



DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 740 and 774

[Docket No. 160217120-7396-02]

RIN 0694-AG85

Wassenaar Arrangement 2015 Plenary Agreements Implementation, Removal of Foreign National Review Requirements, and Information Security Updates; Corrections

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Correcting amendments.

SUMMARY: The Bureau of Industry and Security (BIS) maintains, as part of its Export Administration Regulations (EAR), the Commerce Control List (CCL), which identifies certain items subject to Department of Commerce jurisdiction. This rule corrects citations, replaces text that was inadvertently removed, and corrects other errors associated with the “Wassenaar Arrangement 2015 Plenary Agreements Implementation, Removal of Foreign National Review

Requirements, and Information Security Updates” final rule published on September 20, 2016 (WA15 rule).

DATES: This rule is effective: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For general questions contact Sharron Cook, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce at 202-482 2440 or by e-mail: Sharron.Cook@bis.doc.gov.

For technical questions contact: Office of National Security and Technology Transfer Controls, Information Technology Control Division, Aaron Amundson at 202-482-0707.

SUPPLEMENTARY INFORMATION:

Background

On September 20, 2016, BIS published a final rule entitled, “Wassenaar Arrangement 2015 Plenary Agreements Implementation, Removal of Foreign National Review Requirements, and Information Security Updates” (81 FR 64656-64692), (WA15 rule). The Wassenaar Arrangement (WA) on Export Controls for Conventional Arms and Dual-Use Goods and Technologies is a group of 41 like-minded states committed to promoting responsibility and transparency in the global arms trade, and preventing destabilizing accumulations of arms. As a Participating State, the United States has committed to controlling for export all items on the WA control lists. The lists were first established in 1996 and have been revised annually thereafter.

Proposals for changes to the WA control lists that achieve consensus are approved by Participating States at annual Plenary meetings. Participating States are charged with implementing the agreed list changes as soon as possible after approval. The United States' implementation of WA list changes ensures U.S. companies have a level playing field with their competitors in other WA Participating States. This rule affects three sections of the EAR by correcting citations, replacing text that was inadvertently removed, and correcting other errors associated with the publication of the September 20th WA15 rule.

Part 740—License Exceptions, § 740.13 Technology and Software Unrestricted (TSU).

The introductory paragraph of § 740.13 (License Exception TSU) of the EAR is corrected by removing the reference to “encryption source code (and corresponding object code) that would be considered publicly available under § 734.3(b)(3) of the EAR,” because the publicly available provisions for encryption were moved to § 742.15(b) in the WA15 rule. This action also adds to the introductory paragraph a reference to “release of technology and source code in the United States by U.S. universities to their bona fide and full time regular employees” as that authorization was added in § 740.13(f) of the EAR by the initial implementation rule (78 FR 22718), April 16, 2013.

Part 740—License Exceptions, §740.17 Encryption Commodities, Software, and Technology (ENC).

This correcting action makes three changes to § 740.17 of the EAR, as described below.

In § 740.17, a Note that was inadvertently removed by the WA15 rule is added to introductory paragraph (b). The Note was omitted by error when the mass market provisions were moved from § 742.15(b) to § 740.17(b) in order to consolidate these provisions in one place.

Also in § 740.17, paragraph (b)(2)(i) is amended by replacing the incorrect reference to non-existing paragraph (a)(i)(A) and adding in its place the correct reference to paragraph (b)(2)(i)(A).

Supplement No. 3 to Part 774 (Statements of Understanding)

This correction rule amends the Notes to paragraph (a) by revising paragraph (6) to replace the reference to Note 1 to Category 5, Part II with a reference to Supplement No. 2 to part 774 of the EAR because Note 1 to Category 5, Part II was removed by the WA15 rule and replaced with the Supp. No. 2 reference.

Export Administration Act

Although the Export Administration Act of 1979, as amended, expired on August 21, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013), and as extended by the Notice of August 4, 2016, 81 FR 52587 (August 8, 2016), has continued the Export Administration Regulations (EAR) in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*). BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222, as amended by Executive Order 13637.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches

that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action,” as defined under Executive Order 12866.

2. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

3. The provisions of the Administrative Procedure Act requiring notice of proposed rulemaking, the opportunity for public participation, and a 30-day delay in effective date (5 U.S.C. 553) are inapplicable, because this regulation involves a military and foreign affairs function of the United States (5 U.S.C. 553(a)(1)). Immediate implementation of these amendments fulfills the United States’ international obligation to the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (Wassenaar Arrangement). The Wassenaar Arrangement contributes to international security and regional stability by promoting greater responsibility in transfers of conventional arms and dual use goods and technologies, thus preventing destabilizing accumulations of such items. The Wassenaar Arrangement consists of 41 member countries that act on a consensus basis, and the changes set forth in this action make technical corrections to regulations implementing agreements reached at the December 2015 plenary session of the Wassenaar Arrangement. Because the United States is a significant exporter of the items covered by this rule, implementation of this rule is necessary for the Wassenaar Arrangement to achieve its purpose. Any delay in implementation will create a disruption in the movement of affected items globally, because of disharmony between export control measures implemented by Wassenaar Arrangement members, resulting in tension

between member countries. Export controls work best when all countries implement the same export controls in a timely manner. Delaying this rulemaking to allow for notice and comment and a 30-day delay in effectiveness would prevent the United States from fulfilling its commitment to the Wassenaar Arrangement in a timely manner, and would injure the credibility of the United States in this and other multilateral regimes.

In addition, issuing a notice of proposed rulemaking would be inappropriate and contrary to the public interest in this instance, as this rule is merely making corrections to a previously published final rule.

Although there is no formal comment period, public comments on this final rule are welcome on a continuing basis. Comments should be submitted to Sharron Cook, Office of Exporter Services, Bureau of Industry and Security, Department of Commerce, 14th and Pennsylvania Ave., NW, Room 2099, Washington, DC 20230.

4. Because this action merely makes technical correcting amendments to the previously published WA15 final rule, the analysis required by the the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that is contained in the WA15 final rule continues to apply to the regulatory text that is corrected by this action, and no additional analysis is necessary.

List of Subjects

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements

Accordingly, parts 740 and 774 of the Export Administration Regulations (15 CFR parts 730

through 774) are amended as follows:

PART 740 [AMENDED]

1. The authority citation for part 740 continues to read as follows:

Authority: 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 7201 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 4, 2016, 81 FR 52587 (August 8, 2016).

2. Section 740.13 is amended by revising the introductory text to read as follows:

§ 740.13 Technology and Software—unrestricted (TSU).

This license exception authorizes exports and reexports of operation technology and software; sales technology and software; software updates (bug fixes); “mass market” software subject to the General Software Note; and release of technology and source code in the United States by U.S. universities to their bona fide and full time regular employees. Note that encryption software subject to the EAR is not subject to the General Software Note (see paragraph (d)(2) of this section).

3. In § 740.17:

a. Paragraph (b) introductory text is amended by adding a Note to the paragraph; and

b. Paragraph (b)(2)(i) is amended by removing the reference “paragraph (a)(i)(A)” and adding in its place “paragraph (b)(2)(i)(A)”.

The addition reads as follows:

§ 740.17 Encryption commodities, software, and technology (ENC).

(b) ***

Note to paragraph (b) introductory text: Mass market encryption software that would be considered publicly available under §734.3(b)(3) of the EAR, and is authorized for export under this paragraph (b), remains subject to the EAR until all applicable classification or self-classification requirements set forth in this section are fulfilled.

PART 774 [AMENDED]

4. The authority citation for part 774 continues to read as follows:

Authority: 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824a; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 4, 2016, 81 FR 52587 (August 8, 2016).

Supplement No. 3 to Part 774 [Amended]

5. In Supplement No. 3 to part 774, the Notes to paragraph (a) are amended by revising paragraph (6) to read as follows:

SUPPLEMENT NO. 3 TO PART 774 – STATEMENTS OF UNDERSTANDING

(a) ***

Notes to Paragraph (a): ***

(6) For commodities and software “specially designed” for medical end-use that incorporate an encryption or other “information security” item subject to the EAR, see also section 3 (General “Information Security” Note (GISN)) to Supplement No. 2 to this part.

Dated: June 7, 2017.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

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