PARTIES TO A TRANSACTION AND THEIR RESPONSIBILITIES, ROUTED EXPORT TRANSACTIONS, SHIPPER'S EXPORT DECLARATIONS, AND EXPORT CLEARANCE

Proposed rule with request for comments - 64 FR 53855
Published October 4, 1999

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EOR 2 - Industry Coalition on Technology Transfer (ICOTT)

EOR 3 - Rockwell Automation Allen-Bradley

EOR 4 - Carlos Rodriguez & Associates on behalf of the New York/New Jersey Foreign Freight Forwarders & Brokers Association, Inc

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federal register

Monday
October 4, 1999

Part IV

Department of Commerce

Bureau of Export Administration

Bureau of the Census

15 CFR Parts 30 et al.

Revisions to the Export Administration Regulations: Parties to a Transaction and Their Responsibilities, Routed Export Transactions, Shipper's Export Declarations, and Export Clearance; Proposed Rule

Amendment to Foreign Trade Statistics Regulations To Clarify Exporters' and Forwarding Agents' Responsibilities and To Clarify Provisions for Authorizing an Agent To Prepare and File a Shipper's Export Declaration on Behalf of a Principal Party in Interest; Proposed Rule

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Parts 732, 740, 743, 748, 750, 752, 758, 762, and 772

[Docket No. 990709186–9186–01]

RIN 0694–AB88

Parties to a Transaction and their responsibilities, Routed Export Transactions, Shipper's Export Declarations, and Export Clearance

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Proposed rule, with request for comments.

SUMMARY: The Bureau of Export Administration proposes to revise the Export Administration Regulations (EAR) to clarify the responsibilities of parties to an export transaction, the filing and use of Shipper's Export Declarations, Destination Control Statement requirements, and other export clearance issues.

DATES: Comments must be received December 3. 1999.

ADDRESSES: Written comments should be sent to Sharron Cook, Regulatory Policy Division, Office of Exporter Services, Bureau of Export Administration. Room 2705. 14th Street and Pennsylvania Avenue, N. W., Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: Sharron Cook, Regulatory Policy Division, Bureau of Export Administration, at (202) 482-2440.

SUPPLEMENTARY INFORMATION:

Background

The Bureau of Export Administration (BXA) proposes to amend the Export Administration Regulations (EAR) in order to simplify and clarify the export clearance process and facilitate compliance. BXA's primary objective is to promote flexibility so that parties to transactions subject to the EAR may structure their transactions freely, consistent with national security and foreign policy objectives.

In this proposed rule, BXA defines new terms, including "principal parties in interest". "routed export transaction", and "end-user". and clarifies existing ones (notably the definition of "exporter"). The proposed amendments ensure that for every transaction subject to the EAR, some party to the transaction is clearly responsible for determining licensing authority (License, License Exception, or NLR), and for obtaining the appropriate license or other authorization. The proposed amendments also encourage communication among all parties to a transaction to ensure that each party knows its responsibilities in order to comply with the EAR.

For export control purposes the exporter has generally been the seller. An export transaction, however, has two principal parties in interest: a U.S. party and a foreign party-usually the seller and the buyer. In a "routed export transaction." the foreign principal party in interest agrees to terms of sale that may include assuming responsibility for export licensing. This proposed rule provides that when the foreign principal party expressly assumes responsibility in writing for determining license requirements and obtaining necessary authorization, that foreign party must have a U.S. agent who becomes the "exporter" for export control purposes. Without such a written undertaking by the foreign principal, the U.S. principal is the exporter, with all attendant responsibilities.

The Shipper's Export Declaration (SED) plays an important role in export clearance. Both the EAR and the Foreign Trade Statistics Regulations (FTSR) of the Bureau of Census contain specific requirements regarding the use of this document. The EAR govern the use of the SED as an export control document, while the FTSR govern its use as a source of trade statistics. For statistical purposes, the Census Bureau requires the name of the U.S. principal party in interest, generally the seller, in Block (la) of the SED. For purposes of responsibility for export licensing requirements under the EAR, however, the US. agent of the foreign principal party in interest may be the exporter, regardless of who is listed in Block (la) of the SED. It is important to note that all parties who participate in transactions subject to the EAR are responsible for complying with the EAR. Therefore, a party that is listed in Block 1 (a) of the SED or in the exporter field of the Automated Export System (AES) record is not the sok party to the transaction responsible for compliance with the EAR.

In addition to clarifying export licensing responsibilities, this rule institutes a requirement that the export licensee communicate license conditions to all parties to whom those conditions apply and, when required by the license, to obtain written acknowledgment of receipt of the conditions. This new provision is part of BXA's License and Enforcement Action Program (LEAP), which is designed to enhance compliance with the EAR.

Finally, these proposed amendments significantly revise the first six sections of Part 758 of the EAR by reorganizing. streamlining and clarifying necessary provisions while deleting unnecessary or redundant provisions. Section 758] consolidates into one section all export control-related provisions pertaining to SEDs. In consolidating these provisions into one section, BXA has eliminated those that are already contained in the FTSR. or that were otherwise unrelated to export controls. Section 758.2 clarifies and consolidates provisions relating to the responsibilities of the parties, and § 758.3 consolidates. but does not significantly change, provisions concerning the use of an export license. Section 758.4, which contained very specific provisions relating to conformity of documents. has been greatly simplified in the inter-est of flexibility. Sections 758.5 and § 758 6 have been combined and reduced into one paragraph.

Although the Export Administration Act (EAA) expired'on August 20. 1994. the President invoked the International Emergency Economic Powers Act and continued in effect the EAR, and, to the extent permitted by law, the provisions of the EAA in Executive Order 12924 of August 19. 1994. extended by Presidential notice of August 10. 1999. 64 FR 44101 (August 13. 1999)

Rulemaking Requirements

1. This proposed rule has been determined to be significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the Paperwork Reduction Act (PRA). unless that collection of information displays a currently valid OMB Control Number This rule contains and involves collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) This rule involves collections that have been approved by the Office of Management and Budget under control numbers 0694–0038. and 0694–0096. This rule contains collections that have been approved by the Office of Management and Budget under control numbers: 0607–0152. 0694-0040.0694-0094.0694-0095. 0694–0097. 0694–0088, and 0694–xxxx.

Comments are invited on (a) whether the collection of information is necessary for the functions of the agency. including whether the information shall have practical utility, (b) the accuracy of the agency's estimate of the burden of the proposed collection

of information; (c) ways to enhance the quality, utility. and clarify of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments regarding these or any other aspects of the collection of information to: Sharron Cook. Regulatory Policy Division. Bureau of Export Administration. U.S. Department of Commerce Room 2705. 14th Street and Pennsylvania Ave.. N.W. Washington, DC 20230.

Because of the importance of the issues raised by these regulations, this rule is issued in proposed form and comments will be considered in the development of final regulations. Comments will be considered on provisions included in the regulations as well as provisions or guidance which commenters believe should be included in the regulations. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close December 3. 1999. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the person submitting the comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness. the Department re uires comments in written form.

8 ral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign -governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility. Room 6883. Department of Commerce. 14th Street and Pennsylvania Avenue, N.W.. Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications. may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from the Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 482–0500.

3. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (Sec. 5 U.S.C. 553(a)(l)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 5 U.S.C. or by any other law, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et ***seq.)*** are not applicable.

List of Subjects

15 CFR Part 730

Administrative practice and procedure, Advisory committees. Exports. Foreign trade, Reporting and recordkeeping requirements, Strategic and critical materials.

15 CFR Parts 740, 743. 748. 750. 752. and 758

Administrative practice and procedure, Exports, Foreign trade. Reporting and Record keeping requirements.

15 CFR Part 762

Administrative practice and procedure, Business and industry, Confidential business information. Exports, Foreign trade, Reporting and recordkeeping requirements.

Accordingly, parts 732. 740. 743. 748. 750, 752, 758, 762, and 772 of the Export Administration Regulations (15 CFR Parts 730-799) are proposed to be amended as follows:

1. The authority citation for 15 CFR parts 758 and 762 are revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq*; 50 U.S.C. 1701 *et* seq.: E.O. 12924. 59 FR 43437, 3 CFR. 1994 Comp.. p. 917: Notice of August 10. 1999.64 FR 44101 (August 13. 1999).

2. The authority citation for 15 CFR parts 732, 748. 752. and 772 are revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et* seq.. 50 U.S.C. 1701 *et seq.*; E.O. 12924, 59 FR 43437. 3 CFR. 1994 Comp.. p. 917; E.O. 13026.61 FR 58767, 3 CFR. 1996 Comp.. p. 228: Notice of August 10. 1999. 64 FR 44101 (August13. 1999).

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

Authority: 50 U.S.C. app. 2401 *et* seq.: 50 U.S.C. 1701 et *seq.*: E.O. 12924. 59 FR 43437. 3 CFR. 1994 Comp.. p. 917; E.O. 13026.61 FR 58767. 3 CFR. 1996 Comp.. p. 228: Notice of August 10. 1999.64 FR 44 101 (August13. 1999).

4. The authority citation for 15 CFR part 743 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.* 50 U.S.C. 1701 *etseq;* E.O. 12924. 59 FR 43437. 3 CFR. 1994 Comp.. p. 917; Notice of August 10. 1999.64 FR 44101 (August 13, 1999)

5. The authority citation for 15 CFR part 750 continues to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.: 50 U.S.C. 1701 etseq.; E.O. 12924.59 FR 43437, 3 CFR. 1994 Comp., p. 917: E.O. 12981.60 FR 62980.3 CFR. 1997 Comp.. p. 60; E.O. 13026, 61 FR 58767.3 CFR. 1996 Comp.. p. 228; Notice of August 10. 1999.64 FR 44101 (August 13. 1999).

6. Parts 740 through 772 are amended by revising the phrase "U.S. exporter" to read "exporter" in the following places:

§ 740.9(a) (2)(iii) last sentence
§ 740.10(b)(3)(ii)(C)
§ 743.1(b)
§ 748.11(e)(4)(ii)(1)
Supplement No. 3 to part 748, "BXA-7 11, Statement By ultimate consignee and Purchaser Instructions". Block 8
Supplement No. 3 to part 752. "Instructions on Completing Form BXA-752 "Statement by Consignee in Support of Special Comprehensive License". Block 5

PART 732—[AMENDED]

7. Section 732.5 is revised to read as follows:

§ 732.5 Steps regarding Shipper's Export Declaration, Destination Control Statements, and recordkeeping.

(a) ***Step 27: Shipper's Export Declaration (SED).*** Exporters or agents authorized to complete the Shipper's Export Declaration (SED). or to file SED

information electronically using the Automated Export System (AES). should review § 758.1 of the EAR to determine when an SED is required and what export control information should be entered on the SED or AES record. More detailed information about how to complete an SED or file the SED information electronically using AES may be found in the Bureau of Census Foreign Trade Statistics Regulations (FTSR) at 15 CFR part 30. Reexporters and firms exporting from abroad may skip Steps 27 through 29 and proceed directly to § 732.6 of this part.

(1) *Entering license authority.* You must enter the correct license authority for your export on the SED or AES record (License number, License Exception symbol. or No License Required designator "NLR") as appropriate. See § 758.1 (f) of the EAR and 15 CFR 30.7(m) of the FTSR.

(i) *License number and expiration date.* If you are exporting under the authority of a license. you must enter the license number on the SED or AES record. The expiration date must be entered on paper versions of the SED only.

(ii) *License Exception.* If you are exporting under the authority of a License Exception, you must enter the correct License Exception symbol (e.g.. LVS. GBS, CIV) on the SED or AES record. See § 740.1 of the EAR.

(iii) *NLR.* If you are exporting items for which no license is required, you must enter the designator NLR. You should use the NLR designator in two circumstances: first, when the items to be exported are subject to the EAR but not listed on the Commerce Control List (CCL) (i.e.. items that are classified as EAR99), and second, when the items to be exported are listed on the CCL but do not require a license. Use of the NLR designator is also a representation that no license is required under any of the General Prohibitions set forth in part 736 of the EAR.

(2) *Item description.* You must enter an item description identical to the item description on the license when a license is required or enter an item description sufficient in detail to permit review by the U.S. Government and verification of the Schedule B Number (or Harmonized Tariff Schedule number) for License Exception shipments or shipments for which No License is Required (NLR). See § 758.1 (f) of the EAR; and 15 CFR 30.7(l) of the FTSR.

(3) *Entering the ECCN.* You must enter the correct Export Control Classification Number (ECCN) on the SED or AES record for all items having a classification other than EAR99, i.e.. items listed on the Commerce Control List in Supplement No. 1 to part 774 of the EAR. See § 758.1 (f) of the EAR; and 15 CFR 30.7(m) of the FTSR.

(b) *Step 28: Destination Control Statement.* The Destination Control Statement (DCS) must be entered on the invoice and on the bill of lading, air waybill, or other export control document that accompanies the shipment from its point of origin in the United States to the ultimate consignee or end-user abroad. The person responsible for preparation of those documents is responsible for entry of the DCS. The DCS is required for all exports from the United States of items on the Commerce Control List that are not classified as EAR99, unless the export may be made under License Exception BAG or GFT (see part 740 of the EAR). Reexporters should review § 752.15 of the EAR for DCS requirements when using a Special Comprehensive License; otherwise, DCS requirements do not apply to reexports.

(c) *Step 29: Recordkeeping.* Records of transactions subject to the EAR must be maintained for five years in accordance with the recordkeeping provisions of part 762 of the EAR.

PART 740—[AMENDED]

8. Section 740.1 is amended by revising paragraph (d) to read as follows:

§ 740.1 Introduction.

* * * * *

(d) *Shipper's Export Declaration: Clearing exports under License Exceptions.* You must enter on any required Shipper's Export Declaration (SED) or Automated Export System (AES) record the correct License Exception symbol, e.g.. LVS, TMP. etc., for the License Exception(s) you use to export. In addition, you must enter the correct Export Control Classification Number (ECCN), e.g., 4A003, 5A002, etc., on the SED or AES record for all items having a classification other than EAR99, i.e.. items listed on the Commerce Control List in Supplement No. 1 to part 774 of the EAR. See § 758.1 of the EAR for Shipper's Export Declaration requirements.

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PART 748—[AMENDED]

9. Section 748.4 is amended by revising paragraphs (a) and (b) to read as follows:

§ 748.4 Basic guidance related to applying for alicense.

(a) *License Applicant.* (1) *Export transactions.* Only a person in the United States may apply for a license to export items from the United States. The applicant must be the exporter, who is that principal party in interest with the authority to determine and control the sending of items out of the United States. See definition of "exporter" in part 772 of the EAR.

(2) *Routed export transactions.* The U.S. principal party in interest or the duly authorized U.S. agent of the foreign principal party in interest may apply for a license to export items from the United States. Prior to submitting an application, the agent that applies for a license on behalf of the foreign principal party in interest must obtain a power of attorney or other written authorization from the foreign principal party in interest. See § 758.2(c) and (e) of the EAR.

(3) *Reexport transactions.* The U.S. or foreign principal party in interest, or the duly authorized U.S. agent of the foreign principal party in interest. may apply for a license to reexport controlled items from one country to another. Prior to submitting an application, an agent that applies for a license on behalf of a foreign principal party in interest must obtain a power-of-attorney or other written authorization from the foreign principal party in interest. See power-of-attorney requirements in paragraph (b)(Z) of this section.

(b) *Disclosure of parties on license applications and the power of attorney.* (1) *Disclosure of parties.* License applicants must disclose the names and addresses of all parties to a transaction. When the applicant is the U.S. agent of the foreign principal party in interest. the applicant must disclose the fact of the agency relationship, and the name and address of the agent's principal. If there is any doubt about which persons should be named as parties to the transaction, the applicant should disclose the names of all such persons and the functions to be performed by each in Block 24 (Additional Information) of the BXA-748P Multipurpose Application form. Note that when the foreign principal party in interest is the ultimate consignee or end-user, the name and address need not be repeated in Block 24. See "Parties to the transaction" in § 748.5.

(2) *Power of attorney or other written authorization.* Prior to submitting an application for a license, an agent must obtain a power of attorney or other written authorization from the foreign principal party in interest to act on behalf of the foreign principal party in interest. When completing the BXA-748P Multipurpose Application Form. Block 7 (documents on file with applicant) must be marked "other" and

Block 24 (Additional information) must be marked "748.4(b)(2)" to indicate that the power of attorney or other written authorization is on file with the applicant (agent). See part 762 of the EAR for recordkeeping requirements

* * * * *

10. Section 748.5 is revised to read as follows:

§ 748.5 Parties to the transaction.

The following parties may be entered on the BXA-748P Multipurpose Application Form. The definitions, which also appear in part 772 of the EAR. are set out here for your convenience to assist you in filling out your application correctly:

(a) *Applicant*. The person who applies for an export or reexport license, and who has the authority of a principal party in interest to determine and control the export or reexport of items. See § 748.4(a) of this part and definition of "exporter" in part 772 of the EAR.

(b) *Other party authorized to receive license*. The person authorized by the applicant to receive the license. If a person and address is listed in Block 15 of the BXA-748P Multipurpose Application Form, the Bureau of Export Administration will send the license to that person instead of the applicant. Designation of another party to receive the license does not alter the responsibilities of the applicant, licensee or exporter.

(c) Purchaser. The person abroad who has entered into the transaction to purchase an item for delivery to the ultimate consignee. In most cases, the purchaser is not a bank, forwarding agent, or intermediary. The purchaser and ultimate consignee may be the same entity.

(d) *Intermediate consignee*. The person that acts as an agent for a principal party in interest and takes possession of the items for the purpose of effecting delivery of the items to the ultimate consignee. The intermediate consignee may be a bank, forwarding agent, or other person who acts as an agent for a principal party in interest.

(e) *Ultimate consignee*. The principal party in interest located abroad who receives the exported or reexported items. The ultimate consignee is not a forwarding agent or other intermediary, but may be the end-user.

(f) *End-user*. The person abroad that receives and ultimately uses the exported or reexported items. The end-user is not a forwarding agent or intermediary, but may be the purchaser or ultimate consignee.

PART 750—[AMENDED]

11. Section 750.7 is amended by revising paragraph (d) to read as follows:

§ 750.7 Issuance of licenses.

* * * * *

(d) *Responsibility of the licensee*. The person to whom a license is issued is the licensee. In export transactions. the exporter must be the licensee, and the exporter-licensee is responsible for the proper use of the license, and for all terms and conditions of the license. except to the extent that certain terms and conditions are directed toward some other party to the transaction. In reexport or routed export transactions, a U.S. agent acting on'behalf of a foreign principal party in interest may be the licensee: in these cases, both the agent and the foreign principal party in interest, on whose behalf the agent has acted, are responsible for the use of the license, and for all terms and conditions of the license. except to the extent that certain terms and conditions are directed toward some other party to the transaction. It is the licensee's responsibility to communicate the specific license conditions to the parties to whom those conditions apply. In addition, when required by the license, the licensee is responsible for obtaining written acknowledgment(s) of receipt of the conditions from the parties to whom those conditions apply.

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PART 752—[AMENDED]

11. Section 752.15 is amended by revising the citation "§ 758.3" to read "§ 758.1" in paragraph (a) introductory text.

PART 758—[AMENDED]

12. Part 758 is amended byrevising §§ 758.1, through 758.5 and removing and reserving § 758.6, to read as follows

§ 758.1 The Shipper's Export Declaration (SED).

(a) *The Shipper's Export Declaration (SED)*. The SED (Forms 7525-V or 7525-V-Alt or the Automated Export System (AES electronic equivalent)) is used by the Bureau of Census to collect trade statistics and by the Bureau of Export Administration for export control purposes. The SED and the AES collect basic information such as the names and addresses of the parties to a transaction; the description, the Export Control Classification Number (ECCN) (when required), the Schedule B number or Harmonized Tariff Schedule number. the quantity and value of the items exported; and the license authority for the export. The SED or the AES electronic equivalent is a statement to the United States Government that the transaction occurred as described

(b) *When an SED is required*. You must file a paper SED. or file the SED information electronically using the AES. with the United States Government in the following situations

(1) For all shipments of tangible items subject to the EAR that are authorized under a license, regardless of value or destination;

(2) For all shipments of tangible items subject to the EAR that are authorized under a License Exception or NLR. when the value of the items classified under a single Schedule B Number (or Harmonized Tariff Schedule number) is over $2.500. except as exempted by the Foreign Trade Statistics Regulations (FTSR) in 15 CFR part 30 and referenced in paragraph (c) of this section;

(3) For all shipments subject to the EAR that are destined to Cuba, Iran. Iraq, Libya, North Korea. Serbia. Sudan. or Syria, regardless of value (see 15 CFR 30.55(h) of the FTSR): and

(4) For all shipments that will be transshipped through Canada to a third destination, where the shipment would require an SED if shipped directly to the final destination from the United States (see 15 CFR 30.58(c) of the FTSR).

Note to paragraph **(b)**: In addition to the Shipper's Export Declaration for exporu. the Bureau of Census Foreign Trade Statistics Regulations provide for a specific Shipper.5 Export Declaration for In-Transit Goods (Form 7513). See 15 CFR 30.3 and 30.8 of the FTSR.

(c) *Exemptions*. A complete list of exemptions from the SED or AES filing requirement is set forth in the FTSR Some of these FTSR exemptions have elements in common with certain EAR License Exceptions. An FTSR exemption may be narrower than a License Exception. The following references are provided in order to direct you to the FTSR exemptions that relate to EAR License Exceptions:

(1) License Exception Baggage (BAG). as set forth in § 740.14 of the EAR. See 15 CFR § 30.56 of the FTSR;

(2) License Exception Gift Parcels and Humanitarian Donations (GFT), as set forth in § 740.12 of the EAR. See 15 CFR 30.55(g) of the FTSR;

(3) License Exception Aircraft and Vessels (AVS), as set forth in § 740 15 of the EAR. See 15 CFR 30.55(l) of the FTSR;

(4) License Exception Governments and International Organizations (COV). as set forth in § 740.11 of the EAR See 15 CFR 30.53 of the FTSR:

(5) License Exception Technology and Software Under Restriction (TSR). as set forth in § 740.6 of the EAR. See 15 CFR 30.54(b) and 30.55 (h) of the FTSR; or

(6) License Exception Temporary Imports. Exports. and Reexports (TMP) "tools of trade". as set forth in § 740,9(a)(Z)(i) of the EAR. See 15 CFR 30.56(b) of the FTSR.

(d) Notation *on export documents for exports* exempt *from SED requirements.* When an exemption from filing the Shipper's Export Declaration applies, the forwarding or other agent must include on the bill of lading. air waybill. or other loading document the export authority of the items, i.e.. either the number of and expiration date of a license issued by BXA, the appropriate License Exception symbol, or NLR "No License Required" designator. This notation applies to any bill of lading or other loading document. including one issued by a consolidator (indirect carrier) for an export included in a consolidated shipment. However. this requirement does not apply to a "master" bill of lading or other loading document issued by a carrier to cover a consolidated shipment. The bill of lading or other loading document must be available for inspection along with the items prior to lading on the carrier.

(e) *Signing the Shipper's Export Declaration.* The person who signs the SED must be in the United Stat& at the time of signing. That person, whether exporter or agent. is responsible for the truth, accuracy, and completeness of the SED, except insofar as that person can demonstrate that he or she reasonably relied on information furnished by others.

(f) *The SED or AES electronic equivalent is an export control document.* The SED or AES electronic equivalent is a statement to the U.S. Government. The SED or AES electronic equivalent is an export control document as defined in part 772 of the EAR. False statements made thereon may be a violation of § 764.2(g) of the EAR. When an SED or AES electronic equivalent is presented to the U.S. Government, the signer or filer of the SED or AES electronic equivalent represents the following:

(1) Export of the items described on the SED or AES electronic equivalent is authorized under the terms and conditions of the designated license issued by BXA; is in accordance with the terms and conditions of the appropriate License Exception; or is authorized under "NLR" as No License is Required for the shipment;

('2) Statements on the SED or AES electronic equivalent are in conformity with the contents of any license issued by BXA; and

(3) All information shown on the SED or AES electronic equivalent is true, accurate, and complete.

(g) *Export control information requirement on the SED or AES electronic equivalent.* You must show the license authority (License number, License Exception, or No License Required (NLR)). the Export Control Classification Number (ECCN) (when required), and the item description in the designated blocks of the SED or AES electronic equivalent.

(1) *Specific information requirements for licensed exports.* When exporting under the authority of a license. you must enter on the Shipper's Export Declaration or AES equivalent the license number and expiration date (the expiration date is only required on paper versions of the SED), the ECCN, and an item description identical to the item description on the license. The item description on the license must be stated in Commerce Control List terms, which may be inadequate to meet Census Bureau requirements. In this event, the item description you place on the SED or AES electronic equivalent must be given in enough additional detail to permit verification of the Schedule B Number [or Harmonized Tariff Schedule number) (e.g.. size, material, or degree of fabrication). See 15 CFR 30.7(l) of the FTSR. If you include other items on the SED or AES electronic equivalent that do not require licenses, but that may be exported under the authority of a License Exception or No License Required. you must show the License Exception symbol or NLR designator, along with the specific description (quantity, Schedule B Number (or Harmonized Tariff Schedule number), value) of the item(s) to which the authorization applies in the designated blocks. See 15 CFR 30.7(m) of the FTSR.

(2) *Specific information requirements for License Exceptions.* You must enter on any required Shipper's Export Declaration (SED) or AES electronic equivalent the correct License Exception symbol (e.g., LVS. CBS. CIV) for the License Exception(s) under which you are exporting. Also. you must enter the correct Export Control Classification Number (ECCN) on the SED or AES electronic equivalent for all items having a classification other than EAR99, i.e.. items listed on the Commerce Control List in Supplement No. 1 to part 774 of the EAR. In addition, an item description that is sufficiently detailed to permit review by the U.S. Government and verification of the Schedule B Number (or Harmonized Tariff Schedule number) is required See § 740.1 (d) of the EAR

(3) *Specific information requirements when no license is required.* You must enter on any required Shipper's Export Declaration (SED) or AES electronic equivalent the "NLR" designation when the items to be exported are subject to the EAR but not listed on the Commerce Control List (i.e.. items are classified as EAR99), and when the items to be exported are listed on the CCL but do not require a license. In addition, you must enter the correct ECCN on the SED or AES electronic equivalent for all items being exported under the NLR provisions that have a classification other than EAR99. i.e.. items listed on the Commerce Control List in Supplement No l to part 774 of the EAR Also, you must enter on the SED or AES electronic equivalent an item description that is sufficiently detailed to permit review by the U.S. Government and verification of the Schedule B Number (or Harmonized Tariff Schedule number) The designator "TSPA" may be used, but is not required, when the export consists of technology or software outside the scope of the EAR. See § 734.7 through § 734.11 of the EAR for TSPA information.

(h) *Submission of the SED.* The SED must be submitted to the U.S. Government in the manner prescribed by the Bureau of Census Foreign Trade Statistics Regulations (15 CFR part 30).

(i) *Exports by U.S. Mail.* When you make an export by U.S. mail that requires the submission of an SED. a properly executed paper version of the SED must be submitted to the post office at the place of mailing, or you must file the export information via AES procedures found in the FTSR. See 15 CFR 30.12 of the FTSR. Whenever you export items subject to the EAR that meets one of the exemptions for submission of an SED, you must enter the appropriate export authority on the parcel, i.e., either the number of and expiration date of a license issued by BXA. the appropriate License Exception symbol, or NLR "No License Required" designator.

(j) *Power of attorney or other written authorization.* (1) In a "power of attorney" or other written authorization, authority is conferred upon an agent to perform certain specified acts or kinds of acts on behalf of a principal.

(2) An agent must obtain a power of attorney or other written authorization in the following circumstances:

(i) An agent that represents a foreign principal party in interest in a routed transaction must obtain a power of

attorney or other written authorization that sets forth his authority:

(ii) An agent that applies for a license on behalf of a principal party in interest must obtain a power of attorney or other written authorization that sets forth the agent's authority to apply for the license on behalf of the principal.

Note to paragraph (j)(Z): The Bureau of Census Foreign Trade Statistics Regulations impose additional requirements for a power of attorney or other written authorization. See 15 CFR 30.4 (e) of the FTSR.

(3) This requirement for a power of attorney or other written authorization is a legal requirement aimed at ensuring that the parties to a transaction negotiate and understand their responsibilities. The absence of a power of attorney or other written authorization does not prevent BXA from using other evidence to establish the existence of an agency relationship for purposes of imposing liability.

§ 758.2 Responsibilities of parties to the transaction.

(a) General. All parties that participate in transactions subject to the EAR must comply with the EAR. Parties are free to structure transactions as they wish, and to delegate functions and tasks as they deem necessary. as long as the transaction complies with the EAR. However, acting through a forwarding or other agent, or delegating or redelegating authority, does not in and of itself relieve anyone of responsibility for compliance with the EAR.

(b) *Export transactions*. The U.S. principal party in interest is the exporter, except in certain routed transactions. The exporter must determine licensing authority (License. License Exception. or NLR). and obtain the appropriate license or other authorization. The exporter may hire forwarding or other agents to perform various tasks, but doing so does not necessarily relieve the exporter of compliance responsibilities.

(c) Routed export transactions. All provisions of the EAR, including the end-use and end-user controls found in part 744 of the EAR. and the General Prohibitions found in part 736 of the EAR, apply to routed export transactions. The U.S. principal party in interest is the exporter and must determine licensing authority (License, License Exception, or NLR). and obtain the appropriate license or other authorization, unless the U.S. principal party in interest obtains from the foreign principal party in interest a writing wherein the foreign principal party in interest expressly assumes responsibility for determining licensing requirements and obtaining license authority, making the U.S. agent of the foreign principal party in interest the exporter for EAR purposes. See § 748 4(a)(3) of the EAR.

Note to paragraph (c) For statistical purposes. the Census Bureau requires the name of the U.S. principal party in interest, generally the seller, in Block (la) of the SED. For purposes of licensing responsibility under the EAR. however, the U.S. agent of the foreign principal party in interest may be the exporter, regardless of who is listed in Block (1a) of the SED.

(d) *Information sharing requirements*. In routed export transactions where the foreign principal party in interest assumes responsibility for determining and obtaining licensing authority. the U S. principal party in interest must, upon request, provide the foreign principal party in interest and its forwarding or other agent with the Export Control Classification Number (ECCN). or with sufficient technical information to determine classification. In addition, the U.S. principal party in interest must provide the foreign principal party in interest or the foreign principal's agent any information that it knows will affect the determination of license authority. See § 758.1(f) of the EAR.

(e) Power *of attorney or other written authorization*. In routed export transactions. a forwarding or other agent that represents the foreign principal party in interest, or who applies for a license on behalf of the foreign principal party in interest, must obtain a power of attorney or other written authorization from the foreign principal party in interest to act on its behalf. See § 748.4(b) and § 758.1 (i) of the EAR.

§ 758.3 Use of export license.

(a) *License valid for shipment from any port*. An export license issued by BXA authorizes exports from any port of export in the United States unless the license states otherwise. Items that leave the United States at one port, cross adjacent foreign territory, and reenter the United States at another port before being exported to a foreign country. are treated as exports from the last U.S. port of export.

(b) *Shipments against expiring license*. Any item requiring a license that has not departed from the final U.S. port of export by midnight of the expiration date on an export license may not be exported under that license unless the shipment meets the requirements of paragraphs (b) (1) or (2) of this section.

(1) BXA grants an extension; or

(2) Prior to midnight on the date of expiration on the license. the items:

(i) Were laden aboard the vessel: or

(ii) Were located on a pier ready for loading and not for storage, and were booked for a vessel that was at the pier ready for loading; or

(iii) The vessel was expected to be at the pier for loading before the license expired, but exceptional and unforseen circumstances delayed it, and BXA or the U.S. Customs Service make a judgment that undue hardship would result if a license extension were required.

(c) *Reshipment of undelivered items* If the consignee does not receive an export made under a license because the carrier failed to deliver it, the exporter may reship the same or an identical item, subject to the same limitations as to quantity and value as described on the license. to the same consignee and destination under the same license If an item is to be reshipped to any person other than the original consignee. the shipment is considered a new expon and requires a new license. Before reshipping, satisfactory evidence of the original export and of the delivery failure, together with a satisfactory explanation of the delivery failure. must be submitted by the exporter to the following address: Operations Division. Bureau of Export Administration. U.S. Department of Commerce, Room 2705. 14th Street & Pennsylvania Avenue. N.W.. Washington, D.C. 20230.

§ 758.4 Conformity of documents and unloading of items.

(a) *Purpose*. The purpose of this section is to prevent items licensed for export from being diverted while in transit or thereafter. It also sets forth the duties of the parties when the items are unloaded in a country other than that of the ultimate consignee as stated on the export license.

(b) *Conformity of documents*. When a license is issued by BXA. the information entered on related export control documents (e.g.. the SED. bill of lading or air waybill) must be consistent with the license.

(c) Issuance *of* the *bill of* fading or air *waybill.*—(1) *Ports in the country of the ultimate consignee*. No person may issue a bill of lading or air waybill that provides for delivery of licensed items to any foreign port located outside the country of the intermediate or the ultimate consignee named-on the BXA license and Shipper's Export Declaration (SED).

(2) *Optional ports of unloading*. (i) *Licensed items*. No person may issue a bill of lading or air waybill that provides for delivery of licensed items to optional ports of unloading unless all the optional ports are within the country of

ultimate destination or are included on the BXA license and SED.

(ii) *Unlicensed items.* For shipments of items that do not require a license, the exporter may designate optional ports of unloading on the SED and other export control documents, so long as the optional ports are in countries to which the items could also have been exported without a license. See also 15 CFR 30.7(h) of the FTSR.

(d) *Delivery of items.* No person may deliver items to any country other than the country of the intermediate or ultimate consignee named on the BXA license and SED without prior written authorization from BXA. except for reasons beyond the control of the carrier (such as acts of God, perils of the sea, damage to the carrier, strikes, war, political disturbances or insurrection).

