.S.-origin items is equal to or less than the *de minimis* level described in § 734.4 of the EAR, then the foreign-made item is not subject to the EAR.

(b) *One-time report.* As stated in paragraphs (c) and (d) of § 734.4, a one-time report is required before reliance on the *de minimis* rules for technology. The purpose of the report is solely to permit the U.S. Government to evaluate whether U.S. content calculations were performed correctly.

(1) *Contents of report.* You must include in your report a description of the scope and nature of the foreign technology that is the subject of the report and a description of its fair market value, along with the rationale and basis for the valuation of such foreign technology. Your report must indicate the country of destination for the foreign technology reexports when the U.S.-origin controlled content exceeds 10%, so that BIS can evaluate whether the U.S.-origin controlled content was correctly identified based on paragraph (a)(1) of this Supplement. The report does not require information regarding the end-use or end-users of the reexported foreign technology. You must include in your report the name, title, address, telephone number, E-mail address, and facsimile number of the person BIS may contact concerning your report.

(2) *Submission of report.* You must submit your report to BIS using one of the following methods:

(i) E-mail: *rpd2@bis.doc.gov*;

(ii) Fax: (202) 482–3355; or

(iii) Mail or Hand Delivery/Courier: Regulatory Policy Division, U.S. Department of Commerce, Bureau of Industry and Security, Regulatory Policy Division, 14th and Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230.

(3) *Report and wait.* If you have not been contacted by BIS concerning your report within thirty days after filing the report with BIS, you may rely upon the calculations described in the report unless and until BIS contacts you and instructs you otherwise. BIS may contact you with questions concerning your report or to indicate that BIS does not accept the assumptions or rationale for your calculations. If you receive such a contact or communication from BIS within thirty days after filing the report with BIS, you may not rely upon the calculations described in the report, and may not use the *de minimis* rules for technology that are described in § 734.4 of this part, until BIS has indicated that such calculations were performed correctly.

PART 736—[AMENDED]

■ 11. The authority citation for 15 CFR part 736 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 2151 note; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp. p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, May 13, 2004; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008); Notice of November 8, 2007, 72 FR 63963 (November 13, 2007).

■ 12. Section 736.2 is amended by revising the heading of paragraph (b)(2) and the introductory paragraph to (b)(2)(i) to read as follows:

§ 736.2 General Prohibitions and Determination of Applicability.

* * * * *

(b) * * *

(2) *General Prohibition Two—Reexport and export from abroad of foreign-made items incorporating more than a de minimis amount of controlled U.S. content (U.S. Content Reexports).* (i) You may not, without a license or license exception, reexport or export from abroad 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, or foreign-made technology that is commingled with controlled U.S.-origin technology if such items require a license according to any of the provisions in the EAR and incorporate or are commingled with more than a *de minimis* amount of controlled U.S. content, as defined in § 734.4 of the EAR concerning the scope of the EAR.

* * * * *

PART 762—[AMENDED]

■ 13. The authority citation for 15 CFR part 762 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

■ 14. Section 762.2 is amended by:

■ a. Revising paragraphs (b)(44) and (b)(45); and

■ b. Adding a new paragraph (b)(46), to read as follows:

§ 762.2 Records to be retained.

* * * * *

(b) * * *

(44) § 745.2, End-use certificates;

(45) § 758.2(c), Assumption writing; and

(46) § 734.4(g), *de minimis* calculation (method).

* * * * *

PART 774—[AMENDED]

■ 15. The authority citation for 15 CFR part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.*, 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

■ 16. Supplement No. 3 to part 774 is amended by revising Note 2 to read as follows:

SUPPLEMENT NO. 3 TO PART 774—STATEMENTS OF UNDERSTANDING

* * * * *

Notes applicable to State of Understanding related to Medical Equipment:

* * * * *

(2) Commodities or software are considered ''incorporated'' if the commodity or software is: Essential to the functioning of the medical equipment; customarily included in the sale of the medical equipment; and exported or reexported with the medical equipment.

* * * * *

Dated: September 25, 2008.

Christopher R. Wall,

Assistant Secretary for Export Administration.

[FR Doc. E8–23142 Filed 9–30–08; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[ME–064–7013a; A–1–FRL–8719–7]

Approval and Promulgation of Air Quality Implementation Plans; Revised Format for Materials Being Incorporated by Reference for Maine

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; notice of administrative change.

SUMMARY: EPA is revising the format of 40 CFR part 52 for materials submitted by the State of Maine that are incorporated by reference (IBR) into its State Implementation Plan (SIP). The regulations affected by this format change have all been previously submitted by Maine and approved by EPA.