

items that are controlled for NS reasons to destinations in Country Group D:1; and

(2) Reexports to destinations in Country Group E:2 and Country Group D:2.

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§ 740.17 Encryption commodities and software (ENC).

License Exception ENC authorizes the export and reexport of encryption items controlled under ECCN 5A002, 5D002 or 5E002, and “information security” test, inspection, and production equipment controlled under ECCN 5B002. Encryption items exported and reexported under License Exception ENC remain subject to “EI” controls. No encryption items may be exported or reexported, under this license exception, to countries listed in Country Group E:1 of Supplement No. 1 to this Part—this includes exports and reexports (as defined in § 734.2 of the EAR) of encryption source code and technology to nationals of these countries. Review and reporting requirements apply to certain exports under this license exception (paragraph (d) of this section describes how to submit encryption items for review; paragraph (e) of this section describes which exports are subject to reporting requirements). Certain exports and reexports to government end-users are authorized under paragraphs (a) and (b)(3) of this section. Section 772.1 of the EAR defines the term “government end-user” as it applies to encryption items. Section 742.15 of the EAR describes the license requirements and policies that apply to exports and reexports of encryption items.

(a) *Exports and reexports to countries listed in Supplement 3 to this part.* Encryption items controlled under ECCN 5A002, 5D002 or 5E002 (except cryptanalytic items as defined in Part 772 of the EAR), and “information security” test, inspection, and production equipment controlled under ECCN 5B002, are authorized for immediate export and reexport to government and

non-government end-users located in the countries listed in Supplement 3 to this part 740, subject to the review requirements described in paragraph (d) of this section. Cryptanalytic items are authorized to non-government end-users, only, under this paragraph (a). Encryption items and “information security” test, inspection, and production equipment may also be exported or reexported to any destination eligible under this license exception for the internal use of foreign subsidiaries or offices of firms, organizations and governments headquartered in Canada or in countries listed in Supplement 3 to this part 740. (Note that License Exception ENC prohibits exports and reexports of encryption source code and technology to nationals of countries listed in Country Group E:1 of Supplement No. 1 to this part.) Before you export an item for the first time under this license exception, you must submit to BIS and the ENC Encryption Request Coordinator a review request for that item, as described in paragraph (d) of this section. See paragraph (e) of this section for applicable semi-annual reporting requirements.

(b) *Exports and reexports to all other eligible countries.* (1) *Encryption items for U.S. subsidiaries.* Exports and reexports of encryption items controlled under ECCN 5A002, 5D002 or 5E002 and “information security” test, inspection, and production equipment controlled under ECCN 5B002, are authorized under this license exception, without review, to foreign subsidiaries of U.S. companies for any end-use not prohibited elsewhere in the EAR. This paragraph (b)(1) also authorizes exports and reexports by U.S. companies and their subsidiaries of any such items (including encryption source code and technology), to foreign nationals working as contractors, interns or employees of said U.S. companies and their subsidiaries, provided that the items are for internal company use, including the development of new products. (Note that License Exception ENC prohibits exports and reexports of encryption source code and technology to nationals of countries listed in Country Group E:1 of Supplement No. 1 to this part). All items produced or developed by U.S. subsidiaries with encryption

commodities, software and technology exported under this paragraph (b)(1) are subject to the EAR and require review and authorization before any sale or retransfer outside of the U.S. company.

