



## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

#### 15 CFR Parts 734, 748, 750, 758, 762, 764, and 766

[Docket No. 201110-0299]

RIN 0694-AH81

#### Revisions to Export Enforcement Provisions

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

**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Bureau of Industry and Security (BIS) is amending and clarifying certain provisions of the Export Administration Regulations (EAR) to promote compliance with existing EAR requirements and implement the export enforcement portions of the Export Control Reform Act of 2018 (ECRA). ECRA affirmed existing authorities under the EAR and provided expanded export control authorities to the Secretary of Commerce (Secretary). BIS is also amending certain provisions of the EAR not strictly related to the implementation of ECRA concerning the issuance of licenses and denial orders and the payment of civil penalties.

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

**FOR FURTHER INFORMATION CONTACT:** John Sonderman, Director, Office of Export Enforcement, Bureau of Industry and Security, Phone: (202) 482-5079, E-mail: [EEinquiry@bis.doc.gov](mailto:EEinquiry@bis.doc.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

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. 4801-4852). In its enactment, ECRA repealed most of the Export Administration Act of 1979 (EAA), which had lapsed. ECRA continues existing authorities under the EAR that had been issued pursuant to, and been maintained in force under, the EAA until its lapse, and thereafter under the International Emergency Economic Powers Act (IEEPA). ECRA provides the Secretary of Commerce (Secretary) with additional authorities to ensure the implementation of effective export controls in furtherance of U.S. national security and foreign policy interests.

Accordingly, BIS is amending the EAR to reflect enforcement authorities and to update certain EAR provisions to make them consistent with ECRA. These amendments include replacing existing references to the EAA currently in the EAR with references to ECRA and other export laws and regulations. There are also amendments to the EAR that reflect the expanded scope of authority provided to the Secretary in ECRA. Specifically, this rule amends the EAR to implement the following enforcement provisions: pre-license checks (PLCs) and post-shipment verifications (PSVs) (in §§ 734.11 and 750.4 of the EAR); overseas investigative authority; searches, inspections, detentions, and seizures, and related authorities concerning exports, reexports, and transfers (in-country) (in § 734.11 of the EAR and in part 758 of the EAR, specifically in §§ 758.7, 758.8, and 758.9); inspection of books, records, and other information (in §§ 758.7 and 762.7 of the EAR); and violations and penalties under ECRA (in part 764 of the EAR, and specifically in §§ 748.4, 764.1, 764.2, 764.3, and 766.25).

## **Revisions to Enforcement Provisions to Implement ECRA**

### *Pre-License Checks and Post-Shipment Verifications*

In new § 734.11 of the EAR, BIS is including a reference to BIS's authority to conduct PLCs and PSVs outside the United States. BIS is also amending § 750.4(b)(2) of the EAR to clarify that the results of PLCs, when available, will be communicated to licensing officials within existing timeframes governing the conduct of PLCs, and will be considered in determining the outcome of a license application. These changes are consistent with ECRA

section 1761(a)(7) (50 U.S.C. 4820(a)(7)), which sets forth the Secretary's authority to conduct PLCs and PSVs, and provide increased transparency regarding the purposes for which information is collected.

*Inspection of Books, Records, and Other Information*

BIS is amending § 762.7(a) of the EAR regarding the production for inspection of books, records, and other information required to be kept pursuant to the EAR by persons located within the United States to align with ECRA section 1761(a)(2) (50 U.S.C. 4820(a)(2)). This includes the removal of references to the authority of the U.S. Customs Service, which is not reflected in ECRA. This change does not affect the authorities of other agencies or officials under other statutes and regulations.

BIS is amending § 762.7(b) of the EAR to specify that persons located outside the United States must produce for inspection books and other information required to be kept pursuant to the EAR in addition to records as specified in ECRA section 1761(a)(2) (50 U.S.C. 4820(a)(2)). BIS is also specifying in § 762.7(b) of the EAR that only officials of the United States designated by BIS may rely on the authority in ECRA to require persons outside the United States to produce for inspection the books, records, and other information such persons are required to keep pursuant to the EAR. Consequently, BIS is removing from § 762.7(b) of the EAR the existing reference to requests for records required to be kept pursuant to the EAR by a Foreign Service Post or the U.S. Customs Service. This change does not affect the authorities of other agencies or officials under other statutes and regulations.

*Overseas Investigative Authority; Searches, Inspections, Detentions, and Seizures, and Related Authorities Concerning Exports, Reexports, and Transfers (In-Country) both within and outside the United States*

ECRA provides the Secretary the authority to conduct export enforcement investigations both within and outside the United States consistent with applicable law, as described in ECRA section 1761(a)(4) (50 U.S.C. 4820(a)(4)). Accordingly, BIS is adding § 734.11 to part 734 of

the EAR entitled “BIS Activities conducted outside the United States,” which describes the manner in which such activities will be conducted.

