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DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR parts 734, 738, 740, and 742

[Docket No.990709187-9187-01]

RIN: 0694-AB96

Revision of High Performance Computer Licensing Policy

AGENCY: Bureau of Export Administration, Commerce

ACTION: Final rule.

SUMMARY: The Bureau of Export Administration (BXA) is amending the Export

Administration Regulations (EAR) by raising the performance parameters for those computers which can be exported and reexported under License Exception CTP. The upper threshold of the Composite Theoretical Performance (CTP) parameter for Computer Tier 2 countries is raised from 10,000 millions of theoretical operations per second (MTOPS) to 20,000 MTOPS. The upper threshold for Computer Tier 3 countries is raised from 7,000 MTOPS to 12,300 MTOPS for civilian end-users and end-uses. For military end-users and end-uses in Computer Tier 3 destinations the CTP parameter remains at 2,000 MTOPS for the immediate future. The upper parameter for military end-users and end-uses to Computer Tier 3 countries will be raised from 2,000 MTOPS to 6,500 MTOPS on the same date the threshold for advance notification for high performance computers (HPC) exports to Tier 3 countries is raised from 2,000 MTOPS to 6,500 MTOPS. The threshold for advance notification for exports of HPCs to Tier 3 countries is

raised to 6,500 MTOPS, effective approximately 180 days following the submission of a statutorily mandated report to Congress. The President sent this report to Congress on July 26, 1999. In addition, the following countries are moved from Computer Tier 2 to Computer Tier 1: Brazil, the Czech Republic, Hungary, and Poland.

DATES: This rule is effective August 3, 1999.

FOR FURTHER INFORMATION CONTACT: James A. Lewis, Office of Strategic Trade and Foreign Policy Controls, Bureau of Export Administration, Telephone: (202) 482-4196.

SUPPLEMENTARY INFORMATION:

Background

On January 25, 1996, the Bureau of Export Administration created License Exception CTP for exports and reexports of HPCs. This policy took into account rapid technical advances in

computing power, as well as national security and nonproliferation concerns. License Exception

CTP divided the world into tiers based on U.S. national security and foreign policy interests.

These tiers represent the level of proliferation and security risk a country poses to the U.S. and,

as a result, the technical level of computer exports tier members can receive without applying for

an export license. Computer Tier 1 consists of close U.S. allies; Computer Tier 2 includes

countries representing minimal security concerns to the U.S; countries representing a potential

proliferation or security concern are listed in Computer Tier 3; and Computer Tier 4 consists of

terrorist supporting states.

The President has decided to amend these country tiers by transferring Brazil, the Czech

Republic, Hungary, and Poland from Tier 2 to Tier 1. The Administration will consider moving

additional countries between Computer Tiers in the future.

The rapid evolution of computer technology has also made CTP parameter revisions necessary.

This rule changes the upper threshold of the CTP parameter for Computer Tier 2 from 10,000

MTOPS to 20,000 MTOPS and the upper threshold of Computer Tier 3 countries from 7,000

MTOPS to 12,300 MTOPS for civilian end-users and end-uses. License Exception CTP will be

made available for military end-users and end-uses in Computer Tier 3 in approximately 180

days along with the raising of the advance notification level under the 1998 National Defense

Authorization Act (NDAA) from 2,000 MTOPS to 6,500 MTOPS. Revision of the advance

notification threshold will be effective 180 days after the submission by the President of a

required report notifying the Congress of this change. The President sent this report to Congress

on July 26, 1999. Following this 180 day period, the upper parameter will be raised from 2,000

MTOPS to 6,500 MTOPS for military end-users and end-uses in Computer Tier 3. This level

reflects the Administration's determination that widespread commercial availability makes computers with a performance of 6,500 MTOPS or less uncontrollable. Note that the advance notification requirements of the 1998 NDAA for exports and reexports of computers with a CTP greater than 2,000 MTOPS to Computer Tier 3 destinations remains in effect until such changes are reviewed by the U.S. Congress.

This rule does not have an immediate impact on post-shipment reporting and recordkeeping requirements compelled by the 1998 NDAA for HPC exports. All HPC exports with a CTP greater than 2,000 MTOPS to Tier 3 Countries still require post-shipment reporting. However, BXA may, prior to January 23, 2000, publish an additional rule regarding further reporting requirements to meet stipulations under the 1998 NDAA to provide the Congress an annual report on all HPC exports to Computer Tier 3 destinations. This potential rule will most likely

require HPC exporters to report the intended end-use of all HPC exports with a CTP greater than 2,000 MTOPS but less than or equal to 6,500 MTOPS to Computer Tier 3 destinations. This information is currently provided by exporters in their advance notification requests for computers with a CTP greater than 2,000 MTOPS to Computer Tier 3 destinations.

