

Elimination of Reporting Requirements for Certain Encryption Items, 86 FR 16482 (March 29, 2021)

As part of a final rule published on March 29, 2021 (86 FR 168482) (March 29, 2021 rule) that also implemented decisions from the Wassenaar Arrangement's December 2019 Plenary meeting, BIS amended various provisions in the Export Administration Regulations (EAR), 15 C.F.R. Parts 730-774, related to certain encryption items in Category 5 - Part 2 ("Information Security"), including by eliminating reporting requirements in order to reduce exporters' regulatory burdens. In particular, the changes affect aspects of License Exception Encryption commodities, software, and technology (ENC), Section 740.17 of the EAR.

For certain products described in Section 740.17(b)(1) of the EAR, an annual self-classification report in accordance with Section 740.17(e)(3) of the EAR is required. For products described in Section 740.17(b)(1) of the EAR classified by BIS via a commodity classification request (CCATS), a self-classification report is not required. For items described by Section 740.17(b)(2) of the EAR and specified items described in Section 740.17(b)(3) of the EAR, a classification request (CCATS) per Section 740.17(d) of the EAR is required to make use of the License Exception ENC for export. Also, certain publicly available source code items have an email notification requirement pursuant to Sections 742.15(b) and 740.9 (c)(8) of the EAR.

In summary, the March 29, 2021 rule made the following changes:

(1) eliminated the e-mail notification requirement for 'publicly available' encryption source code (Section 742.15(b)) and beta test encryption software (Section 740.9(c)(8)), except for 'publicly available' encryption source code and beta test encryption software implementing "non-standard cryptography";

(2) eliminated the self-classification reporting requirement for certain 'mass market' encryption products under Section 740.17(b)(1); and

(3) allows self-classification reporting for ECCN 5A992.c or 5D992.c components of 'mass market' products (and their 'executable software'). See Section 740.17(e)(3). The rule moved "mass market" "components," 'executable software', toolsets, and toolkits from Section 740.17(b)(3)(i) to (b)(1). Of those four categories of items, only "mass market" "components" and 'executable software' remain subject to self-classification reporting. Mass market toolsets and toolkits are no longer subject to self-classification reporting.

Note: Non-"mass market" "components," toolsets, and toolkits remain in Section 740.17(b)(3), which requires submission of a classification and specifies a 30-day waiting period prior to use of License Exception ENC.

The March 29, 2021 rule did not change any of the License Exception ENC classification or self-classification reporting requirements for any non-'mass market' encryption items controlled under ECCNs 5A002, 5B002 or 5D002; or for any encryption item ('mass market' or not) that implements "non-standard cryptography".

The following table summarizes the changes made to reporting requirements by the March 29, 2021 rule and also highlights reporting requirements that remain unchanged.

ECCN/Authorization	Before March 29, 2021 rule	After March 29, 2021 rule
5x992.c –mass market items described in 740.17(b)(1) X= A for hardware or D for software	Fell under EAR Section 740.17(b)(1) -Required self-classification report or classification.	Falls under EAR Section 740.17(b)(1) - No self-classification report or classification required.
5x992.c – mass market chips, chipsets, electronic assemblies and field programmable logic devices (except for items implementing “non-standard cryptography”)	Fell under EAR Section 740.17(b)(3) and required a classification.	Falls under EAR Section 740.17(b)(1) -- Require self-classification report or classification.
5x992.c – mass market cryptographic libraries, modules, development kits and toolkits (except for items implementing “non-standard cryptography”)	Fell under EAR Section 740.17(b)(3) and required a classification.	Falls under EAR Section 740.17(b)(1) - No self-classification report or classification required.
5x002.a – encryption items described in EAR Section 740.17(b)(1)	EAR Section 740.17(b)(1) - Required self-classification report or classification.	No change.
5x002.a –non-mass market chips, chipsets, electronic assemblies, field programmable logic devices, cryptographic libraries, modules, development kits, and toolkits	EAR Section 740.17(b)(3) - Required a classification and specifies a 30 day wait period prior to use of ENC.	No change.
5x002.a and 5x992.c items with “non-standard cryptography described in 740.17(b)(3)	EAR Section 740.17(b)(3) - Required a classification and specifies a 30 day wait period prior to use of ENC.	No change.
5x002 – “publicly available” encryption source code and beta test encryption software (except for items implementing “non-standard cryptography”)	EAR Section 742.15(b)- “publicly available” encryption source code and corresponding object code required email notification. EAR Section 740.9(b)(8) - beta test encryption software - required email notification	Based on update to Section 742.15(b)- “Publicly available” encryption source code and corresponding object code no longer require email notification. Based on update to Section 740.9(b)(8)- Beta test encryption software no longer requires email notification.
5x002 - Items described in EAR Section 740.17(b)(2)	Required a classification under EAR Section 740.17(b)(2) and specifies a 30 day wait period prior to use of ENC.	No change