BIS is renaming part 758 of the EAR as “Export clearance requirements and authorities” and renaming § 758.7 of the EAR as “Authorities of the Bureau of Industry and Security, Office of Export Enforcement (OEE).” As amended, these provisions more accurately describe the requirements for clearing export shipments and reflect the broader authorities of OEE, and other officials of the United States designated by OEE, including requirements for reexports and transfers (in-country).

BIS is also adding a new paragraph, (a)(4), to EAR § 758.7 to reflect the authority under ECRA section 1761(a) (50 U.S.C. 4820(a)) to enforce provisions of the EAR that restrict the activities of U.S. persons in connection with certain weapons of mass destruction-related end uses described in § 744.6 of the EAR.

BIS is updating and revising § 758.7(b) of the EAR to outline actions OEE may take to ensure that exports, reexports, and transfers (in-country) comply with all laws and regulations administered or enforced by the Secretary in conformance with section 1761(a)(4)-(5) of ECRA (50 U.S.C. 4820(a)(4), (5)), as well as 13 U.S.C. 305, 22 U.S.C. 401, the EAR, and the Foreign Trade Regulations (FTR) (15 CFR part 30).

Because the EAR are regulations implemented by the Secretary to carry out his express statutory authority in ECRA and 22 U.S.C. 401, BIS is removing reference to authorities granted to Postmasters and the U.S. Customs Service in §§ 758.7 and 758.8 of the EAR. This change does not affect the authorities of other agencies or officials under other statutes and regulations. BIS is also renaming § 758.8 of the EAR as “Return or Unloading of Cargo.”

Under revised § 758.7(b)(2) of the EAR, OEE officials are authorized to require all persons subject to the export laws and regulations administered or enforced by the Secretary to produce books, records, and other information for inspection, consistent with ECRA section 1761(a)(2) (50 U.S.C. 4820(a)(2)).

Section 758.7(b)(6) of the EAR now addresses the provisions previously provided for in § 758.7(b)(7) and BIS is accordingly renaming § 758.7(b)(7) as “Administrative Forfeiture Authority.” BIS is revising § 758.7(b)(8) of the EAR to reflect that other legal and procedural principles may govern the conduct of BIS’s enforcement activities. The authority to order the unloading of items previously described in § 758.7(b)(8), as well as the authority to order the return of cargo previously described in § 758.7(b)(9) is now set forth in § 758.8(b) of the EAR. Accordingly, BIS is removing § 758.7(b)(9) from the EAR. BIS is also removing § 758.7(b)(10) from the EAR as that provision previously described the authority of another agency, the U.S. Customs Service, to designate the time and place of export clearance, which is not reflected in ECRA. However, this change does not affect the authorities of other agencies or officials under other statutes and regulations.

Section 758.8(b) of the EAR is revised to specify actions a carrier must take to return and unload cargo when ordered by OEE and to clarify that OEE may order the return and unloading of cargo to ensure compliance with export laws and regulations administered or enforced by the Secretary. BIS is revising § 758.8(c) of the EAR to update references to relevant provisions of § 758.5 of the EAR.

Section 758.9 of the EAR is revised to clarify that the provisions of part 758 apply to certain activities of U.S. persons, in addition to exports, reexports, and transfers (in-country).

#### *Violations and Penalties under ECRA*

BIS is making multiple amendments to part 764 of the EAR as well as § 748.4(c) of the EAR to align their provisions with ECRA section 1760 (50 U.S.C. 4819). Section 764.1 is revised to include references to conduct that violates ECRA, while retaining references to three sections of the EAA (sections 11A, B, and C) (50 U.S.C. 4611-4613), which remain in force. Section 764.2(f) – “Possession with intent to export illegally” – of the EAR is removed and reserved, as this provision is based on the lapsed EAA and is not carried forward in ECRA. The provisions related to criminal penalties for willful violations of the EAR previously set forth in

§ 764.3(b)(2) are relocated to § 764.3(b), while § 764.3(b)(2) and (3) are removed from the EAR. Supplement no. 1 to part 764 of the EAR is amended to include a prohibition on transfers (in-country) to, or on behalf of, a denied person in the terms of a standard denial order.

