



Billing Code 3510–33-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 764 and 766

[Docket No. 120207107-2565-01]

RIN 0694-AF59

Time Limit for Completion of Voluntary Self-Disclosures and Revised Notice of the Institution of Administrative Enforcement Proceedings.

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: This proposed rule would require that the final, comprehensive narrative account required in voluntary self-disclosures (VSDs) of violations of the Export Administration Regulations (EAR) be submitted to the Office of Export Enforcement within 180 days of the initial VSD notification. This proposed rule also would authorize the use of delivery services other than registered or certified mail for providing notice of the issuance of a charging letter instituting an administrative enforcement proceeding under the EAR. It also would remove the phrase “if delivery is refused” from a provision relating to determining the date of service of

notice of a charging letter's issuance based on an attempted delivery to the respondent's last known address. The Bureau of Industry and Security is proposing these changes to be better able to resolve administrative enforcement proceedings in a timely manner and provide more efficient notice of administrative charging letters.

DATES: Comments must be received no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: You may submit comments by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. The identification number for this rulemaking is BIS-2012-0043.
- By e-mail directly to publiccomments@bis.doc.gov. Include RIN 0694-AF59 in the subject line.
- By mail or delivery to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2099B, 14th Street and Pennsylvania Avenue, NW, Washington, DC 20230. Refer to RIN 0694-AF59.

FOR FURTHER INFORMATION CONTACT: Special Agent Kirk Flashner, Office of Export Enforcement, Bureau of Industry and Security, U.S. Department of Commerce, Room H4514, 14th Street and Pennsylvania Avenue, NW, Washington, DC 20230. Tel: (202) 482-1208. Facsimile: (202) 482-5889.

SUPPLEMENTARY INFORMATION:

Background

The Bureau of Industry and Security (BIS), Office of Export Enforcement (OEE), investigates possible violations of the Export Administration Regulations (EAR) and orders, licenses, and authorizations issued thereunder. These investigations may result in allegations of violations that may be settled, adjudicated in an administrative enforcement proceeding, or referred to the Department of Justice for possible criminal prosecution. This rule proposes three changes to the EAR. One change addresses voluntary self-disclosures in connection with OEE's conduct of investigations. The other two changes address service of notice in administrative enforcement proceedings.

Proposed change regarding voluntary self-disclosures.

Section 764.5 of the EAR provides a procedure whereby parties that believe that they may have committed a violation of the EAR can voluntarily disclose the facts of the potential violations to OEE. Such disclosures that meet the requirements of § 764.5 typically are afforded "great weight" by BIS, relative to other mitigating factors, in determining what administrative sanctions, if any, to seek. Section 764.5 requires an initial notification, which is to include a description of the general nature and extent of the suspected violations, and is followed at a later date by a thorough review and narrative account of the suspected violations, including all relevant supporting documentation. If the person making the initial notification subsequently completes the narrative account, the disclosure is deemed to have been submitted to OEE on the date of the initial notification. The date of the initial notification may be significant because

information provided to OEE may only be considered a voluntary disclosure if the information “is received by OEE for review prior to the time that OEE or another United States Government agency has learned of the same or substantially similar information from another source and has commenced an investigation or inquiry in connection with that information.” 15 C.F.R. § 764.5(b)(3).

Currently, § 764.5 of the EAR does not include a specific time limit within which a narrative account must be submitted to OEE. Too often, initial notifications are not promptly followed by comprehensive narrative accounts, and as a result, OEE must maintain open files on voluntary disclosures for extended periods of time without making sufficient progress towards resolving the matter disclosed. To address these situations and promote expeditious resolution of self-disclosed violations, BIS proposes to set a 180-day deadline for persons who have submitted an initial notification to complete and submit the final narrative report to OEE. The Director of OEE could extend this 180-day time deadline, at his or her discretion, if U.S. Government interests would be served by an extension or upon a showing by the party making the disclosure that more time is reasonably necessary to complete the narrative account. Some illustrative examples of circumstances that might warrant additional time include the following.

- Records or information from multiple entities and/or jurisdictions are needed to complete the narrative account.

- Material changes occur in the business, such as a bankruptcy, large layoffs, or a corporate acquisition or restructuring, and present difficulties in gaining access to, or analysis of, information needed to complete the narrative account.
- A pending U.S. Government determination (such as a commodity jurisdiction determination or a classification request) is needed to complete the narrative account.

The Director of OEE may place conditions on his or her approval of an extension. For example, while BIS generally obtains an agreement to toll the statute of limitations at the time that an initial notification is filed, in response to a request for an extension of the 180-day deadline, the Director of OEE may require a tolling agreement, if one has not already been obtained, to cover any violations disclosed in the initial notification or discovered during the review conducted to prepare the narrative account. The Director of OEE also has discretion to require the disclosing person to undertake specific interim remedial compliance measures as a condition of granting an extension to the 180-day deadline.

Failure to meet either the 180-day deadline or an extended deadline granted by the Director of OEE would not be an additional violation of the EAR. However, that failure may reduce or eliminate the mitigating impact of the voluntary disclosure. The 180-day deadline serves as an incentive to the disclosing party, as meeting the deadline will allow information contained in the narrative account to be credited by OEE as having been voluntarily disclosed on the date of the initial notification, even if the information was not explicitly described in that initial notification.

This new rule is consistent with the notion of an initial notification, which rewards promptness and which acknowledges that a disclosing party might not be able to identify all of the possible violations of the EAR at the time an initial notification was made.

Imposing a deadline to complete voluntary disclosures is consistent with the practices of other agencies. The International Traffic in Arms Regulations imposes a 60-day deadline (22 C.F.R. § 127.12(c)). Similarly, the Department of the Treasury's Office of Foreign Assets Control also imposes time constraints by requiring that disclosures be made within a reasonable time following the initial notification. Based on its experience with voluntary self-disclosures, BIS believes that 180 days is ample time to complete the narrative account in most instances and that requests for extensions will normally not be necessary or justified.

Proposed changes regarding providing notice of the institution of administrative enforcement proceedings.

Section 766.3 of the EAR sets forth the procedures for instituting administrative enforcement proceedings. Those procedures include issuing a charging letter, which constitutes the formal administrative complaint. The charging letter sets forth the essential facts about the alleged violations and certain other information about the case, and informs the respondent that failure to answer the charges will be treated as a default. Respondents must be notified of the issuance of a charging letter by one of the methods listed in § 766.3(b) of EAR. One allowable method is mailing a copy of the letter by registered or certified mail to the respondent's last known address. BIS proposes to add as an authorized method of notification, sending a copy of the charging letter to the respondent's last known address by express mail or by a commercial courier or

delivery service. BIS is proposing to make this change to facilitate the process of notifying the respondent in cases where the respondent's last known address is in a country with a postal service that is inefficient or unreliable or in which postal delivery tracking information is not available. It will also allow BIS to select an efficient and effective method of notifying the respondent of the issuance of the charging letter. Moreover, unlike registered and certified mail, reputable commercial courier or delivery services and the U.S. Postal Service's express mail use point-by-point tracking or similar electronic tracking methods to provide detailed records of a parcel's delivery or attempted delivery. The use of services that provide detailed tracking information for parcels sent outside the United States will enable BIS to track and monitor the delivery status of pending notifications more efficiently and effectively.

Respondents are required to answer a charging letter within 30 days of being served with notice of its issuance. Currently the date of service of notice is determined under § 766.3(c) by the date of delivery, or of attempted delivery if delivery is refused. BIS proposes to remove the phrase "if delivery is refused" from § 766.3(c) of the EAR. This proposed rule eliminates the requirement that an attempted delivery must involve documentation that the delivery was "refused." The phrase "is refused" focuses on registered and certified mail, which include a postcard-sized hard-copy receipt that is returned to the sender after delivery or attempted delivery. This proposed rule provides for the use of reliable mail or delivery services that do not use such a hard-copy return receipt system and can efficiently and effectively track deliveries and attempted deliveries. In addition, BIS has found that in some instances foreign postal services do not return the receipt even though the parcel or package has been not been returned, including in situations where the respondent subsequently contacts BIS about the charging letter.

Moreover, some foreign postal services do not list “refused” as an option on a pre-printed return receipt or do not record other information when the package containing the charging letter is returned, including in situations when the package has been returned opened. This proposed change to § 766.3(c) would better enable BIS to determine the date of service of notice of issuance of charging letters sent to entities located in foreign countries.

Since August 21, 2001, the Export Administration Act of 1979, as amended, has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 C.F.R., 2001 Comp. 783 (2002)), as extended most recently by the Notice of August 15, 2012, 77 FR 49699 (August 16, 2012), has continued the EAR in effect under the International Emergency Economic Powers Act (50 U.S.C. §§ 1701 et seq.). BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

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 is consistent with the goals of Executive Order 13563. This rule has been determined not to be a significant rule 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 (PRA), 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 proposed rule involves an approved information collection entitled “Procedure for Voluntary Self-Disclosure of Violations” (OMB control number 0694-0058). BIS believes that the changes to the voluntary disclosure procedures that this rule proposes would have no material effect on the burden imposed by this collection. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden to Jasmeet Seehra, Office of Management and Budget (OMB), by email to jseehra@omb.eop.gov or by fax to (202) 395-7285; and to the Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, Room 2099B, 14th Street and Pennsylvania Ave., NW, Washington, DC 20230 or by email to publiccomments@bis.doc.gov referencing RIN 0694-AF59 in the subject line.

3. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 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. 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 Regulations, Department of Commerce, submitted a memorandum to the Chief Counsel for

Advocacy, Small Business Administration, certifying that this proposed rule will not have a significant impact on a substantial number of small entities.

This proposed rule would make three changes to the EAR. The first change would require that parties making voluntarily self-disclosures of violations of the EAR complete the process within 180 days of making the initial notification or obtain an extension from OEE. The second change would add delivery by express mail and commercial couriers and delivery services as an acceptable method of serving administrative charging letters on respondents. The third change would remove the words “if delivery is refused” from one section to account for carriers with electronic tracking capabilities. The legal and factual background for these changes is detailed in the preamble to this proposed rule and not repeated here.

