

Trade & Customs - USA

BIS liberalises export controls for encryption items

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Introduction

On June 25 2010 the Commerce Department's Bureau of Industry and Security (BIS) published an interim final rule implementing major changes to the US export controls applicable to encryption items.⁽¹⁾ The changes, effective immediately, simplify the regulation of encryption software, technology and hardware, and should substantially reduce the administrative burden associated with the export and re-export of such items.

The principal changes implemented by the interim final rules are outlined below. The BIS is accepting public comments on the changes until August 24 2010.

Elimination of encryption review requirements for many items

The BIS has eliminated the review requirements under Licence Exception ENC and the mass market provisions for encryption items of lesser national security concern.

The BIS has established a new encryption registration requirement to replace the encryption reviews for such items. This requirement is company specific, rather than product specific. Using a new form in the SNAP-R system, a registrant must submit answers to the questions outlined in revised Supplement 5 to Part 742 of the Export Administration Regulations. These questions solicit information concerning:

- company contacts for encryption items;
- encryption item product categories;
- use of cryptographic functionality in encryption items;
- anticipated exports of encryption source code;
- use of non-US encryption components; and
- the country of manufacture for encryption items.

A company must register only once, unless its answers to the Supplement 5 questions change over time. On successful registration, the BIS will give the registrant an encryption registration number.

Most of a registrant's encryption items may be exported or re-exported immediately on submission to the BIS and the ENC encryption request coordinator of a self-classification report in accordance with Section 742.15(c) of the Export Administration Regulations. These reports identify the encryption products exported/re-exported during the previous year and include key information about each product (eg, classification, export authorisation used). These reports may be submitted by email and must be updated each February.

A valid registration in conjunction with a self-classification report operates like a bulk licence for most encryption products. Under Licence Exception ENC, it authorises exports or re-exports by all persons of commodities classified in Export Control Classification Numbers (ECCNs) 5A002.a.1, a.2, a.5, a.6 or a.9, or ECCN 5B002 and equivalent, or related software classified under ECCN 5D002, except certain items supplied to end users located or headquartered outside the countries listed in Supplement 3 to Part 740 (the so-called 'licence free zone'). The excepted items – which are listed in Sections (b)(2) and (b)(3) of Licence Exception ENC (as revised) –

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require the submission of a 30-day advance classification request to the BIS. A valid registration also authorises exports and re-exports by all persons of mass market: encryption commodities and software classified under ECCNs 5A992 and 5D992, respectively. However, exports and re-exports of items covered by Sections (a), (b)(4) and (c) of Licence Exception ENC and Section (b)(4) of the mass market provisions continue to be authorised without the need for registration.

The encryption registration requirement eliminates the need for 30-day technical reviews of many less sensitive encryption items. It is anticipated that the company-specific registration requirement will be less burdensome to industry than the former product-specific technical reviews. The elimination of the review requirement also has a favourable impact on *de minimis* calculations used to determine the applicability of the Export Administration Regulations to non-US origin items that incorporate some US-origin content. Under the interim final rule, encryption commodities and software may now be considered for *de minimis* treatment if such products are authorised for export under Licence Exception ENC after submission of an encryption registration.

Revisions to encryption reporting obligations

The BIS interim final rule also greatly reduces the reporting obligations associated with encryption items. Previously, semi-annual sales reports were required for most exports under Licence Exception ENC and for re-exports from Canada. Under the interim final rule, such reports are required only for items subject to 30-day classification requests under Section (b)(2) and certain network security and forensics items described in Section (b)(3)(iii) of Licence Exception ENC.

For exports of encryption items not covered by a sales report requirement, an exporter must maintain only those records required by the Export Administration Regulations standard record-keeping provisions. With this change, the BIS anticipates that the number of semi-annual reports will be reduced from 400 to fewer than 100 submissions per year.

Extension of Licence Exception ENC to certain encryption technology

The BIS has also revised Licence Exception ENC by extending it to certain encryption technology destined for certain end users. Previously, the supply of encryption technology outside the licence free zone required a validated export licence. The interim final rule authorises the use of Licence Exception ENC for the export of technology (other than technology for cryptanalytic items, non-standard cryptography and open cryptographic interfaces) to any non-government end user located in a country not listed in Country Group D:1 or E:1, 30 days after submission of an encryption classification request. Exports of technology to the People's Republic of China, which is a D:1 country, will not benefit from this rule.

In other words, eligible 5E002 encryption technology supplied to many countries outside the licence free zone is now treated in the same manner as 5A002 hardware and 5D002 software (other than source code, which is restricted) have historically been treated under Section (b)(3) of Licence Exception ENC. It is therefore anticipated that this rule change will eliminate encryption technology licence applications by 60%.

Decontrolling items with ancillary cryptography

The BIS has also decontrolled items with ancillary cryptography. Previously, ancillary cryptography hardware and software items were controlled under ECCNs reserved for encryption items, although they were not subject to the full array of US encryption controls (eg, encryption review). Under the interim final rule, items with ancillary cryptography are no longer classified under the ECCNs reserved for encryption items. Instead, such items, which are described in a new Note 4 to Category 5, Part 2 of the Commerce Control List, must be reclassified under other ECCNs or designated Export Administration Regulation 99.

The BIS has publicly indicated that in reclassifying items with ancillary cryptography, a company need not seek formal reclassification rulings from the BIS. Rather, a company may self-classify such items. Alternatively, for items that were previously the subject of classification rulings issued by the BIS, a company may email the BIS Information Technology Controls Division and request written confirmation that the items are now reclassified under particular ECCNs or designated Export Administration Regulation 99. In case of doubt, formal classification rulings from the BIS can also be sought.

Grandfathering

Finally, the interim final rule includes an expansive grandfathering provision that permits items that were previously authorised by the BIS for Licence Exception ENC or mass market treatment to be exported or re-exported under the new rule without the need for encryption registrations, self-classification reports, new classification ruling requests or semi-annual sales reports with respect to such exports and re-exports.

However, this grandfathering provision does not apply to items previously made eligible

for Licence Exception ENC under Section (b)(3) that are not now listed in the revised Section (b)(2), and therefore require a licence to certain government end users outside the countries listed in Supplement 3 to Part 740 of the Export Administration Regulations. Further, the grandfathering provision does not apply if the cryptographic functionality of a previously reviewed and classified item has changed.

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Endnotes

(1) Available online at

www.sidley.com/files/News/2792d9a2-c718-4098-81e6-263c0cdd0125/Presentation/NewsAttachment/80a9b566-1301-4c89-b0a4-2645d9aa4C

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