

SUPPORTING STATEMENT
U.S. Department of Commerce
Bureau of Industry and Security
Commercial Encryption Items under Commerce Jurisdiction
OMB Control No. 0694-0104

A. Justification

This is a request to extend the Office of Management and Budget approval.

1. Explain the circumstances that make the collection of information necessary.

This information collection is needed to implement certain export licensing-related requirements under the Export Administration Regulations (EAR). The EAR was issued under authority of Section 15(b) of the **Export Administration Act of 1979** (as amended). The Export Administration Act has expired. The regulations remain in force pursuant to **Executive Order 13222** of August 17, 2001 and annual extensions of the national emergency declared in the Executive Order under the **International Emergency Economic Powers Act** (IEEPA).

The collection is necessary to provide technical and end user information for encryption items that are eligible for export under license exception or under licenses that authorize exports to various destinations. The collection provides technical information to the National Security Agency (NSA) for purposes of its programs related to encrypted communications.

2. Explain how, by whom, how frequently, and for what purpose the information will be used. If the information collected will be disseminated to the public or used to support information that will be disseminated to the public, then explain how the collection complies with all applicable Information Quality Guidelines.

The information about encryption items that is collected under this collection is required to protect the national security and foreign policy interests of the United States by identifying products used to encrypt information in public and private networks worldwide. Many U.S. encryption products are excepted from licensing requirements for export to government and non-government end-users alike (except sanctioned or embargoed destinations), on the basis of a one-time technical review of the encryption product (the information submission required for the pre-export review of encryption items is subject to collection under OMB Control No. 0694-0088); certain products require a license for export to government end users in all but 30 countries following the technical review.

The U.S. Government has determined that technical review, pre-export notification and post-export reporting of encryption items are necessary for reasons of national security and foreign policy. Through these channels, the U.S. Government can determine what specific types of encryption products a foreign private or government end-user is installing or has installed in its network. In addition, the U.S. Government may receive notification when encryption source code is made publicly available in the United States and receives notification of key-length increases in certain encryption products. Specifically, this collection comprises five requirements for submission of information as follows:

- 1) Semi-annual reporting of certain exports of encryption items authorized under License Exception ENC, as required by section 740.17(e)(1) of the EAR;
- 2) Semi-annual reporting of exports of encryption items authorized under license or under encryption licensing arrangement (ELA), required by conditions placed on the license or ELA, as referenced in section 742.15(a) of the EAR;
- 3) 15-day pre-shipment notification of encryption items authorized under license or under ELA, required by conditions placed on the license or ELA, as referenced in section 742.15(a) of the EAR.
- 4) Notification of the Internet location of the source code, or provision of a copy of the source code, of encryption software made publicly available and authorized for export under License Exception TSU, as required by section 740.13(e)(3) of the EAR; and
- 5) Notification of key length increases to commodities and software that have been reviewed and authorized under License Exception ENC, as required by section 740.17(e)(2) of the EAR.

BIS use of the information collected: As discussed below, most of the information is collected through submissions to two dedicated email accounts, one at BIS and one at NSA (crypt@bis.doc.gov and enc@nsa.gov). BIS does not review or use the information collected for any purpose associated with its licensing activities. BIS does not sort the information collected; the information is simply stored in the dedicated email inbox. Because BIS does not review or use the information collected, it does not audit exporters to determine if they are complying with the reporting and notification requirements.

NSA use of the information: On a daily basis, NSA personnel use this information to gain valuable insight into encryption product capabilities, specifications and design. The information also provides disclosure of sales and distributions, unique trend data and the ability to anticipate future requirements. It is estimated that NSA consults the semi-annual reports at least 30 times per month. Most likely, this number is significantly higher, as the information is provided to personnel via a searchable repository that does not track the amount of usage. The pre-shipment

notifications are utilized approximately 40 times per month or more precisely, every time a notice is received. Similar to the semi-annual reports, both the TSU and key-length increase notifications are conglomerated into a repository that does not have a tracking ability.