(2) *Encryption commodities and software to non-government end-users.* Thirty days after registration of a completed review request by BIS ("registration" is defined in § 750.4(a)(2) of the EAR), encryption commodities, software and components controlled under ECCN 5A002 or 5D002 (except such items which provide an open cryptographic interface, as defined in part 772 of the EAR), and "information security" test, inspection, or production equipment controlled under ECCN 5B002, are authorized for export or reexport to any individual, commercial firm or other non-government end-user located outside the countries listed in Supplement 3 to this part 740. The thirty days may not include any time that your review request was on hold without action. To request authorization under the provisions of this paragraph (b)(2), you must submit to BIS and the ENC Encryption Request Coordinator a review request as described in paragraph (d) of this section. See paragraph (e) of this section for applicable semi-annual reporting requirements. Encryption commodities and software eligible for export or reexport under this paragraph (b)(2) include, but are not limited to, the following:

(i) Network infrastructure products, such as high end routers or switches designed for large volume communications, and specially designed software, parts, and components thereof (including commodities and software which activate or enable cryptographic functionality in network infrastructure products that would otherwise remain disabled);

(ii) Encryption source code that would not be considered publicly available for export or reexport under License Exception TSU. (You may immediately export and reexport such encryption source code under License Exception ENC, provided that you have submitted a review request, including a copy of your source code, to BIS and the ENC Encryption Request Coordinator. Note that License Exception

ENC prohibits exports and reexports of encryption source code to countries listed in Country Group E:1 of Supplement No. 1 to this part, or to nationals of these countries.);

(iii) General purpose toolkits;

(iv) Cryptanalytic items (as defined in part 772 of the EAR);

(v) Commodities, software and components not otherwise authorized for export as mass market or retail.

(3) *Retail encryption commodities, software and components to government and non-government end-users.* Thirty days after registration of a completed review request by BIS ("registration" is defined in § 750.4(a)(2) of the EAR), retail encryption commodities, software and components controlled under ECCN 5A002 or 5D002 are authorized for export and reexport to any individual, commercial firm or other non-government end-user located outside the countries listed in Supplement 3 to this part 740. The thirty days may not include any time that your review request was on hold without action. Once BIS has completed its review and authorizes your encryption commodities, software, and components for export or reexport as retail encryption items under License Exception ENC, you may also export or reexport these items to government end-users. To request authorization under the provisions of this paragraph (b)(3), you must submit to BIS and the ENC Encryption Request Coordinator a review request as described in paragraph (d) of this section. See paragraph (e) of this section for applicable semi-annual reporting requirements.

(i) *Retail eligibility criteria.* Retail encryption commodities and software are products and components:

(A) Generally available to the public by means of any of the following:

(1) Are sold in tangible form through retail outlets independent of the manufacturer;

(2) Are specially designed for individual consumer use; or

(3) Are sold or will be sold in large volume, without restriction, through mail order transactions, electronic mail transactions, or telephone call transactions; and

(B) Meeting all of the following:

(1) The cryptographic functionality cannot be easily changed by the user;

(2) Substantial support is not required for installation and use; and

(3) The cryptographic functionality has not been modified or customized to customer specification.

(ii) *Additional types of retail encryption products.* The following products will also be considered to be retail encryption products:

(A) Encryption commodities and software (including key management products) with key lengths not exceeding 64 bits for symmetric algorithms, 1024 bits for asymmetric key exchange algorithms, and 160 bits for elliptic curve algorithms. (You may immediately export or reexport such encryption commodities and software as retail items upon submitting a completed review request to BIS and the ENC Encryption Request Coordinator, in accordance with the requirements described in paragraph (d) of this section);

(B) Encryption products and network-based applications that provide equivalent functionality to other mass market or retail encryption commodities and software (refer to the Cryptography Note (Note 3) to part II of Category 5 of the CCL for the definition of mass market encryption commodities and software);

(C) Encryption products that are limited to allowing foreign-developed cryptographic products to operate with U.S. products (e.g. signing). No review of the foreign-developed cryptography is required;

(D) Encryption commodities and software that activate or enable cryptographic functionality in retail encryption products which would otherwise remain disabled.