(e) *Procedures for unscheduled unloading.*—(1) *Unloading in country where no license is required.* When items are unloaded in a country to which the items could be exported without a license issued by BXA. no notification of BXA is required. However, any persons disposing of the items must continue to comply with the terms and conditions of any license or license exception, and with any other relevant provisions of the EAR.

(2) *Unloading in a country where a license is required.* (i) When items are unloaded in a country to which the items would require a license issued by BXA. no person may effect delivery or entry of the items into the commerce of the country where unloaded without prior written approval from BXA. The carrier, in ensuring that the items do not enter the commerce of the country, may have to place the items in custody. or under bond or other guaranty. In addition, the carrier must inform the exporter and BXA of the unscheduled unloading in a time frame that will enable the exporter to submit its report within 10 days from the date of unscheduled unloading. The exporter must within 10 days of the unscheduled unloading report the facts to and request authorization for disposition from BXA using either: mail, fax, or E-mail. The report to BXA must include:

(A) A copy of the manifest of the diverted cargo;

(B) Identification of the place of unloading; and

(C) A proposal for disposition of the items and a request for authorization for such disposition from BXA.

(ii) *Contact information.* U.S. Department of Commerce. Bureau of Export Administration, Office of Exporter Services, Room 1093. 14th and Pennsylvania Avenue, N.W., Washington, D.C. 20230: phone number 202–482–0436; facsimile number 202–48223322; and E-Mail address: RPD@BXA.DOC.GOV.

§ 758.5 Destination Control Statement.

The Destination Control Statement (DCS) must be entered on the invoice and on the bill of lading, air waybill, or other export control document that accompanies the shipment from its point of origin in the United States to the ultimate consignee or end-user abroad. The person responsible for preparation of those documents is responsible for entry of the DCS. The DCS is required for all exports from the United States of items on the Commerce Control List that are not classified as EAR99, unless the export may be made under License Exception BAG or GFT (see part 740 of the EAR). At a minimum, the DCS must state: "These commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited."

* * * * *

PART 762-[AMENDED]

13. Section 762.2 is amended by:

a. Revising the citation "§ 758.1 (b) (3)" to read "§ 758.2(d)(2)(ii)" in paragraph (b)(29);

b. Revising the citation "758.6" to read "§ 758.1" in paragraph (b) (3 1);

c. Revising paragraphs (b) (15), (b) (37), and (b) (38); and

d. Adding a new paragraph (b) (39) to read as follows:

§ 762.2 Records to be retained.

* * * * *

(b) * * *

(15) § 750.7, Issuance of license and acknowledgment of conditions;

* * * * *

(37) § 743.1, Wassenaar reports;

(38) § 748.14. Exports of firearms: and

(39) § 758.2(c). Assumption writing.

PART 772-[AMENDED]

14. Part 772 is amended by revising the definitions of "Applicant" , "Exporter". "Forwarding agent", "Intermediate consignee", "Purchaser", and "Ultimate Consignee'; removing the definition for "U.S. exporter'; and adding definitions for "End-user". "Order Party", "Other party authorized to receive license", "Principal parties in interest", and "Routed export transaction" in alphabetical order, to read as follows:

* * * * *

Applicant. The person who applies for an export or reexport license, and who has the authority of a principal party in interest to determine and control the export or reexport of items See § 748.4 of the EAR and definition for "exporter" in this part of the EAR

* * * * *

End-user. The person abroad that receives and ultimately uses the exported or reexported items. The end-user is not a forwarding agent or intermediary. but may be the purchaser or ultimate consignee.

* * * * *

Exporter. The person in the United States who has the authority of a principal party in interest to determine and control the sending of items out of the United States. For purposes of completing the SED or filing export information on the Automated Export System (AES). the exporter is the U.S principal party in interest (see Foreign Trade Statistics Regulations, 15 CFR part 30).

* * * * *

Forwarding agent. The person in the United States who is authorized by a principal party in interest to perform the services required to facilitate the export of the items from the United States. This may include air couriers or carriers. In routed export transactions, the forwarding agent and the exporter may be the same for compliance purposes under the EAR.

* * * * *

Intermediate consignee. The person that acts as an agent for a principal party in interest for the purpose of effecting delivery of items to the ultimate consignee. The intermediate consignee may be a bank, forwarding agent. or other person who acts as an agent for a principal party in interest.

* * * * *

Order Party. The person in the United States who conducted the direct negotiations or correspondence with the foreign purchaser or ultimate consignee and who, as a result of these negotiations, received the order from the foreign purchaser or ultimate consignee.

Other party authorized to receive license. The person authorized by the applicant to receive the license. If a person and address is listed in Block 15 of the BXA-748P Multipurpose Application Form, the Bureau of Export Administration will send the license to that person instead of the applicant. Designation of another party to receive the license does not alter the responsibilities of the applicant, licensee or exporter.

* * * * *

Principal parties in interest. Those persons in a transaction that receive the primary benefit, monetary or otherwise,

of the transaction. Generally, the principals in a transaction are the seller and the buyer. In most cases, the forwarding or other agent is not a principal party in interest

* * * * *

Purchaser. The person abroad who has entered into a transaction to purchase an item for delivery to the ultimate consignee. In most cases, the purchaser is not a bank, forwarding agent, or intermediary. The purchaser and ultimate consignee may be the same entity.

* * * * *

Routed export transaction. A transaction where the foreign principal party in interest authorizes a U.S. forwarding or other agent to facilitate export of items from the United States.

* * * * *

Ultimate consignee. The principal party in interest located abroad who receives the exported or reexported items. The ultimate consignee is not a forwarding agent or other intermediary, but may be the end-user.

* * * * *

Dated: September 23, 1999.

R. **Roger Majak,**

Assistant Secretary for Export Administration.

[FR Doc. 99-25604 Filed 10-1-99; 8:45 am]

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DEPARTMENT OF COMMERCE

Bureau of the Census

15 CFR Part 30

[Docket No. 980716180-9171-02]

RIN 0607-AA20

Clarification of Exporters' and Forwarding Agents' Responsibilities; Authorizing an Agent To Prepare and File a Shipper's Export Declaration on Behalf of a Principal Party in Interest

AGENCY: Bureau of the Census, Commerce.

ACTION: Supplementary notice of proposed rulemaking.

SUMMARY: The U.S. Census Bureau (Census Bureau) proposes amending the Foreign Trade Statistics Regulations (FTSR), 15 CFR part 30, to clarify the responsibilities of exporters and forwarding agents in completing the Shipper's Export Declaration (SED) and to clarify provisions for authorizing forwarding agents to prepare and file an SED or file the export information electronically using the Automated Export System (AES) on behalf of a principal party in interest.

DATES: Written comments must be submitted on or before December 3, 1999.

ADDRESSES: Direct all written comments on this proposed rulemaking to the Director, U.S. Census Bureau, Room 2049, Federal Building 3, Washington, D.C. 20233.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to C. Harvey Monk, Jr., Chief, Foreign Trade Division, U.S. Census Bureau, Room 2104, Federal Building 3, Washington, D.C. 20233-6700, by telephone on (301) 457-2255 or by fax on (301) 457-2645.

SUPPLEMENTARY INFORMATION:

Background

The Census Bureau is responsible for collecting, compiling, and publishing trade statistics for the United States. These data are used by various Federal Government agencies and the private sector for planning and policy development. In order to accomplish its mission, the Census Bureau must receive accurate statistical information from the trade community. The Shipper's Export Declaration (SED) and the Automated Export System (AES) record are the primary vehicles used for collecting such trade data, and the information contained therein is used by the Census Bureau for statistical purposes only and is confidential under the provisions of Title 13, United States Code (U.S.C.), Section 301(g). The Census Bureau's primary objective in this proposed rule is to ensure the accuracy of its trade statistics and to clarify reporting responsibilities for all parties involved in export transactions.

As such the Census Bureau proposes amending the FTSR to clarify responsibilities of exporters and forwarding agents in completing the SED and to clarify who should be listed in the "Exporter" box on the SED and in the exporter field on the AES record. This proposed rule defines new terms, including "U.S. principal party in interest" and "routed export transaction," and clarifies existing ones (notably the definition of "exporter") for purposes of completing the SED. The proposed rule will also clarify provisions authorizing an agent to prepare and file an SED or its AES electronic equivalent on behalf of a principal party in interest.

The Census Bureau published a notice of proposed rulemaking on this subject in the **Federal Register** on August 6, 1998 (63 FR 41979). As a result of comments received on that proposed rulemaking and subsequent discussions with the Bureau of Export Administration (BXA), the Census Bureau has decided to issue a supplementary notice of proposed rulemaking to address the issues raised during the comment period and to further clarify provisions contained in that notice of proposed rulemaking. The BXA is also revising appropriate sections of the Export Administration Regulations (EAR) in a document published elsewhere in this issue of the Federal **Register.** The EAR will conform to the provisions of the FTSR in reference to clarifying the responsibilities of exporters and forwarding agents in completing the SED, and BXA will also propose changes to the EAR to simplify export clearance.

Comments

The Census Bureau received sixty-nine (69) comments on the notice of proposed rulemaking published in the **Federal Register** on August 6, 1998 (63 FR 41979). Of the comments received, fifty-nine (59) were opposed to some provisions of the proposed rule and ten supported the proposed rulemaking. Of the fifty-nine comments opposed to the proposed rule, twenty-four (24) had interpreted the rule to require that the "manufacturer" always be listed as the exporter of record on the SED in all export transactions. This was a misinterpretation of the proposed rule, and the revised proposed rulemaking will clearly stipulate that only the "U.S. seller or principal party in interest" be listed as the exporter on the SED. Only when the manufacturer is the actual "seller of the merchandise for export" should it be listed as exporter on the SED or AES electronic record.

The other major reason for opposition to the proposed rule concerned identifying the U.S. seller or principal as the "exporter of record" in EX WORKS (EXW) transactions. EXW is a "term of sale" whereby the foreign buyer takes possession of the merchandise in the United States, and the foreign buyer takes responsibility for facilitating the export of the merchandise out of the United States, including export documentation responsibility. The major concern the U.S. sellers presented, when required to be listed as the "exporter of record" in these transactions, is that the U.S. seller does not have effective control over the merchandise once it is turned over to the foreign buyer's agent. The U.S seller does not want to be held liable for any export control violations that may occur in such a transaction.

The proposed Census Bureau export regulations do not intend to interfere with the terms of sale between the

Foreign buyer and the U.S. seller in the export transaction. However. in order to collect accurate trade statistics, it is critical to have the actual "U.S. seller or principal party in interest" listed as exporter on the SED or the AES electronic record. BXA's proposed rule addresses the liability concerns of exporters in such transactions.

The ten comments in support of the proposed rule indicated approval for the clarification of duties and responsibilities of exporters and Forwarding agents and the clarification of the power of attorney provisions contained in the proposed rule. Those comments supported the clarification of the definition of exporter and felt it gave them more control over the export transaction even in the EXW transaction. The Census Bureau responded to all comments and informed the commentors that a supplementary notice of proposed rulemaking would be issued to address their concerns.

Response to Comments and Proposed Action

In response to the comments received from the trade community on the notice of proposed rulemaking published in the **Federal Register** on August 6. 1998 (63 FR 4 1979). the Census Bureau proposes amending 15 CFR Part 30 to: (a) define the term "exporter." for purposes of the FTSR and completing the SED or AES record, as the U.S. principal party in interest in the export transaction; (b) clarify the reporting responsibilities of the U.S. principal party in interest and forwarding agent in completing the SED or AES record; (c) clarify provisions for authorizing an agent to prepare and file an SED or file the information electronically using the AES; and (d) clarify the documentation and compliance responsibilities of parties involved in the export transaction. **For** purposes of this rule all references to preparing and filing the paper SED also pertain to preparing and filing the AES electronic record.

This proposed rule will clarify the responsibilities of the U.S. principal party in interest and the forwarding agent in preparing the SED or AES record. For export shipments the Census Bureau recognizes "routed export transactions" as a subset of "export transactions." A routed export transaction is where the foreign principal party in interest authorizes a U.S. forwarding or other agent to facilitate export of items from the United States.

For purposes of completing the SED or AES record. the Exporter is the U.S. principal party in interest in the transaction. The U.S. principal party in interest is the person in the United States that receives the primary benefit. monetary or otherwise, of the export transaction. Generally, that person would be the U.S. seller, manufacturer. order party, or foreign entity, if in the United States when signing the SED. In most cases, the Forwarding agent is not a principal party in interest. The Exporter box on the SED will be revised to read "Exporter (U.S. Principal Party in Interest)."

However. the EAR defines the exporter as the person in the United States who has the authority of a principal party in interest to determine and control the sending of items out of the United States (see EAR 15 CFR Part 772). This definition permits the Forwarding agent to apply for a license and act as exporter in some transactions.

The person who signs the SED must be in the United States at the time of signing. If a U.S. manufacturer sells merchandise directly to a foreign buyer for export, the U.S. manufacturer must be listed as the U.S. principal party in interest on the SED. If a U.S. manufacturer sells merchandise, as a domestic sale, to a U.S. buyer (wholesaler/distributor) and that U.S. buyer sells the merchandise to a foreign principal for export, the U.S. seller (wholesaler/distributor) must be listed as the U.S. principal party in interest on the SED. If a U.S. order party, as defined in §30.4(a)(1) of this rule, arranges for the sale and export of merchandise to a foreign principal directly, the U.S. order party must be listed as the U.S. principal party in interest on the SED.

For purposes of completing the SED or AES record, the *forwarding agent* is the person in the United States who is authorized by the U.S. principal party in interest or, in a routed transaction, the foreign principal, to prepare and file the SED or its AES electronic equivalent. In routed export transactions, the forwarding agent and the exporter may be the same for compliance purposes under the EAR. but the forwarding agent is rarely the "exporter" in box la of the SED or in the "exporter" field of the AES record. For example, only when a forwarding agent acts as an "order party" can they be listed as "exporter" in **box** la on the SED or in the "exporter" field of the AES record.

The U.S. principal party in interest can prepare and file the SED or AES record, or it can authorize a forwarding agent to prepare and file the SED or AES record on its behalf. If the US. principal party in interest authorizes a forwarding agent to complete the SED or AES record on its behalf. the U.S. principal party in interest is responsible for: (A) Providing the Forwarding agent with the information necessary to complete the SED or AES record; (B) Providing the Forwarding agent with authorization to complete the SED or AES record. in the form of a power of attorney or written authorization. or signing the authorization box printed on the paper SED **(box** 23 on Form 7525-V or box 29 on Form 7525-V-ALT); and (C) Maintaining the documentation to support the information provided to the forwarding agent For completing the SED or AES record.

The Forwarding agent. if authorized by a principal party in interest, is responsible for: (A) Preparing the SED or AES record, based on instructions received From the U.S. principal party in interest or other parties in the transaction; (B) Providing the U.S principal party in interest with a copy of the export information filed in the Form of a completed SED. an electronic facsimile, or in any other manner prescribed by the exporter; and (C) Maintaining the documentation to support the information reported on the SED or AES record.

In a routed export transaction. where a Foreign principal designates a U.S. Forwarding agent to act on its behalf to prepare and file the SED or AES record. the U.S. principal party in interest must provide the forwarding agent with the following information to assist them in preparing the SED or AES record: (1) Name and address of the exporter (U.S. principal party in interest); (2) Exporter's (U.S. principal party in interest) Internal Revenue Service (IRS) Employer Identification Number (EIN); (3) point of origin (State or Foreign Trade Zone (FTZ)): (4) schedule B description of commodities; (5) domestic (D). foreign (F). or Foreign Military Sale (FMS) (M) code; (6) Schedule B Number; (7) quantity: (8) Upon request **by** the foreign principal or its agent, the Export Control Classification Number (ECCN) or with sufficient technical information to determine classification; (9) Any information that it knows will affect the determination of license authority.

(Note: For Items 8 and 9. where the foreign principal party in interest has assumed responsibility For determining and obtaining license authority, the EAR sets forth the information sharing requirements that apply at 15 CFR 758.2(d)).

In a routed export transaction. the forwarding agent is responsible for preparing the SED or AES record based on instructions received from the U.S. principal party in interest and other parties involved in the transaction. In addition to reporting the information

provided by the U.S principal party in interest on the SED or AES record. the Forwarding agent must provide the Following export information on the SED or AES record: (1) Date of exportation: (2) bill of lading/airway bill number; (3) ultimate consignee; (4) intermediate consignee; (5) Forwarding agent name and address; (6) country of ultimate destination: (7) loading pier: (8) method of transportation; (9) exporting carrier; (10) port of export; (11) port of unloading; (12) containerized; (1 3) weight; (14) value: (15) ECCN; (16) License Authority;

(Note: For items 15 and 16 where the foreign principal party in interest has assumed responsibility for determining and obtaining license authority, the EAR sets forth the information sharing requirements that apply at 15 § 758.2(d)):

and

(17) signing the certification statement on the paper SED (box 24 on Form 7525-V and box 36 on Form 7525-V-ALT). In a routed export transaction, the U.S. principal party in interest must be listed as exporter (U.S. principal party in interest) on the SED or on the AES record.

In a routed export transaction, the forwarding agent is responsible for: (A) Obtaining a power of attorney or written authorization from the foreign principal to act on its behalf; (B) Upon request. providing the U.S. principal party in interest with appropriate documentation verifying that the information provided by the U.S. principal party in interest was accurately reported on the SED or AES record; and (C) Maintaining the documentation to support the information reported on the SED or AES record.

The FTSR places primary responsibility for compliance of the SED and AES requirements on the U.S. principal party in interest in an export transaction and on the forwarding agent in a routed export transaction. However, the FTSR also considers all parties involved in the transaction responsible For the truth, accuracy, and completeness of the information reported on the SED. The parties to the transaction must provide the forwarding agent with the information necessary to correctly prepare the paper SED or to file the data electronically using the AES. As always, documentation must be maintained by all parties involved in the transaction to support the information reported on the SED or the AES record.

All parties that participate in transactions subject to the **FTSR** are responsible for compliance with the FTSR. In all cases where a violation OF the FTSR occurs. the documentation of all parties involved in the transaction must be made available to the proper enforcement officials to determine the liability and responsibility For the export violation pursuant to FTSR § 30.11. Acting through a Forwarding or other agent or delegating or redelegating authority does not in and of itself relieve anyone of their compliance responsibility.

This notice Further clarifies provisions for using a power of attorney or written authorization when a principal party in interest authorizes a Forwarding agent to prepare and file the SED on its behalf and when the SED information is filed electronically, using the AES. Suggested Formats For a power of attorney and a written authorization For executing a SED are available upon request from the U.S. Census Bureau. Foreign Trade Division (FTD).

This amendment will further specify in § 30.4(f) the requirement that the SED be prepared in English. This provision is already included in the Census Bureau's instructions for completing the SED and this amendment will simply include that requirement in the Code of Federal Regulations (CFR).

In addition, this amendment clarifies the provision in § 30.7(d) (2) that a foreign principal, if operating in the U.S. at the time of export, must be listed as exporter (U.S. principal party in interest) on the SED. but does not need to report an IRS EIN or a Social Security Number (SSN) on the SED. Using an EIN or SSN that is not your own is prohibited. However, if no EIN or SSN is available, the Dunn and Bradstreet (DUNS) number, border crossing number, passport number, or any number assigned by U.S. Customs is required to be reported.

The revisions contained in this supplementary notice of proposed rulemaking are consistent with the provisions of the BXA's proposed revisions to the EAR regarding the export control responsibilities of exporters and forwarding agents. The Department of the Treasury concurs with the provisions contained in this proposed rule.

Program Requirements

In order to comply with the requests From the trade community to update the provisions of the FTSR and to clarify the items discussed above, the Census Bureau proposes amending appropriate sections of the FTSR.

The Census Bureau proposes revising Section 30.4 to: (A) Define the term "exporter." for purposes of the FTSR and completing the SED or AES electronic record. as the U.S. principal party in interest in the export transaction; (B) Clarify the reporting responsibilities of the U.S. principal party in interest and Forwarding agent in completing the SED or AES record: (C) Clarify provisions For obtaining authorization For preparing and Filing the SED or the AES electronic record: and (D) Clarify the documentation and compliance responsibilities of parties involved in the export transaction

The Census Bureau proposes redesignating Section 30.4(b) to Section 30.4(f) and include the provision that the SED be prepared in English to be consistent with the current instructions For preparing the SED.

The Census Bureau proposes redesignating Section 30.4(C) to Section 30.4 (g) with minor wording revisions.

The Census Bureau proposes amending Section 30 7(d)(l). "*Name of exporter and exporter's Employer Identification Number,*" to clarify the designation of "exporter" named on the SED by reference to § 30.4.

The Census Bureau proposes amending Section 30 7(d)(2). "*Exporters Employer Identification Number,*" to clarify the requirement that a foreign principal, if in the United States when signing the SED. must be listed as "exporter" on the SED or AES record. However, if no EIN or SSN is available, the DUNS number, border crossing number, passport number. or any number assigned by U.S. Customs is required to be reported.

The Census Bureau further proposes amending section 30.7(e). "*Agent of exporter (forwarding agent),*" to specify the responsibilities of the forwarding agent in preparing the SED by reference to § **30.4.**

Rulemaking Requirements

This proposed rule is exempt from all requirements of Section 553 of the Administrative Procedure Act because it deals with a foreign affairs function (5 U.S.C. (A) (1)). However, this rule is being published as a proposed rule with an opportunity for public comment because of the importance of the issues raised by this rulemaking.

Regulatory Flexibility Act

Because a notice of proposed rulemaking is not required by 5 U.S.C. 553 or any other law, a Regulatory Flexibility Analysis is not required and has not been prepared (5 U.S.C. 603(a)).

Executive Orders

This proposed rule has been determined to be significant For purposes of Executive Order 12866 This proposed rule does not contain policies with Federalism implications

sufficient to warrant preparation of a Federalism assessment under Executive Order 126 12.

Paperwork Reduction Act

Notwithstanding any other provisions of law. no person is required to respond to. nor shall a person be subject to, a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number.

This proposed rule covers collections of information subject to the provisions of the PRA. which are cleared by the OMB under OMB Control Number 0607-O 152.

This proposed rule will not impact the current reporting-hour burden requirements as approved under OMB Control Number 0607-0152 under provisions of the PRA. Public Law 104-13.

List of Subjects in 15 CFR Part 30

Economic statistics, Foreign trade. Exports, Reporting and recordkeeping requirements.

For the reasons set out in the preamble. it is proposed that part 30 be amended as follows:

PART 30—FOREIGN TRADE STATISTICS

1. The authority citation for 15 CFR Part 30 continues to read as follows:

Authority: 5 U.S.C. 301: 13 U.S.C. 301-307: Reorganization Plan No. 5 of 1950 (3 CFR 1949-1953 Comp.. 1004); Department of Commerce Organization Order No. 35-2A. August 4. 1975.40 CFR 42765.

Subpart A-General Requirements—Exporter

2. In part 30. footnotes 4. 5, 6 and 9 are proposed to be redesignated as footnotes 5. 6. 7 and 8. respectively, and § 30.4 is proposed to be revised to read as follows:

530.4 Preparation and signature of Shipper's Export Declarations.

(a) General requirements *(SED).* For purposes of this section. all references to preparing and filing the paper SED also pertain to preparing and filing the AES electronic record. The Shipper's Export Declaration (SED) or the AES electronic equivalent must be prepared and signed by a principal party in interest or by a forwarding agent authorized by a principal party in interest. The person who signs the SED must be in the United States at the time of signing. That person, whether the U.S. principal party in interest or agent. is responsible for the truth, accuracy. and completeness of the SED or AES electronic equivalent, except insofar as that person can demonstrate that he or she reasonably relied on information furnished by others. The Census Bureau recognizes "routed export transactions" as a subset of export transactions. A routed export transaction is where the foreign principal party in interest authorizes a U.S. forwarding or other agent to facilitate export of items from the United States. See paragraph (c) of this section for responsibilities of parties in a routed export transaction.

(1) Exporter (U.S. *principal party in interest*). For purposes of completing the SED. in all export transactions. the exporter required to be listed in box la of the SED or in the "Exporter" field of the AES record is the U.S. principal party in interest. The U.S. principal party in interest is the person in the United States that receives the primary benefit, monetary or otherwise. of the transaction. Generally that person is the U.S. seller, manufacturer, order party[4], or foreign entity, if in the U.S. when signing the SED. In most cases, the forwarding or other agent is not a principal party in interest. Note: The Export Administration Regulations (EAR) (15 CFR parts 730 through 799) defines the "exporter" as the-person in the United States who has the authority of a principal party in interest to determine and control the sending of items out of the United States (see 15 CFR part 772 of the EAR).

(i) If a U.S. manufacturer directly sells merchandise for export to a foreign principal, the U.S. manufacturer must be listed as the exporter (U.S. principal party in interest) on the SED.

(ii) If a U.S. manufacturer sells merchandise, as a domestic sale, to a U.S. buyer (wholesaler/distributor) and that U.S. buyer sells the merchandise for export to a foreign principal; the U.S. seller (wholesaler/distributor) must be listed as the exporter (U.S. principal party in interest) on the SED.

(iii) If a U.S. order party directly arranges for the sale and export of merchandise to a foreign buyer. the U.S. order party must be listed as the exporter (U.S. principal party in interest) on the SED or AES record.

(2) *Forwarding agent*. The forwarding agent is the person in the United States who is authorized by the U.S. principal party in interest or. in the case of a routed transaction. the foreign principal party in interest to prepare and file the SED or its AES electronic equivalenr. and/or perform the services required to facilitate the export of items from the United States. In routed export transactions, the forwarding agent and the exporter may be the same for compliance purposes under the EAR. but the forwarding agent is rarely the "exporter" in box la of the SED or in the "exporter" field of the AES record.

(3) *Principal parties in interest*. Those persons in a transaction that receive the primary benefit. monetary or otherwise. of the transaction. Generally. the principals in a transaction are the seller and the buyer. In most cases a forwarding or other agent is not a principal party in interest.

(b) *U.S. principal party in interest and forwarding agent responsibilities in preparing the SED (except in routed export transactions).*—(1) *Designating the forwarding agent*. The U.S. principal party in interest can prepare and file the SED or AES record. or it can authorize a forwarding agent to prepare and file the SED or AES record on its behalf If the U.S. principal party in interest designates a forwarding agent to act on its behalf in completing the SED or AES record it must be in the form of a power of attorney or written authorization. or by signing the authorization box printed on the paper SED (box 23 on Form 7525-V and box 29 on Form 7525-V-ALT).

(2) *U.S. principal party in interest responsibilities in preparing the SED* (i) If the U.S. principal party in interesr prepares the SED or AES record themselves they are responsible for rhe accuracy of all the export information reported on the SED or AES record. for signing the paper SED. filing the paper SED with U.S. Customs, or transmining the AES record to Customs.

(ii) If the U.S. principal party in interest authorizes a forwarding agent to complete the SED or AES record on its behalf the U.S. principal party in interest is responsible for:

(A) Providing the forwarding agent with the export information necessary to complete the SED or AES record;

(B) Providing the forwarding agenr with a power of attorney or written authorizatlon to complete the SED or AES record, or sign the authorization box printed on the paper SED (box 23 on Form 7525-V and box 29 on Form 7525-V-ALT); and

(C) Maintaining the documentation to support the information provided to the forwarding agent for completion of rhe SED or AES record. as specified in § 30.11.

[4] The Order Party Is that person in the United States who conducted the direct negotiations or correspondence with the foreign principal or ultimate consignee and who. as a result of these negotiations. received the order from the foreign principal or ultimate consignee.

(3) *Forwarding agent responsibilities in preparing the SED.* The forwarding agent. when authorized by a U.S. principal party in interest to prepare and sign the SED or prepare and file the AES record. is responsible for:

(i) Accurately preparing the SED or AES record based on information received from the U.S. principal party in interest;

(ii) Obtaining a power of attorney or written authorization to complete the SED or AES record, or obtaining a paper SED with a signed authorization

(iii) Maintaining the documentation to support the information reported on the SED or AES record. as specified in § 30.11; and

(iv) Providing the U.S. principal party in interest with a copy of the export information filed in the form of a completed SED. an electronic facsimile. or in any other manner prescribed by the exporter.

(c) *U.S. principal party in interest and forwarding agent responsibilities in preparing the SED in "routed export transactions."*

(1) *Designating the forwarding* agent. In a routed export transaction, the forwarding agent must obtain a power of attorney or written authorization from the foreign principal party in interest to act on their behalf. If the foreign principal party in interest designates a U.S. forwarding agent to complete the SED or AES record, the U.S. principal party in interest must provide certain export information to such agent (see paragraph (c) (2) of this section). If the US. principal party in interest authorizes its own forwarding agent to complete the SED or AES record. it must follow the procedures specified in paragraph (b) of this section.

(2) *U.S. principal party in interest responsibilities in a "routed export transaction."* In a routed export transaction where the foreign principal party in interest designates a U.S. forwarding agent to prepare and file the SED or AES record, the U.S. principal party in interest must provide such forwarding agent with the following information to assist in preparing the SED or AES record:

(i) Name and address of the exporter (U.S. principal party in interest);

(ii) Exporter EIN (IRS) Number.;

(iii) Point of origin (State or FTZ);

(iv) Schedule B description of commodities:

(v) Domestic (D). foreign (F), or FMS (M) code;

(vi) Schedule B Number:

(vii) Quantity;

(viii) Upon request from the foreign principal party in interest or its agent. the Export Control Classification Number (ECCN) or with sufficient technical information to determine classification: and

(ix) Any information that it knows will affect the determination of license authority.

Note to paragraph (c)(2): For Items (c)(2)(viii) and (ix). where the foreign principal party in interest has assumed responsibility for determining and obtaining license authority, the EAR sets forth the information sharing requirements that apply. at 15 CFR 758.2(d).

(3) *Forwarding agent responsibilities in a "routed export transaction."* In a routed export transaction, the forwarding agent who is responsible for preparing the SED or AES record must provide the following export information on the SED or AES record:

(i) Date of exportation;

(ii) Bill of lading/airway bill number;

(iii) Ultimate consignee;

(iv) Intermediate consignee;

(v) Forwarding agent name and address;

(vi) Country of ultimate destination;

(vii) Loading pier;

(viii) Method of transportation;

(ix) Exporting carrier;

(x) Port of export;

(xi) Port of unloading;

(xii) Containerized;

(xiii) Weight:

(xiv) Value;

(xv) ECCN;

(xvi) License authority; and

(xvii) Signing the certification box on the paper SED (box 24 on Form 7525–V and box 36 on Form 7525–V–ALT). **In** a routed export transaction the U.S. principal party in interest must be listed as exporter (US. principal party in interest) on the SED or on the AES record.

Note to paragraph (c) (3): For Items (c) (3)(xv) and (xvi), where the foreign prinicipal party in interest has assumed responsibility for determining and obtaining license authority, the EAR sets forth the information sharing requirements that apply, at 15 CFR 758.2(a).

(d) *Information on the Shipper's Export Declaration (SED).* The data provided on the SED or AES electronic record shall be complete, correct, and based on personal knowledge of the facts stated or on information furnished by the parties involved in the export transaction. All parties involved in export transactions, including U.S. forwarding agents, should be aware that invoices and other commercial documents may not necessarily contain all the information needed to prepare the SED or AES record. The parties must ensure that all the information needed for completing the SED or AES record, including correct export licensing information, is provided to the forwarding agent for the purpose of correctly preparing the SED or AES record.

(e) *Authorizing a forwarding agent* In a power of attorney or other written authorization. authority is conferred upon an agent to perform certain specified acts or kinds of acts on behalf of a principal (see 15 CFR 758.1 (i) of the EAR). In cases where a forwarding agent is filing the export information on the SED or electronically using the AES. the forwarding agent must obtain a power of attorney or written authorization from a principal party in interest to file the information on their behalf. A power of attorney or written authorization should specify the responsibilities of the parties with particularity, and should state that the forwarding agent has authority to act on behalf of a principal party in interest as its true and lawful agent for purposes of the export transaction and in accordance with the laws and regulations of the United States

(f) The SED shall be prepared in English and shall be typewritten or prepared in ink or other permanent medium (except indelible pencil) The use of duplicating processes, as well as the overprinting of selected items of information. is acceptable.

(g) All copies of the SEDs must contain all of the information called for in the signature space as to name of firm, address, name of signer, and capacity of signer. The original SED must be signed in ink, but signature on other copies is not required. The use of signature stamps is acceptable. A signed legible carbon or other copy of the export declaration is acceptable as an "original" of the SED.

3. Section 30.7 is proposed to be amended by revising paragraphs (d) and (e) to read as follows:

§ 30.7 Information required on Shipper's Export Declarations.

* * * * *

(d) *Name of exporter (U.S. principal party in interest) and exporter's Employer Identification Number (EIN)* The name and address (number. street, city, state. zip code) of the exporter (U.S. principal party in interest) and the exporter's (U.S. principal party in interest) EIN shall be entered where requested on the SED or AES electronic record. The EIN shall be the exporter's (U.S. principal party in interest) own and not another's EIN.

(1) *Name of exporter (U.S. principal party in* interest). The exporter (U S principal party in interest) named on the SED and in the exporter field on the AES record must be the U.S. principal

party in interest in the transaction. The exporter (U.S. principal party in interest) is the person in the United States that receives the primary benefit, monetary or otherwise, of the export transaction. Generally that person is the U.S. seller, manufacturer, order party, or foreign entity, if in the United States when signing the SED. In all export transactions, the U.S. principal party in interest must be listed in the "Exporter (U.S. principal party in interest)" block on the paper SED or in the "exporter field" in the AES record. (See § 30.4 for details on the specific reporting responsibilities of exporters (U.S. principal party in interest)).

