



If you have questions regarding this alert, please contact the authors below or another member of the [International Trade and Customs](#) team.

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## Significant Changes to U.S. Export Control Regulations on Encryption: First Steps to “Mass Market” and “Ancillary” Cryptography Products

The Obama Administration announced earlier this year that “fundamental reforms” to U.S. export controls laws and regulations were on the way...and it appears that the first of these has arrived! The U.S. Department of Commerce, Bureau of Industry and Security (“BIS”), issued an “Encryption Export Controls” interim final rule on June 25, 2010, effective as of that date, which significantly revises the rules governing the export of most “mass market” electronic products that contain encryption, as well as items that perform “ancillary” cryptography. See 75 Fed. Reg. 36,482 (June 25, 2010).

In an effort to “cut red tape” and streamline procedures, these reforms essentially replace the “review-and-wait process” and semi-annual sales reporting previously required in the Export Administration Regulations (“EAR”) License Exception ENC, Part 740.17, with a “one-time notification-and-ship process.” The central reforms include:

1. Removing review requirements and the 30-day delay for “less sensitive” encryption items eligible for export under License Exception ENC;
2. Lifting the semi-annual sales reporting for these same less sensitive encryption items under License Exception ENC;
3. Establishing a company “Registration Requirement” for encryption items under License Exception ENC or as “mass market” encryption products;
4. Removing the 30-day delay to make most “mass market” encryption items eligible for mass market treatment;
5. Creating an annual *self*-classification report requirement for such items pursuant to encryption Registration;
6. Making encryption technology eligible for export and reexport under License Exception ENC, except to countries of “highest concern,” such as those with whom the United States maintains an embargo; and
7. Decontrol for items that perform “ancillary cryptography” according to the Commerce Control List.

Previously, the EAR under License Exception ENC maintained controls and review requirements regarding three types of products, namely: 1) mass market encryption items, which were removed from national security controls after review; 2) other less sensitive encryption items that can be exported to government and non-government end users (Part 740.17(b)(3)); and 3) sensitive encryption items that are made eligible for export to non-government end users after a review (and to government end users with license authorization) (Part 740.17(b)(2)).

This interim rule removes the review requirement for most mass market and License Exception ENC items, such as local area network (LAN) products, small routers, and most items that meet the Wassenaar Agreement “mass market” criteria. Exporters may now “self-classify” these items and export them after the company has filed their “Registration” with BIS via its online “SNAP-R” application system and receives an “encryption registration number.” Thereafter, the exporter will file a report on an annual basis listing the items it has self-classified and exported. The interim rule also includes grandfathering provisions for most encryption products reviewed and classified by BIS prior to June 25, 2010, which may be exported and reexported without prior registration, BIS classification, or reporting.

However, we note that certain mass market and unrestricted items remain subject to the 30-day technical review requirements, including certain “network infrastructure items” such as: “encryption components,” items providing “non-standard cryptography,” certain items providing “vulnerability analysis, network forensics or computer forensics,” and cryptographic enabling commodities and software. The current semi-annual reporting requirements also remain applicable to these items. The rule also makes most “encryption technology,” currently restricted for export to only 35 countries after submission of a technical review request, eligible for export under license exception to all countries, except those of national security or anti-terrorism concerns, after a 30-day review.

Take note, the rule does not stop at “substantive” changes to the EAR. Also altered are certain administrative requirements, such as the requirement to send a separate hard-copy of your company’s encryption classification request to the Encryption Request Coordinator in Ft. Meade, Maryland.

Finally, the Wassenaar Agreement member countries agreed to “decontrol” items meeting the “ancillary cryptography” criteria at its December 2009 meeting. Based on the guidance currently provided, “decontrolling” these items means that items incorporating or using “cryptography” will no longer be classified under Category 5, Part 2 of the CCL, if their primary function is *not* communications, networking, computing or “information security” and cryptographic functionality is limited supporting the primary function. This change is stated in a new “Note 4” in Category 5, Part 2. Items such as robotics, household appliances, fire alarm systems, inventory management software, and transportation systems have been offered as a few examples of “ancillary” cryptography, which should now be classified as EAR99 or under another appropriate category of the Commerce Control List.

**Do these changes potentially affect your business practices and/or export activities?** If so, please note that BIS has specified a 60-day comment period regarding this interim rule, and we expect that there will be commentary regarding many of the changes. While the interim final rule simplifies and streamlines, it also raises potential questions. Further, BIS has made it clear that this is the first, and certainly not the last, set of reforms that we should expect.

In this era of regulatory change and heightened enforcement, whether you are a small business or multinational, keeping abreast of developments under the President's U.S. Export Control Reform Initiative, such as the Encryption Export Controls interim final rule, will be critical to your business in the weeks and months ahead.

For assistance in navigating these encryption reforms, enhancing and/or modernizing your company's export compliance program, or reviewing your current U.S. exports and reexports, Venable can help.

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