The first proposed change would merely set a deadline of 180 days from the initial disclosure for parties to submit the narrative account that completes the disclosure as part of a voluntary self-disclosure. It makes no changes to the volume or nature of the information that an entity making a voluntary self-disclosure must submit to BIS. It does not create any new substantive requirements, but merely places a reasonable deadline on parties seeking to obtain the benefits of voluntary self-disclosure. If the disclosing party needs more than 180 days, the party may request an extension of time from the Director of OEE. Although this proposed change may place some additional burden on parties making voluntary self-disclosures, that burden would not be significant.

The second proposed change would allow BIS to use delivery services other than certified or registered mail to effect service of charging letters, or amendments and supplements thereto.

This rule makes no changes to any of the actions that any small entity or any entity must make in response to an administrative charging letter or any supplement or amendment thereto. The only potential impact on members of the public is the method by which they would receive notification, and this cannot be considered a significant impact on any entity outside of BIS.

The third proposed change would remove the words “if delivery is refused” from § 766.3(c).

This change is being made to update the EAR to allow the use of carriers that track shipments, which in turn better enables BIS to determine the date of service notifying respondents, foreign entities in particular, that a charging letter has been issued. Like the previous proposed change, this would not impose any burden on a member of the public.

Although BIS cannot state with certainty the number of small entities that would be affected by this rule, any economic impact would be negligible. This rule does not increase any of the information that any party must provide in connection with a voluntary self-disclosure of an EAR violation. It merely requires the disclosing party to complete the comprehensive narrative account of the violations within 180 days of submitting the initial notification. BIS believes that 180 days would be an adequate amount of time for most voluntary self-disclosures. In those instances where additional time is needed to complete the narrative account, the rule provides that the Director of OEE may extend the 180-day deadline. In addition, BIS believes that the proposed change to allow for delivery by a commercial courier or delivery service is necessary in some cases to effect service abroad. Similarly, the proposed removal of the requirement that an

attempted delivery is insufficient absent documentation that the respondent “refused” the delivery is necessary because express mail and reputable commercial courier or delivery services provide detailed tracking information concerning deliveries and attempted deliveries, and because some foreign postal delivery services may not document a refusal. Because none of these proposed changes would have a significant impact on a substantial number of small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects

15 CFR part 764

Administrative practice and procedure, Exports, Law enforcement, Penalties

15 CFR part 766

Administrative practice and procedure, Confidential business information, Exports, Law enforcement, Penalties

For the reasons stated in the preamble, parts 764 and 766 of the Export Administration Regulations (15 CFR parts 730 through 774) are proposed to be amended as follows.

PART 764 – [AMENDED]

1. The authority citation paragraph for part 764 continues to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 15, 2012, 77 FR 49699 (August 16, 2012).

2. Section 764.5 is amended by revising the last sentence of paragraph (c)(2)(i) and by adding three sentences immediately following that sentence to read as follows:

§ 764.5 Voluntary self-disclosure.

* * * * *

(c) * * *

(2) * * * (i) * * * If the person making the initial notification subsequently completes and submits to OEE the narrative account required by paragraph (c)(3) of this section such that OEE receives the narrative account within 180 days of its receipt of the initial notification, matters disclosed by the narrative account will be deemed to have been disclosed to OEE on the date of the initial notification for purposes of paragraph (b)(3) of this section. The Director of OEE may extend this 180-day deadline upon a determination in his or her discretion that U.S. Government interests would be served by an extension or that the person making the initial notification has shown that more than 180 days is reasonably needed to complete the narrative account. The Director of OEE in his or her discretion may place conditions on the approval of an extension. For example, the Director of OEE may require that the disclosing person agree to toll the statute of limitations with respect to violations disclosed in the initial notification or discovered during the review to prepare the narrative account, and/or require the disclosing person to undertake

specified interim remedial compliance measures. Failure to meet the deadline (either the initial 180-day deadline or an extended deadline granted by the Director of OEE) would not be an additional violation of the EAR, but such failure may reduce or eliminate the mitigating impact of the voluntary disclosure under Supp. No. 1 to this part.

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PART 766 – [AMENDED]

3. The authority citation paragraph for part 766 continues to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 15, 2012, 77 FR 49699 (August 16, 2012).

4. Section 766.3 is amended by revising paragraphs (b)(1) and (c) to read as follows:

§ 766.3 Institution of administrative enforcement proceedings.

* * * * *

(b) * * *

(1) By sending a copy by registered or certified mail or by express mail or commercial courier or delivery service addressed to the respondent at the respondent's last known address;

* * *

(c) The date of service of notice of the issuance of a charging letter instituting an administrative enforcement proceeding, or service of notice of the issuance of a supplement or amendment to a

charging letter, is the date of its delivery, or of its attempted delivery by any means described in paragraph (b)(1) of this section.

Dated November 2, 2012

Kevin J. Wolf

Assistant Secretary for Export Administration

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