(2) *Exporter's (U.S. principal party in interest) Employer Identification Number (EIN).* An exporter (U.S. *principal party in interest)* shall report its own IRS EIN on the SED or AES record. If, and only if, no Internal Revenue Service EIN has been assigned to the exporter (U.S. *principal party in interest),* the exporter's (U.S. *principal party in interest)* own Social Security Number (SSN). preceded by the symbol "SS" must be reported. In situations when a foreign principal party in interest who does not possess an EIN or SSN operates from within the U.S. to facilitate its own export, no EIN or SSN reporting requirement applies. Using another's EIN or SSN is prohibited. However, if no EIN or SSN is available, the DUNS (Dunn and Bradstreet) number, border crossing number. passport number. or any number assigned by U.S. Customs is required to be reported on the SED or the AES record.

(e) *Forwarding agent.* The name and address of the duly authorized forwarding agent (if any) of a principal party in interest or the foreign principal party in interest shall be recorded where requested on the SED or AES record. (See § 30.4 for details on the specific reporting responsibilities of forwarding agents).

* * * * *

Dated: September 21, 1999.

Kenneth Prewitt.

Director, Census Bureau.

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Electronic Industries Alliance

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November 18, 1999

Sharron Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
Room 2705
14th Street and Pennsylvania Avenue, N. W.
Washington, DC 20230

Re: Proposed Amendment to the Export Administration Regulations (64 Federal Register 53854, October 4, 1999)

Dear Ms. Cook:

On October 6, the Bureau of Export Administration published a Proposed Rule "in order to simplify and clarify the export clearance process and facilitate compliance." The Electronic Industries Alliance (EIA) sincerely appreciates the Bureau's remarkably fair and open process leading up to publication of this Rule. Nevertheless, we find several aspects of the Proposed Rule to be problematic and urge that it be amended as outlined below.

EIA objects to the proposed requirement in Section 740.1(d) that an ECCN be entered on the SED for all items having a classification other than EAR99. We believe this provision will add significant administrative burdens to corporate shipping departments but provide no benefit to export compliance. This provision would require that companies classify many products they never needed to classify previously. Currently, if a company is exporting to a "safe" end user and determines that it may do so "NLR" or under License Exception, it is unnecessary to expend the extra time and cost to determine the exact ECCN. In other words, companies classify their products "enough" to know what their obligations are. This provision would require companies to determine the exact ECCN for all products, a time-consuming and costly process. Moreover, if the product is being exported to a "safe" destination, having the exact ECCN does nothing to promote national security.

In addition, EIA objects to Section 758.2(c), which requires that, as part of a routed export transaction, the U.S. seller must receive "a writing" from the foreign buyer to ensure that the buyer assumes responsibility for all licensing requirements. We believe that the use of "ex works" in a contract, as defined by Incoterms, is sufficient for

determining responsibility for licensing, and should be sufficient to meet the requirement of “a writing.” To require an additional writing beyond the terms of the contract would contradict the preamble to the Proposed Rule which states that the Department does not want to interfere with the way that parties structure their transactions. EIA urges the Bureau to agree to this interpretation of the provision.

EIA is also concerned by the information sharing requirements in Section 758.2(d) which require, as part of a routed export transaction, a U.S. principal party in interest to provide the foreign principal party in interest with the ECCN or sufficient technical information to determine classification. This provision fails to recognize that the U.S. principal party in interest may be a reseller, with no ability to determine classification. The U.S. principal party in interest may also be a small company, or even an individual, with little or no experience with export licensing. In these situations, the foreign principal party in interest may be best qualified to determine product classifications. Indeed, this is exactly the type of situation "ex works” is designed for. We urge that this provision be amended to recognize that, in a routed export transaction, the burden of responsibility is on the foreign principle party in interest. We propose that the regulations require that the U.S. principal party in interest cooperate to the extent it has the necessary information, but that the foreign principal party in interest is ultimately responsible for product classifications.

Thank you very much for the opportunity to comment on the Proposed Rule. We look forward to working with you as you continue your efforts on this matter.

Sincerely,

Michael Jaffe
Manager, International Trade

ICOTT INDUSTRY COALITION ON TECHNOLOGY TRANSFER
1400 L Street, N.W., Washington, D.C. 20005 Suite 800 (202) 371-5994

December 3, 1999

Ms. Sharron Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
Room 2705
14th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20230

Re: Proposed Rule--Parties to a Transaction and their Responsibilities, Routed Export Transactions, Shipper's Export Declarations and Export Clearance

Dear Ms. Cook:

On behalf of the Industry Coalition on Technology Transfer (ICOTT), we respectfully submit the following comments on the proposed rule, "Parties to a Transaction and Their Responsibilities, Routed Export Transactions, Shipper's Export Declarations, and Export Clearance," that the Bureau of Export Administration published in the October 4, 1999 Federal Register. 64 Fed. Reg. 53854. ICOTT also is submitting comments on an associated rulemaking, published the same day by the Bureau of Census. 64 Fed. Reg. 53861. A copy of our comments on the Census Bureau proposal is attached.

We appreciate the efforts of BXA to consult with industry throughout this rulemaking exercise, which began with an informal announcement at the July 1998 BXA Update conference and the proposed rule published by the Census Bureau on August 6, 1998. 63 Fed. Reg. 41979.

ICOTT supports the proposed streamlining of export clearance requirements in Part 758 of the Export Administration Regulations and believes they will make this part of the EAR more user-friendly. We also support the modernization of export clearance requirements to account for the introduction of the Automated Export System.

ICOTT commends BXA for stating in a note to proposed section 758.2(c) that the listing of the "Exporter" in Box (la) of the Shipper's Export Declaration is for statistical purposes only, and

that "[f]or purposes of licensing responsibility under the EAR . . . the U.S. **agent** of the foreign principal party in interest may be the exporter, regardless of who is listed in Block (la) of the SED."[1]

Nonetheless, ICOTT remains concerned that BXA and other U.S. export enforcement agencies may hold U.S. suppliers in routed transactions responsible for export violations committed by forwarding agents over which those suppliers have no control in a standard "ex works" transaction. This fundamental change in policy increases the likelihood that U.S. suppliers will be compelled to expend scarce financial and personnel resources dealing with unwarranted export investigations that occur solely because of the suppliers' listing as the "Exporter" on SEDs. (We recognize that the Census Bureau should be the primary focus of these particular comments and are raising them in more detail in our comments to that agency.)

In the preamble to the proposed rule, BXA states that the "primary objective [of the proposal] is to promote flexibility so that parties to transactions subject to the EAR may structure their transactions freely, consistent with national security and foreign policy objectives." Many of the modifications in the proposed rule, however, would interfere with existing international commercial law and the natural workings of the marketplace, especially in the area of ex works transactions, without providing offsetting benefits. ICOTT has the following comments on the proposals:

1. <u>Freight forwarders require credible information on the export control status of a product</u>.

The freight forwarder should be permitted to rely upon information provided by its principal. BXA is correctly inclined to permit freight forwarders reasonably to rely in good faith upon classifications or licensing authority provided by the party retaining the freight forwarder. In the ex works transaction, this is the foreign buyer. There is no need for a writing from the foreign buyer beyond the writing, if any, used by the buyer to retain its agent. The agent knows who it is working for and knows who may direct its actions.

By developing default provisions, BXA can provide by regulation that in the ex works transaction the party who controls and determines the movement of the freight is the responsible party for EAR compliance purposes. That would be the freight forwarder, or both the freight forwarder and the buyer. That is the current law. However, it is useful and fair to provide in regulations that the freight forwarder may claim a safe harbor when relying in good faith upon the information provided by its principal.

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1 The public comments by the Census Bureau representatives in the November 15 conference organized by the American Association of Exporters and Importers raise some questions as to whether the Census Bureau shares BXA's intentions on this point.

Such a system will be effective if the rules make clear that the forwarder in an ex works transaction must refrain from moving the cargo until it receives the relevant information from its principal or makes the license determination on its own. This should be the default position of the new regulations.

The freight forwarder in a "routed export transaction" is often caught in the middle and needs to obtain credible information on the export classification number or otherwise whether the export can lawfully be made with no license required ("NLR"), under a license exception, or under a license. Most U.S. sellers have this information. Many not only willingly provide it but also insist that the buyer's freight forwarder use it and provide evidence of such use. Often, however, the buyer may be in a better position to provide this information. Examples include a large buyer obtaining many components from several small companies and a buyer reluctant to tell its vendor to which end users the products will be sent for fear they will be cut out of future transactions.

A better solution would be to make clear in the Exporter of Record regulations that the freight forwarder--when acting as agent for a foreign buyer--has an obligation to determine from a credible source the legal authority for exporting a product. The EOR regulation would state that the freight forwarder must obtain the ECCN (where required), the applicable export authority (NLR, License Exception Symbol, or License Number, product description, dollar amount, quantity, name of consignee, etc.).

Obtaining such information generally should relieve the freight forwarder from liability for negligently aiding and abetting an illegal export. But if the freight forwarder proceeded with the export having not obtained accurate information, it could be subject to liability for any unlawful export under the Iran Air v. Kugelman principle.

The preamble to the final EOR regulation should make clear that in appropriate circumstances, a U.S. manufacturer or reseller that fails or refuses to cooperate (when it reasonably can do so) with a freight forwarder's reasonable requests for information about product specifications and who knows that the product will be exported illegally could be liable for aiding and abetting an illegal export. Enabling the freight forwarder to cite this provision (including this risk of criminal exposure) should help to gain cooperation from the U.S. shipper-manufacturer-seller, and should provide a clearer basis for a refusal to export the product without proper information either from the freight forwarder's foreign client or from another appropriate source such as the U.S. shipper-manufacturer-seller.

2. Model Best Practices.

Model Best Practices could provide another means to address many EOR issues. BXA wisely recognizes that the EAR cannot--and should not--spell out the detailed steps required for each of the many types of export transaction. Indeed, BXA has used many techniques--such as seminars, Export Management System Guidelines, articles, website documents, and individual company visits--to educate and encourage exporters to understand and meet their responsibilities. Trade associations that are members of ICOTT, as well as other industry groups, are willing to work with BXA on outreach efforts to improve practices and communications among the shipping and forwarding communities.

Articles published by the Commerce Department's own export enforcement leaders on subjects such as "Minimum Standards for Freight Forwarders to Avoid Liability" would "get the attention" of the trading community and would go a long way towards raising the professional standard. Such standards, coupled with a credible enforcement threat, are an essential element of any serious export compliance program.

3. Written acknowledgement of license conditions should not he required.

While it may at times be good business practice for an exporter to obtain a written acknowledgement of conditions from a foreign recipient, it is not always appropriate. It is therefore inappropriate to require exporters to obtain written acknowledgement, either by regulation or by standard condition on licenses. See prop. § 750.7(d). ICOTT urges BXA to delete this proposal.

For purposes of the EAR, it is sufficient for licensees to provide notice of license conditions to those to whom the goods are shipped, particularly given that EAR § 758.6 requires a destination control statement to be entered on important shipping documents. ICOTT urges BXA to detach this particular proposal from this rulemaking exercise so that it can be better considered on its own merits.

The imposition by the EAR of a written acknowledgement requirement would create significant problems. Foreign buyers historically have resisted such requirements. The objections to written assurances for License Exception TSR and its predecessors is but one case in point. In some countries it may even be unlawful to provide this type of acknowledgement. In particular, important U.S. trading partners, including Canada, the United Kingdom, the European Union, and other countries have enacted "blocking statutes" or other measures that make it unlawful for local persons to agree to comply with U.S. reexport controls that conflict with their own.

Requiring a written acknowledgement from the recipient would add a potentially lengthy delay between the time licenses are issued and shipments can be made. It is likely that the delay may equal or surpass those already encountered by U.S. exporters in obtaining end user certificates. A

requirement to procure a written acknowledgement--with all its potential delays to consult non-U.S. legal advisors over the legal effect of such an acknowledgement--would wreak havoc upon corporate planning for the shipment of licensed products because there often will be no way to know how long it will take to obtain the written acknowledgement.

BXA has raised legitimate concerns with the lack of communication among the seller, forwarder, and buyer found in several investigations. These problems can be addressed effectively by BXA with clearer rules, default responsibilities for the various parties, and active enforcement. Such steps can achieve BXA's goals without the need to impose a new writing requirement on foreign buyers, without a requirement for sellers for export to obtain such a writing from buyers, and without an impractical requirement for the seller to deal with a freight forwarder that is not under contract to that seller.

4. Mandating classification of all items would impose costs far exceeding any benefits.

ICOTT opposes the proposed requirement (prop. § 758.1(g)) for exporters to enter classifications on SEDs for all items eligible for shipment under licensing symbol NLR or any license exception. In 1996 BXA introduced the concept of NLR to streamline the export clearance process. It is inconsistent with BXA's streamlining efforts to impose a requirement that the ECCN be listed at all times.

Under current EAR § 758.3(h)(2), the ECCN must be entered on the SED when shipping under (1) a license, (2) License Exception GBS, CIV or LVS, or (3) NLR when the item is controlled for CW or NS Column 2 reasons. This requirement already reflects a substantial list of areas of concern and is broader than the requirement that obtained before the 1996 revision of the EAR. See 15 C.F.R. § 786.3(j) (1995) (requiring ECCN only where export made under validated license or General License GLV, GFW, or GCT). We urge BXA to avoid imposing needless and burdensome requirements of this nature.

5. Information sharing requirements would create liability concerns and undue burdens for U.S. suppliers.

Under proposed section 758.2(d), a U.S. supplier would be required, upon request, to provide the foreign principal party in interest and its U.S. agent with the ECCN or with sufficient technical information to classify an item. ICOTT is concerned that these information-sharing requirements could be interpreted to hold a U.S. supplier liable for incorrect classifications or inaccurate technical information provided to foreign parties and their U.S. agents to comply with this proposed provision. A U.S. supplier ought not be liable for making a good faith classification based on the facts available to it at the time of the request. For routed export transactions the proposed regulation should be

amended to state that the foreign principal party in interest is ultimately responsible for product classifications.

Moreover, this requirement in its proposed absolute form would impose an intolerable burden upon small manufacturers, distributors, and retailers--many of whom deliberately have chosen not to export because of the additional complexity that process entails. The U.S. supplier should be required to provide only such information as is (1) in its possession, (2) not subject to any confidentiality agreement, and (3) reasonably accessible.

6. The BXA Proposed Rule would alter long-established standard international commercial terms.

The BXA should not propose a rule that may alter standard Incoterms (International Commercial Terms) that have been well established in the international trade community for decades. Attached is a copy of the "ex works" Incoterm 1990 (with the respective obligations of buyer and seller) as set forth by the International Chamber of Commerce. For the "ex works" Incoterm the ICC has established, inter alia, "default" obligations that operate unless modified by explicit agreement of buyer and seller:

> [The] seller must . . . place the goods at the disposal of the buyer at the time as provided in the contract, at the point of delivery named or which is usual for the delivery of such goods and for their loading on the conveyance to be provided by the buyer.
>
> [The] seller must . . . render the buyer, at the latter's request, risk and expense, every assistance in obtaining any documents which are issued in the country of delivery and/or origin and which the buyer may require for the purposes of exportation and/or importation (and when necessary, for their passage in transit through another country).
>
> [The] buyer must . . . pay all costs and charges incurred in obtaining the documents [mentioned above] . . . , including the cost of certificates of origin, export license and consular fees.

In contrast, the "default" obligations change significantly for a "free on board" Incoterm 1990 transaction (copy attached). In that case, the "seller must . . . at his own risk and expense obtain any export license or other governmental authorization necessary for the export of the goods."

The purpose of an "ex works" transaction is to limit the seller's liability for damage, insurance, export clearance, and other obligations. In contrast, the FOB or "free on board" transaction keeps liability with the seller until the goods are "on board" the carrier.

In its Incoterms 2000, the International Chamber of Commerce has published recently-updated, detailed definitions. Incoterms 2000 provide that:

> 'Ex works' means that the seller delivers when he places the goods at the disposal of the buyer at the seller's premises or another named place (i.e. works, factory, warehouse, etc.) not cleared for export and not loaded on any collecting vehicle.
>
> This term thus represents the minimum obligation for the seller, and the buyer has to bear all costs and risks involved in taking the goods from the seller's premises.
>
> **. . . This term should not be used when the buyer cannot carry out the export formalities directly or indirectly.**

Incoterms 2000, p. 27-29 (emphasis added). The ex works portion of Incoterms 2000 further provides::

> The buyer must obtain at his own risk and expense any export and import license or other official authorization and carry out, where applicable, all customs formalities for the export of the goods.
>
> The seller must render the buyer, at the latter's request, risk and expense, every assistance in obtaining, where applicable, any export license or other official authorization necessary for the export of the goods.

BXA should not alter these long-standing (and recently reconfirmed) international commercial terms.

7. <u>Requiring written undertakings from foreign buyers to assume licensing obligations is redundant for "ex works" transactions.</u>

In setting forth the Buyer's Obligations, Incoterms' section on "ex works" states that the **"buyer must obtain at his own risk and expense any export and import license or other official authorization** and carry out, where applicable, all customs formalities for the export of the goods. Incoterms 2000, p. 29 (emphasis added; footnote omitted). Accordingly, where the parties have contracted for an "ex-works" transaction, requiring a U.S. supplier to obtain a written undertaking from a foreign buyer to shift export compliance obligations is redundant and unnecessary. Incoterms' definition of "ex works" is clear, specific, and sufficient. Requiring a written undertaking in these

instances would add nothing to the parties understanding or liability, and would impose a needless burden upon trade. In cases where U.S. suppliers did not obtain a written undertaking, the effect of the EAR would be to frustrate the intention of the parties (e.g., the U.S. supplier and the foreign buyer) to contract for an "ex works" delivery by keeping the U.S. supplier on the hook for responsibilities that from a commercial standpoint have been assigned to the buyer.

Further, it is unclear what type of writing would be sufficient to satisfy this requirement. BXA officials have been giving mixed messages. At the September 1999 meeting of the RPTAC, Assistant Secretary for Export Enforcement Amanda DeBusk stated that a contract clearly providing that a transaction is "ex works" as defined by Incoterms 2000 would be a reasonable way to satisfy the requirement. At BXA Update in July 1999, a Commerce Department lawyer stated that such a contract would not be sufficient, but that an unsigned letter on corporate letterhead would be satisfactory. We are concerned that this sort of ambiguity will lead to unpredictable application of such a requirement.

ICOTT recommends the adoption of a default rule under which freight forwarders are responsible for export compliance when they export items on behalf of foreign parties. Such a rule would reflect current law. The freight forwarder would not need to obtain any writing from the foreign party, other than any written retainer agreement between the freight forwarder and the foreign buyer. The freight forwarder knows that the foreign party may direct his actions pursuant to their agreement. The proposal seems to move much of the export compliance burden from freight forwarders to U.S. suppliers even though it is the forwarders who actually do the exporting.

Alternatively, ICOTT proposes that written undertakings obtained from foreign parties with an ongoing relationship with U.S. suppliers should remain valid until terminated. This long has been the case in respect of written assurances under License Exception TSR and its predecessor, General License GTDR. There is no need to require a separate written undertaking for each and every shipment to a trusted foreign party.

In fact, the use of ex-works terms and conditions is so prevalent in international trade that a requirement for a writing in this context likely will generate substantial resistance from foreign buyers and their governments. U.S. sellers will object strongly to a requirement that they choose between (a) obtaining a writing from the buyer and passing that on to the buyer's freight forwarder, or (b) taking responsibility for the entirety of the SED in a shipment and export that the seller does not control.

An ex works seller prices its goods with the expectation that all costs, including those for export clearance, after delivery at the seller's facility will be borne by the buyer. If the U.S. seller asks the foreign buyer for a writing and the buyer resists or refuses, the supplier risks the loss of the business. If the foreign buyer begrudgingly signs a writing, the U.S. seller is still required to inject

itself into the commercial relationship between the buyer and its agent. Above all, the U.S. seller may be required to communicate with a party that is unknown to it.

If the foreign buyer refuses to give a writing, the U.S. seller is also required to vouch for all the information on the SED, including shipping information, when the seller has no control or knowledge of the carrier, date of export, destination, ultimate destination, or route. If the seller chooses to give the customer's agent authority to file and SED in its name, the seller will find it nearly impossible to obtain copies of SEDs filed on its behalf. The seller may violate record-keeping requirements and sound compliance principles in the areas of documentation and self-auditing. Even sellers who retain their own freight forwarders frequently have difficulty in obtaining copies of SEDs filed on their behalf and by reason of their fees paid for those services. Doing so when the forwarder is being paid by another party will be all but impossible.

In the ex-works environment under the rules suggested by BXA, as a practical matter the seller would be required to deal with a freight forwarder not of his choosing, not under contract, and not under his control. Sound compliance and communications under those circumstances would be a nightmare for the seller for export in many circumstances.

8. The BXA should not alter standard delivery and carrier terms in the Uniform Commercial Code.

The BXA should issue Exporter of Record rules that do not alter standard delivery and carrier terms concerning delivery, risk of loss and other liability issues in the Uniform Commercial Code. See, e.g., Sections 2-503, 2-504, 2-505, 2-509 (copies attached) and Part 5 of Article 2 of the UCC generally.

9. The BXA should use consistent, clear terms throughout the Proposed Rule.

ICOTT commends the new definitions proposed for Part 772 in the Proposed Rule. ICOTT believes there may remain some possibility for confusion in the use of the terms "exporter," "routed export transaction," and "applicant." It is important that the routed export transaction exception be stated consistently throughout the Proposed Rule.

In addition, numerous exporters appear to be confused about the definitions of "end user" and "ultimate consignee" and the proper treatment of value added resellers or distributors for these purposes. The BXA should clarify the treatment of such parties.

10. Notation on export documents for exports exempt from SED requirements.

Proposed section 758.1 (b)(1) states that Shipper's Export Declarations must be submitted for all shipments authorized under a license. However, it appears that there may be instances where a license is issued and the SED is not required. We ask BXA to clarify this discrepancy.

11. Power of attorney or other written authorization.

Proposed section 748.4(b)(2) attempts to introduce specific requirements for a power of attorney. This is inconsistent with other proposed rules that properly allow other authorizations instead of powers of attorney. The other references thereto should simply refer to "a duly authorized agent."

12. The provisions of section 750.7 should provide appropriate levels of responsibility when the EAR allow third parties to use licenses.

Section 742.15 provides useful authority for distributors and resellers to make shipments under the authority of Encryption Licensing Arrangements. This is helpful, but exporters have been left confused as to the appropriate levels of responsibility when using such authorization. An exporter who allows use of its license when specifically authorized to do so should not be liable for illegal exports outside of its control, unless the exporter knows that such illegal exports will occur. Accordingly, we suggest that the following sentence be added to Section 750.7: "Licensees will be responsible for exports by other parties authorized by the License or the EAR to export pursuant to the licensee's license if the exporter knows the circumstances of said exports."

13. Technical data exports should be exempt from SED filing requirements whether transmitted by mail or by other means.

Currently, technical data subject to the EAR are exempt from the SED tiling requirement if they are (1) exported physically by mail, 15 C.F.R. § 30.54(b) (1999), (2) exported electronically, or (3) are made by other means, do not require a license, are valued at less than $2500, and are not destined for a "terrorist supporting" country, 15 C.F.R. § 30.55(h) (1999). Requiring filing in the third case but not the first two makes little sense and should be addressed by exempting all technical data exports, whatever their means, from the SED tiling requirement. We are making this point to the Census Bureau as well as to BXA.

Second, proposed section 758.1(c)(5) of the BXA regulations erroneously suggests that there is an across-the-board SED filing exemption for technical data under License Exception TSR but none for data under License Exception TSU. The cross reference should be corrected to reflect the actual state of affairs noted in the preceding paragraph.

* * *

Viewed broadly, the focus of the Exporter of Record issue should be on the freight forwarder rather than on the U.S. exporter. This is so for two primary reasons, the first being set forth above in the Incoterms "ex works" context.

The second primary reason is that the freight forwarding community is a defined--or definable--group that has distinct and customary responsibilities in the exporting process. As such that community is a proper focus for U.S. Government "outreach" and education strategies (both directly and through trade associations) to improve professionalism and performance. The freight forwarding community also is a proper strategic focus of U.S. Government export compliance and enforcement resources because there is maximum leverage in a community that serves thousands of exporters. By addressing export-compliance weakness in the freight forwarder community the BXA would render a distinct service not only to that community but also to its very large clientele of U.S. exporters, particularly smaller and medium-sized enterprises.*

In the ex-works transaction, the freight forwarder must either obtain the necessary information from his principal (the foreign buyer), or take responsibility himself for the information, or refrain from moving the cargo.

* * *

ICOTT is a group of major trade associations (names listed below) whose thousands of individual member firms export controlled goods and technology from the United States. ICOTT's principal purposes are to advise United States Government officials of industry concerns about export

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2 The remarks of the BXA's Director of Export Enforcement at the November 15 AAEI conference were a positive step in that direction.

controls, and to inform ICOTT's member trade associations (and in turn their member firms) about the government's export control activities.

Sincerely,

David Calabrese
Acting Chair, Coordinating Committee

Eric L. Hirschhom
Executive Secretary

ICOTT Member Associations

American Electronics Association (AEA)
American Association of Exporters and Importers (AAEI)
Electronic Industries Alliance (EIA)
Semiconductor Equipment Manufacturers International (SEMI)
Semiconductor Industry Association (SIA)

Enclosure

cc: Hon. William Reinsch, Under Secretary
Hon. Amanda DeBusk, Assistant Secretary
Hon. Roger Majak, Assistant Secretary
Mr. Iain Baird, Deputy Assistant Secretary
Mr. John Sopko, Deputy Assistant Secretary
Mr. Mark Menefee, Director, Office of Export Enforcement
Ms. Hillary Hess, Director, Regulatory Policy

This term came into force 1953

EX WORKS

... (ex factory, ex mill, ex plantation, ex warehouse, etc.)

" Ex works" means that the seller's only. responsibility is to make the goods available at his premises (i.e. works or factory). In particular he is not responsible for loading the goods on the vehicle provided by the buyer, unless otherwise agreed. The buyer bears the full cost and risk involved in bringing the goods from there to the desired destination. This term thus represents the minimum obligation for the seller.

A. The seller must:

1 Supply the goods in conformity with the contract of sale. together with such evidence of conformity as may be required by the contract.

2 Place the goods at the disposal of the buyer at the time as provided in the contract. at the point of delivery named or which is usual for the delivery of such goods and for their loading on the conveyance to be provided by the buyer.

3 Provide at his own expense the packing, if any, that is necessary to enable the buyer to take delivery of the goods.

4 Give the buyer reasonable notice as to when the goods will be at his disposal.

5 Bear the cost of checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of placing the goods at the disposal of the buyer.

6 Bear all risks and expense of the goods until they have been placed at the disposal of the buyer at the time as provided in the contract, provided that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

7 Render the buyer, at the latter's request, risk and expense, every assistance in obtaining any documents which are issued in the country of delivery and/or of origin and which the buyer may require for the purposes of exportation and/or importation (and, where necessary, for their passage in transit through another country).

B. The buyer must:

1 Take delivery of the goods as soon as they are placed at his disposal at the place and at the time, as provided in the contract, and pay the price as provided in the contract.

2 Bear all charges and risks of the goods from the time when they have been so placed at his disposal, provided that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

3 Bear any customs duties and taxes that may be levied by reason of exportation.

4 Where he shall have reserved to himself a period within which to take delivery of the goods and/or the right to choose the place of delivery, and should he fail to give instructions in time, bear the additional costs thereby incurred and all risks of the goods from

the date of the expiration of the period fixed, provided that the goods shall have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

5 Pay all costs and charges incurred in obtaining the documents mentioned in article A.7; including the cost of certificates of origin, export licence and consular fees.

FOB means "Free on Board". The goods are placed on board a ship by the seller at a port of shipment named in the sales contract. The risk of loss of or damage to the goods is transferred from the seller to the buyer when the goods pass the ship's rail.

A. The seller must:

1 Supply the goods in conformity with the contract of sale. together with such evidence of conformity as may be required by the contract.

2 Deliver the goods on board the vessel named by the buyer, at the named port of shipment, in the manner customary at the port, at the date or within the period stipulated, and notify the buyer, without delay. that the goods have been delivered on board.

3 At his own risk and expense obtain any export licence or other governmental authorization necessary for the export of the goods.

4 Subject to the provisions of articles 8.3 and 6.4 below, bear all costs and risks of the goods until such time as they shall have effectively passed the ships rail at the named port of shipment, including any taxes, fees or charges levied because of exportation, as well as the costs of any formalities which he shall have to fulfil in order to load the goods on board.

5 Provide at his own expense the customary packing of the goods, unless it is the custom of the trade to ship the goods unpacked.

6 Pay the costs of any checking operations (such as checking quality, measuring, weighing, counting) which shall be necessary for the purpose of delivering the goods.

7 Provide at his own expense the customary clean document in proof of delivery of the. goods on board the named vessel.

8 Provide the buyer, at the latter's request and expense (see B. 6). with the certificate of origin.

9 Render the buyer. at the latter's request. risk and expense. every assistance in obtaining a bill of lading and any documents, other than that mentioned in the previous article, issued in the country of shipment and or of origin and which the buyer may require for the importation of the goods into the country of destination (and, where necessary. for their passage in transit through another country).

B. The buyer must:

1 At his own expense. charter a vessel or reserve the necessary space on board a vessel and give the seller due notice of the name. loading berth of and delivery dates to the vessel.

2 Bear all costs and risks of the goods from the time when they shall have effectively passed the ship's rail at the named port of shipment. and pay the price as provided in the contract,

3 Bear any additional costs incurred because the vessel named by him shall have failed to arrive on the stipulated date or by the end of the period specified. or shall be unable to take the goods or shall close for cargo earlier than the stipulated date or the end of the period specified and all the risks of the goods from

he date of expiration of the period stipulated, provi ded, however, that the goods shall have been duly ap propriated to the contract, that is to say, Clearly se aside or otherwise identified as the contract goods:

4 Should he fail to name the vessel in time or, if h shall have reserved to himself a period withi which to take delivery of the goods, and/or the right t choose the port of shipment, should he fail to give de tailed instructions in time, bear any additional costs ir curred because of such failure, and all the risks of th goods from the date of expiration of the period stipu lated for delivery, provided, however, that the gooc shall have been duly appropriated to the contract. tha is to say, clearly set aside or otherwise identified as th contract goods.

5 Pay any costs and charges for obtaining a bill c lading if incurred under article A.9 above.

6 Pay all costs and charges incurred in obtaining th documents mentioned in articles A.8 and A above, including the costs of cet-tlficates of origin ar consular documents.

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UCC § 2-503. Manner of Seller's Tender of Delivery (Official Text)

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2-323); and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes non-acceptance or rejection.

State variations from official text: None.

¶ 2-503[A] EDITORIAL COMMENTARY

[1] Overview of 2-503

Section 2-503 focuses on the seller's performance of his delivery obligations. Assuming that the seller has agreed to sell something. what are the steps he must take to actually perform his part of the deal? Section 2-503 lays out the rules in this area. It must be read in conjunction with 2-504, with which it forms a single unit.

[2] Seller's Delivery Obligation

Under the Code, the seller's delivery obligation, in the absence of agreement to the contrary, depends on the nature of the underlying sales contract. The sales contract, in turn, will be subject to one of four basic rules. These are: (1) the general delivery rule 2-503(1); (2) the shipment contract rule, governed by 2-503(2) and 2-504; (3) the destination contract rule. governed by 2-503(3); and (4) the stored goods rule, which looks to a situation where goods are "delivered" without being moved, 2-503(4). Where the sales contract requires the delivery of documents, there is a fifth rule: (5) the documentary delivery rule. 2-503(5).

[3] The General Delivery Rule

This is the basic rule and it applies unless displaced by the agreement of the parties or other rules in 2-503. The general delivery rule of 2-503(1) can be divided into the five following requirements:

1. *Conforming goods.* The seller is required to "put and hold conforming goods at the buyer's disposition." This is the basic requirement. The details of its implementation will be determined by the sales contract itself. The *term* "conforming" is defined in Article 2 so as to require "goods or conduct" to be "in accordance with the obligations under the contract." (2-106(2).)

2. *Notification.* The seller is also required to "give the buyer any notification reasonably necessary to enable him to take delivery." The expression to "give" notice has a special content. It requires "taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it." (l-20 1(26) .)

3. *Derails of the delivery obligation.* The general delivery obligation, it will be seen, is cast in general language. Its implementation is not likely to be possible without further specifications of a more detailed sort. The Code leaves this to the sales contract itself. "The manner, time and place for tender are determined by the agreement. . . ." The obvious problem this creates is that such matters may not be dealt with in the agreement. This is a common occurrence and to this end the Code provides for further determination by "this Article." The Code, if you will, will supply the "gaps." These gap-filling sections will be found in Part 3 of Article 2. Section 2-308, for example, is designed to operate in the "absence of specified place for delivery."

4. *Timing of the render.* The timing of the tender is simply another detail, and like any other detail is left to be "determined by the agreement and this Article." A "timing" rule is provided, however, in 2-503(1)(a) itself. which requires that "tender must be at a reasonable hour. and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession."

5. *Facilities for receipt of goods.* The nature of the facilities for receipt of the goods is another detail and here again. like any other detail. it is left to be "determined by agreement and this Article." A "facilities" rule is provided, however, in 2-503(1)(b), which provides that "unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods."

[4] The Shipment Contract Rule

This rule applies "where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination." (2-504.) The essence of the "shipment" contract consists of two elements. On the one hand, the sales contract does not require" or at least "authorize" the sending of the goods, while, on the other, it "does not require him [the seller] to deliver them at a particular destination." It is this latter element that distinguishes the "shipment" from the "Destination" contract. The distinction is important because the "shipment" contract follows one set of rules set out in 2-502(2) and 2-504, while the "destination" contract follows very different rules set out in 2-503(3).