### **Revisions to Enforcement Provisions unrelated to the Implementation of ECRA.**

BIS is making several additional changes to the EAR unrelated to the implementation of ECRA. First, consistent with existing language in § 748.4(d) of the EAR, BIS is amending § 750.7(a) of the EAR to clarify that any license obtained based on a false or misleading misrepresentation or the falsification or concealment of a material fact is void as of the date of issuance. Second, consistent with current BIS practice, BIS is amending § 764.3(a)(1)(ii) of the EAR to change the maximum time period for payment of civil penalties, as a condition of receiving certain privileges under the EAR, from one year to two years. Third, BIS is renaming § 764.3(c)(2)(ii) of the EAR to “Actions by other agencies” to reflect collateral actions that other U.S. government agencies may take with respect to persons based on indictment or conviction for criminal export control violations or the issuance of a denial order. BIS is also revising § 764.3(c)(2)(ii)(A) of the EAR to reflect more accurately when the Directorate of Defense Trade Controls, Department of State, may not issue licenses, or may deny licenses, involving certain parties indicted for, or convicted of, violations of certain statutes specified in the Arms Export Control Act (22 U.S.C. 2778(g)(1)(A)). Finally, BIS is amending § 766.25(a), (b), (c), and (h) of the EAR to specify that the Director of OEE is the designated BIS official for the issuance of orders denying the export privileges of persons convicted of certain criminal offenses; providing notification of the issuance of such orders to affected persons; and determining the terms of such orders, as well as their applicability to related persons. The authority to issue an authorization to engage in activities otherwise prohibited by the terms of a denial order will remain with the Director of the Office of Exporter Services (OExS), in consultation with the Director of OEE.

### **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. 4801-4852) that 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 currently approved by OMB under control numbers 0694-0096, "Five Year Records Retention Period," and 0694-0122, "Miscellaneous Licensing Responsibilities and Enforcement." Both collections include, among other things, the maintenance and production of certain records associated with exports, reexports, and transfers (in-country) subject to the EAR and carry burden estimates of less than one minute per transaction. This regulation does not change the scope of records currently required to be kept and made available for inspection by BIS. Accordingly, this regulation is not expected to increase or reduce the existing burden estimates currently associated with OMB control numbers 0694-0096 and 0694-0122. This regulation simply clarifies the circumstances under which

persons already subject to recordkeeping and production requirements may be asked to make such records available for inspection. You may submit comments regarding the collections of information associated with this rule, including suggestions for reducing the burden, at the following website: [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find the particular information collection by using the search function and entering OMB Control Number 0648-0096 or 0648-0122. .

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

4. Pursuant to ECRA section 1762, 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**

#### *15 CFR Part 734*

Scope of the Export Administration Regulations

#### *15 CFR Part 748*

Applications (classification, advisory, and license) and documentation.

#### *15 CFR Part 750*

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

#### *15 CFR Part 758*

Export clearance requirements and authorities.



*15 CFR Part 762*

Recordkeeping.

*15 CFR Part 764*

Enforcement and protective measures.

*15 CFR Part 766*

Administrative practice and procedure, confidential business information, exports, law enforcement, penalties.

Accordingly, parts 734, 748, 750, 758, 762, 764 and 766 of the EAR are amended as follows:

**PART 734 – SCOPE OF THE EAR**

1. The authority citation for part 734 is revised to read as follows:

**Authority:** 50 U.S.C. 4801-4852; 50 U.S.C. 1701 *et seq.*; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13637, 78 FR 16129, 3 CFR, 2014 Comp., p. 223; Notice of November 12, 2019, 84 FR 61817 (November 13, 2019).

2. Add § 734.11 to read as follows:

**§ 734.11 BIS activities conducted outside the United States.**

The Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801-4852) authorizes the Secretary of Commerce, in carrying out its provisions, to undertake activities outside the United States, including, but not limited to, conducting investigations; requiring and obtaining information from persons; and conducting pre-license checks and post-shipment verifications. BIS officials will act with due care in the jurisdiction of a foreign nation and, to the extent possible, consistent with the applicable host nation government's laws. For any action taken outside the United States, BIS officials will consult and coordinate with the appropriate U.S. Government agencies and act in a manner consistent with the United States' international commitments and international agreements to which the United States is a party.

**PART 748 – APPLICATIONS (CLASSIFICATION, ADVISORY, AND LICENSE) AND DOCUMENTATION**

3. The authority citation for part 748 is revised to read as follows:

**Authority:** 50 U.S.C. 4801-4852; 50 U.S.C. 1701 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

4. Section 748.4 is amended by revising paragraph (c) to read as follows:

**§ 748.4 Basic guidance related to applying for a license.**

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(c) *Prohibited from applying for a license.* No person subject to a denial order based on a conviction for a violation of any statute specified at 50 U.S.C. 4819(e)(1)(B) may apply for any license for a period up to 10 years from the date of the conviction. The duration of the prohibition shall be included as a term of the denial order. See § 766.25 of the EAR.

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**PART 750 – APPLICATION PROCESSING, ISSUANCE, AND DENIAL**

5. The authority citation for part 750 is revised to read as follows:

**Authority:** 50 U.S.C. 4801-4852; 50 U.S.C. 1701 *et seq.*; Sec. 1503, Pub. L. 108-11, 117 Stat. 559; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223; Presidential Determination 2003-23, 68 FR 26459, 3 CFR, 2004 Comp., p. 320.

