



This document is scheduled to be published in the Federal Register on 10/06/2020 and available online at [federalregister.gov/d/2020-22077](https://www.federalregister.gov/d/2020-22077), and on [govinfo.gov](https://www.govinfo.gov)

**BILLING CODE 3510-33-P**

**DEPARTMENT OF COMMERCE**

**Bureau of Industry and Security**

**15 CFR Part 756**

**[Docket No. 200929-0260]**

**RIN 0694-AI29**

**Information Sharing for Purposes of Judicial Review**

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

**ACTION:** Final rule.

**SUMMARY:** The Bureau of Industry and Security (BIS) has the authority under the Export Control Reform Act of 2018 (ECRA) to enforce the Export Administration Regulations (EAR). This rule sets forth the procedure for classified national security information to be submitted *ex parte* and *in camera* to a court reviewing any agency action under the EAR. BIS is taking this action to safeguard national security information by ensuring that access to such information is controlled.

**DATES:** This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Anthony Saler, E-mail: [asaler@doc.gov](mailto:asaler@doc.gov), Office of Chief Counsel for Industry and Security; Phone: 202-482-5301.

**SUPPLEMENTARY INFORMATION:** BIS is adding to part 756 of the EAR new § 756.3, which is entitled “Judicial Review of Agency Action.” Section 4.1(e) of Executive Order (E.O.) 13526 provides that “Persons authorized to disseminate classified information outside the executive branch shall ensure the protection of the information in a manner equivalent to that provided within the executive branch.” This section specifies the procedure for providing a reviewing court access to classified information for any agency action under the EAR. By providing such information *ex parte* and *in camera* to a reviewing court, BIS can limit access to the information and prevent public disclosure of the information during the course of litigation.

### **Executive Order 13526 (75 FR 707)**

On December 29, 2009, the President issued E.O. 13526, prescribing a uniform system for classifying, safeguarding, and declassifying national security information. E.O. 13526 provides the legal basis and 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, distribute 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 final rule has not been designated a “significant regulatory action,” and not economically significant, under section 3(f) of Executive Order 12866. This final rule will

protect national security information by preventing unauthorized persons from accessing such information in the course of judicial review of any agency action.

2. Notwithstanding any other provision of law, no person may be required to respond to or 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. This regulation does not involve any OMB collection of information.

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

4. This final rule is not subject to the requirements of Executive Order 13771 (82 FR 9339, February 3, 2017) because the subsection (b) requirement that agencies publish a notice of proposed rulemaking that includes information on the public proceedings does not apply when an agency for good cause finds that the notice and public procedures are impracticable, unnecessary, or contrary to the public interest, and the agency incorporates the finding (and reasons therefor) in the rule that is issued (5 U.S.C. 553(b)(3)(B)). In addition, the section 553(d)(3) requirement that publication of a rule shall be made not less than 30 days before its effective date can be waived if an agency finds there is good cause to do so.

BIS finds good cause to issue this rule without advance notice and public comment because such procedures are unnecessary, see 5 USC 553(b)(3)(B). This final rule does not

affect any substantive changes to the EAR. It implements the provision in E.O. 13526 that executive branch officials who are authorized to disseminate classified information outside the executive branch ensure the protection of the information in a manner equivalent to that provided within the executive branch. This final rule safeguards classified information by preventing unauthorized persons from accessing classified information submitted to a court reviewing agency action under the EAR. For the same reasons, the Department has determined that this final rule should be issued without a delayed effective date pursuant to 5 USC 553(d)(3).

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 756**

Administrative practice and procedure, Appeals, Judicial review.

Accordingly, part 756 of the Export Administration Regulations (15 CFR parts 730-774) is amended as follows:

#### **PART 756 – APPEALS AND JUDICIAL REVIEW**

1. The authority citation for part 756 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.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

2. The heading for part 756 is revised to read as set forth above.

3. Section 756.1 is revised to read as follows:

**§ 756.1 Scope.**

Section 756.2 describes the procedures applicable to appeals from administrative actions taken under the Export Administration Act (EAA) or the Export Administration Regulations (EAR).

(In this part, references to the EAR are references to 15 CFR chapter VII, subchapter C). Section 756.3 describes the procedures under which the Bureau of Industry and Security (BIS) can safeguard national security information when agency action is under judicial review.

4. Section 756.2 is amended by redesignating paragraphs (a) through (d) as paragraphs (b) through (e) and adding a new paragraph (a) to read as follows:

**§ 756.2 Appeal from an administrative action.**

(a) *Scope.* Any person directly and adversely affected by an administrative action taken by BIS may appeal to the Under Secretary for reconsideration of that administrative action. The following types of administrative actions are not subject to the appeals procedures described in this part:

(1) Issuance, amendment, revocation, or appeal of a regulation. (These requests may be submitted to BIS at any time.)

(2) Denial or probation orders, civil penalties, sanctions, or other actions under parts 764 and 766 of the EAR, except that, any appeal from an action taken under §766.25 and any appeal from an action taken in accordance with §766.23 to make an action taken under §766.25 applicable to a related person shall be subject to the appeals procedures described in this part.

(3) A decision on a request to remove or modify an Entity List entry made pursuant to § 744.16 of the EAR or a decision on a request to remove an Unverified List entry made pursuant to § 744.15 of the EAR.

(4) A decision on whether License Exception Strategic Trade Authorization (STA) is available for “600 series” “end items” pursuant to § 740.20(g) of the EAR.

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5. Add § 756.3 to read as follows:

**§ 756.3 Judicial review of agency action.**

(a) *Definition.* For purposes of this section, the term *agency action* has the same meaning given such term in 5 U.S.C. 551(13), *i.e.*, includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

(b) *Classified national security information.* In any judicial review of any agency action under the EAR, if such action was based in whole or in part on classified national security information as defined in Executive Order 13526 (December 29, 2009), such information may be submitted to the reviewing court *ex parte* and *in camera*. This paragraph (b) does not confer or imply any right to review in any tribunal, judicial or otherwise.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2020-22077 Filed: 10/5/2020 8:45 am; Publication Date: 10/6/2020]