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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 734, 740, 742, 748, 770, and 774

[Docket No. 030529136–3136–01]

RIN 0694–AC78

Export Administration Regulations: Encryption Clarifications and Revisions

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule amends the Export Administration Regulations (EAR) to clarify when encryption commodities and software may be given *de minimis* treatment, when short-range wireless devices incorporating encryption may be given mass market or retail treatment, and to provide guidance on when exporters are required to submit encryption review requests. It also expands the authorizations according to which travelers departing the United States may take encryption for their personal use, and clarifies that specially designed medical equipment and software are not controlled as encryption or “information security” items under the EAR. Finally this rule implements changes to the Wassenaar Arrangement List of dual-use items (agreed upon in the September 2002 meeting and finalized in December 2002) that eliminate from Export Control Classification Number (ECCN) 5A002 certain types of “Personalized smart cards” and equipment specially designed and limited to controlling access to copyright protected data.

EFFECTIVE DATE: June 17, 2003.

FOR FURTHER INFORMATION CONTACT: Norman LaCroix, Acting Director, Information Technology Controls Division, Office of Strategic Trade and

Foreign Policy Controls, Bureau of Industry and Security, U.S. Department of Commerce at (202) 482–4439.

SUPPLEMENTARY INFORMATION

Background

This rule amends § 734.4(b) to clarify the *de minimis* eligibility of encryption items controlled for National Security (“NS”) or Anti-Terrorism (“AT”) reasons under the Export Administration Regulations (EAR), subject to the applicable notification or review requirements described in § 740.13(e) and § 742.15(b). As with other encryption items no longer subject to “EI” controls (such as items classified under Export Control Classification Numbers (ECCNs) 5A992, 5D992 or 5E992), this rule clarifies that ECCN 5D002 encryption source code that would be considered publicly available under § 734.3(b)(3) of the EAR (and the corresponding object code) is eligible for *de minimis* treatment once exporters have complied with the applicable notification requirement that releases such ECCN 5D002 software from “EI” controls.

This rule also updates License Exception BAG and the Related Control notes to ECCN 5A002 relative to the Wassenaar Arrangement List of dual-use items, and in several sections of the EAR clarifies existing instructions related to encryption commodities and software pre-loaded onto laptops, handheld devices, computers or other equipment. This rule also adds a “checklist” on encryption and other “information security” functions to Supplement 5 to part 742 of the EAR, to help exporters more fully consider and identify controlled encryption and “information security” components within their products, when making classification decisions and assessing whether an encryption review by BIS is required.

Consistent with the standing export control agreement among Wassenaar Arrangement member nations, this rule also adds a *nota bene* (“NB”) immediately following Note 1 in Category 5 part II that clarifies that commodities and software specially designed for medical end-use that incorporate encryption items listed in Category 5 part II are not controlled by Category 5, part II of the Commerce Control List. This rule thus clarifies that a commodity or software product that is

specially designed for medical end-use is classified as EAR99, even if the medical product incorporates another product, part or component that would otherwise be classified as 5A002, 5D002, 5A992 or 5D992.

This rule expands the scope of License Exception BAG by allowing U.S. citizens or permanent resident aliens of the United States to export encryption commodities and software for their personal use to any destination except Country Group E:1. Persons other than U.S. citizens or permanent resident aliens of the United States (except nationals of countries listed in Country Group E:1 of Supplement No. 1 to part 740 who are not U.S. citizens or permanent resident aliens of the United States) may also take such commodities and software as accompanying baggage for their personal use to any destination except Country Group E:1. This rule updates the provisions in 740.14(d) for “unaccompanied baggage” by permitting shipments of personal use encryption commodities and software subject to “EI” controls to the same destinations that are permitted for CB, MT, NS and NP controlled items.

In the Related Control notes to ECCN 5A002, the previous restriction to “one-time” copy control of copyright protected audio/video data has been removed. Likewise, as is now the case for such playback audio/video data, software that is subject to the EAR but not specified on the Commerce Control List (*i.e.*, items that are classified as EAR99) remains classified EAR99 when copy protected. Lastly, Related Control note (a) is amended and divided into two sub-paragraphs.

Although the Export Administration Act expired on August 20, 2001, Executive Order 13222 of August 17, 2001 (66 FR 44025, August 22, 2001), as extended by the notice of August 14, 2002 (67 FR 53721, August 16, 2002), continues the Regulations in effect under the International Emergency Economic Powers Act.

Rulemaking Requirements

1. This final rule has been determined to be not significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply, with a collection of information subject to the requirements of the