The classic illustration of a "shipment" contract is had with a sales contract that is F.O.B. the seller's city. When such is the case and the shipment rule is applied, it will be seen that the seller's delivery obligation is normally complete on tender to the carrier in the seller's city. Change the same contract to F.O.B. buyer's city and it becomes a "destination"-type contract and now, when the rules for destination contracts are applied, it will be seen that the seller's delivery obligation continues until tender to the buyer in the buyer's city. A radically different delivery obligation.

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The obvious difficulty this creates is the need to distinguish between "shipment"- and "destination"-type Contracts. As a practical matter, it may be obvious from the agreement itself or from the trade terms used, e.g., F.O.B. seller vs. buyer but, failing that, no more precise norm is provided by the Code save its position that the "shipment" contract is the norm, and the "destination" the variant. (See Official Comment 5 to 2-503.)

If the contract qualifies as a "shipment"-type contract, the seller's delivery obligation is set out in 2-504. The rule in 2-503(2), it will be seen, is simply a cross-reference to this section. "Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions." (2-503(2).)

[5] The Destination Contract Rule

This rule applies "where the seller is required to deliver at a particular destination." The essential element is not the fact that the sales contract calls for the sending of goods and some destination, or address, is supplied. That is verified in almost any sales contract calling for the sending of goods. What is necessary is that under the contract, "the seller is required" to deliver "at a particular destination.'," It is this mandatory element that requires the seller to actually tender the goods to the buyer at the destination point either in person or through an agent or carrier that gives rise to the "destination" contract. It must be carefully distinguished from the "shipment" contract discussed in ¶ 2-503[A][4]. The *normal* sales contract is understood to be of the shipment type, rather than of the destination type. (Official Comment 5 to 2-503.)

Assuming the sales contract qualifies as a "destination" type, the Code requires the seller to comply with the general delivery rule (¶ 2-503[A][3]), but to do so at the particular destination (2-503(3)). The effect of the destination rule, therefore, is simply to move the satisfaction of the general delivery rule to the particular destination point. where the seller is there required to "put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. "

Since the destination-type contract may also require the delivery of documents, the seller has the additional obligation of a proper delivery of the documents. The seller must also "in any appropriate case tender documents as described in subsections (4) and (5)." (2-503(3).)

[6] The Stored Goods Rule

The essence of the stored goods rule is that it calls for delivery of the goods without the physical movement of the goods. Or. to be more specific, it calls for a situation where goods "are in the possession of a bailee" and they are to be "delivered without being moved." A simple illustration of this would be had where furniture is stored in a warehouse and the owner contemplates its sale to a buyer who has no immediate need for the furniture.

Barring some agreement to the contract. the Code provides two methods for the seller's satisfaction of his delivery obligation in this type of situation. These might be described as (1) the preferred method and (2) the alternate method.

1. The *preferred merhod.* The seller can satisfy his delivery obligation using this method in one of two ways. He may either (a) "tender a negotiable document of title covering such goods" or (b) "procure acknowledgment by the bailee of the buyer's right to possession of the goods." This is the preferred method since it satisfies the seller's delivery obligation without more and avoids the problems inherent in the alternate method, such as refusal by the buyer or the warehouse to go along with the accepted method.

2. The *alternate merhod.* The seller can satisfy his delivery obligation under this alternate method in one of two ways. He may either (a) tender to the buyer a "non-negotiable document of

The obvious difficulty this creates is the need to distinguish between "shipment"- and "destination"-type contracts. As a practical matter, it may be obvious from the agreement itself or from the trade terms used, e.g., F.O.B. seller vs. buyer but, failing that, no more precise norm is provided by the Code save its position that the "shipment" contract is the norm, and the "destination" the variant. (See Official Comment 5 to 2-503.)

If the contract qualifies as a "shipment"-type contract, the seller's delivery obligation is set out in 2-504. The rule in 2-503(2), it will be seen, is simply a cross-reference to this section. "Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions." (2-503(2).)

[5] The Destination Contract Rule

This rule applies "where the seller is required to deliver at a particular destination." The essential element is not the fact that the sales contract calls for the sending of goods and some destination, or address, is supplied. That is verified in almost any sales contract calling for the sending of goods. What is necessary is that under the contract, "the seller is required" to deliver "at a particular destination." It is this mandatory element that requires the seller to actually tender the goods to the buyer at the destination point either in person or through an agent or carrier that gives rise to the "destination" contract. It must be carefully distinguished from the "shipment" contract discussed in ¶ 2-503[A][4]. The *normal* sales contract is understood to be of the shipment type, rather than of the destination type. (Official Comment 5 to 2-503.)

Assuming the sales contract qualifies as a "destination" type, the Code requires the seller to comply with the general delivery rule (¶ 2-503[A][3]), but to do so at the particular destination (2-503(3)). The effect of the destination rule, therefore, is simply to move the satisfaction of the general delivery rule to the particular destination point, where the seller is there required to "put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery."

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2. The *alternate method.* The seller can satisfy his delivery obligation under this alternate method in one of two ways. He may either (a) tender to the buyer a "non-negotiable document of

title" or (b) tender "a written direction to the bailee to deliver" the goods. This is a "sufficient** tender. Its weakness lies in the fact that it may be rejected by the buyer. It is "sufficient unless the buyer seasonably objects."

Moreover. even where the buyer does not object and the tender proves "sufficient," it postpones the shifting of the risk of loss. Thus, the "risk of loss of the goods and of any failure . . to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction."

Nor does this end the matter. for even where the buyer does go along with the alternate method. and does present the document or writing in a timely manner and nothing happens to the goods in the interim. there remains the possibility that the bailee may refuse to go along. When such is the case. while "receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons," a "refusal by the bailee to honor the document or to obey the direction defeats the tender."

[7] The Documentary Delivery Rule

For this special rule to apply. the sales contract must be such as "requires rhe seller to deliver documents" (2-503(5)). it is this "requires" that brings the rule into operation. Lest the point be missed. the drafters observe that under 2-503(5), "documents are never 'required' except where there is an express contract term or it IS plainly implicit in the peculiar circumstances of the case or in a usage of trade. Documents mal. of course. be 'authorized' although not required, but such cases are not within the scope of this subsection." (Official Comment 7 to 2-503.)

Where the delivery of documents is required, their delivery can be made through "customary banking channels," which IS "sufficient" (2-503(5)(b)). A proper tender. however. requires "all such documents in proper form." It IS important to note that this involves three quite different elements. all of which are important. To quote the drafters. "when document, are required, there are three main requirements of this subsection: (1) 'All': each required document is essential to a proper tender: (2) 'Such': the documents must be the ones actually required by the contract in terms of source and substance: (3) 'Correct form': All documents must be in correct *form." (Official* Comment 7 to 2-503.)

Suppose a required document cannot be procured'? That presents an obvious and serious problem. Whether it is hopeless or nor depends on the circumstances. The drafters. at least. suggest the following possibilities: "When a prescribed document cannot be procured. a question of fact arises under the provision of this Article on substituted performance as to whether the agreed manner of delivery is actually commercially impracticable and whether the substitute is commercially reasonable." (Official Comment 7 to 2-503.)

The fact that the documents are *all* there. are all *such* as they should be. and in proper form does not mean that they will necessarily be accepted. There remains the possibility that the accompanying draft may be dishonored for any one of a number of reasons, good, bad. and indifferent. When such is the case. "dishonor of a draft accompanying the documents constitutes non-acceptance or rejection" (2-503(5)(b)).

[8] Delivery Obligation and Risk of Loss

There is no inherent necessity thar rules governing satisfaction of the seller's delivery obligation and rules regarding the shifting of rhe risk of loss from the seller to the buyer should be linked. much less that the linkage be a lock-step arrangement. On the other hand, some point must be selected for a shifting of the risk from seller to buyer. and the point at which the seller has satisfied his delivery obligation is an obvious choice.

This is the pattern followed by the Code. One has only to read the delivery obligation rules of 2-503 and 2-504 and compare them with the risk-of-loss rules of 2-509 and 2-510 to see that the same concepts are at work. Indeed, the basic rule-vastly oversimplified- is that satisfaction of the delivery obligation serves to shift the risk of loss to the buyer. This is *not*, repeat *not*, literally the case. There are significant differences but those differences are in the order of "adjustments" to a basic proposition and the basic insight is that risk of loss shifts on completion of the seller's delivery obligation.

¶ 2-503[B] CASE ANNOTATIONS

[1] General Delivery Rule

Mississippi. Buyers purchased certain personal property from a bank. This personal property was located on real property that the bank had sold. The deed of sale, however, provided that removal of the personal property was permitted for one year. When buyers attempted to take possession of the personal property they had bought, the owners of the realty refused them access. Buyers tiled suit against the bank, claiming that the sales contract had been breached because there was not a proper tender as required under 2-503.

The court found that the bank had failed in its delivery obligation, in that it had failed to put and hold the personal propeny at the buyers' disposition. The bank had also failed to give buyers notice of the time limit for removing the personal property from the real property. Ward v. Merchants & Farmers Bank, 349 So. 2d 1374 (1981), 30 U.C.C. Rep. 1588.

[2] Destination Contract Rule

Ohio. Where a wholesaler contracted to deliver diamonds to a retail jeweler and sent them out by registered parcel, which never reached the buyer, the wholesaler was in breach of its obligation to make proper tender of delivery under 2-503. Baumgold Bros.. Inc. v. Allan M. Fox Co., 375 F. Supp. 807 (N.D. Ohio 1973), 14 U.C.C. Rep. 580.

[3] Stored Goods Rule

North Dakota. VFBA, a grain warehouseman, contracted with bean producers who had stored beans with it to purchase their beans. VFBA never paid for the beans and went bankrupt. The lower court found VFBA's surety liable for claims brought under the producer contracts.

On appeal, the surety argued that it should not be liable for any producer contract claim where "delivery" of beans to VFBA's warehouse was lacking.

The appeals court held that delivery was had because VFBA had physical possession of the beans when the contracts were executed. Delivery of a negotiable document of title, under 2-503, was not necessary, absent an express agreement to the contrary, which did not exist. In addition, VFBA's failure to make payment did not make the contract executory and prevent the completion of delivery under 2-511, since VFBA was obligated to pay for the beans. Therefore. the surety was liable. North Dakota Pub. Serv. Comm'n v. Valley Farmers Bean Ass'n, 365 N.W. 2d 528 (1985), 40 U.C.C. Rep. 1847.

[4] Notification Requirement

New Hampshire. Kingston House restaurant ordered forty cases of wine from Law Warehouse. The wine was to be delivered by carrier (i.e., B.S.P. Transportation). The carrier subsequently attempted to deliver the wine at the restaurant on a Monday, a day on which the restaurant was normally closed. One elderly employee of the restaurant was on the premises but when he refused to help unload the truck, the carrier refused to make the delivery, whereupon the wine was taken back to the carrier's warehouse. The carrier refused to redeliver unless Kingston House paid storage costs and a delivery charge.

Kingston House sued the carrier for conversion, arguing that it was not liable for the extra charges because the carrier had failed in its duty to make a proper tender as required under 2-503.

The court found that the requirements for tender by a carrier are the same as the requirements for tender by a seller. Since the carrier failed to give advance notice of the date of

delivery, the tender was improper and the carrier was not entitled to collect the extra charges. Kingston 1686 House, Inc. v. B.S.P. Transp., Inc., 427 A.2d 9 (1981), 30 U.C.C. Rep. 1586.

[5] Conformity of Goods

Delaware. Zallea sold expansion joints to Hydro that proved to be defective and Hydro sued Zallea for breach of warranty. Zallea argued that since the goods were tendered more than four years before the suit was filed, the suit was barred by the statute of limitations in 2-725. Hydro maintained that under 2-503 tender does not occur until the seller puts conforming goods at the buyer's disposition. Since the joints were defective, conforming goods were never delivered and tender did not occur under 2-503.

The court disagreed and held that tender occurred when the joints were made available to Hydro, even though they were defective. It found that any other interpretion of the term tender would render 2-725 superfluous since the statute of limitations for a suit concerning nonconforming goods begins to run upon tender. Ontario Hydro v. Zallea Sys., Inc., 564 F. Supp. 1261 (D. Del. 1983), 36U.C.C. Rep. 1222.

[6] Timing of Delivery

Ohio. A buyer signed a contract to purchase a combine in April 1977 and the combine was delivered in June or July 1977. The combine did not work well and in May 1981. the buyer sued the seller for breach of warranty. The seller claimed that the action was barred by the statute of limitations in 2-725.

The seller argued that the statute of limitations began to run when the contract was signed and that the four-year period had. therefore, expired. The buyer maintained that the statute began to run when the cause of action accrued, which in the case of a breach of warranty is when the seller tenders delivery. Under 2-503, tender occurs when the seller puts conforming goods at the buyer's disposition and notifies the buyer of their availability. Moreover, under the UCC, the seller's obligation is to transfer and deliver the goods. The statute of limitations, therefore, began to run on delivery, not on the date the contract was signed.

The court held that tender cannot occur until the seller is ready to deliver, and since the contract provided that delivery would be made as "soon as possible," it seemed clear that some further action on the seller's part was required before the combine could be delivered so that the contract date could not be the date of tender. The court remanded the case for findings as to the delivery date. Allis-Chalmers Credit Corp. v. Herbolt, 479 N.E.2d 293 (Ct. App. 1984), 41 U.C.C. Rep. 485.

[7] Impossibility

New **York.** Defendant-bank had entered into a futures contract with plaintiff for the purchase of yen but, because of a government regulation beyond its control, was unable to deliver. The bank thereafter offered plaintiff several options, which plaintiff rejected. The court held that under 2-503, tender requires the ability to deliver. Here, the bank could not deliver. and the subsequent options were merely proposals for substituted performance, not tender. United Equities Co. v. First Nat'l City Bank, 374 N.Y.S.2d 937 (Sup. 1975), 17 U.C.C. Rep. 1121, *rev'd* on *appeal*, 383 N.Y.S.2d 6 (Sup. 1976).

¶ 2-503[C] CODE CROSS-REFERENCES

Acceptance. 3-410; 2-606
Agreement. 1-201(3); 2-106(1)
Bailee. 7-102(1)(a)
Bill of lading. 1-20 1(6); 2-323
Buyer. 2-103(1)(a)
Conforming. 2-106
Contract. 1-201(11); 2-106(1)(h)
Dishonor. 3-507; 3-508
Document. 1-201(15); 7-102(1)(e)
Draft. 3-104(2)(a); 4-104(1)(b); 5-103(1)(b)
Goods. 2-105; 7-102(1)(f); 9-105(1)(h)
Honor. 1-201(21)
Negotiable document. 7-104(1)
Non-negotiable document. 7-104(2)
Notification. 1-201(25); 1-201(26); 1-201(27)
Person. 1-201(30)
Presentment. 3-504
Reasonable rime. 1-204; 2-309(1)
Rights 1-201(36)
Seasonably. 1-204(3)
Seller. 2-103(1)(d); 2-707
Written. 1-201(46)

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UCC § 2-504. Shipment by Seller (Official Text)

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

State variations from official text: Wisconsin.

¶ 2-504[A] EDITORIAL COMMENTARY

[1] "Shipment"-Type Contracts: 2-503(2) and 2-504

Section 2-504 forms a unit with 2-503. Section 2-503 is the major section that describes the various delivery obligations of a seller under a sales contract. His obligation differs depending on the type of sales contract involved. One major type is the "shipment" contract. Since the particular details that characterize this type of delivery obligation are extensive. instead of including them in 2-503. they were set apart in their own section. 2-504, which is cross-referenced in 2-503(2). It is 2-504, therefore. that controls the "shipment contract" situation.

The essence of the "shipment"- type obligation is twofold. On the one hand, such a contract must "require" or at least "authorize" the seller's sending of the goods. It involves. therefore, the use of a carrier. This is the positive component. The negative component. on the other hand. is that the contract "does not require him to deliver them at a particular destination." It is this latter element that is critical since where the seller is required to deliver the goods at a particular destination, the contract is a "destination"- rather than a "shipment"-type contract and follows a radically different rule (2-503(3)).

[2] "Shipment"- vs. "Destination"-Type Contracts

Distinguishing the shipment from the destination contract is not easy since any contract calling for the sending of goods will anticipate that the goods will move to some usually known address. The goods, for example, will be consigned to some particular destination. The fact that there is some destination (in this sense), however, does not place the contract in the "destination" category. For that, the contract must "require" the seller to effect delivery at the particular destination. What this means is that the seller has committed himself to getting the goods to the destination and to tendering them there. This differs radically from the shipment contract where the seller's obligation is normally satisfied upon delivery to the carrier- usually at considerable distance from the buyer.

The risk of loss in transit, in turn. usually shifts upon the seller's satisfaction of its delivery obligation. As a result, the risk of loss in transit will usually be the buyer's under a shipment contract (2-509(1)(a)) and the seller's under a destination contract (2-509(1)(b)).

In light of the radical differences, how are the two types of contracts to be distinguished? There is no clear norm provided by the Code. Failing that, a series of practical rules may serve. First, if the seller's obligation is clear in the contract, it will control. The contract, for example. may describe itself as a destination or a shipment type either expressly or in net effect. Second, it is common for the use of some trade term to serve this function. Thus, F.O.B. seller would be "shipment," while

F.O.B. buyer would be "destination." C.I.F. is "shipment." (Official Comment 1 to 2-320.) Third, it may be clear from the past dealings of the parties that they have been working on either a "shipment" or a "destination" basis (1-205(1) and l-205(3)). So, too, if the contract calls for repeated deliveries, the conduct of the parties in effecting these deliveries and making payment may reveal their understanding (2-208). It is also possible to extrapolate from the general trade background the normal and governing rule (1-205(2) and l-205(3)). There comes a time, finally, when nothing seems to work. Where such is the case, the drafters take the position that the normal working rule is always the "shipment" rule. "[U]nder this Article the 'shipment' contract is regarded as the normal one and the 'destination' contract as the variant type. The seller is not obligated to deliver at a named destination and bear the concurrent risk of loss until arrival, unless he has specifically agreed so to deliver or the commercial understanding of the terms used by the parties contemplates such delivery." (Official Comment 5 to 2-503.)

[3] Seller's Delivery Obligations Under a "Shipment"-Type Contract

Once it has been determined that the sales contract is of the "shipment" type and assuming the parties have not altered their responsibilities in some way by agreement, the obligations of the seller are set out in 2-504 and are as follows:

1. *Carrier*. The seller is required to "put the goods in the possession of such a carrier":
2. *Contract of carriage*. "Make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the care";
3. *Documents*. "Obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by agreement or by usage of trade"; and
4. *Notification*. "Promptly notify the buyer of the shipment."

[4] Failure of Satisfaction **by Seller**

The seller is required to make a contract for the carriage of the goods that is "reasonable" and to "notify" the buyer of the shipment. Failure to do so will constitute a breach although the injury may, in fact. be slight, or even nonexistent. Since there is a "nonconformity," however, does rejection remain an option? The Code draws a line here. As a result, "failure to notify the buyer. . . or to make a proper contract . is a ground for rejection only if material delay or loss ensues." (2-504.)

But who is to say with certainty what constitutes a "material" delay or loss? A tough question. Can it be controlled by language in the sales contract? The drafters are of the opinion that it can. "Frequently the agreement expressly requires prompt notification as by wire or cable. Such a term may be of the essence and the final clause of paragraph (c) does not prevent the parties from making this a particular ground for rejection. To have this vital and irreparable effect upon the seller's duties, such a term should be part of the 'dickered' terms written in any 'form,' or should otherwise be called seasonably and sharply to the seller's attention." (Official Comment 5 to 2-504.)

[5] Notice of Shipment

Notice of shipment is a basic requirement the seller must satisfy if the seller is to satisfy his delivery obligation under a shipment contract (2-504(c)). The language is clear enough. The reason behind the language may require elaboration since it resides. in part, on the risk-of-loss rules under the Code.

Whenever goods are shipped to a buyer, there is always the risk that they may be lost in transit. The Code's answer to that is found in 2-509 and 2-510 and it depends in large part on the nature of the sales contract that was made.

All of which takes us to 620 cases of wine that went down with the ship. The wine cost $8,621.25 and was shipped some time during the first week in December 1978, consigned to the *buyer* in Charlotte, N.C. It was a "shipment"-type contract, and the ship went down about two weeks after leaving port.

Who had the risk of loss? The Code's answer to that is the buyer. A clear 2-509(1)(b) type **of case.**

So how *come* the seller was stuck with the loss? Because the seller's obligations in a "shipment"-type contract go to more than conformity of goods to the contract. The seller must also make a proper contract of carriage and, among other things, "promptly notify the buyer of the shipment." (2-504.)

And therein hangs the tale in this case. The seller, sad to say, had failed to give prompt notice of shipment. The result: The risk of loss was still on his shoulders when the ship went down. A grim, but let us hope a salutary, lesson to learn on the importance of notification. Sheinberg-Kellerei GMBH v. Vineyard Wine Co., 281 S.E.2d 425 (N.C. Ct. App. 1981), 32 U.C.C. Rep.96.

Does this mean that whenever a seller fails to make a proper contract of carriage or fails to give "prompt" notice, the risk of loss stays with the seller? No. While that is true when the goods fail to conform. it is not true for all defects associated with the contract of carriage and notification. For these to alter the normal 2-509(1)(b) rule. which shifts the risk to the buyer on delivery to the carrier. the seller's failure must result in "material delay or loss." (2-504(c).) In this case. the ship had gone down and the wine *lost.* The buyer, uninformed of the shipment. had apparently failed to insure. [16 UCCLL 3 (May 1982).]

¶ 2-504[B] CASE ANNOTATIONS

[1] Shipment vs. Desrination Contract

Connecticut. Under an "F.O.B. Norwalk, Connecticut" term. the contract was a shipment, not a delivery. contract. with risk of loss passing to buyer when the goods were put into the hands of the carrier in Connecticut. Electric Regulator Corp. v. Sterling Extruder Corp.. 280 F. Supp. 550 (D. Conn. 1968), 4 U.C.C. Rep. 1025.

[2] Delivery to Carrier

Wyoming. Buyer had purchased pregnant ewes from seller, concluding the sales agreement on March 22. The ewes were separated from other sheep, assembled. loaded for shipment, and were delivered to the carrier on March 26. The ewes had contracted a disease that caused them to abort their young, and the buyer sued the seller for breach of warranty. Seller argued that the sale was concluded on March 22. and if the sheep did not have the disease on that date, he was not liable. The court held that since the separation and assemblage of the sheep was necessary to complete the sale. this brought it within the 2-504 shipment rule. As a result, the risk of loss did not pass to buyer until March 26. when the seller delivered the sheep to the carrier. S-Creek Ranch. Inc. v. Monier & Co., 509 P.2d 777 (1973). 12 U.C.C. Rep. 820.

[3] Contract of Carriage

Washington. Crown Zellerbach sold paper to Western Electric. The paper, while in transit between seller and buyer, was stored in a warehouse operated by Puget Sound Freight Lines and Puget Sound Terminals. A tire destroyed the paper. Western sued Puget and won a judgment for negligence because Puget failed to properly maintain the sprinkler system in the warehouse.

Puget sought contribution from Crown. which had known that the sprinkler system was inadequate when it arranged to have the paper stored there, claiming that Crown had violated the standard of care established by 2-504, which requires a seller to make a reasonable contract

for transporting goods to the buyer. The court held that 2-504 gave Puget no rights against Crown. Section 2-504 is purely contractual and creates rights only between the parties to a sales contract. It neither establishes a standard of care for tort purposes, nor creates a right of action in a third party such as Puget. ITT Rayonier, Inc. v. Puget Sound Freight Lines, 44 Wash. App. 368, 722 P.2d 1310, 2 U.C.C. Rep. 2d 148 (1986).

[4] Material Delay or Loss

9th Cir. A buyer agreed to purchase shirts from a South Korean seller for resale under the buyer's label. But the documents necessary to clear the shirts through customs arrived too late for Christmas sales. The buyer rejected the shipment and sued the seller for breach of contract.

Held: For the buyer. Seller argued that the lower court had erred by applying the perfect tender rule to a 2-504 breach. The court disagreed; the lower court had instructed the jury that a violation of 2-504 is actionable only if material delay or loss results. Monte Carlo Shirt, Inc. v. Daewoo Int'l (Amer.) Corp., 707 F.2d 1054 (1983), 36 U.C.C. Rep. 487.

¶ 2-504[C] CODE CROSS-REFERENCES

Agreement. 1-201(3); 2-106(1)
Buyer. 2-103(1)(a)
Contract. 1-201(11); 2-106(1)(h)
Delivery. 2-503
Document. 1-201(15); 7-102(1)(e)
Goods. 2-105; 7-102(1)(f); 9-105(1)(h)
Notify. 1-201(25); 1-201(26); 1-201(27)
Seller. 2-103(1)(d); 2-707
Send. 1-201(38)
Usage of trade. 1-205

UCC § 2-505. Seller's Shipment Under Reservation (Official Text)

(1) Where the seller has identified goods to the contract by or before shipment:

(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(b) a non-negotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of Section 2-507) a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

State variations from official text: Minnesota.

¶ 2-505[A] EDITORIAL COMMENTARY

[1] Shipment Under Reservation

When goods are identified to a sales contract and then shipped. the goods will normally be covered by a bill of lading issued by the carrier, which serves three functions. It operates as (a) a receipt for the goods, (b) a contract for their carriage, and (c) a document of title (l-201(15)). Its character as a document of title is especially important because the nature of the bill of lading and the manner of its drafting will control the delivery obligation of the carrier. As a result, the seller

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can maintain greater or lesser control of the goods in transit and their ultimate delivery by way of the bill.

If, as is common, the carrier issues a negotiable bill of lading to the seller and this is forwarded *through* banking channels, as is also common, accompanied by a demand draft drawn on the buyer, the bill of lading will not be released before payment of the draft. Since the buyer needs the negotiable bill to get the merchandise, it becomes a case of "pay up" or "no goods." It becomes evident, therefore, that the seller's shipment of the goods "under reservation" in this manner has served to assure the seller of effective control of the goods until actual payment has been made. In technical terms, the seller has retained a "security interest" (l-201(37)) in the goods, which assures continued control of the goods until actual payment is made. This, while one illustration of the documentary sale process, serves to cast into high relief the measure of control retained by the seller. Indeed, the control is such that shipment under reservation will normally be evidenced by a contract provision to that effect and, failing that, there are special rules in the matter. (See 2-310.)

The law governing the bill of lading is contained nor in Article 2, but in its own Article of the Code, Article 7. Section 2-505 is something of an orphan, therefore, far away from home. It is drafted against this much larger body of law. Its function, in turn, is limited and addresses itself mainly to the drafting of'the bill of lading and the consequences of this drafting. To this end, it divides bills of lading, as does Article 7 and commercial practice. into two categories: (I) the negotiable bill of lading and (2) the nonnegotiable bill of lading.

[2] The Negotiable Bill of lading

A bill of lading is negotiable "if by its terms the goods are to be delivered to bearer or to the order of a named person" (7-104(1)(a).) The critical element that renders the bill "negotiable." therefore. is the words of negotiability. The bill itself is usually in standardized form. is preprinted and is prominently labeled as "NEGOTIABLE."

Such a bill may be drawn payable to the order of the seller. or buyer, or some "financing agency." (2-104(2).) It is common to draw the bill to the order of the seller and when such is the case the seller's intention to retain control is evident. It is clear that the seller is intent upon reserving a "security interest" in himself. The same effect is had. however. no matter to whose "order" the negotiable bill is drawn. Thus, "procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest *in* the goods" (2-505(1)(a)). There are special rules. in turn, in Article 9 that are designed to preserve and protect this security interest (9-113).

Where the bill is drawn to the order of some "financing agency." or even to the buyer himself. the seller's reservation of a security interest, while not as evident, remains fully retained. This manner of drafting does not alter the retained security interest but serves merely to indicate "the seller's expectation of transferring that interest to the person named." (2-505(1)(a).)

The point the Code makes here is that "every shipment of identified goods under a negotiable bill of lading reserves a security interest in the seller. . ." (Official Comment 2 to 2-505.) It is important to add, however, that "the security interest reserved to the seller . is restricted to securing payment or performance by the buyer and the seller is strictly limited in his disposition and control of the goods as against the buyer and third parties." (Official Comment 1 to 2-505.)

[3] The Nonnegotiable Bill of Lading

A bill of lading is "nonnegotiable" when by its terms the goods are deliverable neither to bearer nor to the order of a named party (7-104(2)). Put another way, it is a bill of lading that lacks the critical words of negotiability, i.e., "to bearer or to the order of a named person." Such a bill is usually in standardized form, is preprinted and will prominently describe itself as "NONNEGOTIABLE."

The Nonnegotiable bill may be drawn in favor of the seller, or the buyer, or some "financing agency" (2-104(2)). The manner of its drafting is important and the consequences differ depending on whether the goods are consigned to (1) the seller or his nominee or (2) the buyer.

[a] Consignment to Seller or Nominee

Where the nonnegotiable bill of lading is drawn in favor of the seller or his nominee, its effect is to "reserve possession of the goods as security." The drafters caution that while this "reserves possession of the goods as security in the seller but if he seeks to withhold the goods improperly the buyer can tender payment and recover them . . . ." (Official Comment 3 to 2-505.)

[b] Consignment to Buyer

Where the nonnegotiable bill of lading is drawn in favor of the buyer, this eliminates the security interest and this is the case even where the seller retains physical possession of the bill. A nonnegotiable bill so drawn "reserves no security interest even though the seller retains possession of the bill of lading." (2-505(1)(b).)

This sweeping rule admits of one exception. which is had where a cash sale is envisioned such that payment is to be made upon delivery of the goods. When such is the case. the buyer's right to possession of the goods is conditioned upon his making the payment that is due (2-507(2)). Failing such payment, as required. the buyer forfeits any right to continue in possession and the seller has a right of recapture under 2-507(2). This right is preserved under 2-505(2)(b).

Elaborating further upon this point, the drafters note that "in the case of a shipment by non-negotiable bill of lading taken to a buyer, the seller, under subsection (I) retains no security interest or possession as against the buyer and by the shipment he *de facto* loses control as against the carrier except where he rightfully and effectively stops delivery in transit. In cases in which the contract gives the seller the right to payment against delivery. the seller. by making an immediate demand for payment, can show that his delivery is conditional, but this does not prevent the buyer's power to transfer full title to a sub-buyer in ordinary course or other purchaser under Section 2-403." (Official Comment 4 to 2-505.)

[4] Improper Reservation

Shipment of goods with reservation of a security interest in the seller may or may not be authorized by the contract. If it is not authorized, the *seller* is shipping the goods in an unauthorized manner and retaining. thereby, an unauthorized security interest and a degree of control over the shipped goods that violates the contract. He is, in short, in breach and the nature of that breach "constitutes an improper contract of transportation within the preceding section." (2-505(2).) The significance of this characterization of the breach lies in the fact that under the preceding section "failure . . . to make a proper contract under . . [2-504(a)] is ground for rejection only if material delay or loss ensues." (2-504.)

Note, however, that nothing in 2-504(2) alters, impairs, or affects (1) identification under 2-501; (2) seller's rights as a holder of a negotiable document: (3) buyer's right to inspect the goods (see 2-512, 2-513, and 2-310(b)); (4) location or title; (5) passage of risk of loss; (6) rights and remedies of the parties to the contract of sale; or (7) local procedure as to maintenance of a security interest when the action is in replevin by the buyer against the carrier.

¶ 2-505[B] CASE ANNOTATIONS [Reserved]

¶ 2-505[C] CODE CROSS-REFERENCES

Bill of lading. 1-201(6); 2-323 *Buyer.* 2-103(I)(a)

Consignee, consignor. 7- 102
Contract. 1-201(11)
Contract for sale. 2-106(1)(h)
Delivery. 2-503
Document. 1-201(15); 7-102(l)(e)
Financing agency. 2-104
Goods. 2-105; 7-102(1)(f); 9-105(l)(h)
Holder. 1-201(20); 3-301
Identification. 2-501
Negotiable bill of lading. 7-104(1)
Negotiable document. 7-104(1)
Non-negotiable bill of fading. 7-104(2)
Non-negotiable document. 7- 104(2)
Person. l-201(30)
Rights. l-201 (36)
Security interest. 1-201(37)
Seller. 2-103(1)(d); 2-707

UCC § 2-506. Rights of Financing Agency (Official Text)

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

State variations from official text: Hawaii.

¶ 2-506[A] EDITORIAL COMMENTARY

This section treats the rights of a financing agency (a term defined at 2-104) dealing in drafts that relate to a shipment of goods. In addition to such rights under the draft and documents as the financing agency acquires in its own right, the financing agency which pays or purchases for value obtains, to the extent of the amount it paid. all of the shipper's rights in the goods. including the right to have the draft "honored" (see definition at 1-20 I(2 1)) by the buyer and the right to stop the goods in transit. (See 2-506(1).)

The words of 2-506(I), "by paying or purchasing for value" are best understood by consulting the definition of "value" at 1-201(44) and "purchase" at 1-201(32). "Paying" is to be broadly read. It does not matter whether the transaction was consummated via letter of credit or the sale was under a "discount" or other purchase arrangement between the transferor of the bill of lading and the financing agency. "Paying" as used in subsection (I) is typified by the letter of credit. or 'authority to pay' situation in which a banker. by arrangement with the buyer or other consignee. pays on his behalf a draft for the price of the goods. It is immaterial whether the draft is formally drawn on the party paying or his principal, whether it is a sight draft paid in cash or a time draft 'paid' in the first instance by acceptance, or whether the payment is viewed as absolute or conditional. All of these cases constitute 'payment' under this subsection. Similarly. 'purchasing for value' is used to indicate the whole area of financing by the seller's banker. and the principle of subsection (1) is applicable without any niceties of distinction between 'purchase,' 'discount,' 'advance against collection' or the like." (Official Comment 2 to 2-506.)

