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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 200810-0211]

RIN: 0694-AI19

Clarification of Entity List Requirements for Listed Entities When Acting as a Party to the Transaction under the Export Administration Regulations (EAR)

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: In this final rule, the Bureau of Industry and Security (BIS) is clarifying the supplemental license requirements for parties listed on the Entity List pursuant to the Export Control Reform Act of 2018 (ECRA). Specifically, this final rule clarifies the Entity List's supplemental licensing requirements to state that these end-user controls apply to any listed entity when that entity is acting as a purchaser, intermediate or ultimate consignee, or end-user as defined in the Export Administration Regulations (EAR).

DATE: This rule is effective [INSERT DATE OF DISPLAY ON THE PUBLIC INSPECTION LIST].

FOR FURTHER INFORMATION: Chair, End-User Review Committee, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482-5991, Fax: (202) 482-3911, E-mail: ERC@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

The Entity List (Supplement No. 4 to part 744 of the Export Administration Regulations (EAR)) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States. The EAR (15 CFR parts 730-774) impose additional license requirements on, and limit the availability of most license exceptions for, exports, reexports, and transfers (in-country) to listed entities. The license review policy for each listed entity is identified in the “License review policy” column on the Entity List and the impact on the availability of license exceptions is described in the relevant *Federal Register* notice adding entities to the Entity List. BIS places entities on the Entity List pursuant to part 744 (Control

Policy: End-User and End-Use Based) and part 746 (Embargoes and Other Special Controls) of the EAR.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and all decisions to remove or modify an entry by unanimous vote. The ERC approved the clarifications of the Entity List requirements in this rule, which will apply to all current entities on the Entity List and subsequent additions and modifications to the Entity List.

Clarification of Entity List requirements

As referenced above, § 744.11(a) of the EAR sets forth supplemental license requirements applicable to exports, reexports, and transfers (in-country) to entities listed on the Entity List, which have been involved, are involved, or pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States. In contrast to other provisions of the EAR (*i.e.*, §§ 740.2(a)(17), 744.15(b), and 758.1(b)(8)) that set forth restrictions applicable to exports, reexports, and transfers (in-country) to which a person listed on the Unverified List (*See*: Supplement No. 6 to part 744 of the EAR) is a *party to the transaction*, § 744.11(a) imposes supplemental license requirements on exports, reexports, and transfers (in-country) *to entities listed on the Entity List*. Prior to publication of this final rule, § 744.11 did not explicitly address circumstances in which a listed entity may be playing a role other than consignee or end-user in the transaction, *e.g.*, a purchaser or intermediate consignee.

However, since the first set of additions pursuant to § 744.11 on September 22, 2008 (73 FR 54503), Entity List rules published through 2019 typically included a sentence in the Background section of the rules that described the Entity List license requirements and limitations on the use of license exceptions. The purpose of this sentence was to alert exporters, reexporters, and transferors that BIS intended these requirements to apply to those listed entities when acting as any party to the transaction. The sentence specified that,

The license requirements apply to any transaction in which items are to be exported, reexported, or transferred (in-country) to any of the persons or in which such persons act as purchaser, intermediate consignee, ultimate consignee, or end-user.

Since 2019, BIS has evaluated how to revise the EAR to better clarify that Entity List license requirements, as specified on the Entity List, are intended to apply to listed entities regardless of their role as a party to a transaction.

This final rule amends the regulatory text to clarify that Entity List license requirements apply to entities on the Entity List, not only when they are party to a transaction as either an ultimate consignee or end-user, but also when they are party as a purchaser or intermediate consignee.

Consistent with the authority granted under § 4812(c) of ECRA, BIS is amending §§ 744.11 and 744.16 of the EAR and the introductory text of the Entity List in Supplement No. 4 to part 744 to specify that the Entity List requirements apply to all entities involved in a transaction subject to the EAR as described in § 748.5(c)-(f) of the EAR. These changes will make clear for exporters, reexporters, and transferors the scope of the Entity List's licensing requirements to effect the purpose of the Entity List.

As BIS has noted in the answers to frequently asked questions on its website, freight forwarders and other “intermediate consignees” may have access to items subject to the EAR, which creates a risk of diversion when such entities are listed on the Entity List. Similarly, a “purchaser” may coordinate all aspects of the purchase of items subject to the EAR from specifying the exporter, reexporter, or transferor, including designating the ultimate consignee who will receive the goods, to specifying the logistical arrangements made to effect delivery of the items to the ultimate consignee. Accordingly, when a person is listed on the Entity List, that person’s participation as a purchaser or intermediate consignee in an export, reexport, or transfer (in-country) of items subject to the EAR presents a risk that the person’s involvement in a transaction may circumvent the basis for their inclusion on the Entity List.

These clarifications to the Entity List requirements align with other end-user controls under the EAR. Specifically, as noted above, this language revision is consistent with EAR controls pursuant to § 744.15(b), which set forth restrictions applicable to exports, reexports, and transfers (in-country) involving persons listed on the Unverified List. BIS has determined that aligning the language of the Entity List and Unverified List requirements should ease the compliance burden on exporters, reexporters, and transferors because it will eliminate any confusion in interpretation of these two end-user control lists.

