



Office of the General Counsel

B-275864

January 13, 1997

The Honorable Larry Pressler
Chairman
The Honorable Ernest F. Hollings
Ranking Minority Member
Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Thomas J. Bliley, Jr.
Chairman
The Honorable John D. Dingell
Ranking Minority Member
Committee on Commerce
House of Representatives

Subject: Department of Commerce, Bureau of Export Administration: Encryption
Items Transferred From the U.S. Munitions List to the Commerce Control
List

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by Department of Commerce, Bureau of Export Administration (BXA), entitled "Encryption Items Transferred From the U.S. Munitions List to the Commerce Control List" (RIN: 0694-AB09). We received the rule on December 24, 1996. It was published in the Federal Register as an interim rule on December 30, 1996. 61 Fed. Reg. 68572.

The interim rule implements the Administration's policy on encryption exports and reexports as announced in Executive Order No. 13026 and a Presidential Memorandum, both dated November 15, 1996. The rule amends the Export Administration Regulations by imposing national security and foreign policy controls on certain information security systems and equipment, cryptographic devices, software and components specifically designed or modified therefor, and related technology. In addition, the rule requires a license for exports and reexports to all destinations, except Canada, of certain encryption items.

The interim rule is effective on the date of publication in the Federal Register notwithstanding the provisions of 5 U.S.C. § 801(a)(3) which require a 60-day delay in the effective date of a major rule. The Assistant Secretary for Export Administration has determined pursuant to 5 U.S.C. § 808(2) that there is good cause to waive the requirement to provide notice and public participation since the delay would be contrary to the public interest. This determination was made based on the rule implementing an initiative intended to protect the national security and foreign policy interests of the United States and streamline export controls for encryption items.

Enclosed is our assessment of the BXA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that the BXA complied with the applicable requirements.

If you have any questions about this report, please contact James Vickers, Senior Attorney, at (202) 512-8210. The official responsible for GAO evaluation work relating to the subject matter of the rule is Louis Rodrigues, Director, Defense Acquisition Issues. Mr. Rodrigues can be reached at (202) 512-4841.

Robert P. Murphy
General Counsel

Enclosure

cc: Sue E. Eckert
Assistant Secretary for Export Administration
Department of Commerce

ENCLOSURE

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY
THE DEPARTMENT OF COMMERCE, BUREAU OF EXPORT ADMINISTRATION
ENTITLED
"ENCRYPTION ITEMS TRANSFERRED FROM THE U.S. MUNITIONS LIST TO THE
COMMERCE CONTROL LIST"
(RIN: 0694-AB09)

(i) Cost-benefit analysis

The Bureau of Export Administration (BXA) performed a cost benefit analysis in regard to the interim rule. The cost to the government is estimated to be \$1,000,000 for fiscal year 1998 for funding 13 positions to administer the initiative. BXA has requested a departmental transfer of \$834,000 for fiscal year 1997. These costs include administering existing export controls on encryption products which are transferred from the State Department and new changes that liberalize export controls and promote development of a key management infrastructure. For companies that choose to export, there will be costs associated with researching, developing, and marketing new encryption recovery products which costs are not quantified in the analysis. The costs associated with complying with the information collection requirements of the interim rule are estimated to be \$591,850 for the industry.

The benefits derived from the interim rule are the promotion of the growth of electronic commerce and secure communications worldwide through the development of a domestic and international key recovery infrastructure, which benefits national security, law enforcement and public safety. This includes the establishment of Trusted Third Parties who will safeguard keys and make them available to authorized persons, providing access by the government to clear text of material that has been encrypted.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607 and 609

Because the interim rule was exempted from the Administrative Procedure Act, as discussed below, it is not subject to the Regulatory Flexibility Act.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

The interim rule does not contain a Federal mandate under Title 2 of the Act for State, local or tribal governments or the private sector and therefore, section 202 and 205 of the Act are inapplicable.

In addition, the interim rule does not affect small governments or contain a significant intergovernmental mandate. Accordingly, sections 203 and 204 of the Act, which require agencies to consult with small governments and solicit input from State, local and tribal governments, are also inapplicable.

(iv) Other relevant information or requirements under Acts and Executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

Since the interim rule involves a military and foreign affairs function, the provisions of the Administrative Procedure Act requiring a notice of proposed rulemaking, the opportunity for public participation and a delay in the effective date are inapplicable. 5 U.S.C. § 553(a)(1).

However, the BXA has issued the rule as an interim rule and comments are being accepted until February 13, 1997, and will be considered prior to the development of final regulations.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The interim rule contains information collections subject to the Act. The collections have been approved by the Office of Management and Budget and assigned control numbers 0694-0048 and 0694-0088.

In addition, the interim rule contains a new information collection requirement subject to the Act which has received emergency approval by OMB and assigned control number 0694-0104. The burden hours estimated for the new requirement include: marketing plans (40 hours each); semi-annual progress reports (8 hours each); safeguard procedures (4 hours each); recordkeeping (2 hours each); and annual reports (4 hours each). Comments regarding this new information collection are solicited in the preamble to the interim rule.

Statutory authorization for the rule

While the Export Administration Act (50 U.S.C. app. § 2401 et seq.) expired on August 20, 1994, the President invoked the International Emergency Economic Powers Act and continued in effect, to the extent permitted by law, the provisions

of the Export Administration Act and the Export Administration Regulations in Executive Order No. 12924 (August 19, 1994), notice of August 15, 1995 (60 Fed. Reg. 42767) and notice of August 14, 1996 (61 Fed. Reg. 42527).

Executive Order No. 12866

The interim rule was reviewed by the Office of Management and Budget under the Executive Order as a "significant regulatory action." The Office of Information and Regulatory Affairs of OMB approved the interim rule as complying with the requirements of the Order based on the information supplied by the BXA, including a planned regulatory action document describing the reason for the rule and an assessment of the costs and budgetary impact of the rule.

Executive Order No. 12612 (Federalism)

The BXA has determined that the interim rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under the Order.

In its submission, BXA did not identify any other statute or executive order imposing procedural requirements relevant to the interim rule.