However, the only right to have the draft (a term defined at 3-104(2)(a)) honored is as against the buyer-no other party.

The section also deals with the financing agency's right of reimbursement. which is not impaired by subsequent discovery of defects in relevant documents provided the document was "apparently regular on its face" and the draft was honored or purchased "in good faith" and "under commitment to or authority from the buyer." (2-506(2).)

Rejection. 2-601 (a) Seller. 2-103(l)(d); 2-707
Seasonably. 1-204(3)

UCC § 2-509. Risk of Loss in the Absence of Breach (Official Text)

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).

¶ 2-509[A] EDITORIAL COMMENTARY

Two preliminary points must be made about the 2-509 risk-of-loss rules. The first is that the 2-509 rules are designed to apply in routine. risk-of-loss situations. That is to say. they are designed to allocate risk-of-loss burdens where both buyer and seller are striving to perform as agreed and the goods are destroyed without fault of either party. Where fault does enter the picture. the rules vary. This is the subject of the following section, 2-5 10.

The second point, which 2-509(4) makes clear, is that the 2-509 rules are designed to operate in lieu of agreement to the contrary. 2-509(4) provides that "the provisions of this section are subject to contrary agreement of the parties." It is common in turn. for the allocation of risk of loss to be determined by contract and included in a special provision to that effect.

Even in the absence of such a provision, the type of contract itself may follow different rules under the Code i.e., the sale on approval as set out in 2-327.

[1] The Risk-of-Loss Rules: In General

At first reading, the Code rules appear as a sort of grab bag of disparate rules. Not so. Anyone familiar with the Code will see strong affinities between the Code's solution of risk-of-loss problems (i.e., 2-509), its solution ofdelivery problems (i.e., 2-503). and even its solution of "title" problems (i.e., 2-401).

With that said, it should be quickly added that while the similarities are apparent, one gets the uncomfortable impression that the drafters of these three sections were not communicating with one another. The result is a curiously out-of-synch relationship.

In all three, the analysis proceeds in an identical manner: isolate the typical sales pattern, e.g., shipment vs. destination type sales contracts, and then devise a rule that hopefully best meets the needs of that type of situation. Unfortunately, the typical sales patterns, as isolated in 2-503, 2-509, and 2-401, while basically the same, differ enough to **cause confusion.**

What, then, are the basic sales patterns isolated in 2-509?

1. *Shipment conrracrs.* Where the sales contract calls for "shipment by carrier" and is of the "shipment" type, 2-509(l)(a) applies and the risk shifts on delivery to the carrier. What constitutes a "shipment" contract is discussed in 2-503.
2. *Destination contracts.* Where the sales contract calls for "shipment *by Currier* to a particular destination, 2-509(1)(b) applies and risk shifts on tender at the destination point. What constitutes a "destination" contract is discussed in 2-503. It bears noting that this rule applies *only* where delivery is affected by the use of a "carrier." As a result, where the seller is responsible for delivery to a particular destination but does *nor* employ a "carrier," e.g., he uses his own truck, this rule does *nor* apply.
3. *In-sroruge type arrangement.* Where the goods are in the possession of a bailee, e.g., in storage, and the ownership is to shift without moving merchandise, 2-509(2) applies.
4. *The general rule.* In all other cases, the catchall rule of 2-509(3) applies. This is the basic Code rule, and it actually consists of two rules. One deals with the nonprofessional seller. Here, the risk shifts on tender of delivery. (See 2-503 for the rules on tender.) The other deals with the professional. i.e., the "merchant"; here, risk remains on the seller until the buyer has actually received the goods.

[2] "Title"

The Code's approach to risk of loss is *not* title-oriented but functional. It divides a sales contract into four function types and then devises rules for each type that seem best for that functional type. There is no single idea that unifies the various rules. The rule selected is designed to make "good *sense*" in that category. It usually does. The four classes of contracts are (a) the shipment type sales contract (2-509(1)(a)); (b) the destination type contract. where the contract calls for delivery by carrier (2-509(1)(h)); (c) the storage type contract where the contract calls for delivery *of* the goods but the goods themselves are not to be physically moved (2-509(2)); and (d) the general or catch-all rule, which is designed to cover all other type of sales contracts (2-509(3)).

[3] Carrier Contracts in General: 2-509(1)

Section 2-509 singles out for special treatment any sales contract calling for delivery "by carrier." It is this "carrier" feature that is critical and it is not to be confused with delivery by the seller in his own trucks.

The mere fact that the goods are, in fact, delivery "by carrier" is not enough to trigger the carrier rules. It is essential that the sales contract (properly understood) (see 1-201(3)) either "requires" or "authorizes" the shipment of goods by carrier (2-509(1)). This is important because the risk-of-loss rules do not operate in a vacuum. If the risk of loss is the seller's, a prudent seller is likely to insure against the loss. Conversely if the risk is the buyer's, the buyer is likely to insure. Prudent steps of this character are difficult unless the parties can predict with reasonable certainty who has the risk of loss at any given moment.

Where the sales contract is *of* this type, 2-509 divides it into two categories: (1) carrier contract: shipment type; and (2) carrier contract: destination type.

[4] Carrier Contracts: Shipment Type

Where the contract "requires or authorizes" the shipment of goods "by carrier" and the sales contract is of the "shipment" type, the risk of loss shifts from the seller to the buyer on delivery of the goods to the carrier. "The risk of loss passes to the buyer when the goods are duly delivered to the carrier." What constitutes "due delivery" will be determined by other sections, 2-503(2) and 2-504, but assuming it is had, the risk shifts at that point. This remains the case, moreover, even where the sale is of the "documentary" type, calling for a transfer of shipping documents through banking channels, i.e., "even though the shipment is under reservation (Section 2-505)" (2-509(1)(a)).

The classic illustration of the "shipment" type contract is had with the sales contract that is F.O.B. seller's city, (2-319(l)(a)). The delivery obligation of the seller under such a contract is normally completed on due delivery of the goods to the carrier in the seller's city, i.e., at the point of shipment (2-503(2) and 2-504). At that point, under 2-509(1)(a) the risk of loss shifts over to the buyer. As a result, the risk of loss in transit is borne by the buyer under this type of contract.

[5] Carrier Contracts: Destination Type

Where the contract "requires or authorizes" the shipment of goods "by carrier" and the sales contract is of the "destination" type, the risk of loss remains with the seller until the goods reach the destination. Thus. where the contract "require[s] him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery" (2-50% 1)(b)).

The classic illustration of the destination type contract is had with the sales contract that is F.O.B. buyer's city (2-3 19(I)(b)). This requires the seller "at his own expense and risk [to] transport the goods to that place and there tender delivery of them . . ." (2-319(1)(b)). The manner of satisfying that delivery obligation is set out in 2-503(3) and 2-503(1). In sum. it comes down to a proper tender of the goods at the particular destination. The risk of loss. in turn. shifts at the same point under 2-509(1)(b), i.e., "when the goods are there duly so tendered as to enable the buyer to take delivery." As a result. the risk of loss in transit is borne by the seller under this type of contract.

[6] Shipment vs. Destination Type Contracts

The Code draws a sharp distinction between sales contracts calling for shipment by carrier, which are of the "shipment" type, and those of the "destination" type. The allocation of risk of loss differs radically depending on the classification. With "shipment," the shift comes early on delivery to the carrier; with "destination," it comes late with tender at the particular destination. With differences so great, application of the rules would seem easy. The Achilles heel of the process is the need to determine in any given case whether the sales contract in question is, in fact, of the "shipment" or the "destination" type.

A case involving the shipment of diamonds through the mail illustrates the problem. They were lost in the mail. Who bears the loss? The seller who shipped them, or the buyer at the other end? The buyer was in Ohio and the seller in New York, and the court found that shipment of the diamonds by carrier was understood. So that put the parties squarely into 2-509(1). So far. so good.

The problem is in knowing which to apply, Since the goods that are shipped are usually shipped somewhere, it is hard to see why every contract is not a "destination" contract, with the risk of loss while the goods are in transit always on the seller. That is not the way the Code rules operate.

The drafters were convinced that the "normal" sales contract calling for delivery of merchandise by carrier was a "shipment," and nor a "destination." contract. They make that clear in the Official

Comments (not, paradoxically, in the Official Comment to 2-509, where you might be expected to look, but in the comment to 2-503, which you might well have missed). There, they describe the "destination" contract as the "variant" type and state that it comes into play only when the seller "has specifically agreed so to deliver **or** the commercial understanding of the terms used by the parties contemplates such delivery." The idea being that with the "destination" contract, the seller has agreed to do ***something*** *more* than merely ship the goods to the buyer. Just what that something more is, is not clear.

The diamonds in the case were shipped by mail from New York to Ohio. Section **2-509(1)** applies because shipment was by carrier. But which of the two rules do you apply? The buyer said nothing about the details of shipment other than that he wanted the diamonds **"sent."** The seller, in turn, mailed them "registered and insured." They were stolen in transit.

So who had the risk of loss? The court held that it was a "destination" type of contract, with the risk of loss on the seller until transfer to the buyer at the destination (2-509(1)(b)). The seller's intention to deliver "at a particular destination is shown by its insurance coverage and use of registered mail, reinforces this construction." For the court, perhaps, but it *may* well have come as a surprise to the seller. Baumgold Bros., Inc. v. Allen M. Fox, East, 375 F. Supp. 807 (N.D. Ohio 1973), 14 U.C.C. Rep. 580.

As a practical matter, where there is the least doubt as to who has the risk of loss under the Code-and there can be plenty where the goods are to be shipped by carrier-add a risk-of-loss clause in the sales contract. The Code rules operate only where the parties have not specified who bears the risk up to what point. A word to the wise should be sufficient. [8 UCCLL 7 (Sept. 1974).]

[7] Presumption of "Shipment" Contract

The Code's assumption that the normal sales contract requiring the shipment of goods is a "shipment." and not a "destination." contract may be avoided by the use of the familiar F.O.B. term. Thus. F.O.B. seller's city is a "shipment" contract. while F.O.B. buyer's city is a "destination" contract.

Suppose. however. that there is no F.O.B. term to solve the problem; then what? It is possible that trade background (i.e., trade usage, 1-205), or past dealings between buyer and seller (i.e.. course ofdealing, I-205) may resolve rhe ambiguities and supply the answer. But. failing that. what does one do'? The assumption then is that there is a "shipment." rather than a "destination" contract, and the loss in transit falls on the buyer.

A Michigan court summed it up fairly neatly: "Under Article 2 of the UCC, the 'shipment' contract is regarded as the normal one and the 'destination' contract as the variant. The seller is not obligated to deliver at a named destination and bear the concurrent risk of loss until arrival, unless he has specifically agreed to deliver or the commercial understanding of the terms used by the parties contemplates such delivery (Official Comment 5 to 2-509). Thus a contract that contains neither an F.O.B. *term* nor any other term explicitly allocating loss is a shipment contract."

How can that be, the buyer wanted to know, when the sales contract required the seller to *ship the goods to* buyer's *place of business* in *Birmingham!* That is just not enough to generate a '*destination" contract, replied the Michigan court. "[The buyer's] position is that 'ship to' substitutes for and is equivalent to an F.O.B. term, namely F.O.B. place of destination. But that argument is persuasively refuted by the response that a 'ship to' address must be supplied in any case in which carriage is contemplated. Thus a 'ship to' term has no significance in determining whether a contract is a shipment or a destination contract for risk of loss purposes. Other buyers have occasionally argued that the 'ship to' term made the contract into a destination contract. Courts have properly rejected this argument. See, *e.g., Electric Regulator Corp. v. Sterling Extruder* Corp., 280 F. Supp. 550, 557-558; 4 U.C.C. Rep. 1025, 1032 (D. Conn. 1968). See also White

and Summers, Handbook of the U.C.C., pp. 144-145. Eberhard Mfg. Co. v. Brown, 232 N.W.2d 378 (Mich. App. 1975). 17 U.C.C. Rep. 978.

While the drafters' description of the "shipment" contract as the norm and the "destination" the variant is helpful and while it may well constitute the deciding factor in an ambiguous case, it would be hazardous indeed to assume that a contract is a "shipment" contract simply because the contract is silent on the point. Such may not be the case. Consider, for example, the Kansas buyer who ordered the printing of bond certificates from an Illinois company. The bonds were to be shipped by carrier to the buyer's attorneys in New York in time for a bond closing. The understanding was that the bonds were to be shipped on December 16 to arrive at the Signature Company in New York on December 17 for inspection and signing, prior to the formal closing on December 18. Was this a "shipment" or "destination" contract?

It certainly mattered, since the seller had duly delivered four boxes of the bonds, as ordered, to a private carrier on December 16 in Illinois, as agreed. He had. therefore, completed his delivery obligation if a "shipment" contract **was** envisioned.

Not so, if it was classified as a destination type. So classified, the seller's delivery obligation carried forward to New York. That presented real problems for the seller since one of the four boxes did not arrive on time, necessitating postponement of the formal closing and generating $44,000 in losses.

The truth of the matter is that neither buyer nor seller. in all probability. was aware of this "shipment" vs. "destination" distinction at the time of the contract. A court, however, has to resolve the matter in some way. It is not at all unlikely. therefore. that the court may poke around the facts and surrounding circumstances in the hope of extrapolating the "real" intentions of the party, That "real" intention may, of course, go either way depending on how the court "reads" the situation. The term of that process, in this case, was a ruling by the U.S. Court of Appeals for the Tenth Circuit. that this was a "destination" type contract. As a result the seller was in breach for not tendering the full four boxes. on time, in New York and had to pick up the $44,000 in damages.

The "shipment" versus "destination" distinction should therefore be made in the contract. When it is not, this sort of problem is inevitable. Halstead Hosp.. Inc. v. Northern Bank Note Co., 680 F.2d 1307 (10th Cir. 1982), 33 U.C.C. Rep. 1965. [16 UCCLL 11 (Jan. 1983).]

[8] Shipment by Seller in Own Truck

The Code rules in 2-509(1) regarding "shipment" and "destination" sales contracts apply only where the contract calls for shipment of the goods "by carrier." It is possible that the seller has agreed to deliver the goods himself. for example, in his own truck. Here, the "shipment/ destination" distinction does nor *apply*. The seller now bears the in-transit risks. and the only question is at what precise point after arrival does the risk shift. Does it. for example, shift on "tender" of the merchandise or only when the buyer actually takes physical possession of the goods? The rule to be applied is not "by carrier" rule of 2-509(1) but the general or catch-all rule of 2-509(3). All very complex, to be sure. but that complexity is unavoidable since that is the way the Code was drafted. [10 UCCLL 1 March 1976).]

[9] Stored Goods and the Risk of Loss: 2-509(2)

Where goods are stored with a bailee and they are sold with the understanding that they will be left in storage notwithstanding the sale. this presents two quite different problems. The first is the manner in which the seller is to satisfy his delivery obligation. How is "delivery" of the grain to be effected when the goods are not to be "physically moved"? This is a standard problem and the Code provides a set of rules for solving this problem in 2-503(4). It will be seen that a handshake will not normally suffice. There is, in turn. a preferred method of delivery. i.e.. use of either a

negotiable document of title or acknowledgment by the bailee (2-503(4)(a)) and an alternate method that is not quite as effective i.e., use either a nonnegotiable document of title or a delivery order. The details of these various methods are discussed at 2-503.

The second question is radically different. This is the risk of loss question. Thus, assuming the sale of goods that are in storage and are to be left in storage even after the sale, at what point in time does the risk of loss shift over from the seller to the buyer?

Why not tie in the rules for the seller's satisfaction of his delivery obligation in 2-503(4) with the rules on the shifting of the risk of loss? This is what is done in 2-509(2).

The preferred method for a seller's satisfaction of his delivery obligation allows for one of two ways: (a) "tender [of] a negotiable document of title covering such goods" (2-503(4)(a)) or (b) the procuring of an "acknowledgment by the bailee of the buyer's right to possession of the goods" (2-504(4)(a)). One of the reasons this is a "preferred" method is found in 2-509(2). The risk of loss shifts, without more, when either device is employed. Thus, the risk will shift (a) on the buyer's "receipt of a negotiable document of title covering the goods," or (b) "on acknowledgment by the bailee of the buyer's right to possession of the goods", (2-509(2)(b)).

Matters are not so simple where the alternate method is employed. Section 2-509(2)(c) clearly envisions the possibility of employing either (a) the nonnegotiable document or (b) the delivery order, but it is silent on the point at which the risk of loss shifts. It solves this with a cross-reference to 2-503(4)(b). The point being made is that the risk of loss rule is so intimately connected with the delivery obligation and presents so peculiar a risk when the alternate method is employed that the risk of loss rule is moved forward. and set out with the delivery obligation itself. Bluntly put, the seller assumes a greater risk of loss burdens when the alternative method of satisfying his delivery obligation is employed. Unlike the automatic shifting of the risk on use of the preferred method. the risk is deferred when the alternate method is employed. The risk is not deferred now "until the buyer has had a reasonable time to present the document or direction." Or. more accurately, the "risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direciton, and a refusal by the bailee to honor the document or to obey the direction defeats the tender" (2-503(4)(b)).

[10] Stored Goods: The Acknowledgment Rule

Where goods are in storage and are sold with the understanding that they are to remain in storage. the Code provides two quite different methods for satisfying this delivery obligation. There is the preferred method of 9-503(4)(a) and the alternate method of 2-503(4)(b). Both work but in somewhat different ways.

The preferred method provides for the use of either one of two devices. It may be accomplished by either (a) the seller's "tender [of] a negotiable document of title covering such goods" or (b) by the seller's procurement of "acknowledgment by the bailee of the buyer's right to possession of the goods." One of the virtues of using either of the two preferred devices is that the risk of loss is made to shift on its effective utilization. Thus, the risk of loss will shift on either (a) the buyer's "receipt of a negotiable document of title" (2-509(2)(a)) or (b) "on acknowledgment by the bailee of the buyer's right to possession of the goods" (2-509(2)(b)).

The "acknowledgment" rule seems clear cut and problem free. This was sorely tested when a warehouse burned down containing 38,000 pounds of pork. The pork had been sold by A to B with the understanding that it was to remain in storage until some later date.

The seller of the pork had informed the warehouse of the transfer on January 13, and the transfer had apparently been executed promptly. As the seller saw it, that was enough. He "should not bear the risk of loss of goods it did not own or have any right to control." His call to the warehouse and their acknowledgment of the transfer to him was enough.

Not so, replied the buyer. How can one "be made to bear the loss of goods that it does not know it owns?" The acknowledgment must. therefore be *to* me (i.e., the buyer).

The Seventh Circuit ruled that what acknowledgment there had been on January 13 or thereabout, when the seller had instructed the warehouse to effect the transfer, was not enough. The "acknowledgment" of 2-509(2) had to be to the buyer, not the seller. So that point was made.

As it so happened, however, a notification had been sent by the warehouse to the buyer on January 17, but it had not arrived until January 24. The fire, in turn had occurred on January 17. To compound the confusion still further, it was not clear whether the fire occurred just before or just after the sending of the notice.

If that sounds like a problem ripe for a law school examination, it probably is. Unlike students, however, judges are free to defer their answers until another time. The court did just that. Thus, while it ruled that the acknowledgment must be made to the buyer, it left open the issue of whether it is effective on sending or on receipt. Jason's Foods Inc. v. Peter Ackrich & Sons, Inc., 774 F.2d 214 (7th Cir. 1985), 41 U.C.C. Rep. 1287. [20 UCCLL 2 (Apr. 1986).]

[11] The General or Catch-M Risk-of-Loss Rule: 2-509(3)

The general risk-of-loss rule is found in 2-509(3). It is a "catch-all" rule designed to cover any case where the risk-of-loss allocation is not allocated by agreement (2-509(4)). the type of contract employed, i.e., use of a "sale on approval" type contract (2-509(4)), the particular characteristic of the sales contract itself as calling for delivery "by carrier" (2-509(1)). or for the delivery of goods without their being moved (2-509(2)).

A common illustration of where it might apply would be had where the contract calls for pickup by the buyer or delivery by the seller where shipment "by carrier" is not authorized. When such is the case there is not one but two quite different rules. They turn on the nature of the seller.

If the seller is a "merchant" as defined in 2-104(I). the risk of loss does not shift until buyer's "receipt of the goods." This defers the shifting of the risk or loss until the buyer has taken "physical possession of them" (2-103(1)(c)). In all other cases. the risk of loss shifts at the earlier point of "tender of delivery."

What this means. of course, is that under the general rule. the "merchant" seller is burdened with greater risk-of-loss obligations than the nonmerchant. In explanation of the rule. the drafters observe that "[t]he underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer. on the other hand. has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession." (Official Comment 3 to 2-509.)

[12] General Rule: The Problem of Delayed Pickup

Does it make sense for a seller to accommodate a buyer who would like to leave the merchandise with the seller for a few days-or more? It probably makes good business sense. Why not accommodate a buyer. if one can do so without undue burden?

What may come as a surprise to the seller is that this small courtesy involves a significant added obligation. For better or worse. under the Code. the merchant-seller who makes such an accommodation shoulders the full risk of loss on that delayed pickup item until it is actually picked up. So, if anything happens to the merchandise before the buyer actually takes "physical possession" of it (2-103(1)(3)). the loss fails on the seller (see 2-509(3)).

It might be argued that once one gets beyond short-term, in-regular-course-of-business retentions, the seller ceases to be merely a garden variety "seller" and becomes a "bailee" (i.e., an agent for storage purposes), and follows the rules as to bailees. A variety of Code arguments have been advanced in support of such a thesis. The seller, for example, it might be argued. might

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become the "agent" for the buyer in affecting "receipt" of the goods at some early point, thereby satisfying the normal 2-509(3) "receipt" rule. Beyond that point, of course, the seller becomes simply a "bailee." Or it might be argued that since the sales contract in question envisions a delivery without any physical moving of the goods, a different rule should be applied. Thus, where goods are stored in a warehouse with a "bailee," for example, and a sale is effected with no movement of the merchandise contemplated, the risk shifts to the buyer once the bailee "acknowledges" he is holding for the buyer (2-509(2)(b)). Would it be possible to apply this to the sale, which is coupled with a post-sale bailment?

How is the matter to be handled? The Supreme Court of North Dakota had little doubt on that score and flatly rejected the assertion that at some point the seller in possession becomes a "bailee" in such a way as to alter the normal operation of the 2-503(3) rule that places the risk of loss on the merchant-seller, until actual receipt of the goods by the buyer or, where the seller is not a merchant, until a proper tender has been effected. What is *more*, the court felt completely in line not only with what cases there were (citing Cundle v. Sherrard Motor Co., 525 S.W.2d 238 (Tex. 1975), 17 U.C.C. Rep. 754; Galbraith v. American Motor Home Corp., 14 Wash. App. 754, 545 P.2d 561 (1976), 18 U.C.C. Rep. 914), but with some very heavy Code commentators as well.

So the handwriting would appear to be on the wall regarding this troublesome issue, and any merchant-seller about to store goods sold had better give serious thought to the added risk it entails. Risks he may find acceptable and be quite willing to shoulder; or risks he may find onerous and can easily shift. Risks, however, which should be faced at the start and provided for. Martin v. Melland's Inc., 283 N.W.2d 76 (N.D. 1979), 27 U.C.C. Rep. 94.

[13] The General Rule: The "Trade-In" Problem

Israel Martin, a North Dakota farmer, had little doubt as to who owned his old hay-mowing rig, when he had traded it in on a new truck and haymower combination. The dealer did. The deal, on both the new rig and the old rig, had definitely been closed, the papers had been signed. and the farmer had delivered the certificate of title on the old rig to the dealer. So it belonged to the dealer, not the farmer. While the farmer had retained possession of the old rig and was using it, that was simply a convenience pending delivery of the new rig.

Was the farmer correct on that one'? The answer was important. since the old rig was destroyed by fire. But, surely the farmer had it insured. Sorry, his insurance on that old rig had been allowed to lapse. Why insure a rig you've already sold. which "belongs" to someone else anyway?

Israel Martin's neat little analysis of the legal situation was, unfortunately, way off the mark. Who "owns" the tractor, while extremely important in the resolution of this sort of problem at one time (before passage of the UCC), is quite irrelevant under the Code (2-401). In technical terms, risk-of-loss turns not on "title" but on a set of fairly precise rules set out in 2-509 and 2-510. In Israel Martin's case, the risk of the loss on the trade-in was his until he "tendered delivery" of the old rig on receipt of the new (2-509(3)). So whether he was the "owner" of the trade-in or not, he was certainly responsible for it. As a result, if something happened to it (e.g., a tire), the loss was his, not the dealer's

So why worry about the trade-in'? Because not giving the legal status of the trade-in any thought can hurt. Israel Martin learned that lesson the hard way and the rest of us can well profit from his experience. Martin v. Melland's Inc., 283 N.W.2d 76 (N.D. 1979), 27 U.C.C. Rep. 94. [13 UCCLL 12 (Feb. 1980).]

[14] The General Rule: The Problem of Job-Site Delivery

A point that is sometimes missed is that satisfaction of the seller's delivery obligation is linked under Article 2 to the shifting of the risk of loss from the seller to the buyer. The correlation is not one-to-one, but it is very close.

Consider, for example, the routine order by a subcontractor ofplumbing equipment for delivery to a jobsite in New York. The order was delivered to the site in four installments. On two such deliveries, delivery receipts were signed by an unnamed laborer of the general contractor, who simply signed the general contractor's name. On the other two deliveries, the delivery receipts were left unsigned. This is not to say the goods never got there. No one questioned the fact that the goods had, in fact, been delivered to the jobsite.

Had the seller satisfied his obligation to deliver the goods? The New York court that heard the case ruled that the seller had not. Why not? Because while delivered to the right place, they had not been delivered to the right person. They had been delivered to the general contractor and not to the subcontractor!

In this instance, the seller's failure to satisfy his delivery obligation successfully blocked any shifting of the risk-of-loss (2-509(3)). As a result, goods left at the jobsite were left at the seller's risk. As it turned out. much was missing. The prudent seller, therefore, is well advised to specify not merely (1) where the goods are to be delivered but (2) to whom and (3) allocation of the risk of loss as well. National Plumbing Supply Corp. v. Castellano, 460 N.Y.S.2d 248 (Justice Ct. of Ossining, 1983), 36 U.C.C. Rep. 814, [18 UCCLL 1 (Mar. 1984).]

[15] Risk of Loss and Breach

The rules provided for the allocation of risk of loss in 2-509 assume that the parties to the contract are not in breach of contract. Where a breach has occurred. e.g., the goods fail to conform to the contract, the normal 2-509 rules are modified by 2-510, which adjusts the rules to take the breach into consideration.

Another and different type of breach problem is had where the normal rules apply and there is no breach in the sense of 2-510. The seller. for example. has conformed completely with the contract but the goods are lost in transit while the risk is that of the seller. Since the seller has the risk of loss. the loss falls on the seller. Matters, however, may not end there. There is, after all. a contract to deliver merchandise and the merchandise has been lost in transit. The aggrieved buyer, as a result, may respond with a lawsuit. The seller agreed to deliver and did not deliver. Now what?

The answer will depend on the nature of the sales contract and the operation of Code rules such as 2-613 on the casualty to identified goods. It is not a simple problem.

¶ 2-509[B] CASE ANNOTATIONS

[1] Variation by Agreement: 2-509[4]

Michigan. This case involved the destruction of a boat while in the possession of the seller, Postma, awaiting delivery to the buyer, Hayward. Prior to delivery, Hayward had signed a promissory note for the purchase price that was secured by the boat. The security agreement accompanying the note contained provisions relating to the buyer's obligation to care for the boat and to procure insurance for it. After the boat was destroyed by a fire on Postma's premises, the buyer demanded that Postma reimburse him for payments already made under the note or to pay off the note in its entirety.

The seller took the position that the clauses in the security agreement relating to the buyer's obligations shifted the risk of loss to the buyer before the boat was destroyed.

The court disagreed. Under 2-509(3), where the parties have not agreed to the contrary and the seller is a merchant. the risk of loss shifts to the buyer only upon the buyer's receipt of the goods. The court noted that while 2-509(4) does allow the parties to shift the risk by agreement, such an agreement must be clear and unequivocal. Here. the security agreement did not mention the risk of loss. Since that was so, the risk was not shifted and remained in the seller since the buyer had never received the boat. Hayward v. Postma, 31 Mich. App. 720, 188 N. W.2d 31 (1971), 9 U.C.C. Rep. 379.

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Rockwell
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3 pages

November 29, 1999

Ms. Sharron Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
Room 2705
14th Street and Pennsylvania Ave., N. W.
Washington, D.C. 20230

RE: Proposed Amendment to the Export Adminsitration Regulations (64 Federal Register 53854, Oct. 4, 1999)

Dear Ms. Cook:

Rockwell would like to take this opportunity to comment on the Proposed Rule set forth in the referenced Federal Register to simplify and clarify the export clearance process and compliance.

Rockwell supports revisions to Section 740.1 which states that when a license exception is used, the correct Export Control Classification Number (ECCN), other than a classification of EAR 99 must be entered on the Shippers' Export Declaration (SED).

Section 758.2 requires that, in order for the Foreign principal party under a routed transaction to assume responsibility for Export Compliance, the US principal party must recevie a written undertaking from the Foreign principal party. Rockwell is a global company with subsidiaries in many countries. Many times these subsidiaries are responsible for selling to local customers(Foreign principal party). However, the local customers (Foreign principal party), an example would be those in S. America, request that the product be shipped via their preferred freight forwarder at a U.S. port of export. Under the contract with the customer (Foreign principal party), the customer (Foreign principal party) is managing the freight. Reason being, the customer (Foreign principal party) is paying for the freight and must be the importer of record as required by certain laws in the receiving country. In addition, the customer (Foreign principal party) could be buying from many US companies and consolidating freight at the port of export. Rockwell US may not have knowledge of what is in a consolidated shipoment or when it will occur. A customer (Foreign principal party) may collect equipment at the port of export for a month before shipment.

Rockwell US actually sells to its subsidiary who is the principal party receiving payment from the customer (Foreign principal party). Based on this information, the requirements stated in Federal

Register 53854 will place a major buden on Rockwell to try and obtain agreement from the Foreign principal party in writing. The Foreign principal party working with their forwarding agent truly has control over what is being exported, not Rockwell. The written requirment to be obtained from the Foreign principal party should be removed.

Another requirment under Section 758.2 for routed transactions is that the US principal party must upon request provide the Foreign principal party and its forwarding or other agent with the Export Control Classification Number (ECCN). Under curent Supply Chain Management practices today, many forwarding agents or logistic companies go beyond the service of moving freight from point to point and assemble/integrate products. If a Foreign principal party contracts to have this service perfomred, the result could be a change in item ECCN/Schedule B' versus what the US principal party in interest provided. The US principal party in interest should not be held liable for such change in classification based on item change by the Foreign principal party or their forwarding or other agent. ECCN/Schedule B information provided to a party upon written request may be changed and the US principal party should not be liable, the forwarding or other agent or Foreign principal party should be liable.

Regards,

Janet Folk Reuter

Janet Folk Reuter
Director, Export/Import Compliance and International Transportation

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December 3, 1999

Via Hand Deliverv

Ms. Sharron Cook
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U.S. Department of Commerce
Room 2705
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Washington, D.C. 20230

Re: Written Comments in Response to Proposed Rule Changes by the Bureau of Export Administration Docket No. 990709186-9186-01. 15 CFR Parts 30 et al.. and the Bureau of the Census Docket No. 9807 16 1 80-9 17 l-02, 15 CFR Part 3 0

Dear Ms. Cook:

On behalf of our client, the New York/New Jersey Foreign Freight Forwarders & Brokers Association, Inc., we herewith enclose comments to the regulations proposed by the Bureau of Export Administration in Docket No. 990709186-9186-01, 15 CFR Parts 30 et al., and the Bureau of the Census in Docket No. 980716180-9171-02, 15 CFR Part 30. An original and three (3) courtesy copies of the Association's comments are enclosed.

If you have any questions regarding this filing, please contact the undersigned at your convenience.

Very truly yours,

CARLOS RODRIGUEZ & ASSOCIATES

By: Carlos Rodriguez

Enclosures: As stated

Nyfw/general/cover to commerce.doc/cr

BEFORE THE
BUREAU OF EXPORT ADMINISTRATION
AND THE BUREAU OF THE CENSUS
U.S. DEPARTMENT OF COMMERCE

PARTIES TO A TRANSACTION AND THEIR RESPONSIBILITIES, ROUTED EXPORT TRANSACTIONS, SHIPPER'S EXPORT DECLARATIONS, AND EXPORT CLEARANCE
AND
CLARIFICATION OF EXPORTERS' AND FORWARDING AGENTS' REPSONSIBILITIES; AUTHORIZING AN AGENT TO PREPARE AND FILE A SHIPPER'S EXPORT DECLARATION ON BEHALF OF A PRINCIPAL PARTY IN INTEREST

DOCKET NO. 990709 186-9 186-01
AND
DOCKET NO. 980716180-9171-02

COMMENTS OF THE NEW YORK/NEW JERSEY FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC.

Submitted by:

Stewart D. Hauser
President

Louis Policastro, Jr.
Vice President Export

NEW YORK/NEW JERSEY FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC.

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Dated: December 3, 1999

BEFORE THE
BUREAU OF EXPORT ADMINISTRATION
AND THE BUREAU OF THE CENSUS
U.S. DEPARTMENT OF COMMERCE

PARTIES TO A TRANSACTION AND THEIR RESPONSIBILITIES, ROUTED EXPORT TRANSACTIONS, SHIPPER'S EXPORT DECLARATIONS, AND EXPORT CLEARANCE
AND
CLARIFICATION OF EXPORTERS' AND FORWARDING AGENTS' REPSONSIBILITIES; AUTHORIZING. AN AGENT TO PREPARE AND FILE A SHIPPER'S EXPORT DECLARATION ON BEHALF OF A PRINCIPAL PARTY IN INTEREST

DOCKET NO. 990709186-9186-01
AND
DOCKET NO. 980716180-9171-02

COMMENTS OF THE NEW YORK/NEW JERSEY FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC.

