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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 740

[Docket No. 190524472-9472-01]

RIN 0694- AH65

Modification of License Exception Additional Permissive Reexports (APR)

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) proposes to amend the Export Administration Regulations (EAR) by modifying License Exception Additional Permissive Reexports (APR). Specifically, BIS is proposing to remove provisions which authorize reexports of certain national security-controlled items on the Commerce Control List (CCL) to gain better visibility into transactions of national security or foreign policy interest to the United States.

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

ADDRESSES: Comments on this rule may be submitted to the Federal rulemaking portal (www.regulations.gov). The regulations.gov ID for this rule is: BIS-2020-0010. All relevant comments (including any personally identifying information) will be made available for public inspection and copying.

FOR FURTHER INFORMATION CONTACT: Eileen Albanese, Director, Office of National Security and Technology Transfer Controls, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482-0092 or Email: eileen.albanese@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

The Department of Commerce's Bureau of Industry and Security (BIS) is proposing to revise part 740 of the Export Administration Regulations (EAR) (15 CFR, Subchapter C, parts 730-774), which provides information on license exceptions. An export license exception is an authorization allowing the export, re-export, or transfer (in-country), under stated conditions, of items subject to the EAR that would otherwise require a license. Because there are a number of circumstances under which a license exception may replace the need for a license, there are several types of license exceptions described in part 740.

With this rule, BIS is proposing to modify License Exception Additional Permissive Reexports (APR) (§ 740.16 of the EAR) which, among other things, authorizes certain reexports between and among certain countries. To advance the objectives discussed in the Administration's December 2017 National Security Strategy as well as address the challenges discussed in the Administration's January 2018 National Defense Strategy available at <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>, BIS proposes to remove a provision of License Exception APR due to variations in how the United States and its partners, including partners located in Country Group A:1, perceive the threat caused by the increasing integration of civilian and military technology development in countries of concern. A current listing of country groups can be found at

<https://www.bis.doc.gov/index.php/documents/regulation-docs/2255-supplement-no-1-to-part-740-country-groups-1/file>.

Based on discussions with partner governments and U.S. companies, BIS has evidence of differences in licensing review standards for national-security controlled items destined to Country Group D:1, so that countries in Country Group A:1 or Hong Kong may approve a license for the reexport of a U.S.-origin item that would have been denied if exported directly from the United States.

Proposed Revision to License Exception APR (§ 740.16 Additional Permissive Reexports)

Currently, paragraph (a) of License Exception APR authorizes the reexport of certain items from a country in Country Group A:1 or Hong Kong to certain destinations, provided that the reexport is consistent with an export authorization from the country of reexport, and that the item is not subject to reasons for control described in § 740.16(a)(2), which includes missile technology and nuclear nonproliferation controls. BIS is proposing to remove countries in Country Group D:1 as a category of eligible destination for national security-controlled items under paragraph (a) of License Exception APR by amending § 740.16(a)(3). BIS is considering this change because, as described above, the Department acknowledges there may be variations of national security or foreign policy concerns between other countries and the United States. Even Wassenaar participating states in Country Group A:1 may have export authorization policies that do not align with the national security or foreign policy interests of the U.S. government.

As such, BIS believes that reexports of national security-controlled items currently permitted under § 740.16(a)(3)(ii) should be reviewed by the U.S. government before proceeding. Removing the provision currently found in § 740.16(a)(3)(ii) and requiring a

reexport license for national security-controlled items to Country Group D:1 will allow the U.S. government prior review of these reexports to ensure that the reexports are authorized consistent with U.S. policy.

Request for Comment

Overall, license exceptions can be of significant benefit to exporters and reexporters, although they can be complex and may require detailed analysis before use. BIS has historically encouraged exporters and reexporters to use license exceptions since they reflect U.S. policy, reduce the burden for both exporters/reexporters and BIS staff, and reduce obstacles and costs that can inhibit trade.