6. Section 750.4 is amended by revising paragraph (b)(2) to read as follows:

**§ 750.4 Procedures for processing license applications.**

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(b) \*\*\*

(2) *Pre-license checks.* BIS conducts pre-license checks in order to establish the identity and reliability of the recipient of the items subject to the EAR that require a license, as well as to substantiate representations made on the license application. The results of the pre-license

check, including the U.S. government's inability to conduct the pre-license check due to the end user's or host government's actions, will be considered in determining the outcome of a license application. The time required to conduct a pre-license check is not included in license application processing time calculations according to this paragraph, if the pre-license check is:

(i) Conducted through government channels, and

(ii) The request for a pre-license check is made by the Secretary or by another agency

within the following time frames:

(A) The pre-license check is requested within 5 days of the determination that it is necessary; and

(B) The analysis resulting from the pre-license check is completed and reported to licensing officials within 5 days.

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7. Section 750.7 is amended by revising paragraph (a) to read as follows:

**§ 750.7 Issuance of licenses.**

(a) *Scope.* Unless limited by a condition set out in a license, the export, reexport, or transfer (in-country) authorized by a license is for the item(s), end-use(s), and parties described in the license application and any letters of explanation. The applicant must inform the other parties identified on the license, such as the ultimate consignees and end users, of the license's scope and of the specific conditions applicable to them. BIS grants licenses in reliance on representations the applicant made or submitted in connection with the license application, letters of explanation, and other documents submitted. Any license obtained in which a false or misleading representation was made, or a material fact was falsified or concealed on the license application, letters of explanation, or any document submitted in connection with the license application, shall be deemed void as of the date of issuance. See § 750.8(a) of the EAR, which provides that all licenses are subject to revocation, in whole or in part, without notice. See part 764 of the EAR for other sanctions that may result in the event a violation occurs. A BIS license

authorizing the release of “technology” to an entity also authorizes the release of the same “technology” to the entity’s foreign persons who are permanent and regular employees (and who are not proscribed persons) of the entity’s facility or facilities authorized on the license, except to the extent a license condition limits or prohibits the release of the “technology” to foreign persons of specific countries or country groups.

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## **PART 758 – EXPORT CLEARANCE REQUIREMENTS AND AUTHORITIES**

8. The authority citation for part 758 is revised to read as follows:

**Authority:** 50 U.S.C. 4801-4852; 50 U.S.C. 1701 *et seq.*; 13 U.S.C. § 305, 22 U.S.C. § 401; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

9. The heading for part 758 is revised to read as set forth above.

10. Section 758.7 is revised to read as follows:

### **§ 758.7 Authorities of the Bureau of Industry and Security, Office of Export Enforcement (OEE).**

(a) *Actions to assure compliance with export laws and regulations.* OEE officials and any other officials of the United States designated by OEE are authorized and directed to take appropriate action to enforce the authorities granted to the Secretary under the laws and regulations of the United States, including ECRA, 13 U.S.C. 305, 22 U.S.C. 401, 50 U.S.C. 1701 *et seq.*, the EAR, and the Foreign Trade Regulations (FTR) (15 CFR part 30). This includes, but is not limited to, assuring that:

(1) Exports, reexports, and transfers (in-country) without a license issued by BIS are either outside the scope of the license requirements of the EAR or authorized by a license exception and comply with the terms of the license exception;

(2) Exports, reexports, transfers (in-country) purporting to be authorized by licenses issued by BIS are, in fact, so authorized and the transaction complies with the terms of the license;

(3) Accurate EEI filings have been made for exports as required by this part, the FTR, and other federal regulations; and

(4) The activities of U.S. persons, wherever located, which are subject to a license requirement pursuant to § 744.6 of the EAR, are authorized by and comply with the terms of a BIS license.

(b) *Types of actions.* In carrying out the authorities granted to, and exercised by, the Secretary pursuant to ECRA, 13 U.S.C. 305, 22 U.S.C. 401, 50 U.S.C. 1701 *et seq.*, the EAR, the FTR, and other applicable laws and regulations of the United States, including the authority to control the export, reexport, and transfer (in-country) of items, in any form, subject to the jurisdiction of the United States, whether by U.S. or foreign persons; control the activities of U.S. persons, wherever located, as described in § 744.6 of the EAR; ensure compliance with export controls; monitor shipments and other means of transfer; conduct investigations; and issue orders, OEE officials and any other officials of the United States designated by OEE are authorized to take the types of enforcement actions described below.

(1) *Inspection, search, and detention of items—(i) Purpose of inspection, search, and detention.* All items subject to export laws and regulations administered or enforced by the Secretary that have been, are being, or are about to be exported, reexported, or transferred (in-country) are subject to inspection, search, and detention. The scope of inspection may include, but is not limited to, item identification; technical appraisal (analysis) or both; verifying the accuracy of the EEI filing, or if there is no EEI filing, the air waybill, bill of lading or other loading document covering the item about to be exported, reexported, or transferred (in-country); and verifying the value and quantity of such item.

(ii) *Place of inspection, search, and detention.* Inspection, search, and detention may take place at any location inside or outside of the United States, to include, but not limited to, the borders of the United States, all ports of exit, the premises of freight forwarders, bonded warehouses, foreign trade zones, and manufacturing, transportation, and storage facilities.

(iii) *Technical identification.* Where, in the judgment of the official making the inspection, the item cannot be properly identified, a sample may be taken for more detailed examination or for laboratory analysis.

(A) *Obtaining samples.* The sample will be obtained by the official making the inspection in accordance with the provisions for sampling imported merchandise. The size of the sample will be the minimum representative amount necessary for identification or analysis. This will depend on such factors as the physical condition of the material (whether solid, liquid, or gas) and the size and shape of the container.

(B) *Notification.* When a sample is taken, the exporter, reexporter, or transferor, or their agent(s), and the ultimate consignee will be notified by letter from an OEE official, documenting the port of export, reexport, or other place of inspection, date of sampling, BIS license number (if any) or other authorization, invoice number, quantity of sample taken, description of item, marks and packing case numbers, and manufacturer's number for the item. A copy of the letter will be placed in the container that had been opened by the inspecting official, and a copy will be retained by the inspecting official's office.

(C) *Disposal of samples.* Samples will be disposed of in accordance with the U.S. Customs and Border Protection procedure for imported commodities.

(2) *Inspection and production of books, records, and other information.* OEE officials are authorized to require any person subject to export laws and regulations administered or enforced by the Secretary, including, but not limited to, exporters, reexporters, transferors, or their agent(s), and owners and operators of carriers or their agents, as well as intermediate consignees, ultimate consignees, and end users, and their agent(s) to produce for inspection and copying any books, records and other information, including, but not limited to, invoices, orders, letters of credit, inspection reports, technical documentation, packing lists, shipping documents and instructions, and correspondence.

(3) *Questioning of individuals.* OEE officials are authorized to question any person, including, but not limited to, the owner or operator of a carrier and the carrier's agent(s), as well as the exporter, reexporter, transferor (in-country), or their agent(s).

(4) *Prohibiting lading.* OEE officials may prevent the lading of items on a conveyance.

(5) *Inspection, search, and detention of conveyance.* OEE officials are authorized to inspect, search, and detain any conveyance at any time to determine whether items have been, are being, or are about to be exported, reexported, or transferred (in-country). Inspection, search, and detention of a conveyance may take place at any location inside or outside of the United States, to include, but not limited to, the borders of the United States, all ports of exit, the premises of freight forwarders, bonded warehouses, foreign trade zones, and manufacturing, transportation, and storage facilities.

(6) *Seizure of property.* OEE officials are authorized to seize any property, tangible or intangible, when there is probable cause to believe that such property is subject to administrative forfeiture (nonjudicial civil forfeiture or summary forfeiture), civil judicial forfeiture, or criminal forfeiture. Seizures of property subject to forfeiture may take place at any location inside or outside of the United States, to include, but not limited to, the borders of the United States, all ports of exit, the premises of freight forwarders, bonded warehouses, foreign trade zones, and manufacturing, transportation, and storage facilities.

(7) *Administrative forfeiture authority.* OEE is authorized to initiate administrative forfeiture (nonjudicial civil forfeiture or summary forfeiture) proceedings and forfeit property in accordance with the procedures set forth in 18 U.S.C. 981(d) and the Customs laws (19 U.S.C. 1602 *et seq*).

(8) *Enforcement activity.* (i) All BIS actions taken to implement, administer, and enforce the authorities granted to the Secretary shall be conducted pursuant to the U.S. Constitution and all applicable laws and regulations, including judicially recognized exceptions to the requirement

for a search warrant under the Fourth Amendment, for example, consent of the person to be searched, exigent circumstances, searches incident to a lawful arrest, and border searches.

(ii) BIS may enter into any such agreements (*e.g.*, memoranda of understanding) with other Federal agencies as deemed necessary by BIS to execute the authorities set forth in this part in a lawful and orderly manner.

(iii) BIS shall issue additional guidance as necessary to ensure the lawful and orderly execution of the Secretary's authorities.

(iv) Nothing in this section is intended to limit or abridge BIS law enforcement officers from exercising their lawful authority in carrying out their official duties.

11. Section 758.8 is revised to read as follows:

**§ 758.8 Return or unloading of cargo.**

(a) *Carrier.* As used in this section, the term "carrier" includes a connecting or on-forwarding carrier, as well as the owner, charterer, agent, master, or any other person in possession, control, or charge of the vessel, aircraft, vehicle, or other kind of conveyance, whether such person is located in the United States or in a foreign country.

(b) *Ordering return or unloading of shipment.* In order to ensure compliance with export laws and regulations administered or enforced by the Secretary, OEE officials, or any other official of the United States designated by OEE, may, with respect to a particular export, reexport, or transfer (in-country), order any carrier to return or unload the shipment. For the purpose of this section, furnishing a copy of the order to any person included within the definition of carrier will be sufficient notice of the order to the carrier. The carrier must, as ordered:

(1) Unload the shipment and make it available to OEE officials for search and inspection;

or

(2) Return the shipment to the United States or cause it to be returned; or



(3) Unload the shipment at a port of call and take steps to assure that it is placed in custody under bond or other guaranty not to enter the commerce of any foreign country without the prior approval of BIS.

(c) *Requirements regarding shipment to be unloaded.* The provisions of § 758.5(d) and (e) of this part, relating to reporting, notification to BIS, and the prohibition against unauthorized delivery or entry of the item into a foreign country shall apply also when items are unloaded at a port of call, as provided in paragraph (b)(3) of this section.

(d) *Notification.* Upon discovery by any person included within the term “carrier,” as defined in paragraph (a) of this section, that a violation of the export laws and regulations administered or enforced by the Secretary has occurred, is occurring, or is about to occur with respect to a shipment on board, or otherwise in the possession or control of the carrier, such person must immediately notify both:

(1) The Office of Export Enforcement at the following address: Room H-4508, U.S. Department of Commerce, 14<sup>th</sup> Street and Constitution Ave., N.W., Washington, DC 20230, Telephone: (202) 482-1208, Facsimile: (202) 482-0964; and

(2) The person in actual possession or control of the shipment.

12. Section 758.9 is revised to read as follows:

**§ 758.9 Other applicable laws and regulations.**

The provisions of this part apply only to exports, reexports, and transfers (in-country), as well as the activities of U.S. persons described in § 744.6 of the EAR, which are subject to the export laws and regulations administered or enforced by the Secretary. Nothing contained in this part shall relieve any person from complying with any other law of the United States or rules and regulations issued thereunder, including those governing EEI filings to AES, manifests, or any other applicable rules and regulations.

**PART 762 – RECORDKEEPING**

13. The authority citation for part 762 is revised to read as follows:

**Authority:** 50 U.S.C. 4801-4852; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

14. Section 762.7 is revised to read as follows:

**§ 762.7 Producing and inspecting records.**

(a) *Persons located in the United States.* Persons located in the United States may be asked to produce books, records, and other information that are required to be kept by any provision of the EAR, or any license, order, or authorization issued thereunder and to make them available for inspection and copying by any authorized official of the BIS, or any other official of the United States designated by BIS, without any charge or expense to such official. OEE and the Office of Antiboycott Compliance encourage voluntary cooperation with such requests. When voluntary cooperation is not forthcoming, OEE and the Office of Antiboycott Compliance are authorized to issue subpoenas requiring persons to appear and testify, or to produce books, records, and other writings. In instances where a person does not comply with a subpoena, the Department of Commerce may petition a district court to have the subpoena enforced.

(b) *Persons located outside of the United States.* Persons located outside of the United States that are required to keep books, records, and other information by any provision of the EAR or by any license, order, or authorization issued thereunder shall produce all books, records, and other information required to be kept, or reproductions thereof, and make them available for inspection and copying upon request by an authorized official of BIS without any charge or expense to such official. BIS may designate any other official of the United States to exercise the authority of BIS under this subsection.

**PART 764 – ENFORCEMENT AND PROTECTIVE MEASURES**

15. The authority citation for part 764 is revised to read as follows:

**Authority:** 50 U.S.C. 4801-4852; 50 U.S.C. 4611-4613; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

16. Section 764.1 is revised to read as follows:

## **§ 764.1 Introduction.**

In this part, references to the EAR are references to 15 CFR chapter VII, subchapter C. This part specifies conduct that constitutes a violation of the ECRA and/or the EAR and the sanctions that may be imposed for such violations. Antiboycott violations are described in part 760 of the EAR, and the violations and sanctions specified in part 764 also apply to conduct relating to part 760, unless otherwise stated. This part describes administrative sanctions that may be imposed by BIS. This part also describes criminal sanctions that may be imposed by a United States court and other sanctions that are neither administrative nor criminal pursuant to sections 11A, B, and C of the Export Administration Act EAA and other statutes. Information is provided on how to report and disclose violations. Finally, this part identifies protective administrative measures that BIS may take in the exercise of its regulatory authority.

17. Section 764.2 is revised to read as follows:

## **§ 764.2 Violations.**

(a) *Engaging in prohibited conduct.* No person may engage in any transaction or take any other action prohibited by or contrary to, or refrain from engaging in any transaction or take any other action required by ECRA, the EAR, or any order, license or authorization issued thereunder.

(b) *Causing, aiding, or abetting a violation.* No person may cause or aid, abet, counsel, command, induce, procure, permit, or approve the doing of any act prohibited, or the omission of any act required, by ECRA, the EAR, or any order, license or authorization issued thereunder.

(c) *Solicitation and attempt.* No person may solicit or attempt a violation of ECRA, the EAR, or any order, license, or authorization issued thereunder.

(d) *Conspiracy.* No person may conspire or act in concert with one or more persons in any manner or for any purpose to bring about or to do any act that constitutes a violation of ECRA, the EAR, or any order, license, or authorization issued thereunder.