(iii) *Examples of eligible retail encryption products:* Subject to the retail eligibility criteria in paragraph (b)(3)(i) of this section, retail encryption items include, but are not limited to, the following:

(A) General purpose operating systems that do not qualify as mass market;

(B) Non-programmable encryption chips, and chips that are constrained by design for retail products;

(C) Retail networking products, such as low-end routers, firewalls, and vir-

tual private networking (VPN) equipment designed for small office or home use;

(D) Desktop applications (e.g. e-mail, browsers, games, word processing, database, financial applications or utilities) that do not qualify as mass market;

(E) Programmable database management systems and associated application servers;

(F) Low-end servers and application-specific servers (including client-server applications, e.g. Secure Socket Layer (SSL)-based web applications and applets, servers, and portals);

(G) Network and security management products designed for, bundled with, or pre-loaded on single CPU computers, low-end servers or retail networking products; and

(H) Short-range wireless components and software that do not qualify as mass market. Commodities and software that would not otherwise be controlled under Category 5 (telecommunications and "information security") of the Commerce Control List, but which are controlled under ECCN 5A002 or 5D002 only because they incorporate components or software that provide short-range wireless encryption functions (e.g., with an operating range typically not exceeding 100 meters), may be exported or reexported under the retail provisions of License Exception ENC, without review or reporting.

(4) *Reviews for de minimis eligibility:* Items controlled for "EI" reasons under ECCN 5A002, 5D002 or 5E002 are not eligible for *de minimis* treatment under § 734.4 of the EAR. However, exporters may, as part of a review request, ask that U.S.-origin retail encryption software controlled under ECCN 5D002 and U.S.-origin parts and components controlled under ECCN 5A002, that are incorporated in foreign-made items, be made eligible for *de minimis* treatment. The review of *de minimis* eligibility for such items will take U.S. national security interests into account.

(c) *Reexports and transfers.* U.S. or foreign distributors, resellers or other entities who are not original manufacturers of encryption commodities and software are permitted to use License Exception ENC only in instances where

the export or reexport meets the applicable terms and conditions of this section. Transfers of encryption items listed in paragraph (b) of this section to government end-users, or for government end-uses, within the same country are prohibited, unless otherwise authorized by license or license exception. Foreign products developed with or incorporating U.S.-origin encryption source code, components or toolkits remain subject to the EAR, but do not require review (for encryption reasons) by BIS. These products can be exported or reexported under License Exception ENC without notification and without further authorization (for encryption reasons) from BIS. Such products include foreign-developed products that are designed to operate with U.S. products through a cryptographic interface.

(d) *Review requirement.* (1) *Review request procedures.* To request review of your encryption products under License Exception ENC, you must submit to BIS and to the ENC Encryption Request Coordinator the information described in paragraphs (a) through (e) of Supplement 6 to part 742 of the EAR (Guidelines for Submitting Review Requests for Encryption Items). Review requests must be submitted on Form BIS-748P (Multipurpose Application), or its electronic equivalent, as described in § 748.3 of the EAR. To ensure that your review request is properly routed, insert the phrase “License Exception ENC” in Block 9 (Special Purpose) of the application form and place an “X” in the box marked “Classification Request” in Block 5 (Type of Application)—Block 5 does not provide a separate item to check for the submission of encryption review requests. Failure to properly complete these items may delay consideration of your review request. Review requests that are not submitted electronically to BIS should be mailed to the address indicated in § 748.2(c) of the EAR. See paragraph (e)(5)(ii) of this section for the mailing address for the ENC Encryption Request Coordinator. BIS will notify you if there are any questions concerning your request for review under License Exception ENC (e.g., because of missing or incomplete support documentation). Once your review has been completed, BIS will no-

tify you in writing concerning the eligibility of your products for export or reexport, under the provisions of this license exception. BIS reserves the right to suspend your eligibility to export and reexport under License Exception ENC and to return your review request without action, if you have not met the review requirements. You may not export or reexport retail encryption commodities, software and components under this license exception to government end-users headquartered outside of Canada and the countries listed in Supplement 3 to this part 740, unless you have received prior authorization from BIS.