The information collected is not disseminated to the public or used to support information that will be disseminated to the public.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological techniques or other forms of information technology.

Semi-annual reporting requirements under License Exception ENC and under license/ELA conditions may be submitted by email, on CD by mail, or in paper format. Pre-shipment notifications, key-length increase notifications and source code notifications for License Exception TSU are required by the EAR to be emailed to BIS and to NSA.

4. Describe efforts to identify duplication.

The Bureau of Industry and Security has identified significant duplication of the collection of post-shipment reporting on exports under license exception and under licenses required under sections 740.17(e) and 742.15(a) of the EAR. A large percentage of this information is already collected by the U.S. Government through the Automated Export System (AES) administered by the Bureau of the Census. AES reporting is collected immediately upon export; section 740.17(e) and 742.15(a) reporting is collected only semi-annually, up to eight months after an export has taken place. BIS has suggested to NSA that it take steps to obtain access to AES information. NSA did research on the feasibility to leverage the AES data, but found that it did not provide the level of detail and/or specific information required for national security purposes.

5. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.

This collection of information may impose a burden on small businesses or other small entities. There is anecdotal evidence that many small businesses are unaware of the regulatory requirements and therefore do not comply with them. As the encryption products developed and exported by small businesses and individual persons may have the same level of cryptographic functionality as the products developed and exported by large businesses, there is not a practical means to minimize burden on small businesses or entities.

6. Describe the consequences to the Federal program or policy activities if the collection is not conducted or is conducted less frequently.

If the collection of post-shipment reports were not conducted or were conducted less frequently, the U.S. Government would still have access to specific information because the regulations require exporters to maintain records of their exports for five years following shipment; therefore, the information is available upon request. In addition, comparable information on most exports subject to the semi-annual post-shipment reporting requirement is available to the U.S. Government through the AES system. The exception is the intangible (i.e., electronic) export of software, which is not subject to AES reporting.

Pre-shipment notifications for exports under licenses and ELAs are collected as an alternative to transaction-by-transaction licensing. A license application generally takes up to 30 days to process. If collection of 15-day pre-shipment notifications were not conducted, the information would be collected by licensing the individual export transactions. This would be a greater burden on exporters and the U.S. Government.

The License Exception TSU notification is provided for in the EAR to inform the U.S. Government when encryption source code is made publicly available for export from the United States. However, there is no requirement for a person or company to notify the government when it makes encryption source code publicly available. Therefore, it is unknown what percentage of publicly available encryption source code is notified to the U.S. Government through this requirement. In addition, encryption source code may be made publicly available (e.g., posted on the Internet) in other countries, and would not be subject to the EAR. If this collection were not conducted, the U.S. Government could search the Internet and published materials for encryption source code.

The key length increase notification is provided for in the EAR as an alternative to requiring review of a new version of an encryption item when the only change to the item is an increase in the key length. Only 8 notifications of key length increases were received in 2008.

7. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with OMB guidelines.

There are no special circumstances that require the collection to be conducted in a manner inconsistent with the guidelines in 5 CFR 1320.6.

8. Provide a copy of the PRA Federal Register notice that solicited public comments on the information collection prior to this submission. Summarize the public comments received in response to that notice and describe the actions taken by the agency in response to those comments. Describe the efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

The notice requesting public comment was published in the Federal Register on June 17, 2009, pp 286633-28664. No comments were received.

9. Explain any decisions to provide payments or gifts to respondents, other than remuneration of contractors or grantees.

There is no plan to provide any payment or gift to respondents.

10. Describe any assurance of confidentiality provided to respondents and the basis for assurance in statute, regulation, or agency policy.

Section 12(c) of the EAA provides for the confidentiality of export licensing information submitted to the Department of Commerce.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

There are no questions of a sensitive nature.