The New York/New Jersey Foreign Freight Forwarders and Brokers Association (the "Association") submits the following comments to the regulations proposed by the Bureau of Export Administration ("BXA") in Docket No. 990709186-9186-01, 15 CFR Parts 30 et al., and the Bureau of the Census ("Census") in Docket No. 980716180-9 171-02, 15 CFR Part 30, and hereby respectfully requests that BXA and Census take note where the Association is in agreement with the proposed rules, and that it make certain changes thereto in order to ensure proper administration of export regulations as they pertain to transportation intermediaries, such as air and ocean freight forwarders and non-vessel-operating common carriers ("NVOCCs").[1]

[1] "Non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier. See 46 U.S.C. app. $3(17)(B) (1999).

I. INTRODUCTION AND SUMMARY

The New York/New Jersey Foreign Freight Forwarders and Brokers Association is an association of approximately one hundred sixty (160) ocean freight forwarders, NVOCCs, and customhouse brokers, serving the New York-New Jersey port area for the last eighty years. The Association is an affiliated member of the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA"). The Association understands that the NCBFAA is submitting comments to the proposed regulations and the Association supports those comments. The following comments are meant to supplement the NCBFAA's comments. The Association's members provides services on behalf of thousands of exporters and importers that are engaged in international trade in the foreign commerce of the United States. The members routinely assist companies with export control compliance as freight forwarders and NVOCCs. In the past, the Association has provided commentary on proposed BXA, Census, U.S. Department of State, Office of Defense Trade Controls, and other federal agency export control regulations with the objective of providing insight from the forwarding/NVOCC and customs broker community. Thus, the members of the Association are well situated to provide comment on the proposed rule changes by both BXA and Census. The Association requests that BXA and Census take into consideration the Association's written comments in the issuance of final rules.

SUMMARY OF PROPOSED BXA REGULATION CHANGES.

BXA proposes to amend the Export Administration Regulations ("EAR") "in order to simplify and clarify the export clearance process and facilitate compliance."[2] Specifically, the proposed BXA regulation would define new terms, including "principal parties in interest" ("PPI") to an export transaction; "routed export transaction;" and "end-user;" and attempts to

[2] See Fed. Reg. at 53854 (1999).

clarify existing definitions, such as "exporter."[3] The stated objective of the proposed BXA rule changes is to "ensure that for every transaction subject to the EAR, some party to the transaction is clearly responsible for determining licensing authority (License, License Exception, or NLR), and for obtaining appropriate license or other authorization."[4] The proposed BXA regulations also attempt to "clarify" the responsibilities of parties involved in a "routed transaction." In a "routed transaction," the foreign principal party in interest agrees to terms of sale that may include assuming responsibility for export licensing. The proposed rule provides that when a foreign principal party expressly assumes responsibility in writing for determining license requirements and obtaining necessary authorization, that foreign party must have a U.S. agent who becomes the "exporter" for export control purposes. The proposed BXA regulations provide that without a written undertaking by the foreign principal, the U.S. principal is the exporter, with all attendant responsibilities.[5] The proposed BXA regulations would also institute a requirement that the export licensee communicate license conditions to all parties to whom those conditions apply and, when required by the export license, obtain written acknowledgment of receipt of the conditions.

SUMMARY OF PROPOSED CENSUS REGULATION CHANGES.

The proposed Census regulations seek to clarify the responsibilities of exporters and forwarding agents in completing the Shipper's Export Declaration ("SED") and to clarify provisions for authorizing forwarding agents to prepare and tile a SED or file the export documentation electronically using the Automated Export System ("AES") on behalf of a principal party in interest. The proposed Census regulations distinguish between sales by U.S.

[3] The proposed defmition of "Exporter" is the person in the United States who has the authority of a principal party in interest to determine and control the sending of items out of the United States. For purposes of completing the SED or filing export information on the Automated Export System (AES), the exporter is the U.S. principal party in interests. See Fed Reg. at 53860 (1999).
[4] Id. at 53854.
[5] Id.

parties to buyers overseas, and sales by U.S. parties to foreign buyers where title is transferred to the foreign buyers in the U.S. (a so-called "routed transaction").

For purposes of completing the SED or AES record, the proposed Census regulations restrict who can appear as "exporter" on the documentation. Census proposes that for completing the SED or AES record, the exporter is the U.S. principal party in interest in the transaction. Under the proposed Census regulations, the U.S. PPI is the person in the United States that "receives the primary benefit, monetary or otherwise, of the export transaction."[6] In general, the U.S. PPI would be the U.S. seller, manufacturer, order party,' or foreign entity, if in the United States when signing the SED. In most cases, Census believes, the forwarding agent is not a PPI and proposed to revise the Exporter box on the SED to read "Exporter (U.S. Principal Party in Interest)."' However, the EAR defines an exporter as the person in the U.S. who has the authority of a PPI to determine and control the sending of items out of the United States.' This definition permits the forwarder to apply for a license and act as an exporter in some transactions, according to BXA and Census." The revised Census regulations propose to limit the preparation and signature of a SED or other export documentation to the PPI or a forwarding agent who has received written authorization from a PPI. The SED must be signed by a person that is in the U.S. at the time of the execution of the document. The exporter of record on the SED must be a U.S. PPI. For purposes of completing the SED or AES record, the forwarding agent is the person in the U.S. who is authorized by the U.S. PPI, or in a routed transaction, the foreign PPI, to prepare and file the SED or AES electronic equivalent. For compliance purposes with Census regulations, the revised rules would prohibit a forwarder from appearing as

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[6] Id. at 53862.
[7] An "Order Party" is defined as that person in the United States who conducted the direct negotiations or correspondence with the foreign principal or ultimate consignee and who, as a result of these negotiations, received the order from the foreign principal or ultimate consignee. See Fed. Reg. at 53864 (1999).
[8] Id.
[9] See 15 CFR § 772 (1998).

"exporter" in box "la" on the SED or in the "exporter" field on the AES record. In addition, the proposed Census regulations attempt to broaden a forwarder's responsibilities to the U.S. PPI, as well as a foreign PPI in a routed transaction."

The Association's comments are directed primarily at the Census proposed regulations. In general, the Association supports the efforts of BXA and Census in revising the initial proposed regulations of August 6, 1998.[12] The Association believes that the agencies have eliminated most of the inadvertent regulatory burdens that would have resulted from implementation of the initial rules. However, the Association believes that there are still outstanding issues that BXA and Census should review and revise before final implementation of the new regulations.

I. Census Should Amend the Proposed Rules to Provide Needed Protection of Business Proprietary and Confidential Information.

Comments to Census' initial set of proposed regulations illustrated the importance of recognizing that often in "ex works"[13] transactions, foreign customers of U.S. suppliers are sensitive to keeping confidential from the seller such information as the country of destination; the identity of the ultimate purchaser; and the ultimate purchase price of the commodity.[14]

The Association shares the concerns of the NCBFAA, and others, that the proposed regulations would require a forwarder that prepares and files a SED or AES record to make available all information or data elements to the U.S. PPI upon request." It appears that the

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[10] Id. at 53862.
[11] See proposed § 30.49 et seq.
[12] See Fed. Reg., Vol. 63, Aug. 6, 1998.
[13] "Ex works" means that the seller fulfills his obligation to deliver when he has made the goods available at his premises (i.e., works, factory, warehouse, etc.) to the buyer. In particular, the seller is not responsible for loading the goods on the vehicle provided by the buyer or for clearing the goods for export, unless otherwise agreed. The buyer bears all costs and risks involved in taking the goods from the seller's premises to the desired destination. This term thus represents the minimum obligation for the seller. See Incoterms 1990, International Chamber of Commerce (1999).
[14] See generally comments of National Brokers and Forwarders Association of America, Inc., dated October 5, 1998.
[15] See proposed 15 CFR § 30.4(b)(3)(iv)..

proposed Census rule does not comport with existing regulations at § 30.91(a), which set forth the confidentiality of information on SEDs and AES records. The Association reads the proposed rule to enable a U.S. PPI in an "ex works" or routed export transaction to have access to all of the information on the SED or AES record despite the parties' agreement that certain business proprietary information and data will remain confidential. This, of course, would not apply to transactions where the items are subject to various export controls and license requirements.

The Association believes that Census's proposed regulations were not intended to adversely impact existing commercial realties between parties involved in an "ex works" or routed export transaction. The Association believes that Census could easily amend the proposed regulations to more accurately reflect the stated objective of the new rules, as well as continue to protect existing commercial relationships between foreign buyers, U.S. sellers and manufacturers of commodities. The Association supports the NCBFAA's recommended revisions to proposed § 30.4(b)(3)(iv) which would make clear that information available to the U.S. PPI is restricted to ONLY information or data provided by that party. Further, the Association supports the recommendation of the NCBFAA to revise existing § 30.91(a) to eliminate any implication that the U.S. PPI would be entitled to receive information in a routed export transaction that has been supplied by a foreign purchaser.

II. Proposed Census Regulations Would Conflict with Existing Shipping Laws and Regulations by Requiring the Identity of the Exporter on the SED and the Shipper on a Bill of Lading be Identical.

It is important to note that clarification is needed by Census on whether it intends to require for the administration of SED regulations the identity of the exporter on the SED and on a bill of lading or airway bill to be the same entity. As stated above, many of the Association's members are also NVOCCs, which, under the Shipping Act of 1984, as amended, are common

carriers that do not operate the vessels by which the transportation is provided, but act as a shipper in relation to the actual ocean common carrier (steamship line).[16] When a NVOCC is involved in an ocean shipment, it will appear as a shipper in the master bill of lading issued by the underlying ocean common carrier. Thus, under existing U.S. shipping laws and regulations, coupled with the realities of the commercial world in which NVOCCs operate, it would not be possible for the U.S. PPI, as defined in the proposed rules, and the shipper on the master bill of lading or airway bill (issued by a steamship line or airline) to be identical. The proposed regulations would adversely impact existing commercial realities between a NVOCC, a common carrier issuing the master bill of lading, and a U.S. PPI. The Association understands that Census is attempting to better administer its task of collecting information and data to determine U.S. trade statistics. However, the Association believes that Census can achieve its objective in the revised rule without requiring that the same entity be identified as both exporter of record on the SED or AES record and the master bill of lading." The forwarding/NVOCC industry has developed to a point where it is not only common industry practice but required by federal law for the NVOCC to appear as the "shipper" on the master bill of lading. Further, those members of the Association that are engaged in air freight forwarding activities are also subject to the same problem, if Census intends to require both the shipper on the airway bill and the exporter of record to be the same entity since the forwarder is routinely identified by the airline carrier as the "shipper." The Association requests that Census carefully review this situation and clarify that the U.S. PPI on the SED does not have to be the same party that appears on the master bill of lading or airway bill, in the case when a forwarder/intermediary has assumed the role as "shipper."

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[16] See 46 U.S.C. § 3(17)(B) (1999).
[17] Id.

III. Census Should Revise the Proposed Rule on Obtaining a Power of Attorney when a Forwarder is Involved in an "Ex Works" or Routed Export Transaction.

Proposed § 30.4(e) states that " . . . [i]n cases where a forwarding agent is filing the export information on the SED or electronically using the AES, the forwarding agent must obtain a power of attorney or written authorization from a principal party in interest to file the information on their behalf. . . [a] power of attorney or written authorization should specify the responsibilities o the parties with particularity, and should state that the forwarding agent has authority to act on behalf of a principal party in interest as its true and lawful agent for purposes of the export transaction and in accordance with the laws and regulations of the United States."" The Association is concerned that the proposed rule does not accurately reflect commercial realities that are involved in an "ex works" or routed export transaction shipment. By the very nature of the "ex works" sales agreement, the U.S. seller has decided not to become directly involved in any part of the transportation of the goods beyond the domestic point agreed to between the parties.

The proposed rule by Census would appear to create a requirement for the forwarder involved in facilitating the transaction to obtain a power of attorney or similar authorization from the U.S. PPI in addition to the proposed requirement that the forwarding agent obtain proper authorization from the foreign PPI. This rule, if promulgated, would result in increased regulatory burden on the forwarder to obtain an additional authorization from the U.S. entity involved in the routed export transaction when the forwarding agent is acting on behalf of the foreign PPI. There appears to be no need to require the forwarder to obtain a power of attorney from the U.S. PPI in a case where the forwarder has obtained the proper authorization from a foreign PPI involved in a routed export transaction. Pursuant to proposed §§ 30.4(b)(3) and 30.4(c)(2)(3), the U.S. PPI would still be required to provide all information, material, and data

to the forwarder and the forwarder would still be responsible for ensuring that such information is properly provided on the SED or AES record entry. Clarification of the proposed rule is needed for routed export transactions where a freight forwarder is involved on behalf of a foreign PPI.

The Association hereby requests that Census amend the proposed regulations to provide needed clarification in an "ex works" or routed export transaction. There is no regulatory requirement for a forwarder to obtain a power of attorney or other authorization from the U.S. seller involved in the transaction. Again, the Association believes that nothing is accomplished by requiring the forwarder to obtain authorization from both the foreign PPI and the U.S. seller in a routed transaction, provided that the foreign PPI has provided the forwarder with proper authorization and has been appointed by its principal, the foreign PPI.

IV. Census Should Amend Proposed § 30.4(b)(3)(iv) to Reduce the Regulatory Burden on the Forwarding; Agent.

The Association believes that the proposed rule at § 30.4(b)(3)(iv) would permit U.S. exporters to demand from forwarding agents all relevant information or data affiliated with an export shipment in various and non-uniform manners.[19] The Association believes that the proposed requirement is contrary to keeping with the intent of the rule changes which is to reduce the regulatory burden of the exporting process. Further, such a liberal application of the rule may permit U.S. entities to obtain business proprietary and confidential information which was never intended to be made available under certain circumstances, such as "ex works" transactions. This concern was illustrated in the foregoing comments. The Association believes that Census should clarify the rule to require a forwarding agent to provide to an exporter all

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[18] See proposed 15 CFR § 30.4(e).

[19] Proposed § 30.4(b)(3)(iv) states: "Providing the U.S. principal party in interest with a copy of the export information filed in the form of a completed SED, an electronic facsimile, or in any other manner prescribed by the exporter." (Emphasis added.)

relevant and non-confidential information and data in the same format in which it is submitted to the government, such as the SED or AES record. Otherwise, forwarding agents would be subjected to a bombardment of requests from U.S. exporters for information and data in a variety of forms, each citing the governing Census regulation as proposed at § 30.4(b)(3)(iv).

The Association is also generally concerned that the proposed rule changes appear to require that the forwarding agent act with certainty when providing required information to the government on a SED or AES record.[20] Certain information required by proposed § 30.4(c)(3), such as bill of lading or airway bill number; identity of the exporting carrier; value of the goods; port of export; loading pier; etc., may not be certain prior to the tiling of the SED or AES record, or may change after the shipment has left the country. The Association is concerned that the rule change may place an unnecessary burden on the forwarding community that would re-submit or re-file SED or AES record information that has changed since the filing of the initial data with the government prior to export. The Association requests that Census provide guidance and clarification to the forwarding community to enable forwarding agents to rely on good faith estimates of certain information required at proposed § 30.4(c)(3). Alternatively, forwarders would have to "routinely" amend previously filed SED or AES records, which would be especially true for air shipments.

In addition to the foregoing, the Association supports the proposed rule change to § 30.7(d)(2), which would clarify that a foreign principal, if operating in the U.S. at the time of export, must be listed as exporter (U.S. PPI), but does not need to report an Internal Revenue Service EIN or Social Security Number on the SED. Further, the proposed rule change would enable the exporter to use the Dunn and Bradstreet (DUNS) number, border crossing number, passport number, or any number assigned by U.S. Customs to comply with this provision of the

[20] See proposed § 30.4(c)(3) forwarding agent responsibilities in a "routed transaction."

EAR. The Association believes that this rule change would further enhance export opportunities for U.S. companies and also provide a more flexible option for export regulation compliance purposes when a foreign PPI is involved in the transaction.

CONCLUSION.

For the foregoing reasons, the Association respectfully requests that BXA and Census consider the suggested revisions to the proposed regulations at 15 CFR Part 30 et al. and that the suggested revisions be incorporated into the final rules promulgated. The Association believes that its proposed changes take into consideration the objective of simplifying and clarifying the export clearance process, as well as ensuring increased compliance with BXA and Census regulations. Further, the Association believes that its comments assist BXA and Census in promulgating regulations that will result in regulations that protect the interests of freight forwarders, NVOCCs, and the general exporting community.

The Association is happy to provide further assistance to BXA and Census as the final rules are promulgated.

Respectfully submitted,

NEW YORK/NEW JERSEY FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION, INC.

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December 3, 1999

Sharron Cook
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Re: Docket No. 990709186-9186-01
Parties to a Transaction and Their Responsibilities, Routed Export Transactions, Shipper's Export Declarations, and Export Clearance

Dear Ms. Cook:

The Joint Industry Group (JIG), submits the following comments in response to the Bureau of Export Administration proposed rulemaking entitled *Parties to a Transaction and Their Responsibilities, Routed Export Transactions, Shipper's Export Declarations, and Export Clearance* published in the October 4, 1999 Federal Register (64 FR 53854).

JIG is a coalition of more than 160 companies, trade associations, professionals and businesses actively involved in international trade. We both examine and reflect the concerns of the business community relative to current and proposed Customs and export-related policies, actions, legislation, and regulations. We undertake to improve policies and procedures through dialogue with government agencies and the Congress. The Joint Industry Group represents over $350 billion in trade.

JIG submitted comments in response to the Census Bureau's original proposed rulemaking on this issue in 1998. We commend both Census and the Bureau for Export Administration (BXA) for working together to draft a proposal that would address both statistic gathering and enforcement processes vital to the missions of both bureaus. This has led to some improvements in the language of this most recent proposal.

We remain concerned, however, about some aspects of the proposed regulations and suggest that Census and BXA seriously consider the following comments and suggested modifications before drafting a final rule.

Comments

1. We understand the policy objectives leading to the compromise between Census and BXA concerning the use of the identical term "exporter" to serve both as (1) a synonym for the "US principal party in interest" for purposes of completing an SED (or filing using the AES system); and as (2) a term identifying a potentially different party responsible for complying with BXA export control regulations. Although we do not question the validity of Census's or BXA's objectives in identifying the party most capable of supplying accurate and reliable information to each agency, we are concerned that the use of the identical term "exporter" to label different parties will result in unnecessary confusion even if a thorough training and outreach program is implemented.

2. In the case of routed transactions, the proposed rules do not provide a form of "writing" acceptable to BXA for shifting the responsibility for determining licensing requirements and obtaining license authority from the US Principal Party in Interest to the US agent of the foreign principal party in interest. In contrast, Census provides sample powers-of-attorney and written authorization for executing an SED (available upon request from the Census Bureau's Foreign Trade Division.)

3. The concept of the US principal party in interest in the export transaction remains vague and confusing. In the context of defining the term "Exporter (US principal party in interest)" Section 30.4(a)(1) states:

   > "The US principal party in interest is the person in the United States that receives the primary benefit, monetary, or otherwise, of the transaction. Generally, that person is the US seller, manufacturer, order party, or foreign entity, if in the US when signing the SED."

   What does "generally" mean, and what decision rules should be used to determine when some other party may or must be named as the "US principal party in interest?"

4. The proposed regulations do not fully consider operational coordination for export shipments, involving the traditional specific roles and responsibilities of a US manufacturer, the forwarding agent, and the foreign purchaser.

5. As stated in *Guide to INCOTERMS* 1990, the seller has no obligation in filing an export clearance in behalf of the buyer. The proposed regulations would not be in accord with internationally accepted terms of sale and therefore nullify this commercial practice.

6. The owner of the goods at the time of export should be the responsible party.

7. The proposed regulations create an added administrative burden that does not already exist in the current regulations.

8. The proposed regulations do not appear to add value to the export transaction any more than current regulations. If each party to the transaction would just do what is required under current regulations the desired result could be achieved.

Suggested Specific Modifications

1. Treat the freight forwarder as the exporter in "routed transactions" or include on the SED another block identifying the party responsible for export compliance. This is in addition to the proposed field for the Exporter (US Principal Party in Interest).

2. If the first suggestion will not be implemented, state specifically that the Exporter (US Principal Party in Interest) in Box (la) of the SED is a term used for statistical purposes, not for export liability purposes, and delete the phrase "under the EAR" from proposed Section 30.4(a)(2) so that the regulations cover the numerous export shipments where the EAR do not govern export compliance.

JIG and its members again express appreciation for your time and consideration of our concerns and suggestions.

Sincerely,

Robert Kimbrel
Chairman
JIG Export Process Committee

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3pages

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December 3, 1999

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Re: Docket No. 990709186-9186-01, Proposed Rule to Revise the Export Administration to Clarify the Responsibilities of Parties to an Export Transaction and Routed Export Transaction

Dear Ms. Cook:

On behalf of the National Council on International Trade Development (NCITD), we are providing comments on the October 4, 1999, proposed rule revising the Export Administration Regulations (EAR) to simplify and clarify the export clearance process and facilitate export compliance. NCITD is a nonprofit trade association of large and small U.S. exporters and importers who are advocates of EAR policies that are consistent with national security, foreign policy, and a flexible export transaction process that promotes export trade.

The Commerce Department is to be commended for the changes that were made to simplify the proposed regulations by eliminating redundant information (reduction of several thousand words) and by improving the clarity of definitions and responsibilities for parties to an export transaction, especially a routed export transaction.

In general, NCITD agrees with the proposed regulations. However, listed below are a few areas in which the NCITD would appreciate resolution, information, and clarification:

1. Issue: NCITD is opposed to having the name of the U.S. principal party in interest identified in block (1a) of the Shipper's Export Declaration (SED) in a routed export transaction, when the foreign principal party in interest has provided written authority to a U.S. agent to act on their behalf. The current SED provides no clear identification of the exporter of record in a routed export transaction. The lack of clarity on the SED form in a routed export transaction, when the U.S. forwarding agent is the exporter, causes the U.S. principal party in interest (i.e. U.S. manufacturer, seller) to be the first contact point by law enforcement regarding compliance issues. This practice is still unacceptable and will cause an additional burden for industry when the

forwarding agent is controlling the export and the manufacturer or seller is not the exporter of record but identified as such in block (1a) of the SED.

Recommendation: The addition of a new block on the SED form for the U.S. principal party in interest to the export transaction will ensure accurate and correct trade statistics. This will allow block (1a) to accurately display the exporter as the person in the United States who is or has the authority of the principal party in interest to the export transaction to determine and control the sending of items out of the United States. This proposal allows the U.S. forwarding agent, in a routed export transaction, to be the exporter in block (1a) when the U.S. forwarding agent has written authority from the foreign principal party in interest to provide export services on their behalf. This improvement to the SED form would eliminate confusion and enable law enforcement to start with the correct exporter in all exports transactions, especially a routed export transaction. The adoption of this recommendation to add a block to the SED for the U.S. principal party in interest will save time for all involved in a routed export transaction and allow for one common definition of exporter between the Census Bureau and Commerce Department.

2. **Request for information: (758.2** (c)) The final ruling should include examples of what is considered an acceptable "writing" from the foreign principal party in interest to the U.S. principal party in interest in a routed transaction (i.e. contractual agreement, email, etc).

3. **Clarification required:** In a routed export transaction, the final ruling should clarify if the U.S. principal party in interest, for record purposes, is required to get a written statement from the U.S. agent confirming the agent's acceptance of responsibility to act on behalf of the foreign principal party in interest. NCITD feels this type of additional burden on the U.S. principal party in interest, if required, would significantly delay the export process and be restrictive to export trade.

4. **Issue: (740.1** and 732.5(a)(3)) The new requirement for placing the Export Control Classification Number (ECCN) on the SED places an undue burden on some of the NCITD members that are in the engineering business. In 1996, the Bureau of Export Administration simplified the Export Administration Regulations (EAR) to help industry by clarifying the regulations and streamlining the steps needed to make licensing determinations. Those changes were of great benefit to industry, and industry has used these changes to simplify their own internal control programs (ICPs) while remaining fully compliant with the law.

The following information is presented to show how the October 4, 1999 proposed rule regarding ECCN placement on the SED would affect a typical engineering firm. The work processes of engineering firms differ greatly from those of a manufacturing company. The latter has an inventory of goods, which can be classified under an ECCN or EAR99 and put into an export compliance matrix. In fact, these firms must classify their goods as many of these companies sell to customers who will require that information to export to various countries around the world. In an engineering firm, the items exported vary from project to project due to the type of plant (i.e. specifically fabricated for that plant), the client's requirements, and the availability of a newer item at the time of a project, not previously available. It is very difficult and actually not practical to maintain a matrix of items.

Therefore, an engineering firm must take a somewhat different approach to its ICP that is more in line with its work process. Since the country of destination is known, this approach allows for concentration only of those ECCNs that are controlled to the destination country. An example follows: the ICP of an engineering company begins with a known country destination (for the project). At project kickoff, the project engineers develop a control list specific to that country. All items to be exported to the project are reviewed against all ECCNs that are controlled for that country. Items are labeled with the applicable ECCN, and required licenses are obtained. Items that are clearly EAR99 or could possibly fall into an ECCN not controlled to that country are immediately labeled "NLR." No further review is required to determine if those items in fact fall into the "non-controlled" ECCNs, which in the worse case scenario, would still end up NLR. The NLR notation remains with the item throughout the entire

procurement process until it finally reaches the freight forwarder who uses that information for the SED Item 21.

To require an engineer to take the time to determine EAR99 vs ECCN for an ECCN not controlled for the country of destination is unnecessary, creates an undue cost for the company, and does not enhance an already fully compliant ICP. Moreover, such research and entry will add cost and erode global competitiveness. Specific examples of how this type of research will have a negative impact on the work process follow:

ECCN 2A292 Piping, fittings and valves made of, or lined with, stainless steel, copper-nickel alloy, or other alloy steel containing 10% or more nickel and/or chromium.
Country Chart NP column 2, and AT column 1.

Items controlled by this ECCN would not be a project consideration for export to countries not identified by the Commerce Country Chart (Part 738, Supp. 1) as being controlled.

Our U.S. purchased pipe/valves are normally grouped in bulk for all sizes and pipe schedules (wall thickness). Should this provision be adopted, our engineers will be required to create a subgroup of U.S. purchased pipe/valves to separately consider all pipe 8" and larger made of the controlled pipe materials, and of a pipe thickness sufficient to meet the ECCN control criteria. Then after these analyses were performed, no license would be required.

ECCN 2B350 Chemical manufacturing facilities and equipment, (as follows).
Country Chart CB column 3, and AT column 1.

Items controlled by this ECCN would not be a project consideration for export to countries not identified by the Commerce Country Chart (Part 738, Supp. 1) as being controlled.

Items controlled by this ECCN have the following determinative criteria: the material being used to contain the process fluids and size parameters. Should this SED regulation be adopted, our engineers would be required to separately identify vessels fabricated to the specified ECCN dimensions of the controlled materials. Then after these analyses were performed, no license would be required.

Recommendation: While we understand that the placement of ECCNs on the SED would be used as a tool for Export Enforcement, we feel that an undue burden would be placed on those exporters whose current ICPs assure proper licensing determinations for all exports. We recommend Export Enforcement continue to use their existing procedures for reviewing SEDs. NLR notations should be questioned as necessary when exports involve sensitive items going to countries of high level concern.

NCITD feels that the above comments are consistent with the Census Bureau and Commerce Department's objectives, that the proposed regulations be clear and understandable for export compliance reasons and still allow for the assignment of responsibilities to parties in interest to an export transaction to ensure accurate and correct statistical data.

Thank you for the opportunity to provide input.

Sincerely,

Mary O. Fromyer

Mary O. Fromyer
Executive Director

EOR 7
2 pages

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Andy Yood
Director of Tax

December 1, 1999

Mr. Kenneth Prewitt
Director, U.S. Census Bureau
Room 2049
Federal Building 3
Washington, D.C. 20233

Dear Mr. Prewitt:

On behalf of its members, the American Petroleum Institute ("API") submits the following comments in response to a Supplementary Notice of Proposed Rulemaking published at Vol. 64, No. 191, FR page 53861, (October 4, 1999) in reference to 15 CFR, Part 30, "Clarification of Exporters' and Forwarding Agents' Responsibilities; Authorizing an Agent To Prepare and File a Shipper's Export Declaration on Behalf of a Principal Party in interest". The API represents approximately 400 companies involved in all aspects of the oil and gas industry, including exploration, production, transportation, refining and marketing.

By this submission, API also supports the comments submitted bv Fina Oil and Chemical Company (Attachment 1), on November 19, 1999, to your office and to the Bureau of Export Administration (Attachment 2).

Exporter Of Record / U.S. Principal Party In Interest

Definition:

API requests the definition of "U. S. Principal Party in Interest" be expanded in order to allow the 'U.S. manufacturer" to be listed as the exporter on the SED. It remains unclear to us why Census is not allowing the U.S. manufacturer to be the exporter in transactions where the U.S. manufacturer is selling domestically to a U.S. seller and the U.S. seller is selling the merchandise for export.

The description of exporter appears to allow the U.S. manufacturer to be the exporter of record; however, the background section appears to restrict the exporter to be the U.S. seller as stated in the above scenario. If this is the intent of the proposed rule, Census needs to further explain the basis and support for this restriction. This type of commercial flexibility is needed in structuring

business transactions and is consistent with the goal of stimulating U.S. commerce through increased exports.

API appreciates the opportunity to comment and urges a careful consideration of our recommendations. If you or any other member of the Bureau of Census has questions regarding our comments, please do not hesitate contacting Mr. Eddie Aquino of my staff, at 202/682-8464.

Sincerely

C: Sharron Cook, with/attachments

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December 3, 1999

Ms. **Sharron** Cook
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RE: Comments on Proposed Rule Concerning "Routed Export Transactions" and Other Issues, Docket No. 990709186-9186-01

Dear Ms. Cook:

The American Electronics Association **(AEA),** a **3,000-member** company organization representing the U.S. electronics, software and information technology industries, respectfully submits the following comments on Proposed Rule, "Parties to a Transaction and Their Responsibilities, Routed Export Transactions, Shipper's Export Declarations, and Export Clearance", that your agency published in 64 Federal **Register** 53854 (Oct. 4, 1999) l s o submitting comments on an associated rulemaking by the Census Bureau which was published in 64 Federal **Register** 53361 (Oct. **4, 1999).**

We appreciate the **efforts** made by BXA to consult with industry throughout this **rulemaking** exercise ever since the Census Bureau issued its proposed rule on this subject, (63 **Fed. Reg.** 4 1979 (Aug. 6, **1998).)** We support the Proposed Rule's streamlining of Export Clearance provisions of EAR Part 758, which will make this part of the EAR more user-friendly. We also support the modernization of export clearance requirements.

We commend BXA for stating *in* a note to proposed EAR **§ 758.2(c)** that the listing of "Exporters" in Box (la) of the Shipper's Export Declaration is for statistical purposes and that "**[f]or** purposes of licensing responsibility under the EAR . . . the U, S. agent of the foreign principal party in interest may be the exporter, regardless of who is listed in Block **(1a)** of the SED". Nonetheless, we remain quite concerned that the proposed revision of the *Census* Bureau's Foreign Trade Statistics Regulations BXA will require in many cases a party to be listed as "exporter of record" that *is* not the party that has the authority "to determine and control the export of items." This fundamental change in policy makes it more likely that some U.S. principal parties in interest will have to expend precious financial and personnel resources fending off unwarranted export investigations that would not have taken place, but for their listing as the so-called "Exporter" on **the** SED. We recognize that the Census Bureau should be the primary focus of these particular comments but wished to let you know that this remains a concern.

We also have four specific concerns with the Proposed Rule of BXA. In the Preamble to the proposed rule, BXA states that its "primary objective is to promote flexibility so that parties to transactions subject to the EAR may structure their transactions freely, consistent with national security and foreign policy objectives." As currently worded, the following modifications recommended by the proposed rule would interfere with the natural workings of the marketplace, especially in the area of EX-WORKS transactions, without adequate justification for doing so:

(1) The requirement, in 750.7(d), for exporters to obtain written acknowledgement of license conditions when required by license;

(2) The requirement in all cases for a written undertaking by a foreign buyer to shift the burden of export compliance away from a U.S. supplier;

(3) The requirement for exporters to enter classifications on SEDs for items eligible for shipment under NLR or any License Exception; and

(4) The requirement for U.S. suppliers to provide, upon request, to a foreign principal party in interest and its U.S. agent with the ECCN or sufficient technical information to classify an item.

On a matter related to the subject of the proposed rule, we would like to express our concern with the practice of some BXA licensing officers to r&se to process license applications fiom U.S. agents of foreign parent organizations.

1. Written Acknowledgement of License Conditions From Foreign Recipients Should Not Bc Required bv Regulation or Standard Condition . It may be a good business practice for exporters in many cases to obtain from foreign consignees a written acknowledgement of license conditions. However, this is not always appropriate. Therefore, it is not appropriate to require exporters to obtain written acknowledgments, either by regulation or by standard condition on licenses. We urge BXA to delete this provision from the proposed rule.

Significant problems would be created by the imposition of a written acknowledgement requirement in the EAR. First, in some countries, it may be illegal to provide this type of acknowledgement. In particular, important U.S. trading partners, including Canada, the United Kingdom, the European Union, and other countries have enacted measures which make it illegal for local persons to agree to comply with U.S. export controls that conflict with their own. Companies buying U.S. goods in those countries have been advised by their counsel that it is wise to comply with U.S. extraterritorial reexport controls, but that explicitly agreeing to do so could violate their own country's blocking statutes. U.S. exporters and their customers have learned to finesse this conflict of laws by means of the U.S. exporter notifying the consignee of U. S reexport control restrictions without insisting that the consignee assent to them.

