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ADMINISTRATION OF EXPORT CONTROLS ON ENCRYPTION PRODUCTS

COMMUNICATION

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

REVISIONS TO THE PROVISIONS THAT APPLY TO THE DEPARTMENT OF COMMERCE IN THE EXPORT ADMINISTRATION REGULATIONS, 15 CFR PART 730 ET SEQ.—RECEIVED IN THE UNITED STATES HOUSE OF REPRESENTATIVES NOVEMBER 15, 1996, PURSUANT TO 50 U.S.C. 1703(b)



JANUARY 7, 1997.—Referred to the Committee on International Relations and ordered to be printed

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THE WHITE HOUSE,
Washington, November 15, 1996.

Hon. NEWT GINGRICH,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: In order to take additional steps with respect to the national emergency described and declared in Executive Order 12924 of August 19, 1994, and continued on August 15, 1995, and August 14, 1996, necessitated by the expiration of the Export Administration Act (EAA) on August 20, 1994, I hereby report to the Congress that pursuant to section 204(b) of the International Emergency Economic Powers Act, 50 U.S.C. 1703(b) (the "Act"), I have today exercised the authority granted by the Act to issue an Executive order (a copy of which is attached) to revise the provisions that apply to the administration of the export control system maintained by Department of Commerce in the Export Administration Regulations, 15 CFR Part 730 *et seq*.

The new Executive order relates to my decision to transfer certain encryption products from the United States Munitions List administered by the Department of State to the Commerce Control List administered by the Department of Commerce. When I made that decision I also decided to amend Executive Order 12981 of December 5, 1995, which sets forth procedures for the interagency review and disposition of dual-use export license applications, to include the Department of Justice among the agencies that have the opportunity to review such applications with respect to encryption products transferred to Department of Commerce control.

Also, in issuing the new order, I provided for appropriate controls on the export and foreign dissemination of encryption products transferred to the Department of Commerce. Among other provisions, I determined that the export of encryption products transferred to Department of Commerce control could harm national security and foreign policy interests of the United States even where comparable products are or appear to be available from foreign sources. Accordingly, the new order makes clear that any EAA provision dealing with issuance of licenses or removal of controls based on foreign availability considerations shall not apply with respect to export controls on such encryption products. Notwithstanding this, the Secretary of Commerce retains the discretion to consider the foreign availability to comparable encryption products in any particular case.

Sincerely,

WILLIAM J. CLINTON.

EXECUTIVE ORDER

ADMINISTRATION OF EXPORT CONTROLS ON ENCRYPTION PRODUCTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including but not limited to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*), and in order to take additional steps with respect to the national emergency described and declared in Executive Order 12924 of August 19, 1994, and continued on August 15, 1995, and on August 14, 1996, I, WILLIAM J. CLINTON, President of the United States of America, have decided that the provisions set forth below shall apply to administration of the export control system maintained by the Export Administration Regulations, 15 CFR Part 730 *et seq.* ("the EAR"). Accordingly, it is hereby ordered as follows:

Section 1. Treatment of Encryption Products. In order to provide for appropriate controls on the export and foreign dissemination of encryption products, export controls of encryption products that are or would be, on this date, designated as defense articles in Category XIII of the United States Munitions List and regulated by the United States Department of State pursuant to the Arms Export Control Act, 22 U.S.C. 2778 *et seq.* ("the AECA"), but that subsequently are placed on the Commerce Control List in the EAR, shall be subject to the following conditions: (a) I have determined that the export of encryption products described in this section could harm national security and foreign policy interests even where comparable products are or appear to be available from sources outside the United States, and that facts and questions concerning the foreign availability of such encryption products cannot be made subject to public disclosure or judicial review without revealing or implicating classified information that could harm United States national security and foreign policy interests. Accordingly, sections 4(c) and 6(h)(2)–(4) of the Export Administration Act of 1979 ("the EAA"), 50 U.S.C. App. 2403(c) and 2405(h)(2)–(4), as amended and as continued in effect by Executive Order 12924 of August 19, 1994, and by notices of August 15, 1995, and August 14, 1996, all other analogous provisions of the EAA relating to foreign availability, and the regulations in the EAR relating to such EAA provisions, shall not be applicable with respect to export controls on such encryption products. Notwithstanding this, the Secretary of Commerce ("Secretary") may, in his discretion, consider the foreign availability of comparable encryption products in determining whether to issue a license in a particular case or to remove controls on particular products, but is not required to issue licenses in particular cases or to remove controls on particular products based on such consideration;

(b) Executive Order 12981, as amended by Executive Order 13020 of October 12, 1996, is further amended as follows:

(1) A new section 6 is added to read as follows: "*Sec. 6. Encryption Products.* In conducting the license review described in section 1 above, with respect to export controls of encryption products that are or would be, on November 15, 1996, designated as defense articles in Category XIII of the United States Munitions List and regulated by the United States Department of State pursuant to the Arms Export Control Act, 22 U.S.C. 2778 et seq., but that subsequently are placed on the Commerce Control List in the Export Administration Regulations, the Departments of State, Defense, Energy, and Justice and the Arms Control and Disarmament Agency shall have the opportunity to review any export license application submitted to the Department of Commerce. The Department of Justice shall, with respect to such encryption products, be a voting member of the Export Administration Review Board described in section 5(a)(1) of this order and of the Advisory Committee on Export Policy described in section 5(a)(2) of this order. The Department of Justice shall be a full member of the Operating Committee of the ACEP described in section 5(a)(3) of this order, and of any other committees and consultation groups reviewing export controls with respect to such encryption products."

(2) Sections 6 and 7 of Executive Order 12981 of December 5, 1995, are renumbered as new sections 7 and 8, respectively.

(c) Because the export of encryption software, like the export of other encryption products described in this section, must be controlled because of such software's functional capacity, rather than because of any possible informational value of such software, such software shall not be considered or treated as "technology," as that term is defined in section 16 of the EAA (50 U.S.C. App., 2415) and in the EAR (61 Fed. Reg. 12714, March 25, 1996);

(d) With respect to encryption products described in this section, the Secretary shall take such actions, including the promulgation of rules, regulations, and amendments thereto, as may be necessary to control the export of assistance (including training) to foreign persons in the same manner and to the same extent as the export of such assistance is controlled under the AECA, as amended by section 151 of Public Law 104–164;

(e) Appropriate controls on the export and foreign dissemination of encryption products described in this section may include, but are not limited to, measures that promote the use of strong encryption products and the development of a key recovery management infrastructure; and

(f) Regulation of encryption products described in this section shall be subject to such further conditions as the President may direct.

Sec. 2. Effective Date. The provisions described in section 1 shall take effect as soon as any encryption products described in section 1 are placed on the Commerce Control List in the EAR.

Sec. 3. Judicial Review. This order is intended only to improve the internal management of the executive branch and to ensure the implementation of appropriate controls on the export and foreign dissemination of encryption products. It is not intended to, and does not, create any rights to administrative or judicial review, or

any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

WILLIAM J. CLINTON.

THE WHITE HOUSE, *November 15, 1996.*

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