In light of the rapid technological advancement in HPCs, the United States will routinely review these licensing levels to determine if further adjustments are warranted. In particular, for Tier 2, the United States will review the licensing level in six months with the expectation of raising the level to the 32,000 to 36,000 MTOPS range. Changes to Tier 3 may also be made at that time.

This rule specifically amends the EAR in the following ways:

1. In section 740.7, Brazil, the Czech Republic, Hungary, and Poland are moved from Computer Tier 2 to Computer Tier 1, and the upper threshold of the CTP parameter for

Computer Tier 2 is raised from 10,000 MTOPS to 20,000 MTOPS.

2. In section 740.7, the upper threshold of the CTP parameter for Computer Tier 3 is raised from 7,000 MTOPS to 12,300 MTOPS for civilian end-users and end-uses. The upper parameter for military end-users and uses is raised from 2,000 MTOPS to 6,500 MTOPS, effective January 23, 2000.

3. In section 740.7, the CTP level for computers requiring advance notification for export and reexport to Computer Tier 3 destinations is raised from 2,000 MTOPS to 6,500 MTOPS, effective January 23, 2000.

4. In section 740.11 and Supplement No. 1 to section 740.11, the CTP level for computers not eligible for License Exception GOV is raised from 10,000 MTOPS to 20,000 MTOPS.

5. In section 742.12, the upper threshold of the CTP parameter as measured in MTOPS for

Computer Tier 2 is raised from 10,000 MTOPS to 20,000 MTOPS.

6. In section 742.12, the upper threshold of the CTP parameter for Computer Tier 3 is raised from 7,000 MTOPS to 12,300 MTOPS for civil end-users and end-uses. Effective January 23, 2000, the upper threshold of the CTP parameter for Computer Tier 3 is raised from 2,000 MTOPS to 6,500 MTOPS for military end-users and end-uses.

Although the Export Administration Act (EAA) expired on August 20, 1994, the President invoked the International Emergency Economic Powers Act and continued in effect the EAR, and to the extent permitted by law, the provisions of the EAA, as amended, in Executive Order 12924 of August 19, 1994, as extended by the President's notices of August 15, 1995 (60 FR 42767), August 14, 1996 (61 FR 42527) August 13, 1997 (62 FR 43629) and August 13, 1998 (63 FR 44121).

Rule Making Requirements

1. This final rule has been determined to be significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to respond to

nor be subject to a penalty for failure to comply with a collection of information subject to the

requirements of the Paperwork Reduction Act unless that collection of information displays a

current valid OMB Control Number. This regulation involves collections previously approved

by the Office of Management and Budget under control numbers 0694-0088, “Multi-Purpose

Application,” which carries a burden hour estimate of 45 minutes per manual submission and 40

minutes per electronic submission. Miscellaneous and recordkeeping activities account for 12

minutes per submission. In addition, information is also collected under OMB control number

0694-0107, “National Defense Authorization Act,” Advance Notifications and Post-Shipment

Verification reports.

3. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

4. The provisions of the Administrative Procedure Act requiring notice of proposed rule making, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military or foreign affairs function of the United States (see 5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rule making and an opportunity for public comment be given for this rule. Because a notice of proposed rule making and opportunities for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., are inapplicable.

Therefore, this regulation is issued in final form. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to Frank J. Ruggiero, Office of Exporter Services, Bureau of Export Administration, Department of Commerce, P.O. Box 273, Washington, D.C. 20044.

List of Subjects

15 CFR Part 734

Administrative practice and procedure, Exports, Foreign trade.

15 CFR Part 738

Administrative practice and procedure, Exports, Foreign trade.

15 CFR Part 740

Administrative practice and procedure, Exports, Foreign trade, Reporting and record

keeping requirements.

15 CFR Part 742

Exports, Foreign Trade.

Accordingly, parts 734, 738, 740, and 742 of the Export Administration Regulations (15

CFR Parts 730-774) are amended as follows:

1. The authority citation for 15 CFR part 734 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 et seq., 1701 et seq.; E.O. 12924, 3 CFR, 1994 Comp.,
p.

917; E.O. 12938, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 3 CFR, 1996 Comp. p. 219; E.O.

13026, 3 CFR, 1996 Comp., p. 228; Notice of August 13, 1998, 63 FR 44121, 3 CFR, 1998

comp., p. 294.

2. The authority citation for 15 CFR Part 738 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 18 U.S.C. 2510 et seq.; 22 U.S.C. 287c; 22 U.S.C. 3201 et seq.; 22 U.S.C. 6004;

30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228 and Notice of August 13, 1998 63 FR 44121, 3 CFR 1998 Comp., pg. 294.