Second, U.S. exporters would, in many cases, be unclear as to what constitutes compliance. For example, suppose the original foreign consignee is a distributor. Would a written acknowledgement be required from all end-users *ad infinitum?*

Third, requiring a written acknowledgement from the consignee can add a potentially lengthy and untimely delay between the time licenses are issued and shipments can be made. Depending on who is authorized to execute such an acknowledgment, the delay may equal or surpass those already encountered by U.S. exporters in obtaining end-user certificates. It currently takes exporters of high performance computers between 6- 10 months to obtain end-user certificates from MOFTEC in the People's Republic of China. A requirement to procure a written acknowledgement would play havoc with corporate planning for the shipment of licensed products since there often would be no way to know whether it is required or how long it would take to obtain the written acknowledgement. Many licenses are issued after months of review and near the end of a fiscal quarter, when a late requirement for yet another document from the consignee can cause shipment delays affecting the exporters finances.

The license application process already mandatesthat supporting end-user documents be executed in most cases at the front end, Except for extremely sensitive cases, it has long been sufficient for export enforcement purposes for licensees to provide at the back end of the process the destination control statement set forth in EAR § 758.6. (That provision of the EAR provides that exporters may, but need not, make this notice more specific,) A new requirement for the consignee to acknowledge all license conditions would impose significant new burdens without adequate justification. Notice to the consignee is sufficient and more appropriate.

2. Written Undertakings From Foreign Buyers to Assume Licensing Obligations Are Redundant in "EX-WORKS" Transactions. We are concerned that the Proposed Rule struggles more than necessary for a new writing as a "piece of evidence" for enforcement officials. This struggle creates a default rule for routed transactions that will shift the burden to a party other than the one that the parties can prove was never intended to be responsible for the export. The Proposed Rule should not require the U.S. principal party in interest to lose its ability to demonstrate that the parties intended the foreign buyer to be the "exporter". We recommend the adoption of a much cleaner default rule whereby freight forwarders are held responsible for export compliance if they are exporting items on behalf of foreign parties. Such a rule would refl ect current law and be quite easy to apply, The freight forwarder would not need to obtain any writing from the foreign party, other than payment. The freight forwarder knows when he is employed by a foreign buyer even if other aspects of a transaction are not clear. The Proposed Rule in this case serves to remove much of the export compliance burden away from freight forwarders to U.S. suppliers even when it is clear that freight forwarders would be the ones actually exporting on behalf of their foreign principal That is unacceptable.

Alternatively, we propose that written undertakings obtained from foreign parties with an ongoing relationship with U.S. suppliers should remain valid until terminated. There is no need for a requirement to obtain a written undertaking for each and every shipment with a trusted foreign party.

A requirement for a U.S. supplier to obtain pursuant to Proposed EAR § 758.2(c) a written undertaking from a foreign buyer to accept export clearance responsibilities is completely unnecessary in cases where the parties have agreed by contract to conduct an "EX-WORKS" transaction. In its Incoterms, the International Chamber of Commerce has published detailed definitions of some of the principal terms used in international trade. Because of the specificity

and clarity of its definitions and the need for common definitions to minimize misunderstandings, the Incoterms are widely utilized in transactions all over the world. Incoterms provide that:

> 'EX-WORKS means that the seller delivers when he places the goods at the disposal of the buyer at the seller's premises or another named place (i.e. works, factory, warehouse, etc,) not cleared for export and not loaded on any collecting vehicle.
>
> This term thus represents the minimum obligation for the seller, and the buyer has to bear all costs and risks involved in taking the goods fiom the seller's premises,
>
> . . . **This term should not be used when the buyer cannot carry out the export formalities directly or indirectly.**

(Incoterms 2000, p. 27 (emphasis added).) In setting forth the Buyer's Obligations, the Incoterm's section on "ex works" states that **the "buyer must obtain at his own risk and expense any export rnd import license or other official authorization** and carry out, where applicable, all customs formalities for the export of the goods. (Incoterms 2000, p. 29 (emphasis added)(footnote omitted).)

In view of the specificity and clarity of the Incoterms' definition of "ex works", there is no need for the EAR to require U.S. suppliers to obtain from foreign buyers written undertakings of export compliance responsibility in cases involving exports which are "ex works" by contract. Implementing a requirement for a written undertaking in these instances would clarify nothing and would simply impose an unwarranted burden on trade. **In cases where U.S. suppliers did not obtain a written undertaking, the effect of the EAR would be to frustrate the clear intention of the parties (e.g., the U.S. supplier and the foreign buyer) to a contract with au "EX WORKS" provision.**

It is important to be clear on this point. We are concerned that BXA officials have been giving mixed messages as to whether a clear contract incorporating EX-WORKS is sufficient as a written undertaking to expressly accept export clearance responsibilities. At the September meeting of the RPTAC, Assistant Secretary for Export Enforcement Amanda DeBusk stated that a contract that clearly provided that a transaction would be "ex works" as defined by Incoterms 2000 would seem to be a reasonable way to satisfy the requirement. However, she acknowledged that at the Export Update Conference in Washington in July 1999, Commerce Counsel said that such a contract would not be sufficient, but that an unsigned letter on corporate letterhead would be. Stating that the Proposed Rule is "deliberately ambiguous" on this point leaves exporters concerned that the application of this provision of the Proposed Rule by the Office of Export Enforcement will not be predictable.

It is appropriate for a U.S. principal party in interest to accept a risk of being held responsible if a contract is not dear. But, it is not appropriate to do so when a contract is clear. BXA should at minimum state in the preamble to the final rule that any contract clearly incorporating terms of sale provisions that make the foreign buyer responsible for export compliance will constitute a sufficient writing for purposes of Section 758.2(c).

On a topic related to the subject matter of this rulemaking, we are bothered by the practice of some BXA licensing officers to refuse to consider license applications submitted by U.S. agents of certain foreign entities. Licensing officers have required many U.S. manufacturers to submit license applications and to oversee shipments to companies who wish to undertake the responsibility themselves. This approach interferes with the normal functioning of the market and growth patterns of companies and forces U.S. companies to behave, in effect, as if they are vertically integrated when in fact the trend is in the opposite direction in the business sector. It appears that some BXA licensing officers have been taking this position because they have been overly willing to see a conspiracy to evade U.S. export controls in every business transaction that does not fit a preconceived model. Non-U.S. organizations have many good business reasons to take possession of purchases on an EX-WORKS basis. For example, many foreign companies want to take control of purchased items via their U.S. subsidiaries as soon as possible to expedite shipping, consolidate purchases and otherwise reduce freight costs, and provide more certainty in planning their affairs. Tax and investment considerations can also play a role. While extremely sensitive cases may warrant a refusal to approve applications from agents of some non-U. S. companies, BXA licensing officers should not be implementing such a practice on a widespread basis.

3. Mnndntine Classification of All Items Would Impose Costs Far Bevond Anv Benefits.
We strongly oppose the proposed § 740.1(d) requirement for exporters to enter classifications on SEDs for items eligible for shipment under NLR or any License Exception.

There seems to be a disconnect between BXA officials and industry as to why an ECCN need not be entered on all SEDs. We understand BXA's main interests on this issue to be: making sure that items are classified accurately and shipped only to authorized destinations and preventing the practice of some parties of preprinting SEDs with the NLR symbol already entered. For the following reasons, requiring classification in all instances would impose a far greater burden on exporters than is justified by these interests.

First, parties that have been preprinting SEDs with NLR would not be stopped. They would just modify their practice and preprint SEDs with EAR99 as well as NLR.

Second, under current EAR § 758.3(h)(2), the ECCN must be entered on the SED when shipping under a License, License Exceptions GBS, CIV, or LVS, or under NLR and the item is controlled for CW or NS Column 2 reasons. These requirements are reasonable because only certain ECCNs are eligible for export under these License Exceptions, and this burden was imposed as part of a check on the new ability of exporters to export what had been controlled products under the newly established authorizations. Also, these requirements result in useful data for classifications that had been controlled. However, for most shipments eligible for NLR or other License Exceptions (e.g., TSU for mass market software, the classification of which is irrelevant except for encryption products), the entry of ECCN classifications on the SED will not provide particularly useful data to BXA.

Third, it would extremely expensive and burdensome for industry to classify all items being exported. For example, it might take an hour to determine that an item is eligible for shipment

under NLR under several potential classifications, But, it might take 10 more hours to determine whether the exact classification is EAR99 or XX9XX. Unless and until the exporter plans to export to Syria, this extra 10 hours devoted to classification would be wasted time. This example serves to illustrate that the added cost of determining the exact classification of many items is too high compared with the pyrrhic benefit. BXA's own classification practices demonstrate just how difficult the classification process can be. Otherwise, BXA would be able to satisfy EAR § 750.2(a)'s 14-day deadline for processing classification requests.

Fourth, this increased burden will fall mainly on small exporters of "uncontrolled" products. Such exporters do not have the corporate resources to devote to automate placing the exact classifications of each and every item that is authorized for export under NLR or License Exceptions other than GBS, CIV, or LVS. Such exporters usually cannot afford the very expensive software programs mainly purchased by large exporters to classify items (Even those who do purchase such software start by specifying the ECCNs for the "controlled" products that may require licenses for many destinations, and later (if ever) use their remaining resources to classify those products, parts and components that they know can be exported to all but the T-7 destinations under NLR or License Exceptions.)

Finally, this proposed provision will create technical violations of what are now lawful shipments with little to show for it. Many exporters either will fail to list the ECCN for all shipments due to the excessive burden or will incorrectly choose to classify their products under EAR99 when in fact this will not be the correct classification. The result will be millions of technical violations for shipments which mean absolutely nothing because the shipments are authorized by the EAR.

4. **Information Sharing Requirements Would Create Liability Concerns for U.S. Suppliers.** Under proposed EAR § 758.2(d), a U.S. supplier would be required, upon request, to provide the foreign principal party in interest and its U.S. agent with the ECCN or sufficient technical information to classify an item. We are concerned that these information sharing requirements could be interpreted to hold a U.S. supplier strictly liable for incorrect classifications or inaccurate technical information provided to foreign parties and their U.S. agents to comply with this proposed provision. The Proposed Rule seems to assume that all U.S. suppliers are manufacturers, when in many cases they are resellers with less ability than the foreign supplier to provide export classifications or sufficient technical data. We propose adding the phrase "to the best of its ability to do so based on information that is in its possession" to the end of the first sentence. Otherwise, this provision is forcing U.S. suppliers who have agreed to contract away this responsibility to undertake it without compensating them for doing so. This is a blatant interference with the ability of parties freely to structure their responsiblities for export transactions. Many suppliers do not choose to export because of the cost of learning the complex EAR, and price their wares accordingly just as they price their products differently depending on which party is responsible for costs of freight, insurance, and risk of loss. With regard to routed export transactions, the proposed regulation should also be amended to state that the foreign principal party in interest is ultimately responsible for product classifications. Even when U.S. suppliers provide such information, the classification may change depending on how the product is configured or assembled with other products prior to shipment,

Finally, when BXA does publish a final rule, we request that implementation be delayed for 90 days so that exporters can develop and test automated systems updates and revisions needed.

Thank you again for your time and consideration of our comments. Please do not hesitate to that contact me for addition information or to further discuss.

Sincerely,

AnnMarie McIntyre
Director, Trade Regulation

cc: Director, U.S. Census Bureau
Ms. Amanda DeBusk, Assistant Secretary of Commerce for Export Enforcement
Roger Majak, Assistant Secretary
Iain Baird, Deputy Assistant Secretary
John Sopko, Deputy Assistant Secretary
Mark Menefee, Director, Office of Export Enforcement
Hillary Hess, Director, Regulatory Policy Division

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3 pages

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Amy Beargie
Assistant Int'l Trade Counsel

December 2, 1999

VIA HAND DELIVERY
Ms. Sharron Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration, Rm 2705
U.S. Department of Commerce
14th Street and Pennsylvania Ave, NW
Washington, DC 20230

Subject: Comments on Proposed Amendments to the EAR Concerning the Responsibilities of Parties to a Transaction in Export Compliance

Dear Ms. Cook:

United Technologies Corporation (UTC) submits these comments in response to the Bureau of Export Administration's (BXA) notice of proposed rulemaking and request for comments (64 Fed. Reg. 53854) dated October 4, 1999, concerning proposed amendments to the Export Administration Regulations (EAR). The stated purpose of the proposed amendments is to simplify and clarify the export clearance process and facilitate compliance. As stated in the notice, BXA's primary objective is to promote flexibility so that parties to transactions subject to the EAR may structure their transactions freely, consistent with national security and foreign policy objectives.

We understand that the above-described proposed rules represent the significant efforts of both BXA and the Census Bureau to strike a balance between the bureaus' respective responsibilities and objectives, and the practical effects of implementation on multiple industry sectors. After reviewing the proposed rules and surveying UTC's various business units on the practical effects of the proposed rules, we offer the following suggestions to further clarify the responsibilities of the parties to an export transaction.

According to the proposed amendment to section 758.2(c) of the EAR, the U.S. principal party in interest is the exporter and must determine licensing authority and

obtain the appropriate license or other authorization, unless it obtains from the foreign principal party in interest a writing wherein the latter expressly assumes responsibility for determining licensing requirements and obtaining license authority, making the U.S. agent of the foreign principal party in interest the exporter for EAR purposes. In other words, the U.S. seller must obtain a 'writing" from the foreign buyer that indicates the buyer's assumption of responsibility for export compliance for the transaction.

In keeping with the stated purpose of these amendments, i.e., to simplify and clarify the export clearance process and facilitate compliance, we propose that BXA add a provision addressing what constitutes a sufficient "writing" for purposes of section 758.2(c). To account for the various ways in which an export transaction may be structured, such a provision should provide some guidance on the various ways in which the 'writing" requirement may be satisfied, including but not limited to the following.

First, any language appearing on transaction documentation (e.g., purchase order, invoice, or confirmation) that specifies a usage of trade which places responsibility for export compliance on the foreign principal party such as "ex works" terms of sale, or otherwise states that the foreign principal party in interest assumes responsibility for export compliance, should be considered a sufficient writing for purposes of section 758.2(c). As an Incoterm, "ex works" is universally accepted in the international trade arena as assigning responsibility for the export transaction to the foreign buyer once the goods are placed at the buyer's disposal at the seller's premises. We understand that BXA may object to recognizing this Incoterm in its regulations because it does not want to rely on a term that is subject to revision by a non-U.S. body. Our response to this objection is that although the definition of "ex works" may be tweaked from time to time, it is highly unlikely that it will lose its essential meaning, i.e., the buyer assumes responsibility for the goods, including export compliance, once the goods are placed at the buyer's disposal at the seller's premises. If for some unforeseen reason the term is radically revised to mean something that is not compatible with the EAR, BXA would have to amend only one provision of the EAR (the 'writing" provision we are proposing) in order to eliminate the concept of "ex works" from its regulations.

Second, a blanket contract, certificate, or other signed writing that assigns responsibility for export compliance to the foreign buyer over a specified period of time should also be considered a sufficient 'writing" for purposes of section 758.2(c). For example, in the case of a requirements contract or where a U.S. seller and foreign buyer have a long-term relationship and anticipate frequent transactions with short turnaround times over a long period of time, the parties should be able to freely contract with each other to fix responsibility for export compliance.

Finally, in view of the rapid growth of electronic transactions, the proposed rule should address what constitutes a sufficient writing in that context. For electronic transactions conducted over the internet or via interactive software, BXA should consider an

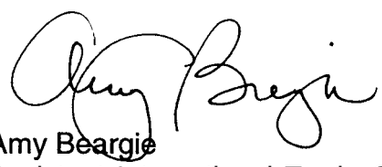
electronic acknowledgement by the foreign buyer that it assumes responsibility for export compliance to be a sufficient "writing" for purposes of section 758.2(c). An electronic acknowledgement would include the buyer completing and transmitting an electronic form or checking a box on a prompt screen when providing information for an order.

We note that the above suggestions as to what constitutes a sufficient writing for purposes of section 758.2(c) would advance BXA's primary objective, i.e., to promote flexibility so that parties to transactions subject to the EAR may structure their transactions freely.

***

UTC appreciates the opportunity to present its views on BXA's proposed amendments to the EAR. For additional information, please contact Amy Beargie at (202) 336-7458.

Sincerely,



Amy Beargie
Assistant International Trade Counsel

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4 pages

INGRAM MICRO®

'December 1, 1999

Sharon Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
Room 2705
14th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20230

Subject: Federal Register: October 4, 1999 Volume 64, 53853
Written Comments

Dear Ms. Cook,

Thank you for the opportunity to offer the following comments concerning the proposed rulemaking changes to the preparation of the Shipper's Export Declaration. The issues for my company primarily concern a routed export transaction in three main areas:

- Record keeping
- Liability
- Conformity of Documents

Summary of analysis of the proposed rule relating to routed export transactions shipped under Ex-Works Incoterms:

The foreign principal party in interest must issue a written statement to the U.S. principal party in interest to confirm that they will assume responsibility to determine license requirements and obtain any necessary export license approvals. The foreign principal party in interest must also issue a power of attorney or letter of authority to their forwarding agent, giving them the authority to act on behalf of the foreign principal party in interest when applying for an export license.

Partners in Excellence

The U.S. principal party in interest will ship to the foreign principal party in interest via the designated forwarding agent. The U.S. principal party in interest will prepare an information document for the forwarding agent that includes all the items listed in the Federal Register by the Census Bureau, including its EIN.

INGRAM MICRO INC.
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Santa Ana, CA 92799-5125
(714)566-1000

Under the Ex-Works Incoterm, the forwarding agent will take delivery of the goods at the dock of the U.S. principal party in interest (seller's dock) and assume responsibility for export clearance and export document preparation. As the responsible party for export clearance, the forwarding agent will obtain the export license if required. It is also the forwarding agent's responsibility to prepare the export documents based on the information document provided by the U.S. principal party in interest. The document set would include the Commercial Invoice for export clearance and customs declaration purposes on behalf of the buyer, SED listing the U.S. principal party in interest as exporter of record (under the new proposed rules) and the AWE3 showing the forwarding agent as the Shipper.

Record keeping:

It is very unclear to me what bearing the proposed rule may have on record keeping responsibilities. This needs to be clarified.

Per the Federal Register notice, under forwarding agent responsibilities in a routed export transaction, the forwarding agent must "upon request", provide the U.S. principal party in interest with appropriate documentation verifying that the information provided by the U.S. principal party in interest was accurately reported on the SED or AES record.

Since the U.S. principal party in interest is now the exporter of record even for a routed export transaction shipping under Ex-Works, is the U.S. principal party in interest **RESPONSIBLE** for maintaining a file copy of the SED for 5 years? "Upon request" leads me to believe this is an optional practice rather than mandatory. While it may be prudent to collect copies of SED's prepared by the forwarding agent for internal audit purposes, it needs to be clarified as to whether or not the U.S. principal party in interest, reported as exporter of record, must maintain a file copy under a routed export transaction.

Currently EAR Sec 762.4 says the "regulated person" must retain the original record. Under a routed export transaction, would the forwarding agent be defined as the person required to "make the record" per 762.1(b) even though the U.S. principal party in interest is the exporter of record on the SED? If affirmative, the rule should clearly state-that the forwarding agent would be responsible for retaining the original record.

Our forwarding agent database currently contains over 800 different freight forwarders. It would be an administrative nightmare to retrieve shipping records for every routed exported transaction. Today, when the U.S. principal party in interest is not the exporter of record under Ex-Works, we are not responsible for making the record.

Liability:

If a forwarding agent makes false statements or misrepresents facts concerning our shipment on the SED, are we held liable in any way? We would have a record of the information we tendered to the forwarding agent to complete the SED accurately which would serve as evidence that accurate data was submitted to the forwarding agent but not reported as presented. It appears that there is no intent to hold the U.S. principal party in interest responsible for errors made by the forwarding agent.

Conformity of documents:

Under BXA FR Pg 12, Sec 758.4 (b). "Conformity of documents: When a license is issued by BXA, the information entered on related export control documents (e.g. SED, bill of lading or air waybill) must be consistent with the license." Under the proposed rule, the exporter of record will always be the U.S. principal party in interest even if the licensee is a forwarding agent acting under the power of attorney of the foreign principal party of interest. How will the licensee's name be listed on the SED? How does this comply with "conformity of documents" when the license number listed on the SED was not issued to the exporter of record named on the same SED? When shipping against an approved license, the SED should reflect the licensee as the exporter of record.

Power of attorney from U.S. principal party in interest:

In a routed export transaction does a forwarding agent need a power of attorney from the U.S. principal party in interest to sign the SED that lists the U.S. principal party in interest as exporter of record? Today, the forwarding agent cannot sign an SED when the U.S. principal party in interest is listed as exporter of record unless they have the power of attorney on file or the U.S. principal party in interest signs box 23 of the SED authorizing the forwarding agent to complete the appropriate data fields, sign and submit on behalf of the U.S. principal party in interest. Maybe it is implied that the power of attorney from the U.S. principal party in interest is not required since the forwarding agent is acting on behalf of the foreign principal party in interest from whom he has obtained a power of attorney. It would be beneficial to have an explicit statement to indicate that for a routed export transaction under Ex-Works, a power of attorney from the U.S. principal party in interest is not required.

Accuracy of statistical reporting:

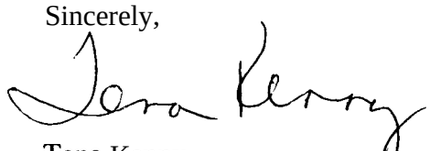
No doubt, there is a problem with accurate reporting on SED's today when a forwarding agent is preparing the SED and required to make independent decisions about product classifications. Freight forwarders do not have the technical knowledge to make qualified decisions. To ensure that forwarding agents handling our shipments today have the data needed to prepare an accurate SED, it is our standard operating procedure to provide the forwarding agent with a document titled Reference and Information document that includes all the details needed to prepare an SED accurately. With the reference document, they are able to prepare an SED as exporter of record with the confidence that it will be an accurate report.

Even though we voluntarily provide this document today, I do not believe it is a common practice of all exporters. Therefore, I agree with the proposal that would require the U.S. principal party in interest to provide the forwarding agent with all the product details needed to accurately prepare an SED. But I disagree with the proposal that the U.S. principal party in interest would also need to be named as the exporter of record. Since the intent of this proposed change is to improve the accuracy of the data being reported, that objective would be met by simply requiring the U.S. principal party in interest to provide the information. Should there be any question by Census or BXA about the data reported on the SED, the forwarding agent will have the information document from the U.S. principal party in interest on file to support the SED.

This process would ensure the integrity of the data being reported without causing inconsistencies with the transaction documents. Under a routed export transaction, the U.S. principal party in interest is not engaged in the actual export of the goods which are under the control of the forwarding agent designated by the foreign principal party in interest. The U.S. principal party in interest would also have no participation in the legal export via the export license application approval process when the foreign principal party in interest has authorized the forwarding agent to act on their behalf when formal approval is required. And yet, the U.S. principal party in interest is to be named as exporter of record on the SED.

I appreciate the opportunity to express the concerns of my company and look forward to reviewing further publications in the Federal Register.

Sincerely,



Tena Kenny
Manager, Export Control Systems

Telephone: 714-382-1203

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10 pages

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Sharron Cook
Bureau of Export Administration
Office of Exporter Services
14th Street and Pennsylvania Ave N. W.
Room 2705
Washington D.C. 20230

Dear S harron:

Again, thank you for all your help. Here are my comments as promised

Sincerely,

Marie Rapport

Marie Rapport
President
Broker Power Inc.

10/13/99

BXA Proposed Rule On
Responsibilities of Parties to Export Transactions
(Part IV - Final)

The Bureau of Export Administration (BXA) has issued a proposed rule to revise the Export Administration Regulations (EAR) regarding the responsibilities of parties to export transactions, the filing and use of the Shipper's Export Declaration (SED) or Automated Export System (AES) equivalent, etc. Written comments are due by December 3, 1999.

This is Part **IV,** the final part of a multi-part series of summaries of this proposed rule and focuses on certain omissions in referencing the Shippers Export Declaration (SED) or its Automated Export System (AES) electronic equivalent, as well as certain ambiguities in the proposed rule. *(See ITT's 10/07/99, 10/08/99 news, 10/12/99 news, (Ref: 99100651) , (Ref: 99100751), and (Ref: 99100851) for Parts I, II and III.)*

BXA Inconsistent in Stating "SED or AES Equivalent"

Although this proposed rule is generally well-written, BXA is not always consistent in its use of the phrase "SED or AES electronic equivalent". In about a dozen places in the proposed rule, BXA only states "SED" when it meant to state "SED or AES electronic equivalent". As the proposed rule states in several places that various provisions apply to "paper SEDs" only, using "SED" alone without reference to either paper or the AES equivalent is ambiguous.

BXA's Use of Cross References Are Vague

In addition, BXA may cross reference one part of the proposed rule to another part of the proposed rule in a vague fashion. For example, at the end of proposed 15 CFR 748.4(a)(1), BXA states "See definition of exporter in part 772" without indicating how this cross reference applies to the definition of exporter in 748.4(a)(1). (In this case, BXA sources confirmed by phone that the part 772 definition is *different* from the 748.4(a)(1) definition.)

D/N 990709186-9186-01 FR Pub 10/04/99 Agency: BXA

BXA Contact – Sharron Cook (202) 482-2440

Call BP for: A. copy of proposed rule)8 pp, request (Ref: 99100651)
B. copy of proposed rule, with inconsistencies and examples of the ambiguities highlighted (8 pp)

[Ref: 991012771

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Parts 732, 740, 743, 748, 750, 752, 758, 762, and 772

[Docket No. 990709186–9186–01]

RIN 0694–AB88

Parties to a Transaction and their responsibilities, Routed Export Transactions, Shipper's Export Declarations, and Export Clearance

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Proposed rule, with request for comments.

SUMMARY: The Bureau of Export Administration proposes to revise the Export Administration Regulations (EAR) to clarify the responsibilities of parties to an export transaction, the filing and use of Shipper's Export Declarations, Destination Control Statement requirements, and other export clearance issues.

DATES: Comments must be received December 3. 1999.

ADDRESSES: Written comments should be sent to Sharron Cook, Regulatory Policy Division, Office of Exporter Services, Bureau of Export Administration, Room 2705. 14th Street and Pennsylvania Avenue, N.W.. Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: Sharron Cook, Regulatory Policy Division, Bureau of Export Administration, at (202) 482–2440.

SUPPLEMENTARY INFORMATION:

Background

The Bureau of Export Administration (BXA) proposes to amend the Export Administration Regulations (EAR) in order to simplify and clarify the export clearance process and facilitate compliance. BXA's primary objective is to promote flexibility so that parties to transactions subject to the EAR may structure their transactions freely. consistent with national security and foreign policy objectives.

In this proposed rule, BXA defines new terms, including "principal parties in interest", "routed export transaction", and "end-user". and clarifies existing ones (notably the definition of "exporter"). The proposed amendments ensure that for every transaction subject to the EAR, some party to the transaction is clearly responsible for determining licensing authority (License, License Exception, or NLR), and for obtaining the appropriate license or other authorization. The proposed amendments also encourage communication among all parties to a transaction to ensure that each party knows its responsibilities in order to comply with the EAR.

For export control purposes the exporter has generally been the seller. An export transaction, however, has two principal parties in interest: a U.S. party and a foreign party-usually the seller and the buyer. In a "routed export transaction," the foreign principal party in interest agrees to terms of sale that may include assuming responsibility for export licensing. This proposed rule provides that when the foreign principal party expressly assumes responsibility in writing for determining license requirements and obtaining necessary authorization, that foreign party must have a U.S. agent who becomes the "exporter" for export control purposes. Without such a written undertaking by the foreign principal, the U.S. principal is the exporter, with all attendant responsibilities.

The Shipper's Export Declaration (SED) plays an important role in export clearance. Both the EAR and the Foreign Trade Statistics Regulations (FTSR) of the Bureau of Census contain specific requirements regarding the use of this document. The EAR govern the use of the SED as an export control document, while the FTSR govern its use as a source of trade statistics. For statistical purposes, the Census Bureau requires the name of the U.S. principal party in interest, generally the seller, in Block (la) of the SED. For purposes of responsibility for export licensing requirements under the EAR, however, the U.S. agent of the foreign principal party in interest may be the exporter, regardless of who is listed in Block (la) of the SED. It is important to note that all parties who participate in transactions subject to the EAR are responsible for complying with the EAR. Therefore, a party that is listed in Block 1 (a) of the SED or in the exporter field of the Automated Export System (AES) record is not the sole party to the transaction responsible for compliance with the EAR.

In addition to clarifying export licensing responsibilities, this rule institutes a requirement that the export licensee communicate license conditions to all parties to whom those conditions apply and, when required by the license, to obtain written acknowledgment of receipt of the conditions. This new provision is part of BXA's License and Enforcement Action Program (LEAP), which is designed to enhance compliance with the EAR.

Finally. these proposed amendments significantly revise the first six sections of Part 758 of the EAR by reorganizing, streamlining and clarifying necessary provisions while deleting unnecessary or redundant provisions. Section 758.1 consolidates into one section all export control-related provisions pertaining to SEDs. In consolidating these provisions into one section, BXA has eliminated those that are already contained in the FTSR. or that were otherwise unrelated to export controls. Section 758.2 clarifies and consolidates provisions relating to the responsibilities of the parties, and § 758.3 consolidates, but does not significantly change, provisions concerning the use of an export license. Section 758.4, which contained very specific provisions relating to conformity of documents, has been greatly simplified in the interes: of flexibility. Sections 758.5 and § 758.6 have been combined and reduced into one paragraph.

Although the Export Administration Act (EAA) expired on August 20. 199-l. the President invoked the International Emergency Economic Powers Act and continued in effect the EAR, and, to the extent permitted by law, the provisions of the EAA in Executive Order 12924 of August 19, 1994, extended by Presidential notice of August 10. 1999. 64 FR 44101 (August 13. 1999).

Rulemaking Requirements

1. This proposed rule has been determined to be significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB Control Numbe: This rule contains and involves collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 350 1 *et seq.*). This rule involves collections that have been approved by the Office of Management and Budge: under control numbers 0694-0038. and 0694-0096. This rule contains collections that have been approved by the Office of Management and Budge: under control numbers: 0607–0152. 0694–0040, 0694–0094, 0694–0095. 0694–0097, 0694–0088, and 0694–xxxx.

Comments are invited on (a) whether the collection of information is necessary for the functions of the agency, including whether the information shall have practical utility: (b) the accuracy of the agency's estimate of the burden of the proposed collection

- should say paper SED + doesnt
- should say AES Eq. + doesn't

of information; (c) ways to enhance the quality, utility, and clarify of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments regarding these or any other aspects of the collection of information to: Sharron Cook, Regulatory Policy Division, Bureau of Export Administration, U.S. Department of Commerce Room 2705, 14th Street and Pennsylvania Ave., N.W. Washington, DC 20230.

Because of the importance of the issues raised by these regulations, this rule is issued in proposed form and comments will be considered in the development of final regulations. Comments will be considered on provisions included in the regulations as well as provisions or guidance which commenters believe should be included in the regulations. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close December 3. 1999. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the person submitting the comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department re uires comments in written form.

8 ral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, Room 6883, Department of Commerce, 14th Street and Pennsylvania Avenue, N.W.. Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from the Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 482–0500.

3. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking. the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (Sec. 5 U.S.C. 553(a)(l)). Further. no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 5 U.S.C. or by any other law, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et *seq.*) are not applicable.

List of Subjects

15 CFR Part 730

Administrative practice and procedure, Advisory committees, Exports. Foreign trade, Reporting and recordkeeping requirements, Strategic and critical materials.

15 CFR Parts 740, 743, 748, 750, 752, and 758

Administrative practice and procedure, Exports, Foreign trade, Reporting and Record keeping requirements.

15 CFR Part 762

Administrative practice and procedure, Business and industry, Confidential business information, Exports, Foreign trade, Reporting and recordkeeping requirements.

Accordingly, parts 732, 740. 743.748. 750, 752, 758, 762, and 772 of the Export Administration Regulations (15 CFR Parts 730-799) are proposed to be amended as follows:

1. The authority citation for 15 CFR parts 758 and 762 are revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12924, 59 FR 43437, 3 CFR. 1994 Comp.. p. 917; Notice of August 10. 1999, 64 FR 44101 (August 13. 1999).

2. The authority citation for 15 CFR parts 732. 748. 752. and 772 are revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et* seq.; 50 U.S.C. 1701 etseq.: E.O. 12924. 59 FR 43437, 3 CFR, 1994 Comp.. p. 917; E.O. 13026, 61 FR 58767, 3 CFR. 1996 Comp.. p. 228: Notice of August 10. 1999.64 FR 44101 (August 13. 1999).

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

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 *et seq.*; E.O. 12924, 59 FR 43437, 3 CFR. 1994 Comp.. p. 917: E.O. 13026.61 FR 58767, 3 CFR. 1996 Comp.. p. 228: Notice of August 10. 1999, 64 FR 44101 (August 13. 1999).

4. The authority citation for 15 CFR part 743 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq*: 50 U.S.C. 1701 *et seq*; E.O. 12924, 59 FR 43437, 3 CFR. 1994 Comp.. p. 917; Notice of August 10. 1999.64 FR 44101 (August 13. 1999).

5. The authority citation for 15 CFR part 750 continues to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; E.O. 12924, 59 FR 43437, 3 CFR. 1994 Comp.. p. 917; E.O. 12981, 60 FR 62980, 3 CFR. 1997 Comp., p. 60: E.O. 13026, 61 FR 58767, 3 CFR. 1996 Comp.. p. 228; Notice of August 10. 1999, 64 FR 44101 (August 13. 1999).