(2) *Grandfathering.* Encryption commodities, software, parts or components (except cryptanalytic items) previously approved for export may be exported or reexported without further review to government and non-government end-users in countries listed in Supplement 3 to this part 740, and to any non-government end-user outside the countries listed in Supplement 3 to this part 740 (except items which provide an open cryptographic interface as defined in part 772 of the EAR). This includes products approved under a license, an Encryption Licensing Arrangement, or classified as eligible to use License Exception ENC (except for those products that were authorized only for export to U.S. subsidiaries) prior to October 19, 2000. Encryption technology previously approved for export under a license or an Encryption Licensing Arrangement may be exported or reexported to government and non-government end-users in countries listed in Supplement 3 to this part 740.

(3) *Key length increases.* Exporters may increase the key lengths of products previously classified and continue to export these products under the applicable provisions of License Exception ENC, without further review, upon certification to BIS and the ENC Encryption Request Coordinator in accordance with paragraph (d)(3)(ii) of this section. No other change in cryptographic functionality is allowed under License Exception ENC.

(i) Any product previously classified as ECCN 5A002 or 5D002 (except encryption items that provide an open

cryptographic interface, as defined in § 772.1 of the EAR) may, with any upgrade to the key length used for confidentiality or key exchange algorithms, be exported or reexported under License Exception ENC to any non-government end-user without an additional review. A license is required to export or reexport items that provide an open cryptographic interface to end-users located outside the countries listed in Supplement 3 to this part 740. In addition, products previously reviewed by BIS that were determined to be eligible as “retail” under this license exception may be exported or reexported to government end-users, without additional review. For products not previously determined to be eligible as retail products, another review is required to determine their eligibility as “retail” products under paragraph (b)(3) of this section.

(ii) Exporters must certify to BIS, in a letter from a corporate official, that the only change to the encryption product is the key length for confidentiality or key exchange algorithms and that there is no other change in cryptographic functionality. Certifications must include the original authorization number issued by BIS and the date of issuance. BIS must receive this certification prior to any export of an upgraded encryption product. The certification should be sent to BIS and a copy of the certification should be sent to the ENC Encryption Request Coordinator at the mailing address indicated in paragraph (e)(5) of this section.

(e) *Reporting requirements.* (1) *Semi-annual reporting requirement.* Semi-annual reporting is required for exports and reexports under this license exception. Certain encryption items and transactions are excluded from this reporting requirement (see paragraph (e)(4) of this section). For instructions on how to submit your reports, see paragraph (e)(5) of this section.

(2) *General information required.* Exporters must include all of the following applicable information in their reports:

(i) For items exported to a distributor or other reseller, including subsidiaries of U.S. firms, the name and address of the distributor or reseller, the item and the quantity ex-

ported and, if collected by the exporter as part of the distribution process, the end-user’s name and address;

(ii) For items exported through direct sale, the name and address of the recipient, the item, and the quantity exported (except for retail products, if the end-user is an individual consumer);

(iii) For exports of ECCN 5E002 items to be used for technical assistance that are not released by § 744.9 of the EAR, the name and address of the end-user; and

(iv) The authorization number and the name of the item(s) exported.

(3) *Information on foreign manufacturers and products that use encryption items.* For direct sales or transfers, under License Exception ENC, of encryption components, source code, general purpose toolkits, equipment controlled under ECCN 5B002, technology, or items that provide an open cryptographic interface to foreign developers or manufacturers when intended for use in foreign products developed for commercial sale, you must submit the names and addresses of the manufacturers using these encryption items and, if you know when the product is made available for commercial sale, a non-proprietary technical description of the foreign products for which these encryption items are being used (e.g., brochures, other documentation, descriptions or other identifiers of the final foreign product; the algorithm and key lengths used; general programming interfaces to the product, if known; any standards or protocols that the foreign product adheres to; and source code, if available).