Changes made to the EAR

In this final rule, BIS is revising § 744.11(a) of the EAR to specify that supplemental license requirements for entities included on the Entity List apply regardless of the role that the listed entity has in the transaction (*i.e.*, purchaser, intermediate consignee, ultimate consignee or

end-user). The definitions of “purchaser,” “intermediate consignee,” “ultimate consignee,” and “end-user” are defined in § 748.5(c)-(f) and part 772 of the EAR.

Also in § 744.11(a), BIS is removing text indicating that the scope of the license requirements apply only to an entity listed on the Entity List “in an entry that contains a reference to this section.” BIS is removing this text because it is not consistent with the current practice of including references in Entity List entries to other parts of the EAR that set forth the scope of the supplemental license requirements and license review policies applicable to those entities. This final rule also makes conforming changes to the remainder of § 744.11.

BIS is also revising § 744.16(a) of the EAR, which similarly clarifies that the supplemental license requirements applicable to exports, reexports, and transfers (in-country) to *entities listed on the Entity List*, including on the basis of other sections of parts 744 (*e.g.*, §§ 744.2, 744.3, and 744.4) and 746. In keeping with the revision to § 744.11(a) described above, BIS is also clarifying that the license requirement described in § 744.16(a) applies whenever an entity listed on the Entity List is a party to the transaction as defined in § 748.5(c)-(f) of the EAR.

Finally, BIS is replacing the reference to “items listed in an entry on the Entity List” in § 744.16(a) of the EAR with a reference to the License Requirement column on the Entity List. BIS is making this change because the License Requirement column describes which items subject to the EAR require a license when an entity involved in a transaction is listed on the Entity List.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA), 50 U.S.C. Sections 4801–4852. ECRA provides the legal basis for BIS’s principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 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 of 1995 (44 U.S.C. 3501 et seq.), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by OMB under control number 0694–0088, Simplified Network Application Processing System, which includes, among other things, license applications and carries a burden estimate of 42.5 minutes for a manual or electronic submission. BIS expects this rule will slightly increase the number of

license applications required to be submitted to BIS each year by clarifying that the existing Entity List requirements apply to exports, reexports, and transfers (in-country) in which an entity listed on the Entity List acts as any party to the transaction, which will now include when the listed entity is a purchaser or intermediate consignee. BIS estimates the total number of additional license applications will not exceed 25 per year, for a total increase in public burden under OMB control number 0694-0088 of no more than 17 hours and 40 minutes per year. Any comments regarding the collection of information associated with this rule, including suggestions for reducing the burden, may be sent to Jasmeet K. Seehra, Office of Management and Budget (OMB), by e-mail to Jasmeet_K._Seehra@omb.eop.gov, or online at <https://www.reginfo.gov/public/do/PRAMain>.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to § 1762 of the Export Control Reform Act of 2018 (50 U.S.C. 4801-4852), which was included in the John S. McCain National Defense Authorization Act for Fiscal Year 2019, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity 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 not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 744 – CONTROL POLICY: END-USE AND END-USER BASED

1. The authority citation for part 744 is revised to read as follows:

Authority: 50 U.S.C. 4801-4852; 50 U.S.C. 4601 et seq.; 50 U.S.C. 1701 et seq.; 22 U.S.C. 3201 et seq.; 42 U.S.C. 2139a; 22 U.S.C. 7201 et seq.; 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 19, 2019, 84 FR 49633 (September 20, 2019); Notice of November 12, 2019, 84 FR 61817 (November 13, 2019).

2. Section 744.11 is amended by revising paragraph (a) to read as follows:

§ 744.11 License requirements that apply to entities acting contrary to the national security or foreign policy interests of the United States.

* * * * *

(a) *License requirement, availability of license exceptions, and license application review policy.*

A license is required, to the extent specified on the Entity List, to export, reexport, or transfer (in-country) any item subject to the EAR when an entity that is listed on the Entity List is a party to the transaction as described in § 748.5(c) through(f). License exceptions may not be used unless authorized in the Entity List entry for the entity that is party to the transaction.

Applications for licenses required by this section will be evaluated as stated in the Entity List entry for the entity that is party to the transaction, in addition to any other applicable review policy stated elsewhere in the EAR.

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3. Section 744.16 is amended by revising paragraph (a) to read as follows:

§ 744.16 Entity List.

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(a) *License requirements.* In addition to the license requirements for items specified on the Commerce Control List (CCL), you may not, without a license from BIS, export, reexport, or transfer (in-country) any items included in the License Requirement column of an entity's entry on the Entity List (supplement No. 4 to this part) when that entity is a party to a transaction as described in § 748.5(c) through(f) of the EAR. The specific license requirement for each listed

entity is identified in the license requirement column on the Entity List in Supplement No. 4 to this part.

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4. Supplement No. 4 to part 744 is amended by revising the introductory text of the supplement to read as follows:

Supplement No. 4 to Part 744 - Entity List

This Supplement lists certain entities subject to license requirements for specified items under this part 744 and part 746 of the EAR. License requirements for these entities include exports, reexports, and transfers (in-country) unless otherwise stated. A license is required, to the extent specified on the Entity List, to export, reexport, or transfer (in-country) any item subject to the EAR when an entity that is listed on the Entity List is a party to the transaction as described in § 748.5(c) through(f). This list of entities is revised and updated on a periodic basis in this Supplement by adding new or amended notifications and deleting notifications no longer in effect.

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Matthew S. Borman,
Deputy Assistant Secretary
for Export Administration.

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