3. The authority citation for 15 CFR Part 740 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; E.O. 12924, 59 FR 43437,

3 CFR, 1994 Comp., p. 917; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228 and Notice of August 13, 1998 63 FR 44121, 3 CFR 1998 Comp., p.294.

4. The authority citation for 15 CFR Part 742 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; 18 U.S.C. 2510 et seq.;

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U.S.C. 3201 et seq.; 42 U.S.C. 2139a; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179;

E.O. 12851, 3 CFR, 1993 Comp., p. 608; E.O. 12924, 59 FR 43437, 3 CFR, 1994

Comp., p. 917; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O.

13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; and Notice of August 13, 1998, 63 FR

44121, 3 CFR 1998 Comp., p. 294.

PART 734 - [AMENDED]

5. Section 734.4 is amended by revising the phrase “7,000 MTOPS” in paragraph (a) to read “12,300 MTOPS”.

PART 738 - [AMENDED]

6. Supplement No. 1 to Part 738 is amended by revising the the phrase “greater than 10,000 MTOPS” in the second footnote to read “greater than 20,000 MTOPS”

PART 740 - [AMENDED]

7. Section 740.7 is amended by:

- a. Revising paragraphs (b)(1) and (c);
- b. Revising paragraphs (d)(2) and (d)(3); and
- c. Revising paragraphs (d)(5)(i) and (d)(5)(v) introductory text to read as follows:

§740.7 Computers (CTP)

* * * * *

(a) * * *

(b) Computer Tier 1

(1) Eligible countries. The countries that are eligible to receive exports and reexports

under this License Exception are Australia, Austria, Belgium, Brazil, Czech Republic, Denmark,

Finland, France, Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Japan,

Liechtenstein, Luxembourg, Mexico, Monaco, Netherlands, New Zealand, Norway, Poland,

Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

(2) * * *

(c) Computer Tier 2

(1) Eligible countries. The countries that are eligible to receive exports under this

License Exception include Antigua and Barbuda, Argentina, Bahamas, Barbados, Bangladesh,

Belize, Benin, Bhutan, Bolivia, Botswana, Brunei, Burkina Faso, Burma, Burundi, Cameroon,

Cape Verde, Central Africa, Chad, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Cyprus,

Dominica, Dominican Republic, Ecuador, El Salvador, Equatorial Guinea, Eritrea, Ethiopia, Fiji,
Gabon, Gambia (The), Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti,
Honduras, Hong Kong, Indonesia, Jamaica, Kenya, Kiribati, Korea (Republic of), Lesotho,
Liberia, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritius,
Micronesia (Federated States of), Mozambique, Namibia, Nauru, Nepal, Nicaragua, Niger,
Nigeria, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Rwanda, St. Kitts &
Nevis, St. Lucia, St. Vincent and Grenadines, Sao Tome & Principe, Senegal, Seychelles, Sierra
Leone, Singapore, Slovak Republic, Slovenia, Solomon Islands, Somalia, South Africa, Sri
Lanka, Surinam, Swaziland, Taiwan, Tanzania, Togo, Tonga, Thailand, Trinidad and Tobago,
Tuvalu, Uganda, Uruguay, Venezuela, Western Sahara, Western Samoa, Zaire, Zambia, and
Zimbabwe.

(2) Eligible computers. The computers eligible for License Exception CTP to Tier 2

destinations are those having a CTP greater than 2,000 MTOPS, but less than or equal to 20,000 MTOPS.

(d) Computer Tier 3

(1) * * *

(2) Eligible computers. The computers eligible for License Exception CTP to Tier 3

destinations are those having a CTP greater than 2,000 MTOPS, but less than or equal to 12,300 MTOPS for civil end-users and end-uses. Beginning on January 23, 2000, computers having a CTP greater than 2,000 MTOPS but less than or equal to 6,500 MTOPS are eligible for License Exception CTP to military end-users and end-uses subject to the restrictions in paragraph (d)(3) of this section.

(3) Eligible exports. Only exports and reexports to permitted end-users and end-uses located in countries in Computer Tier 3. License Exception CTP does not authorize exports and reexports to Computer Tier 3 for nuclear, chemical, biological, or missile end-users and end-uses and military end-users and end-uses subject to license requirements under §744.2, §744.3, §744.4, §744.5, and §744.12 of the EAR. Such exports and reexports will continue to require a license and will be considered on a case-by-case basis. Retransfers to defined proliferation end-users and end-uses in eligible countries is strictly prohibited without prior authorization.

(4) * * *

(5) NDAA notification.