12. Provide an estimate in hours of the burden of the collection of information.

The totals associated with this collection are **940** respondents, **8,090** burden hours and **\$242,688** in labor costs, as follows:

It is estimated that there will be a total of **400 post-shipment reports** of exports of encryption items under License Exception ENC and encryption licenses with reporting requirements, based on the submission of 314 reports by email and 20 reports in hard copy for calendar year 2008 (for the reporting periods January–June 2008 and July–December 2008). The calendar year 2008

reports included approximate 300 reports of exports under License Exception ENC and 30 reports under ELAs and licenses. The number of post-shipment reports is expected to increase as BIS has recently issued a number of very broad ELAs that will replace several hundred individual transaction licenses. It is estimated that it will take 20 hours to complete each report, for a total of 8,000 hours. The estimate of 20 hours is based on anecdotal reports from large exporters that the compilation of the semi-annual reports of thousands of exports may take up to 80 hours of staff time, and on the receipt of reports of only one or two exports that would take significantly less than 20 hours. At an hourly rate of \$30/hour, the annual burden on the public is \$240,000.

The estimate for the annual number of **pre-shipment notifications** is **300**, based on the submission of 250 notifications in calendar year 2008. The number of pre-shipment notifications is expected to increase as BIS is issuing more ELAs with the pre-shipment notification condition imposed on them, in place of licenses for individual export transactions. These notifications require approximately 10 minutes to prepare and submit, so the total burden hours would be 50 hours. At an hourly rate of \$30/hour, the annual burden on the public is \$1,500.

It is estimated that there will be approximately **230 notifications under License Exception TSU** for the export and reexport of unrestricted encryption source code, based on the submission of this number notifications in calendar year 2008. It will take companies 10 minutes to complete such notifications by submitting an email to two addressees (BIS and NSA); thus, at \$30 an hour, the burden on the public is $(230 \times 10 \text{ minutes} = 38 \text{ hours}) 38 \text{ hours} \times \$30 = \$1140$.

It is estimated that there will be **10 email notifications reports for key length increases** for previously reviewed products under section 740.17(d)(3) of the EAR, based on the submission of 8 notifications in calendar year 2008. It will take companies 10 minutes to complete such notifications; thus, at \$30 an hour, the burden on the public is $(10 \times 10 \text{ minutes/each} = 1.6 \text{ hours}) 1.6 \text{ hours} \times \$30 = \$48$.

Summary of burden hours/costs for respondents:

Activity	Annual Responses	Burden per Response	Total Hours	Hourly Rate	Cost (\$)
ENC/ELA semi-annual reports	400	20 hours	8000	30	240,000
Pre-shipment Notifications	300	10 minutes	50	30	1,500
TSU notifications	230	10 minutes	38	30	1,140
Key length increase notifications	10	15 minutes.	2.5	30	48
TOTALS	940		8,090		242,688

13. Provide an estimate of the total annual cost burden to the respondents or record-keepers resulting from the collection (excluding the value of the burden hours in #12 above).

There is no capitol equipment or startup costs associated with this collection.

14. Provide estimates of annualized cost to the Federal government.

BIS does not review the submissions for any regulatory purpose; however, BIS does spend time explaining the collection requirements to exporters, totaling approximately 100 inquiries per year. At a rate of \$40 per hour, this totals an annual cost to BIS of \$4,000.

NSA analysts review the reports and notifications submitted. It is estimated that NSA staff spend 115 hours per month (1,380 hours per year) on the administration (e.g., sorting and reformatting) of encryption reports and notifications submitted. At a rate of \$40 per hour, this totals an annual cost to NSA of approximately \$55,200.

15. Explain the reasons for any program changes or adjustments.

There is an increase of 260 responses and 3,583 burden hours. This is an adjustment based upon an increased number of reports and notifications received during calendar year 2008.

16. For collections whose results will be published, outline the plans for tabulation and publication.

This collection will not be published.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons why display would be inappropriate.

Not applicable.

18. Explain each exception to the certification statement.

Not applicable.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable.