



**BILLING CODE 3510–JT–P**

**DEPARTMENT OF COMMERCE**

**Bureau of Industry and Security**

**Export Control Reform: Conforming Change to Defense Sales Offset Reporting Requirements**

**15 CFR Part 701**

**[Docket No. 150825780-6125-02]**

**RIN 0694–AG38**

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Final rule.

**SUMMARY:** This rule requires reporting of offsets agreements in connection with sales of items controlled on the United States Munitions List (USML) and items controlled in “600 series” Export Control Classification Numbers (ECCNs) on the Commerce Control List (CCL) except for certain submersible and semi-submersible cargo transport vessels and related items that are not on the control lists of any of the multilateral export control regimes of which the United States is a member. Since the early 1990s, BIS has required reporting of offsets agreements in connection with sales of items controlled on the USML. Those reporting requirements will continue, unchanged by this rule. Beginning on October 15, 2013, some items

have been removed from the USML and been added to 600 series ECCNs. These items were subject to offsets reporting requirements prior to being added to 600 series ECCNs. Some other items have been moved from non-600 series ECCNs to 600 series ECCNs as part of the Administration's Export Control Reform Initiative. This rule requires reporting of offsets agreements in connection with sales of items controlled in 600 series ECCNs regardless of whether the item was added to a 600 series ECCN simultaneously with its removal from the USML or was subject to the EAR prior to its inclusion in a 600 series ECCN, except for certain submersible and semi-submersible cargo transport vessels and related items that are not on the control lists of any of the multilateral export control regimes of which the United States is a member. The changes made by this rule were the subject of a proposed rule for which BIS received no comments. This final rule adopts the text of the proposed rule without change.

**DATES:** Effective: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Ronald DeMarines, Strategic Analysis Division, Office of Strategic Industries and Economic Security, 202-482-3755, or *ronald.demarines@bis.doc.gov*.

**SUPPLEMENTARY INFORMATION:**

**Background**

Part 701 of Title 15, Code of Federal Regulations – Reporting of Offsets Agreements in Sales of Weapon Systems or Defense-Related Items to Foreign Countries or Foreign Firms (herein the Offsets Reporting Regulations) requires that U.S. firms report certain offset

agreements to BIS annually. BIS uses the information so reported to develop a “detailed annual report on the impact of offsets on the defense preparedness, industrial competitiveness, employment, and trade of the United States” (herein “the offset report to Congress”), that is submitted to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives, as required by Section 723 of the Defense Production Act of 1950, as amended (DPA) (50 U.S.C. 4568(a)(1)). An offset for purposes of the Offsets Reporting Regulations is compensation required by the purchaser as a condition of the purchase in government-to-government or commercial sales of defense articles or services. This compensation can take a variety of forms, including: co-production, technology transfer, subcontracting, credit assistance, training, licensed production, investment, and purchases. An agreement to provide offsets with a value exceeding \$5,000,000 must be reported to BIS. Performance of an existing offset commitment for which offset credit of \$250,000 or more has been claimed must also be reported to BIS.

The Defense Production Act describes the items for which the offset report to Congress must be submitted as “weapon system[s] or defense-related item[s].” (*See* section 723 of the DPA) (50 U.S.C. 4568(c)(1)). The Offsets Reporting Regulations currently require reporting of offsets in connection with “defense articles and/or defense services” as defined by the Arms Export Control Act and the International Traffic in Arms Regulations (22 CFR parts 120 – 130) (ITAR). *See* 15 CFR 701.2(a). The ITAR includes the USML (22 CFR part 121), which describes the defense articles that it regulates. Beginning on October 15, 2013, as part of the Administration’s Export Control Reform Initiative, a series of rules removed a number of defense articles from the USML and added them to the CCL (15 CFR part 774, Supp. No. 1). BIS created a new series of ECCNs in the EAR, identified as the “600 series” because the third

character in the ECCN is the numeral “6,” for those defense articles. The 600 series items formerly controlled on the USML were subject to offsets reporting requirements before being added to the 600 series.

Simultaneously with adding former USML defense articles to the 600 series ECCNs, BIS added to those ECCNs some items that are of a military nature but that were already subject to the EAR. BIS took this step to provide consistent treatment for all military items that are subject to the EAR. Some of these items were in existing ECCNs. Others were subject to the EAR, but not set forth in any ECCN. Such items are designated under the EAR as EAR99 items. Items that were subject to the EAR prior to being added to 600 series ECCNs were not subject to offsets reporting requirements.

On December 2, 2015, BIS published a proposed rule (*see* 80 FR 75438) to require reporting of offsets agreements in connection with sales of all items controlled in 600 series ECCNs, except for certain submersible and semi-submersible cargo transport vessels and related items that are not on the control lists of any of the multilateral export control regimes of which the United States is a member, regardless of whether the item was controlled on the USML or subject to the EAR prior to being controlled under a 600 series ECCN. BIS received no comments on that proposed rule and this rule adopts the text of the proposed rule without change. The preamble to that proposed rule contained a description of 600 series ECCNs and a discussion of the antecedents to the current 600 series ECCNs, which identified items that were moved from the USML to 600 series ECCNs and items that were moved from non-600 series ECCNs to 600 series ECCNs (*see* 80 FR 75438, 75439 – 75441, December 2, 2015). The facts presented in that discussion have not changed and it is not repeated here.

## **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). This rule does not materially change any regulatory burden on the public and is consistent with the goals of Executive Order 13563. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person 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.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. The collection of offset reports has been approved by OMB under control number 0694-0084. The estimated number of annual responses is 30 and the estimated number of burden hours is 360. BIS believes that this rule will not materially change the number of responses or burden hours authorized under 0694-0084 because the primary impact of this rule is to restore reporting requirements that have lapsed since those estimates were made, and to retain reporting requirements that otherwise will lapse in the coming months. Although this rule will create new reporting requirements for some items that were subject to Department of Commerce export control jurisdiction prior to being added to 600 series ECCNs, the impact of those additions on the burden is likely to be insignificant because those items are primarily low value items such as military ground vehicles designed for non-combat use, which are not usually the subject of offset agreements. The higher value items that typically trigger offset requirements by the foreign government purchaser, such as combat aircraft, strategic

airlifter aircraft, ships, missiles and missile defense systems, are remaining on the USML and their offset reporting requirements have not changed. In addition, any increase in the reporting burden by the imposition of offsets reporting requirements on items that have moved to 600 series ECCNs is likely to be offset by a reduction in that burden resulting from the removal of some items from the USML and their addition to non-600 series ECCNs, which are not subject to offsets reporting requirements. Those items are: commercial spacecraft including satellites and related items, and certain energetic materials. Send comments regarding this burden estimate or any other aspect of these collections of information, including suggestions for reducing the burden, to Jasmeet K. Seehra, Office of Management and Budget, by e-mail at [jseehra@omb.eop.gov](mailto:jseehra@omb.eop.gov) or by fax to (202) 395-7285 and to William Arvin at [william.arvin@bis.doc.gov](mailto:william.arvin@bis.doc.gov).

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

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Chief Counsel for Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy, Small Business Administration that this rule will

not have a significant impact on a substantial number of small entities for the reasons explained below. BIS received no comments regarding the certification. Consequently, BIS has not prepared a final regulatory flexibility analysis.

Small entities include small businesses, small organizations and small governmental jurisdictions. For purposes of assessing the impact of this rule on small entities, a small entity is defined as: (1) A small business according to the “Table of Small Business Size Standards Matched to North American Industry Classification System Codes,” effective January 22, 2014, published by the Small Business Administration (the SBA size standards); (2) a small governmental jurisdiction that is a government of a city, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. BIS has determined that this rule will not affect any of these categories of small entities.

SBA's size standards classify businesses in various North American Industry Classification System (NAICS) codes as small based on their annual revenue or number of employees. For example, in 2014, the maximum annual revenue for a small business was \$33.5 million and the maximum number of employees was 1,500. Since BIS began collecting data in 1994, virtually all of the submissions that it has received have been from a small number of very large companies that exceed the SBA size standards for a small business. Since 1994, the number of companies that submitted data to BIS pursuant to this regulation has not exceeded 26 per year. On average, the companies that submit data to BIS have annual revenues well in excess of \$1 billion. For instance, in 2014, the most recent year for which BIS has data collected pursuant to this regulation, only one of the 26 companies that submitted data had reported revenue of less than \$1 billion. That company had revenue of \$120 million.

Some small businesses likely are involved in fulfilling offset obligations by acting as subcontractors to the large prime contractors that report directly to BIS, meaning that they report indirectly to BIS pursuant to this section. However, this rule will not significantly increase the burden on such companies. Most of the information collected by BIS pursuant to this section is already collected by such small businesses so that they can accurately account for their obligations under the offset agreement (which is imposed at the behest of the foreign buyer) and report them to the prime contractor. The only data element required by this rule that might not be needed for those reports to the prime contractor is the classification of offset agreements and transactions by NAICS code. Even subcontractors involved in the manufacture of defense articles are likely to conduct business with the U.S. government and, therefore, be required to classify their products and services in accordance with the NAICS (*See* System for Award Management User Guide – V. 1.8, July 23, 2012, Section 3.4, page 92, available at [https://www.sam.gov/sam/transcript/SAM\\_User\\_Guide\\_v1.8.pdf](https://www.sam.gov/sam/transcript/SAM_User_Guide_v1.8.pdf)). In addition, the U.S. government takes steps to facilitate selection of the correct NAICS code by private parties. The U.S. Census Bureau posts instructions on its Web site on how to properly classify products and services in accordance with the NAICS. BIS has included illustrative examples in § 701.4(c)(1)(iii) and (c)(2)(iv) on classifying military export sales and offset transactions by NAICS codes.

In addition, small governmental entities and small organizations are not likely to be involved in international defense trade, and will therefore have no reason to submit data to BIS pursuant to this regulation. Consequently, this rule will not have a significant impact on a substantial number of small entities.

#### **List of Subjects in 15 CFR Part 701**

Administrative practice and procedure, Arms and munitions, Business and industry, Exports, Government contracts, Reporting and recordkeeping requirements.

Accordingly, 15 CFR part 701 is amended as follows:

**PART 701—[AMENDED]**

1. The authority citation for part 701 continues to read as follows:

**Authority:** 50 U.S.C. 4568; E.O. 12919, 59 FR 29525, 3 CFR, 1994 Comp., p. 901; E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

2. In § 701.2, revise paragraphs (a) and (b) to read as follows:

**§ 701.2 Definitions.**

(a) *Offsets*—Compensation practices required as a condition of purchase in either government-to-government or commercial sales of:

(1) Defense articles and/or defense services as defined by the Arms Export Control Act and the International Traffic in Arms Regulations; or

(2) Items controlled under an Export Control Classification Number (ECCN) that has the numeral “6” as its third character in the Commerce Control List found in Supplement No. 1 to part 774 of this chapter other than semi-submersible and submersible vessels specially designed for cargo transport and parts, components, accessories and attachments specially designed therefor controlled under ECCN 8A620.b; test, inspection and production equipment controlled in ECCN 8B620.b, software controlled in ECCN 8D620.b and technology controlled in ECCN 8E620.b.

(b) *Military Export Sales*—Exports that are either Foreign Military Sales (FMS) or commercial (direct) sales of:

(1) Defense articles and/or defense services as defined by the Arms Export Control Act and International Traffic in Arms Regulations; or

(2) Items controlled under an Export Control Classification Number (ECCN) that has the numeral “6” as its third character in the Commerce Control List found in Supplement No. 1 to part 774 of this chapter other than semi-submersible and submersible vessels specially designed for cargo transport and parts, components, accessories and attachments specially designed therefor controlled under ECCN 8A620.b; test, inspection and production equipment controlled in ECCN 8B620.b; software controlled in ECCN 8D620.b; and technology controlled in ECCN 8E620.b.

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3. In § 701.3, revise paragraph (a) to read as follows:

**§ 701.3 Applicability and scope.**

(a) This part applies to U.S. firms entering contracts that are subject to an offset agreement exceeding \$5,000,000 in value and that are for the sale to a foreign country or foreign firm of:

(1) Defense articles and/or defense services as defined by the Arms Export Control Act and International Traffic in Arms Regulations; or

(2) Items controlled under an Export Control Classification Number (ECCN) that has the numeral “6” as its third character in the Commerce Control List found in Supplement No. 1 to

part 774 of this chapter other than semi-submersible and submersible vessels specially designed for cargo transport and parts, components, accessories and attachments specially designed therefor controlled under ECCN 8A620.b; test, inspection and production equipment controlled in ECCN 8B620.b; software controlled in ECCN 8D620.b and technology controlled in ECCN 8E620.b.

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Dated: February 24, 2016

Kevin J. Wolf

Assistant Secretary for Export Administration

[FR Doc. 2016-04425 Filed: 2/29/2016 8:45 am; Publication Date: 3/1/2016]