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## Export Controls and Economic Sanctions Update

### Changes to the Encryption Regulations in 2016

#### Introduction

The Department of Commerce's Bureau of Industry and Security (BIS) intends to publish amendments to the Export Administration Regulations (EAR) tomorrow, September 19th, governing Encryption Items in the U.S. Federal Register. These amendments include (1) changes arising from the Obama Administration's ongoing Export Control Reform (ECR) effort, and (2) changes to Category 5, Part 2 of the Commerce Control List of the EAR arising from the 2015 Wassenaar Dual Use List Review. A copy of the pre-publication notice can be found on the Federal Register's [Pre-Publication](#) page.

#### Export Control Reform Changes

The ECR effort will result in significant process improvements governing exports of Encryption Items, but only minor updates to the control parameters for "Network Infrastructure" Encryption Items. This is perhaps the "last gasp" of the ECR process, which so far has resulted in extensive changes to the U.S. Munitions List of the International Traffic in Arms Regulations (ITAR) and creation of the Commerce Munitions List of the EAR, but left the controls on Encryption Items essentially static since the last significant changes in 2010.

Further, a reorganization of Category 5 – Part 2 will result in a major reorganization of ECCN 5A002, including the addition of two new ECCN 5A00X subclassifications. As such, there will be categories for three primary sets of items: Cryptographic "Information Security," Non-Cryptographic "Information Security," and, Cryptanalytic Items. Along with the reorganization of ECCN 5A002, ECCNs 5A992, 5D992, and 5E992 have been adjusted and most items that are not Note 3 ("Mass market") items, will be moved from the 5X992 classifications to EAR99.

#### Process Improvements

ENC Registration and Annual Reporting Consolidation. The ENC Registration requirement will be eliminated. However, elements of the ENC Registration will be added to the required Annual Reports for items described in Sections 740.17(b)(1) or Section 742.15(b)(1) of the EAR. (These sections describe products frequently referred to as "Unrestricted" and "Mass Market" Encryption Items.). The new, updated requirements for the Annual Reports will be published in Supplement No. 8 to Part 742 of the EAR.

CCATS Accepted as Substitute for Annual Reporting. Products described in a CCATS will not be subject to the new Annual Reporting requirement. This will eliminate the duplication of effort, where exporters obtain CCATS for Unrestricted and Mass Market Encryption Items that otherwise require Annual Reporting. In addition, once included in an Annual Report, products do not need to be included in subsequent Annual Reports.

Exports to "Less Sensitive Government End-Users" Authorized under License Exception ENC. Previously, exporters had to obtain an export license or Encryption Licensing Arrangement (ELA) in order to export Encryption Items described in Section 740.17(b)(2) to Government End-Users located in countries outside of Supplement No. 3 to Part 740 of the EAR. (Section 740.17(b)(2) describes products frequently referred to as "Restricted" Encryption Items). Such products will now become eligible for export under License Exception ENC to "Less Sensitive Government End-Users" described in a new definition added to Part 772 of the EAR. These are the same types of end-users that have been previously authorized under Global ELAs. Exports to more sensitive Government End-Users will continue to require either an ELA or an individual license.

Publicly Available Software and Source Code No Longer Subject to the EAR. After filing of a one-time Notification, encryption software and source code that is publicly available no longer will be subject to the EAR.

Amendments to the Technical Questionnaire for Encryption Items. BIS has made additions, subtractions and clarifications to the technical questionnaire that must be submitted in connection with classification requests

and other submissions for encryption products. The new requirements are described in the revised Supplement No. 6 to Part 742 of the EAR.

Authorization of Intra-Company Transfers of Encryption Items. A new provision permitting intra-company transfers of encryption items will be added in a new Section 740.17(a)(1)(ii) of the EAR. This will authorize exports and reexports among related parties for internal use when the parent company is headquartered in a country that is listed in Supplement No. 3 to Part 740.

## Updates to Section 740.17(b)(2) "Restricted Items"

The controls on Restricted Encryption Items described in Section 740.17(b)(2) of the EAR will be updated, featuring a new definition of "Network Infrastructure," as well as some important, albeit modest, increases to the control parameters.

Definition of "Network Infrastructure". BIS will publish the following definition of "network infrastructure" as a Note to items controlled in Section 740.17(b)(2) of the EAR:

**2. 'Network infrastructure' (as applied to encryption items).** A 'network infrastructure' commodity or software is any "end item," commodity or "software" for providing one or more of the following types of communications:"

- (a) Wide Area Network (WAN);
- (b) Metropolitan Area Network (MAN);
- (c) Virtual Private Network (VPN);
- (d) Satellite;
- (e) Digital packet telephony/media (voice, video, data) over Internet protocol;
- (f) Cellular; or
- (g) Trunked.

**Note 1 to paragraph 2:** 'Network infrastructure' end items are typically operated by, or for, one or more of the following types of end users:

- (1) Medium- or large- sized businesses or enterprises;
- (2) Governments;
- (3) Telecommunications service providers; or
- (4) Internet service providers.

**Note 2 to paragraph 2:** Commodities, software and component for the "cryptographic activation" of a 'network infrastructure' item are also considered 'network infrastructure' items.

The underlying concept is that Encryption Items sold to medium and large enterprises, and telecommunications and internet service providers, should be controlled as "Network Infrastructure" items, whereas items sold for use in branch offices of such enterprises and consumers should be exempted.

Encrypted Throughput Increase. The encrypted throughput described in Section 740.17(b)(2)(i)(A)(1) of the EAR will be increased from 90 Mbit/s to 250 Mbit/s. Note that BIS has not adopted suggestions for a definition of "encrypted throughput."

Single Line Data Rate Eliminated. The single line data rate parameter described in Section 740.17(b)(2)(i)(A)(2) will be eliminated as it is largely redundant for Encryption Items that are controlled based on their encrypted throughput.

Encrypted Tunnels and VOIP End-Points. BIS will eliminate the current limitation of 250 concurrent encrypted tunnels in Section 740.17(b)(2)(i)(A)(4). It also will increase the permitted number of encrypted VOIP end-points from 1,000 to 2,500.

## Other Encryption Changes

Satellite Consumer Premises Equipment. Satellite ground equipment installed in consumer's premises will no longer be controlled as a restricted encryption item and is therefore eligible for "mass-market treatment". The controls on satellite gateway ground station equipment will remain unchanged.

Interpreted Languages. BIS has not previously provided consistent guidance on whether software written in an interpreted language (e.g. Python) should be treated as "source code". While there is no greater clarity, BIS will revise the questions in Supplement No. 6 that are submitted with a CCATS request to include "Identify the version(s) and type(s) of compilers, runtime interpreters or code assemblers used, as applicable."

IPsec. BIS has added a new question to Supplement No. 6 addressing products with IPsec capabilities, requesting details of the product's implementation of IKE vendor IDs.

Croatia. Croatia will be added to Supplement No. 3.

## Conclusion

As mentioned above, this is perhaps the "last gasp" of the ECR process, which so far has resulted in extensive changes to the U.S. Munitions List of the ITAR and creation of the Commerce Munitions List of the EAR, but

left the controls on Encryption Items essentially static since the last significant changes in 2010.

Later today, we will circulate changes to other Categories of the EAR resulting from changes made to the Wassenaar Arrangement's List of Dual-Use Goods and Technologies agreed to at the 2015 Plenary meeting.

As always, do not hesitate to contact us with questions related to these notices.

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If you have any questions or would like additional information on the material covered in this notice, please contact one of the authors:

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