The main advantage of using a license exception is that it provides relief from the requirement to apply for a license. The resources needed to apply for and administer a BIS license include those necessary to access the BIS electronic systems, complete the application and supporting documentation, and track license use if the license covers multiple transactions. Additionally, a licensing requirement can have a significant impact on the timing and predictability of order fulfillment due to license processing time, which involves interagency review and can vary according to the transaction. Recordkeeping requirements for license exceptions generally parallel those for licenses.

BIS is requesting comment on how the proposed change would impact persons who currently use or plan to use License Exception APR. Currently, BIS does not have a way to readily account for how many items are being authorized for reexport or transfer (in-country) under the provisions of License Exception APR, so BIS is seeking information as to the volume of transactions affected by this proposed change, how the proposed change would affect the amount of time necessary to complete such transactions in the future, and how the proposed

change would otherwise affect current business. Please also see the Paperwork Reduction Act section of the rulemaking requirements for additional areas available for comment.

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). ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule. As set forth in § 1768 of ECRA, all delegations, rules, regulations, orders, determinations, licenses, or other forms of administrative action that have been made, issued, conducted, or allowed to become effective under the Export Administration Act of 1979 (previously, 50 U.S.C. 4601 et seq.) (as in effect prior to August 13, 2018 and as continued in effect pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)) or the Export Administration Regulations, and are in effect as of August 13, 2018, shall continue in effect according to their terms until modified, superseded, set aside, or revoked under the authority of ECRA.

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 proposed rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866.

2. This proposed rule is not subject to the requirements of Executive Order 13771 because it is issued with respect to a national security function of the United States. As described in this rule and consistent with the Administration’s National Security Strategy and National Defense Strategy, modification of the license exception described herein would enhance the national security of the United States by reducing the risk that exports, reexports, and transfers (in-country) of items subject to the EAR could take place contrary to U.S. national security or foreign policy interests. This proposed rule would allow the United States government to review transactions involving items and destinations of national security concern prior to their completion to mitigate this risk. The cost-benefit analysis required pursuant to Executive Orders 13563 and 12866 indicates that this rule is intended to improve national security as its primary direct benefit. Accordingly, this rule meets the requirements set forth in the April 5, 2017, OMB guidance implementing Executive Order 13771, regarding what constitutes a regulation issued “with respect to a national security function of the United States” and it is, therefore, exempt from the requirements of Executive Order 13771.

3. 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.) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by OMB under control number 0694–0088, Simplified Network Application Processing System, which includes, among other things, license applications and carries a burden estimate of 43.8 minutes for a manual or electronic submission.

BIS is not able to estimate the increase in total burden hours associated with the PRA and OMB control number 0694–0088 as a result of this rule because, prior to publication of this proposed rule, BIS did not have a way to readily account for how many items were being authorized for reexport or transfer (in-country) under provisions of License Exception APR. BIS encourages public comments from reexporters to assist the agency in developing estimates for the impact on burden hours if the changes included in this proposed rule were published in final form.

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

5. Pursuant to section 1762 of the Export Control Reform Act of 2018 (Title XVII, Subtitle B of Pub. L. 115-232, 132 Stat. 2208), which was included in the John S. McCain National Defense Authorization Act for Fiscal Year 2019, this action is exempt from the Administrative Procedure Act (APA) (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date. Nonetheless, BIS is providing the public with an opportunity to review and comment on this rule, despite its being exempted from that requirement of the APA.

6. 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 740

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

Accordingly, 15 CFR part 740 of the EAR (15 CFR parts 730 – 774) is proposed to be amended as follows:

PART 740 – [AMENDED]

1. The authority citation for 15 CFR part 740 is revised to read as follows:

Authority: 50 U.S.C. 4801-4852; 50 U.S.C. 4601 et seq.; 50 U.S.C. 1701 et seq.; 22 U.S.C. 7201 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.

2. Amend § 740.16 by revising paragraph (a)(3) to read as follows:

§ 740.16 Additional permissive reexports (APR).

(a) ***

(3) The reexport is destined to a country in Country Group B that is not also included in Country Group D:2, D:3, or D:4; and the commodity being reexported is both controlled for national security reasons and not controlled for export to Country Group A:1.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

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