(4) *Exclusions from reporting requirements.* Reporting is not required for the following items and transactions:

(i) Any encryption item to U.S. subsidiaries for internal company use;

(ii) Encryption commodities or software with a symmetric key length not exceeding 64 bits;

(iii) Retail products exported to individual consumers;

(iv) Encryption items exported via free or anonymous download;

(v) Encryption items from or to a U.S. bank, financial institution or their subsidiaries, affiliates, customers

or contractors for banking or financial operations;

(vi) Items that incorporate components limited to providing short-range wireless encryption functions;

(vii) Retail operating systems, or desktop applications (e.g. e-mail, browsers, games, word processing, data base, financial applications or utilities) designed for, bundled with, or pre-loaded on single CPU computers, laptops or hand-held devices;

(viii) Client Internet appliance and client wireless LAN cards;

(ix) Foreign products developed by bundling or compiling of source code.

(5) *Submission requirements.* You must submit the reports required under this section, semi-annually, to BIS, unless otherwise provided in this paragraph (e)(5). For exports occurring between January 1 and June 30, a report is due no later than August 1 of that year. For exports occurring between July 1 and December 31, a report is due no later than February 1 the following year. These reports must be provided in electronic form to BIS. Recommended file formats for electronic submission include spreadsheets, tabular text or structured text. Exporters may request other reporting arrangements with BIS to better reflect their business models. Reports may be sent electronically to BIS at crypt@bis.doc.gov (with a copy to the ENC Encryption Request Coordinator at enc@ncsc.mil), or disks and CDs containing the reports may be mailed to the following addresses:

(i) Department of Commerce, Bureau of Industry and Security, Office of Strategic Trade and Foreign Policy Controls, 14th Street and Pennsylvania Ave., NW., Room 2705, Washington, DC 20230, Attn: Encryption Reports.

(ii) A copy of the report should be sent to: Attn: ENC Encryption Request Coordinator, 9800 Savage Road, Suite 6131, Ft. Meade, MD 20755-6000.

[67 FR 38862, June 6, 2002, as amended at 68 FR 35785, June 17, 2003]

§ 740.18 Agricultural commodities (AGR).

(a) *Eligibility requirements.* License Exception AGR permits the export of agricultural commodities to Cuba, as well as the reexport of U.S. origin agricultural commodities to Cuba, pro-

vided your transaction meets *all* of the following criteria:

(1) The commodity meets the definition of "agricultural commodities" in part 772 of the EAR;

(2) The commodity is EAR99. You must have an official commodity classification of EAR99 from BIS for fertilizers, western red cedar and live horses before you submit a notification under this license exception. See § 748.3 of the EAR for information on how to submit a commodity classification request;

(3) The export or reexport is made pursuant to a written contract, except for donations and commercial samples which are not subject to this contract requirement;

(4) The export or reexport is made within 12 months of the signing of the contract or within 12 months of notification that no objections were raised (if no contract is required). In the case of multiple partial shipments, all such shipments must be made within the 12 months of the signing of the contract or within 12 months of notification that no objections were raised (if no contract is required); and

(5) You notify BIS prior to exporting or reexporting according to the procedures set forth in paragraph (c) of this section. If you intend to engage in multiple shipments during the one-year period after the signing of the contract, you need only notify BIS prior to the first shipment.

(b) *Restrictions.* (1) No export or reexport to any individual or entity designated as a Specially Designated Terrorist or Foreign Terrorist Organization may be made under License Exception AGR (see part 744 of the EAR).

(2) No export or reexport to or for use in biological, chemical, nuclear warfare or missile proliferation activities may be made under License Exception AGR (see part 744 of the EAR).

(3) No U.S.-owned or controlled foreign firm may export from abroad to Cuba a foreign produced agricultural commodity containing more than 10% U.S.-origin content. Such U.S.-owned or controlled foreign firms require a specific license from BIS as well as the Department of the Treasury's Office of Foreign Assets Control (OFAC). Transactions not subject to the EAR (under