



EXPORT CONTROL DEVELOPMENTS

How U.S. EAR Encryption Rule Change Will Affect Re-Exporters in Asia

On June 25, 2010, the U.S. Bureau of Industry and Security ("BIS") published amendments to the encryption provisions of the Export Administration Regulations ("EAR"). As the U.S. export regulation is extra-territorial, traders in Asia need to be up-to-date on the changes relating to the re-export of U.S. origin encryption items, such as items classified under ECCN 5A002, 5D002, 5A992, and 5D992, etc. These amendments consist of the following key points and are effective immediately on June 25, 2010.

i. Reduce or eliminate review and reporting requirements for many encryption items

The new rule removes the review requirement for most mass market and License Exception ENC unrestricted items. Although re-exporters outside of the U.S. have generally not been affected by the review and report requirement to BIS, it is recommended to understand this encryption procedure change in order to follow U.S. re-export control rule appropriately.

Although certain high level encryption items are still subject to the 30-day technical review requirement, a manufacturer or exporter may now self-classify most of these items and export them following registration with BIS on-line. The exporter will receive an "encryption registration number" ("ERN") e.g. R123456, no more than 30 minutes after submission of its registration application. While the exporter in the US is required to file a report on an annual basis listing the items it has self-classified and exported, re-exporters outside of the US are not required to register with the BIS nor submit an annual report for eligible items as long as the U.S. exporter has done so accordingly. In other words, re-exporters that are not the producer of the encryption item can rely on the information provided by the producer, and there is no significant change to the obligations of the re-exporter outside of the US.

Many traders may be familiar with CCATS number (Commodity Classification Automated Tracking System) which is an alphanumeric code assigned by the BIS to products for verification of encryption review status. The CCATS remains in use and is covered by a "grandfather" provision. Thus, the re-exporter may use the CCATS previously issued by BIS without any encryption registration, provided that the encryption functionality has not changed. The re-exporter outside of the US should use the new number scheme, "encryption registration number" ("ERN"), to verify the registration and self-classification status of certain cryptography items with the U.S. manufacturer.

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Although the procedures are streamlined and simplified for less sensitive encryption items, the amended rules are still differentiated in the treatment of and reporting procedures for different types of encryption as indicated in section 740.17 (ENC) and 742.15 (Mass Market). Traders in Asia should review and understand the new rules so as to correctly communicate with the encryption item producer in the US.

ii. Decontrol many encryption items through implementation of the Wassenaar Arrangement's "ancillary cryptography" exemption note

Of most interest to re-exporters in Asia would be the decontrol of encryption items of "ancillary cryptography." The BIS has amended the EAR by implementing the agreements reached under the Wassenaar Arrangement at the plenary meeting in December 2009. ("Ancillary Cryptography", Note 4 of Category 5 – Part 2) Items incorporating or using "cryptography" will no longer be classified under Category 5, Part 2 of the Commerce Control List ("CCL") if their primary function is not communication, networking, computing or "information security" and the cryptographic functionality is limited to supporting the primary function. Examples of such items include consumer appliances, such as LCD TV, game devices, music digital players, industrial, manufacturing, medical or clinical systems, business process management systems, CAD software, and transportation systems, etc. Such items may be self-classified under another category of the CCL, or as EAR99.

This provision decontrols many IT and electronics items from the controlled list and eliminates the re-export license obligation.

The United States is not the first country to implement the "Ancillary Cryptography" provision of Wassenaar 2009. Each Wassenaar member country reflects (or will reflect) the provision in its own domestic law but in its own time. Among Asian countries, the countries which have already implemented the "Ancillary Cryptography" note and removed the relevant cryptography items from their dual-use controlled list are:

- Japan: effective from April 01, 2010
- Hong Kong: effective from June 14, 2010

No other countries or regions have incorporated the ancillary cryptography exemption of Wassenaar. Traders need to understand this jurisdictional difference, as items with exactly the same cryptography technical specifications may be decontrolled in the US, Japan and Hong Kong, but may still remain as controlled items in other countries, such as Singapore, Korea and Taiwan.



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Cecil Leong
cecil.leong@bryancavetrade.com
+65 6403 6388

Wong Chian Voen
chianvoen.wong@bryancavetrade.com
+86 21 2308 3000

Stephanie Wong
stephanie.wong@bryancavetrade.com
+65 6403 6391

Tatsuya Kanemitsu
tatsuya.kanemitsu@bryancavetrade.com
+813 5532 7413

Ashley Yean
ashley.yean@bryancavetrade.com
+65 6403 6385