(e) *Acting with knowledge of a violation.* No person may order, buy, remove, conceal, store, use, sell, loan, dispose of, transfer, transport, finance, forward, or otherwise service, in whole or in part, or conduct negotiations to facilitate such activities with respect to, any item that has been, is being, or is about to be exported, reexported, or transferred (in-country), or that is otherwise subject to the EAR, with knowledge that a violation of ECRA, the EAR, or any order, license, or authorization issued thereunder, has occurred, is about to occur, or is intended to occur in connection with the item.

(f) [Reserved]

(g) *Misrepresentation and concealment of facts.* (1) No person may make any false or misleading representation, statement, or certification, or falsify or conceal any material fact, either directly to BIS or an official of any other United States agency, or indirectly through any other person:

(i) In the course of an investigation or other action subject to the EAR; or

(ii) In connection with the preparation, submission, issuance, use, or maintenance of any “export control document” or any report filed or required to be filed pursuant to the EAR; or

(iii) For the purpose of or in connection with effecting an export, reexport, transfer (in-country) or other activity subject to the EAR.

(2) All representations, statements, and certifications made by any person are deemed to be continuing in effect. Every person who has made any representation, statement, or certification must notify BIS, and any other relevant agency, in writing, of any change of any material fact or intention from that previously represented, stated, or certified, immediately upon receipt of any information that would lead a reasonably prudent person to know that a change of material fact or intention has occurred or may occur in the future.

(h) *Evasion.* No person may engage in any transaction or take any other action with intent to evade the provisions of ECRA, the EAR, or any order, license or authorization issued thereunder.

(i) *Failure to comply with reporting, recordkeeping requirements.* No person may fail or refuse to comply with any reporting or recordkeeping requirement of ECRA, the EAR, or of any order, license, or authorization issued thereunder.

(j) *License alteration.* Except as specifically authorized in the EAR or in writing by BIS, no person may alter any license, authorization, export control document, or order issued under ECRA or the EAR.

(k) *Acting contrary to the terms of a denial order.* No person may take any action that is prohibited by a denial order or a temporary denial order issued by BIS to prevent imminent violations of ECRA, the EAR, or any order, license or authorization issued thereunder.

18. Section 764.3 is revised to read as follows:

**§ 764.3 Sanctions.**

(a) *Administrative.* Violations of ECRA, the EAR, or any order, license or authorization issued thereunder are subject to the administrative sanctions described in this section and to any other liability, sanction, or penalty available under law. The protective administrative measures that are described in § 764.6 of this part are distinct from administrative sanctions.

(1) *Civil monetary penalty.* (i) A civil monetary penalty not to exceed the amount set forth in ECRA may be imposed for each violation, and in the event that any provision of the EAR is continued or revised by IEEPA or any other authority, the maximum monetary civil penalty for each violation shall be that provided by such other authority.

(ii) The payment of any civil penalty may be made a condition, for a period not exceeding two years after the imposition of such penalty, to the granting, restoration, or continuing validity of any export license, license exception, permission, or privilege granted or to be granted to the person upon whom such penalty is imposed.

(iii) The payment of any civil penalty may be deferred or suspended in whole or in part during any probation period that may be imposed. Such deferral or suspension shall not bar the

collection of the penalty if the conditions of the deferral, suspension, or probation are not fulfilled.

(2) *Denial of export privileges.* An order may be issued that restricts the ability of the named persons to engage in exports, reexports, and transfers (in-country) involving items subject to the EAR, or that restricts access by named persons to items subject to the EAR. An order denying export privileges may be imposed either as a sanction for a violation of ECRA, the EAR, or any other statute set forth at 50 U.S.C. 4819(e)(1)(B); or as a protective administrative measure described in § 764.6(c) or (d) of this part. An order denying export privileges may suspend or revoke any or all outstanding licenses issued under the EAR to a person named in the denial order or in which such person has an interest; may deny or restrict exports, reexports, and transfers (in-country) by or to such person of any item subject to the EAR; and may restrict dealings in which that person may benefit from any export, reexport, or transfer (in-country) of such items. The standard terms of a denial order are set forth in supplement no. 1 to this part. A non-standard denial order, narrower in scope, may be issued. Authorization to engage in actions otherwise prohibited by a denial order may be given by the Office of Exporter Services, in consultation with the Office of Export Enforcement, upon a written request by a person named in the denial order or by a person seeking permission to deal with a named person. Submit such requests to: Bureau of Industry and Security, Office of Exporter Services, Room 2099b, U.S. Department of Commerce, 14<sup>th</sup> Street and Pennsylvania, Ave., NW, Washington, DC 20230.

(3) *Exclusion from practice.* Any person acting as an attorney, accountant, consultant, freight forwarder, or in any other representative capacity for any license application or other matter before BIS may be excluded by order from any or all such activities before BIS.

(b) *Criminal.* Whoever willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids and abets in the commission of, an unlawful act described in 50 U.S.C. 4819(a) shall be fined not more than \$1,000,000; and in the case of the individual, shall be imprisoned for not more than 20 years, or both.