(i) General requirement. The National Defense Authorization Act (NDAA) of FY98 enacted on November 18, 1997 requires advance notification of certain exports and

reexports of computers to Computer Tier 3 countries. Prior to January 23, 2000, advance notification is required for all exports and reexports of computers with a CTP between 2,000 and 12,300 MTOPS to Computer Tier 3 destinations. Beginning on January 23, 2000, advance notification is required for all exports and reexports of computers with a CTP between 6,500 and 12,300 MTOPS to Computer Tier 3 destinations. For each such transaction destined to Computer Tier 3, prior to using License Exception CTP, you must first notify BXA by submitting a completed Multipurpose Application Form (BXA-748P). The Multipurpose Application Form must be completed including all information required for a license application according to the instructions described in Supplement No. 1 to part 748 of the EAR, with two exceptions. You (the applicant as listed in Block 14) shall in Block 5 (Type of Application) mark the box "Other." This designator will permit BXA to route the NDAA notice into a special

processing procedure. (Blocks 6 and 7, regarding support documentation, may be left blank.)

You must also provide a notice using this procedure prior to exporting or reexporting items that

you know will be used to enhance beyond 2,000 MTOPS the CTP of a previously exported or

reexported computer. Beginning on January 23, 2000, you must provide a notice using this

procedure prior to exporting or reexporting items that you know will be used to enhance beyond

6,500 MTOPS the CTP of a previously exported or reexported computer. BXA will not initiate

the registration of an NDAA notice unless all information on the Multipurpose Application form

is complete.

* * * * *

(v) Post-shipment verification. This section outlines special post-shipment

reporting requirements for exporters of computers with a CTP over 2,000 MTOPS to destinations

in Computer Tier 3 under the NDAA. These reporting requirements also apply when you know that the items being exported will be used to enhance beyond 2,000 MTOPS the CTP of a previously exported or reexported computer. Such reports must be submitted in accordance with the provisions of this paragraph (d)(5)(v), and records of such exports subject to the post-shipment reporting requirements of this section, must be kept in accordance with part 762 of the EAR.

* * * * *

8. Section 740.11 is amended by revising the phrase “10,000 MTOPS” in paragraphs (a)(2)(ii) and (iii) and in paragraph (c)(2)(i) to read “20,000 MTOPS”.

9. Supplement No. 1 to section 740.11 is amended by revising the phrase “10,000 MTOPS” in paragraphs (a)(1)(ii), (a)(1)(iii), (b)(1)(ii), and (b)(1)(iii) to read “20,000 MTOPS”.

PART 742 - [AMENDED]

10. Section 742.12 is amended by revising the phrase “greater than 10,000” in paragraph (b)(2)(i) to read “greater than 20,000”; by revising the phrase “to military end-users and end-uses and to nuclear, chemical, biological, or missile end-users and end-uses defined in part 744 of the EAR” in paragraph (b)(3)(i)(A) to read “to nuclear, chemical, biological, or missile end-users and end-uses and military end-users and end-uses subject to license requirements under §744.2, §744.3, §744.4, §744.5, and §744.12 of the EAR”; by revising the phrase “to military end-users and end-uses and nuclear, chemical, biological, or missile end-users and end-uses defined in part 744 of the EAR” in paragraph (b)(3)(ii) to read “to nuclear, chemical, biological, or missile end-users and end-uses and military end-users and end-uses subject to license requirements under §744.2, §744.3, §744.4, §744.5, and §744.12 of the EAR”; and by revising paragraphs (b)(3)(i)(B) and

(C) to read as follows:

* * * * *

§742.12 High Performance Computers

* * * * *

(b) * * *

(3) * * *

(i) * * *

(B) A license is required to export or reexport computers with a CTP

greater than 12,300 MTOPS for civilian end-users and end-uses in countries in Computer Tier 3.

Prior to January 23, 2000, a license is required to export or reexport computers having a CTP

greater than 2,000 MTOPS to military end-users and end-uses in Computer Tier 3. Beginning on

January 23, 2000, a license is required to export or reexport computers having a CTP greater than 6,500 MTOPS to military end-users and end-uses in Computer Tier 3.

(C) Prior to January 23, 2000, a license may be required to export or reexport computers with a CTP greater than 2,000 MTOPS to countries in Computer Tier 3 pursuant to the NDAA (see §740.7(d)(5) of the EAR). Beginning on January 23, 2000, a license may be required to export or reexport computers with a CTP greater than 6,500 MTOPS to countries in Computer Tier 3 pursuant to the NDAA (see §740.7(d)(5) of the EAR).

* * * * *

Dated:

Iain S. Baird

Deputy Assistant Secretary for

Export Administration