

## WSGR ALERT

FEBRUARY 2011

# IMPORTANT EXPORT CONTROL CHANGES: FURTHER RELAXATION OF CERTAIN REQUIREMENTS GOVERNING THE EXPORT OF ENCRYPTION SOFTWARE; EXPORT CONTROL CERTIFICATION FOR USCIS FORM I-129

### Further Relaxation of Certain Requirements Governing the Export of Encryption Software

On Friday, January 7, 2011, the U.S. Commerce Department's Bureau of Industry and Security (BIS) published amendments to the Export Administration Regulations (EAR) that further ease restrictions governing the export of certain encryption software. The rule is effective immediately.

#### Two Key Changes:

- Loosening of Controls on Mass-Market Software: Publicly available mass-market encryption software with a symmetric key length greater than 64 bits is no longer subject to the EAR once an encryption registration is submitted to the BIS and the product is properly classified.
  - Generally, this covers software that is **available to any person at no cost** and has certain encryption or decryption capabilities.
  - If any money is obtained for the software (exceeding the cost of reproduction, if distributed on CD-ROM) or the software is not freely available for download to any interested end-user, this rule does not apply.

- Loosening of Controls on TSU Software: Publicly available encryption software classified under ECCN 5D002 when the source code is publicly available per license exception TSU (technology and software unrestricted) is no longer subject to the EAR.

#### What Does This Mean?

These amendments mean that exports and reexports to certain embargoed countries can be made without restriction. Specifically, once the appropriate paperwork is filed, the mass-market and TSU-eligible software may be freely exported and downloaded to persons in Cuba, Syria, and North Korea since BIS is the licensing agency for exports and reexports of software, technology, and commodities to these three embargoed countries. However, the Treasury Department's Office of Foreign Assets Control (OFAC), the agency that licenses exports and reexports to Iran and Sudan, has not implemented comparable amendments. Consequently, exports and reexports to Iran and Sudan are not affected by the BIS amendments, and exports and reexports of mass-market and TSU software to those countries remain subject to restrictions, including license requirements.

#### What Should I Do?

Review your encryption software to determine whether it qualifies for mass-

market status. If it meets the mass-market criteria set forth in Section 742.15 of the EAR and has not yet been classified as mass market, then it may be reclassified as mass market and eligible for this new relaxed control. For instance, software that is currently classified under ECCN 5D992 pursuant to one of the exceptions in Category 5 Part 2, such as software specifically designed and used for banking purposes, may now want to be classified as mass market so that it can no longer be subject to the EAR.

### Export Control Certification for USCIS Form I-129

As of February 20, 2011, companies petitioning for certain non-immigrant visas to employ foreign persons in the United States will be required to certify on the Form I-129 whether an export license is required for that foreign person to perform his or her job at the company. This newly added certification (shown on the next page) ensures that the petitioning company is complying with export control laws relating to the release of technology or technical data for the development, production, or use of U.S.-origin items to that foreign person ("deemed export laws"). This is the first time that the visa-petition process has required an export-control-related certification. Making an inaccurate or false certification to a U.S. government entity can carry stiff penalties.

*Continued on page 2...*

## Export Control Changes . . .

Continued from page 1...

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### Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States

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(For H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions only. This section of the form is not required for all other classifications. See Page 3 of the Instructions before completing this section.)

**Check Box 1 or Box 2 as appropriate:**

With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

1. A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or
2. A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.

When using a license exception in the EAR as the authority for the transfer of the technology to the foreign national, there has been some confusion regarding the proper certification. If a company is using license exception TSR or ENC under the EAR as its authorization for the transfer of technology to the foreign national, then the proper certification is that no license is required and Box 1 should be checked. If the company is using license exception CIV or APP as its authority for the transfer of technology to the foreign national, then the proper certification is that a license is required since a foreign-national review needs to be submitted to BIS and Box 2 should be checked.

This certification is only required for petitions for H-1B, H-1B1, L-1, or O-1 visas. Please see the firm's December 9, 2010, WSGR Alert on USCIS Form I-129 for further information.

Please contact Josephine Aiello LeBeau, Melissa Mannino, or Anne Seymour of Wilson Sonsini Goodrich & Rosati's export controls practice at (202) 973-8800 with any questions; to discuss the requirements governing the export of your encryption commodities, technology, and software; or to discuss the export control requirements relating to the hiring of foreign nationals.



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This communication is provided for your information only and is not intended to constitute professional advice as to any particular situation. We would be pleased to provide you with specific advice about particular situations, if desired. Do not hesitate to contact us.

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