(c) *Other sanctions.* Conduct that violates ECRA, the EAR, or any order, license, or authorization issued thereunder, and other conduct specified in sections 11A, B, and C of the EAA may be subject to sanctions or other measures in addition to criminal and administrative sanctions under ECRA or the EAR. These include, but are not limited to, the following:

(1) *Statutory sanctions.* Statutorily-mandated sanctions may be imposed on account of specified conduct related to weapons proliferation. Such statutory sanctions are not civil or criminal penalties, but restrict imports and procurement (See section 11A of the EAA, Multilateral Export Control Violations, and section 11C of the EAA, Chemical and Biological Weapons Proliferation), or restrict export licenses (See section 11B of the EAA, Missile Proliferation Violations, and the Iran-Iraq Arms Non-Proliferation Act of 1992).

(2) *Other sanctions and measures—(i) Seizure and forfeiture.* Any property seized pursuant to export laws and regulations administered or enforced by the Secretary is subject to forfeiture. (50 U.S.C. 4819(d) and 4820(j); 22 U.S.C. 401; and 13 U.S.C. 305).

(ii) *Actions by other agencies.* (A) The Department of State may not issue licenses or approvals for the export or reexport of defense articles and defense services controlled under the Arms Export Control Act to persons convicted of criminal offenses specified at 22 U.S.C. 2778(g)(1)(A), or to persons denied export privileges by BIS or another agency; and may deny such licenses or approvals where the applicant is indicted for, or any party to the export is convicted of, those specified criminal offenses. (22 CFR 126.7(a) and 127.11(a)).

(B) The Department of Defense, among other agencies, may suspend the right of any person to contract with the United States Government based on export control violations. (Federal Acquisition Regulations at 48 CFR 9.407-2).

19. Supplement no. 1 to part 764 is amended by revising paragraph (b) to read as follows:

**Supplement No. 1 to Part 764—Standard Terms of Orders Denying Export Privileges**

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(b) *Standard denial order terms.* The following are the standard terms for imposing periods of export denial. Some orders also contain other terms, such as those that impose civil penalties, or that suspend all or part of the penalties or period of denial.

“It is therefore ordered:

First, that [the denied person(s)] may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as “item”) exported or to be exported from the United States that is subject to the Export Administration Regulations (EAR), or in any other activity subject to the EAR, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of the denied person any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by a denied person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a denied person acquires or attempts to acquire such ownership, possession or control;



C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the denied person of any item subject to the EAR that has been exported from the United States;

D. Obtain from the denied person in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by a denied person, or service any item, of whatever origin, that is owned, possessed or controlled by a denied person if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that, after notice and opportunity for comment as provided in § 766.23 of the EAR, any person, firm, corporation, or business organization related to the denied person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this order.

This order, which constitutes the final agency action in this matter, is effective [DATE OF ISSUANCE].”

## **PART 766 – ADMINISTRATIVE ENFORCEMENT PROCEEDINGS**

20. The authority citation for part 766 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.

21. Section 766.25 is amended by revising paragraphs (a), (b), (c), and (h), to read as follows:

**§ 766.25 Administrative action denying export privileges.**

(a) *General.* The Director of the Office of Export Enforcement (OEE), in consultation with the Director of the Office of Exporter Services, may deny the export privileges of any person who has been convicted of a violation of any of the statutes set forth at 50 U.S.C. 4819(e)(1)(B), including any regulation, license, or order issued pursuant to such statutes.

(b) *Procedure.* Upon notification that a person has been convicted of a violation of one or more of the provisions specified in paragraph (a) of this section, the Director of OEE, in consultation with the Director of the Office of Exporter Services, will determine whether to deny such person export privileges, including but not limited to applying for, obtaining, or using any license, License Exception, or export control document; or participating in or benefitting in any way from any export or export-related transaction subject to the EAR. Before taking action to deny a person export privileges under this section, the Director of OEE will provide the person written notice of the proposed action and an opportunity to comment through a written submission, unless exceptional circumstances exist. In reviewing the response, the Director of OEE will consider any relevant or mitigating evidence why these privileges should not be denied. Upon final determination, the Director of OEE will notify by letter each person denied export privileges under this section.

(c) *Criteria.* In determining whether and for how long to deny U.S. export privileges to a person previously convicted of one or more of the statutes set forth in paragraph (a) of this section, the Director of OEE may take into consideration any relevant information, including, but not limited to, the seriousness of the offense involved in the criminal prosecution, the nature and duration of the criminal sanctions imposed, and whether the person has undertaken any corrective measures.

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(h) *Applicability to related person.* The Director of OEE, in consultation with the Director of the Office of Exporter Services, may take action in accordance with § 766.23 of this

part to make applicable to related persons an order that is being sought or that has been issued under this section.

Matthew S. Borman

Deputy Assistant Secretary for Export Administration

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