6. Parts 740 through 772 are amended by revising the phrase "U.S. exporter" to read "exporter" in the following places:

§ 740.9(a) (2) (iii) last sentence
§ 740.10(b)(3) (ii)(C)
§ 743.1(b)
§ 748.11(e)(4)(ii)(1)
Supplement No. 3 to part 748. "BXA–7 11, Statement By ultimate consignee and Purchaser Instructions", Block 8
Supplement No. 3 to part 752, "Instructions on Completing Form BXA-752 "Statement by Consignee in Support of Special Comprehensive License", Block 5

PART 732-[AMENDED]

7. Section 732.5 is revised to read as follows:

§ 732.5 Steps regarding Shipper's Export Declaration, Destination Control Statements, and recordkeeping.

(a) *Step 27: Shipper's Export Declaration (SED).* Exporters or agents authorized to complete the Shipper's Export Declaration (SED), or to file SED

information electronically using the Automated Export System (AES), should review § 758.1 of the EAR to determine when an SED is required and what export control information should be entered on the SED or AES record. More detailed information about how to complete an SED or file the SED information electronically using AES may be found in the Bureau of Census Foreign Trade Statistics Regulations (FTSR) at 15 CFR part 30. Reexporters and firms exporting from abroad may skip Steps 27 through 29 and proceed directly to § 732.6 of this part.

(1) *Entering license authority.* You must enter the correct license authority for your export on the SED or AES record (License number, License Exception symbol, or No License Required designator "NLR") as appropriate. See § 758.1 (f) of the EAR and 15 CFR 30.7(m) of the FTSR.

(i) *License number and expiration date.* If you are exporting under the authority of a license, you must enter the license number on the SED or AES record. The expiration date must be entered on paper versions of the SED only.

(ii) *License Exception.* If you are exporting under the authority of a License Exception, you must enter the correct License Exception symbol (e.g.. LVS. GBS, CIV) on the SED or AES record. See § 740.1 of the EAR.

(iii) *NLR.* If you are exporting items for which no license is required, you must enter the designator NLR. You should use the NLR designator in two circumstances: first, when the items to be exported are subject to the EAR but not listed on the Commerce Control List (CCL) (i.e., items that are classified as EAR99), and second, when the items to be exported are listed on the CCL but do not require **a** license. Use of the NLR designator is also a representation that no license is required under any of the General Prohibitions set forth in part 736 of the EAR.

(2) *Item description.* You must enter an item description identical to the item description on the license when a license is required or enter an item description sufficient in detail to permit review by the U.S. Government and verification of the Schedule B Number (or Harmonized Tariff Schedule number) for License Exception shipments or shipments for which No License is Required (NLR). See § 758.1(f) of the EAR; and 15 CFR 30.7(l) of the FTSR.

(3) *Entering the* ECCN. You must enter the correct Export Control Classification Number (ECCN) on the SED or AES record for all items having a classification other than EAR99, i.e., items listed on the Commerce Control List in Supplement No. 1 to part 774 of the EAR. See § 758.1 (f) of the EAR: and 15 CFR 30.7(m) of the FTSR.

(b) *Step 28: Destination Control Statement.* The Destination Control Statement (DCS) must **be** entered on the invoice and on the bill of lading, air waybill, or other export control document that accompanies the shipment from its point of origin in the United States to the ultimate consignee or end-user abroad. The person responsible for preparation of those documents is responsible for entry of the DCS. The DCS is required for all exports from the United States of items on the Commerce Control List that are not classified as EAR99, unless the export may be made under License Exception BAG or GFT (see part 740 of the EAR) Reexporters should review § 752.15 of the EAR for DCS requirements when using a Special Comprehensive License; otherwise, DCS requirements do not apply to reexports.

(c) *Step 29: Recordkeeping.* Records of transactions subject to the EAR must be maintained for five years in accordance with the recordkeeping provisions of part 762 of the EAR.

PART 740—[AMENDED]

8. Section 740.1 is amended by revising paragraph (d) to read as follows:

§ 740.1 Introduction.

* * * * *

(d) *Shipper's Export Declaration: Clearing exports under License Exceptions.* You must enter on any required Shipper's Export Declaration (SED) or Automated Export System (AES) record the correct License Exception symbol, e.g., LVS, TMP. etc.. for the License Exception(s) you use to export. In addition, you must enter the correct Export Control Classification Number (ECCN). e.g., 4A003, 5A002, etc., on the SED or AES record for all items having a classification other than EAR99, i.e., items listed on the Commerce Control List in Supplement No. 1 to part 774 of the EAR. See § 758.1 of the EAR for Shipper's Export Declaration requirements.

* * * * *

PART 748-[AMENDED]

9. Section 748.4 is amended by revising paragraphs (a) and (b) to read as follows:

§ 748.4 Basic guidance related to applying for a license.

(a) *License Applicant.* (1) *Export transactions.* Only a person in the United States may apply for a license to export items from the United States. The applicant must be the exporter, who is that principal party in interest with the authority to determine and control the sending of items out of the United States. **See definition of "exporter" in part 772 of the EAR.**

(2) *Routed export transactions.* The U.S. principal party in interest or the duly authorized US. agent of the foreign principal party in interest may apply for a license to export items from the United States. Prior to submitting an application. the agent that applies for a license on behalf of the foreign principal party in interest must obtain a power of attorney or other written authorization from the foreign principal party in interest. **See § 758.2(c) and (e) of the EAR.**

(3) *Reexport transactions.* The U.S. or foreign principal party in interest. or rhe duly authorized U.S. agent of the foreign principal party in interest, may apply for a license to reexport controlled items from one country to another. Prior to submitting an application, an agent that applies for a license on behalf of a foreign principal party in interest must obtain a power-of-attorney or other written authorization from the foreign principal party in interest. See power-of-attorney requirements in paragraph (b) (2) of this section.

(b) *Disclosure of parties on license applications and the power of attorney.* (1) *Disclosure of parties.* License applicants must disclose the names and addresses of all parties to a transaction. When the applicant is the U.S. agent of the foreign principal party in interest, the applicant must disclose the fact of the agency relationship, and the name and address of the agent's principal. If there is any doubt about which persons should be named as parties to the transaction, the applicant should disclose the names of all such persons and the functions to be performed by each in Block 24 (Additional Information) of the BXA-748P Multipurpose Application form. Note that when the foreign principal party in interest is the ultimate consignee or end-user, the name and address need not be repeated in Block 24. See "Parties to the transaction" in § 748.5.

(2) *Power of attorney or other written authorization.* Prior to submitting an application for a license, an agent **must** obtain a power of attorney or other written authorization from the foreign principal party in interest to act on behalf of the foreign principal party in interest. When completing the BXA-748P Multipurpose Application Form. Block 7 (documents on file with applicant) must **be** marked "other" and

Block 24 (Additional information) must be marked "748.4(b)(2)" to indicate that the power of attorney or other written authorization is on file with the applicant (agent). See part 762 of the EAR for recordkeeping requirements.

* * * * *

10. Section 748.5 is revised to read as follows:

§ 748.5 Parties to the transaction.

The following parties may be entered on the BXA-748P Multipurpose Application Form. The definitions, which also appear in part 772 of the EAR, are set out here for your convenience to assist you in filling out your application correctly.

(a) *Applicant.* The person who applies for an export or reexport license, and who has the authority of a principal party in interest to determine and control the export or reexport of items. See § 748.4(a) of this part and definition of "exporter" in part 772 of the EAR.

(b) *Other party authorized to receive license.* The person authorized by the applicant to receive the license. If a person and address is listed in Block 15 of the BXA-748P Multipurpose Application Form, the Bureau of Export Administration will send the license to that person instead of the applicant. Designation of another party to receive the license does not alter the responsibilities of the applicant, licensee or exporter.

(c) *Purchaser.* The person abroad who has entered into the transaction to purchase an item for delivery to the ultimate consignee. In most cases, the purchaser is not a bank, forwarding agent, or intermediary. The purchaser and ultimate consignee may be the same entity.

(d) *Intermediate consignee.* The person that acts as an agent for a principal party in interest and takes possession of the items for the purpose of effecting delivery of the items to the ultimate consignee. The intermediate consignee may be a bank, forwarding agent, or other person who acts as an agent for a principal party in interest.

(e) *Ultimate consignee.* The principal party in interest located abroad who receives the exported or reexported items. The ultimate consignee is not a forwarding agent or other intermediary. but may be the end-user.

(f) *End-user.* The person abroad that receives and ultimately uses the exported or reexported items. The end-user is not a forwarding agent or intermediary, but may be the purchaser or ultimate consignee.

PART 750—[AMENDED]

11. Section 750.7 is amended by revising paragraph (d) to read as follows:

§ 750.7 Issuance of licenses.

* * * * *

(d) *Responsibility of the licensee.* The person to whom a license is issued is the licensee. In export transactions, the exporter must be the licensee, and the exporter-licensee is responsible for the proper use of the license, and for all terms and conditions of the license, except to the extent that certain terms and conditions are directed toward some other party to the transaction. In reexport or routed export transactions, a U.S. agent acting on behalf of a foreign principal party in interest may be the licensee: in these cases, both the agent and the foreign principal party in interest, on whose behalf the agent has acted, are responsible for the use of the license, and for all terms and conditions of the license, except to the extent that certain terms and conditions are directed toward some other party to the transaction. It is the licensee's responsibility to communicate the specific license conditions to the parties to whom those conditions apply. In addition, when required by the license, the licensee is responsible for obtaining written acknowledgment(s) of receipt of the conditions from the parties to whom those conditions apply.

* * * * *

PART 752-[AMENDED]

11. Section 752.15 is amended by revising the citation "§ 758.3" to read "§ 758.1" in paragraph (a) introductory text.

PART 758—[AMENDED]

12. Part 758 is amended by revising §§ 758.1, through 758.5 and removing and reserving § 758.6, to read as follows:

§ 758.1 The Shipper's Export Declaration (SED).

(a) *The Shipper's Export Declaration (SED).* The SED (Forms 7525-V or 7525-V-Alt or the Automated Export System (AES electronic equivalent)) is used by the Bureau of Census to collect trade statistics and by the Bureau of Export Administration for export control purposes. The SED and the AES collect basic information such as the names and addresses of the parties to a transaction; the description, the Export Control Classification Number (ECCN) (when required), the Schedule B number or Harmonized Tariff Schedule number, the quantity and value of the items exported; and the license authority for the export. The SED or the AES electronic equivalent is a statement to the United States Government that the transaction occurred as described.

(b) *When an SED is required.* You must file a paper SED. or file the SED information electronically using the AES. with the United States Government in the following situations:

(1) For all shipments of tangible items subject to the EAR that are authorized under a license, regardless of value or destination:

(2) For all shipments of tangible items subject to the EAR that are authorized under a License Exception or NLR. when the value of the items classified under a single Schedule B Number (or Harmonized Tariff Schedule number) is over $2.500. except as exempted by the Foreign Trade Statistics Regulations (FTSR) in 15 CFR part 30 and referenced in paragraph (c) of this section;

(3) For all shipments subject to the EAR that are destined to Cuba, Iran, Iraq, Libya, North Korea, Serbia, Sudan. or Syria, regardless of value (see 15 CFR 30.55(h) of the FTSR); and

(4) For all shipments that will be transshipped through Canada to a third destination, where the shipment would require an SED if shipped directly to the final destination from the United States (see 15 CFR 30.58(c) of the FTSR).

Note to paragraph (b): In addition to the Shipper's Export Declaration for exports. the Bureau of Census Foreign Trade Statistics Regulations provide for a specific Shipper's Export Declaration for In-Transit Goods (Form 7513). See 15 CFR 30.3 and 30.8 of the FTSR.

(c) *Exemptions.* A complete list of exemptions from the SED or AES filing requirement is set forth in the FTSR. Some of these FTSR exemptions have elements in common with certain EAR License Exceptions. An FTSR exemption may be narrower than a License Exception. The following references are provided in order to direct you to the FTSR exemptions that relate to EAR License Exceptions:

(1) License Exception Baggage (BAG), as set forth in § 740.14 of the EAR. See 15 CFR § 30.56 of the FTSR;

(2) License Exception Gift Parcels and Humanitarian Donations (GFT), as set forth in § 740.12 of the EAR. See 15 CFR 30.55(g) of the FTSR;

(3) License Exception Aircraft and Vessels (AVS). as set forth in § 740.15 of the EAR. See 15 CFR 30.55(l) of the FTSR;

(4) License Exception Governments and International Organizations (GOV), as set forth in § 740.11 of the EAR. See 15 CFR 30.53 of the FTSR;

(5) License Exception Technology and Software Under Restriction (TSR), as set forth in § 740.6 of the EAR. See 15 CFR 30.54(b) and 30.55 (h) of the FTSR; or

(6) License Exception Temporary Imports, Exports, and Reexports (TMP) "tools of trade", as set forth in § 740.9(a)(2)(i) of the EAR. See 15 CFR 30.56(b) of the FTSR.

(d) *Notation on export documents for exports exempt from SED requirements.* When an exemption from filing the Shipper's Export Declaration applies, the forwarding or other agent must include on the bill of lading, air waybill, or other loading document the export authority of the items, i.e.. either the number of and expiration date of a license issued by BXA, the appropriate License Exception symbol, or NLR "No License Required" designator. This notation applies to any bill of lading or other loading document, including one issued by a consolidator (indirect carrier) for an export included in a consolidated shipment. However, this requirement does not apply to a "master" bill of lading or other loading document issued by a carrier to cover a consolidated shipment. The bill of lading or other loading document must be available for inspection along with the items prior to lading on the carrier.

(e) *Signing the Shipper's Export Declaration.* **The person who signs the** SED must be in the United States at the time of signing. That person, whether exporter or agent, is responsible for the truth, accuracy, and completeness of the SED, except insofar as that person can demonstrate that he or she reasonably relied on information furnished by others.

(f) *The SED or AES electronic equivalent is an export control document.* The SED or AES electronic equivalent is a statement to the U.S. Government. The SED or AES electronic equivalent is an export control document as defined in part 772 of the EAR. False statements made thereon may be a violation of § 764.2(g) of the EAR. When an SED or AES electronic equivalent is presented to the U.S. Government, the signer or filer of the SED or AES electronic equivalent represents the following:

(1) Export of the items described on the SED or AES electronic equivalent is authorized under the terms and conditions of the designated license issued by BXA: is in accordance with the terms and conditions of the appropriate License Exception; or is authorized under "NLR" as No License is Required for the shipment;

(2) Statements on the SED or AES electronic equivalent are in conformity with the contents of any license issued by BXA; and

(3) All information shown on the SED or AES electronic equivalent is true, accurate, and complete.

(g) *Export control information requirement on the SED or AES electronic equivalent.* You must show the license authority (License number, License Exception, or No License Required (NLR)), the Export Control Classification Number (ECCN) (when required), and the item description in the designated blocks of the SED or AES electronic equivalent.

(1) *Specific information requirements for licensed exports.* When exporting under the authority of a license, you must enter on the Shipper's Export Declaration or AES equivalent the license number and expiration date (the expiration date is only required on paper versions of the SED). the ECCN. and an item description identical to the item description on the license. The item description on the license must be stated in Commerce Control List terms, which may be inadequate to meet Census Bureau requirements. In this event, the item description you place on the SED or AES electronic equivalent must be given in enough additional detail to permit verification of the Schedule B Number (or Harmonized Tariff Schedule number) (e.g., size, material, or degree of fabrication). See 15 CFR 30.7(l) of the FTSR. If you include other items on the SED or AES electronic equivalent that do not require licenses, but that may be exported under the authority of a License Exception or No License Required, you must show the License Exception symbol or NLR designator, along with the specific description (quantity, Schedule B Number (or Harmonized Tariff Schedule number), value) of the item(s) to which the authorization applies in the designated blocks. See 15 CFR 30.7(m) of the FTSR.

(2) *Specific information requirements for License Exceptions.* You must enter on any required Shipper's Export Declaration (SED) or AES electronic equivalent the correct License Exception symbol (e.g., LVS. CBS. CIV) for the License Exception(s) under which you are exporting. Also, you must enter the correct Export Control Classification Number (ECCN) on the SED or AES electronic equivalent for all items having a classification other than EAR99, i.e., items listed on the Commerce Control List in Supplement No. 1 to part 774 of the EAR. In addition, an item description that is sufficiently detailed to permit review by the U.S. Government and verification of the Schedule B Number (or Harmonized Tariff Schedule number) is required. See § 740.1 (d) of the EAR.

(3) *Specific information requirements when no license is required.* You must enter on any required Shipper's Export Declaration (SED) or AES electronic equivalent the "NLR" designation when the items to be exported are subject to the EAR but not listed on the Commerce Control List (i.e., items are classified as EAR99), and when the items to be exported are listed on the CCL but do not require a license. In addition, you must enter the correct ECCN on the SED or AES electronic equivalent for all items being exported under the NLR provisions that have a classification other than EAR99, i.e., items listed on the Commerce Control List in Supplement No. 1 to part 774 of the EAR. Also, you must enter on the SED or AES electronic equivalent an item description that is sufficiently detailed to permit review by the U.S. Government and verification of the Schedule B Number (or Harmonized Tariff Schedule number). The designator "TSPA" may be used, but is not required, when the export consists of technology or software outside the scope of the EAR. See § 734.7 through § 734.11 of the EAR for TSPA information.

(h) *Submission of the SED.* The SED must be submitted to the U.S. Government in the manner prescribed by the Bureau of Census Foreign Trade Statistics Regulations (15 CFR part 30).

(i) *Exports by U.S. Mail.* When you make an export by U.S. mail that requires the submission of an SED. a properly executed paper version of the SED must be submitted to the post office at the place of mailing, or you must file the export information via AES procedures found in the FTSR. See 15 CFR 30.12 of the FTSR. Whenever you export items subject to the EAR that meets one of the exemptions for submission of an SED. you must enter the appropriate export authority on the parcel, i.e., either the number of and expiration date of a license issued by BXA. the appropriate License Exception symbol, or NLR "No License Required" designator.

(j) *Power of attorney or other written authorization.* (1) In a "power of attorney" or other written authorization. authority is conferred upon an agent to perform certain specified acts or kinds of acts on behalf of a principal.

(2) An agent must obtain a power **Gf** attorney or other written authorization in the following circumstances:

(i) An agent that represents a foreign principal party in interest in a routed transaction must obtain a power of

attorney or other written authorization that sets forth his authority:

(ii) An agent that applies for a license on behalf of a principal party in interest must obtain a power of attorney or other written authorization that sets forth the agent's authority to apply for the license on behalf of the principal.

Note to paragraph (j)(2): The Bureau of Census Foreign Trade Statistics Regulations impose additional requirements for a power of attorney or other written authorization. See 15 CFR 30.4 (e) of the FTSR.

(3) This requirement for a power of attorney or other written authorization is a legal requirement aimed at ensuring that the parties to a transaction negotiate and understand their responsibilities. The absence of a power of attorney or other written authorization does not prevent BXA from using other evidence to establish the existence of an agency relationship for purposes of imposing liability.

5758.2 Responsibilities of parties to the transaction.

(a) *General.* All parties that participate in transactions subject to the EAR must comply with the EAR. Parties are free to structure transactions as they wish, and to delegate functions and tasks as they deem necessary, as long as the transaction complies with the EAR. However, acting through a forwarding or other agent, or delegating or redelegating authority, does not in and of itself relieve anyone of responsibility for compliance with the EAR.

(b) *Export transactions.* The U.S. principal party in interest is the exporter, except in certain routed transactions. The exporter must determine licensing authority (License, License Exception, or NLR). and obtain the appropriate license or other authorization. The exporter may hire forwarding or other agents to perform various tasks, but doing so does not necessarily relieve the exporter of compliance responsibilities.

(c) *Routed export transactions.* All provisions of the EAR, including the end-use and end-user controls found in part 744 of the EAR, and the General Prohibitions found in part 736 of the EAR, apply to routed export transactions. The U.S. principal party in interest is the exporter and must determine licensing authority (License, License Exception, or NLR). and obtain the appropriate license or other authorization, unless the U.S. principal party in interest obtains from the foreign principal party in interest a writing wherein the foreign principal party in interest expressly assumes responsibility for determining licensing requirements and obtaining license authority, making the U.S. agent of the foreign principal party in interest the exporter for EAR purposes. See § 748.4(a)(3) of the EAR.

Note to paragraph (c) For statistical purposes, the Census Bureau requires the name of the U.S. principal party in interest, generally the seller, in Block (la) of the SED. For purposes of licensing responsibility under the EAR, however, the U.S. agent of the foreign principal party in interest may be the exporter, regardless of who is listed in Block (la) of the SED.

(d) *Information sharing requirements.* In routed export transactions where the foreign principal party in interest assumes responsibility for determining and obtaining licensing authority, the U.S. principal party in interest must, upon request, provide the foreign principal party in interest and its forwarding or other agent with the Export Control Classification Number (ECCN), or with sufficient technical information to determine classification. In addition, the U.S. principal party in interest must provide the foreign principal party in interest or the foreign principal's agent any information that it knows will affect the determination of license authority. See § 758.1 (f) of the EAR.

(e) *Power of attorney or other written authorization.* In routed export transactions, a forwarding or other agent that represents the foreign principal party in interest, or who applies for a license on behalf of the foreign principal party in interest, must obtain a power of attorney or other written authorization from the foreign principal party in interest to act on its behalf. See § 748.4(b) and § 758.1 (i) of the EAR.

§ 758.3 Use of export license.

(a) *License valid for shipment from any port.* An export license issued by BXA authorizes exports from any port of export in the United States unless the license states otherwise. Items that leave the United States at one port, cross adjacent foreign territory, and reenter the United States at another port before being exported to a foreign country. are treated as exports from the last U.S. port of export.

(b) *Shipments against expiring license.* Any item requiring a license that has not departed from the final U.S. port of export by midnight of the expiration date on an export license may not be exported under that license unless the shipment meets the requirements of paragraphs (b) (1) or (2) of this section.

(1) BXA grants an extension; or

(2) Prior to midnight on the date of expiration on the license, the items:

(i) Were laden aboard the vessel: or

(ii) Were located on a pier ready for loading and not for storage, and were booked for a vessel that was at the pier ready for loading; or

(iii) The vessel was expected to be at the pier for loading before the license expired, but exceptional and unforseen circumstances delayed it, and BXA or the U.S. Customs Service make a judgment that undue hardship would result if a license extension were required.

(c) *Reshipment of undelivered items.* If the consignee does not receive an export made under a license because the carrier failed to deliver it, the exporter may reship the same or an identical item, subject to the same limitations as to quantity and value as described on the license, to the same consignee and destination under the same license. If an item is to be reshipped to any person other than the original consignee, the shipment is considered a new export and requires a new license. Before reshipping, satisfactory evidence of the original export and of the delivery failure, together with a satisfactory explanation of the delivery failure. must be submitted by the exporter to the following address: Operations Division. Bureau of Export Administration, U.S. Department of Commerce, Room 2705. 14th Street & Pennsylvania Avenue, N.W.. Washington, D.C. 20230.

§ 758.4 Conformity of documents and unloading of items.

(a) *Purpose.* The purpose of this section is to prevent items licensed for export from being diverted while in transit or thereafter. It also sets forth the duties of the parties when the items are unloaded in a country other than that of the ultimate consignee as stated on the export license.

(b) *Conformity of documents.* When a license is issued by BXA. the information entered on related export control documents (e.g., the SED, bill of lading or air waybill) must be consistent with the license.

(c) *Issuance of the bill of lading or air waybill.*—(1) *Ports in the country of the ultimate consignee.* No person may issue a bill of lading or air waybill that provides for delivery of licensed items to any foreign port located outside the country of the intermediate or the ultimate consignee named on the BXA license and Shipper's Export Declaration (SED).

(2) *Optional ports of unloading.* (i) *Licensed items.* No person may issue a bill of lading or air waybill that provides for delivery of licensed items to optional ports of unloading unless all the optional ports are within the country of

ultimate destination or are included on the BXA license and SED.

(ii) *Unlicensed* items. For shipments of items that do not require a license, the exporter may designate optional ports of unloading on the SED and other export control documents, so long as the optional ports are in countries to which the items could also have been exported without a license. See also 15 CFR 30.7(h) of the FTSR.

(d) *Delivery of items.* No person may deliver items to any country other than the country of the intermediate or ultimate consignee named on the BXA license and SED without prior written authorization from BXA. except for reasons beyond the control of the carrier (such as acts of God, perils of the sea, damage to the carrier, strikes, war, political disturbances or insurrection).

(e) *Procedures for unscheduled unloading.*—(1) *Unloading in country where no license is required.* When items are unloaded in a country to which the items could be exported without a license issued by BXA. no notification of BXA is required. However, any persons disposing of the items must continue to comply with the terms and conditions of any license or license exception, and with any other relevant provisions of the EAR.

(2) *Unloading in a country where a license is required.* (i) When items are unloaded in a country to which the items would require a license issued by BXA, no person may effect delivery or entry of the items into the commerce of the country where unloaded without prior written approval from BXA. The carrier, in ensuring that the items do not enter the commerce of the country, may have to place the items in custody, or under bond or other guaranty. In addition, the carrier must inform the exporter and BXA of the unscheduled unloading in a time frame that will enable the exporter to submit its report within 10 days from the date of unscheduled unloading. The exporter must within 10 days of the unscheduled unloading report the facts to and request authorization for disposition from BXA using either: mail, fax, or E-mail. The report to BXA must include:

(A) A copy of the manifest of the diverted cargo;

(B) Identification of the place of unloading; and

(C) A proposal for disposition of the items and a request for authorization for such disposition from BXA.

(ii) *Contact information.* U.S. Department of Commerce, Bureau of Export Administration, Office of Exporter Services, Room 1093, 14th and Pennsylvania Avenue, N.W., Washington, D.C. 20230; phone number 202-482-0436; facsimile number 202-482-3322; and E-Mail address: RPD@BXA.DOC.GOV.

§ 758.5 Destination Control Statement.

The Destination Control Statement (DCS) must be entered on the invoice and on the bill of lading, air waybill, or other export control document that accompanies the shipment from its point of origin in the United States to the ultimate consignee or end-user abroad. The person responsible for preparation of those documents is responsible for entry of the DCS. The DCS is required for all exports from the United States of items on the Commerce Control List that are not classified as EAR99, unless the export may be made under License Exception BAG or GFT (see part 740 of the EAR). At a minimum, the DCS must state: "These commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited."

* * * * *

PART 762-[AMENDED]

13. Section 762.2 is amended by:

a. Revising the citation "§ 758.1 (b) (3)" to read "§ 758.2(d) (2) (ii)" in paragraph (b)(29);

b. Revising the citation "758.6" to read "§ 758.1" in paragraph (b) (3 1);

c. Revising paragraphs (b) (15), (b) (37), and (b) (38); and

d. Adding a new paragraph (b) (39) to read as follows:

§ 762.2 Records to be retained.

* * * * *

(b) * * *

(15) § 750.7. Issuance of license and acknowledgment of conditions;

* * * * *

(37) § 743. 1, Wassenaar reports;

(38) § 748.14, Exports of firearms: and

(39) § 758.2(c), Assumption writing.

PART 772—[AMENDED]

14. Part 772 is amended by revising the definitions of "Applicant" , "Exporter", "Forwarding agent". "Intermediate consignee". "Purchaser". and "Ultimate Consignee'; removing the definition for "U.S. exporter'; and adding definitions for "End-user", "Order Party", "Other party authorized to receive license", "Principal parties in interest", and "Routed export transaction" in alphabetical order, to read as follows:

* * * * *

Applicant. The person who applies for an export or reexport license, and who has the authority of a principal party in interest to determine and control the export or reexport of items. See § 748.4 of the EAR and definition for "exporter" in this part of the EAR.

* * * * *

End-user. The person abroad that receives and ultimately uses the exported or reexported items. The end-user is not a forwarding agent or intermediary, but may be the purchaser or ultimate consignee.

* * * * *

Exporter. The person in the United States who has the authority of a principal party in interest to determine and control the sending of items out of the United States. For purposes of completing the SED or filing export information on the Automated Export System (AES). the exporter is the U.S. principal party in interest (see Foreign Trade Statistics Regulations, 15 CFR part 30).

* * * * *

Forwarding agent. The person in the United States who is authorized by a principal party in interest to perform the services required to facilitate the export of the items from the United States. This may include air couriers or carriers. In routed export transactions, the forwarding agent and the exporter may be the same for compliance purposes under the EAR.

* * * * *

Intermediate consignee. The person that acts as an agent for a principal party in interest for the purpose of effecting delivery of items to the ultimate consignee. The intermediate consignee may be a bank, forwarding agent, or other person who acts as an agent for a principal party in interest.

* * * * *

Order Party. The person in the United States who conducted the direct negotiations or correspondence with the foreign purchaser or ultimate consignee and who. as a result of these negotiations, received the order from the foreign purchaser or ultimate consignee.

Other party authorized to receive license. The person authorized by the applicant to receive the license. If a person and address is listed in Block 1.5 of the BXA-748P Multipurpose Application Form, the Bureau of Export Administration will send the license to that person instead of the applicant. Designation of another party to receive the license does not alter the responsibilities of the applicant, licensee or exporter.

* * * * *

Principal parties in interest. Those persons in a transaction that receive the primary benefit, monetary or otherwise.

of the transaction. Generally, the principals in a transaction are the seller and the buyer. In most cases, the forwarding or other agent is not a principal party in interest.

* * * * *

Purchaser. The person abroad who has entered into a transaction to purchase an item for delivery to the ultimate consignee. In most cases, the purchaser is not a bank, forwarding agent. or intermediary. The purchaser and ultimate consignee may be the same entity.

* * * * *

Routed export transaction. A transaction where the foreign principal party in interest authorizes a U.S. forwarding or other agent to facilitate export of items from the United States.

* * * * *

Ultimate consignee. The principal party in interest located abroad who receives the exported or reexported items. The ultimate consignee is not a forwarding agent or other intermediary. but may be the end-user.

* * * * *

Dated: September 23. 1999.

R. Roger Majak.

Assistant Secretary *for Export Administration.*

[FR Doc. 99-25604 Filed 10-l-99; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF COMMERCE

Bureau of the Census

15 CFR Part 30

[Docket No. **980716180-9171-02]**

RIN 0607-AA20

Clarification of Exporters' and Forwarding Agents' Responsibilities; Authorizing an Agent To Prepare and File a Shipper's Export Declaration on Behalf of a Principal Party in Interest

AGENCY: Bureau of the Census, Commerce.

ACTION: Supplementary notice Of proposed rulemaking.

SUMMARY: The U.S. Census Bureau (Census Bureau) proposes amending the Foreign Trade Statistics Regulations (FTSR), 15 CFR part 30. to clarify the responsibilities of exporters and forwarding agents in completing the Shipper's Export Declaration (SED) and to clarify provisions for authorizing forwarding agents to prepare and file an SED or file the export information electronically using the Automated Export System (AES) on behalf of a principal party in interest.

DATES: Written comments must be submitted on or before December 3. 1999.

ADDRESSES: Direct all written comments on this proposed rulemaking to the Director. U.S. Census Bureau, Room 2049, Federal Building 3, Washington, D.C. 20233.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to C. Harvey Monk, Jr.. Chief, Foreign Trade Division, U.S. Census Bureau, Room 2104, Federal Building 3. Washington, D.C. 20233-6700, by telephone on (301) 457-2255 or by fax on (301) 457-2645.

SUPPLEMENTARY INFORMATION:

Background

The Census Bureau is responsible for collecting. compiling, and publishing trade statistics for the United States. These data are used by various Federal Government agencies and the private sector for planning and policy development. In order to accomplish its mission, the Census Bureau must receive accurate statistical information from the trade community. The Shipper's Export Declaration (SED) and the Automated Export System (AES) record are the primary vehicles used for collecting such trade data. and the information contained therein is used by the Census Bureau for statistical purposes only and is confidential under the provisions of Title 13. United States Code (U.S.C.). Section 301(g). The Census Bureau's primary objective in this proposed rule is to ensure the accuracy of its trade statistics and to clarify reporting responsibilities for all parties involved in export transactions.

As such the Census Bureau proposes amending the FTSR to clarify responsibilities of exporters and forwarding agents in completing the SED and to clarify who should be listed in the "Exporter" box on the SED and in the exporter field on the AES record. This proposed rule defines new terms. including "U.S. principal party in interest" and "routed export transaction." and clarifies existing ones (notably the definition of "exporter") for purposes of completing the SED. The proposed rule will also clarify provisions authorizing an agent to prepare and file an SED or its AES electronic equivalent on behalf of a principal party in interest.

The Census Bureau published a notice of proposed rulemaking on this subject in the **Federal Register** on August 6. 1998 (63 FR 4 1979). As a result of comments received on that proposed rulemaking and subsequent discussions with the Bureau of Export Administration (BXA). the Census Bureau has decided to issue a supplementary notice of proposed rulemaking to address the issues raised during the comment period and to further clarify provisions contained in that notice of proposed rulemaking. The BXA is also revising appropriate sections of the Export Administration Regulations (EAR) in a document published elsewhere in this issue of the **Federal Register.** The EAR will conform to the provisions of the FTSR in reference to clarifying the responsibilities of exporters and forwarding agents in completing the SED. and BXA will also propose changes to the EAR to simplify export clearance.

Comments

The Census Bureau received sixty-nine (69) comments on the notice of proposed rulemaking published in the **Federal Register** on August 6. 1998 (63 FR 4 1979). Of the comments received, fifty-nine (59) were opposed to some provisions of the proposed rule and ten supported the proposed rulemaking. Of the fifty-nine comments opposed to the proposed rule, twenty-four (24) had interpreted the rule to require that the "manufacturer" always be listed as the exporter of record on the SED in all export transactions. This was a misinterpretation of the proposed rule, and the revised proposed rulemaking will clearly stipulate that only the "U.S. seller or principal party in interest" be listed as the exporter on the SED. Only when the manufacturer is the actual "seller of the merchandise for export" should it be listed as exporter on the SED or AES electronic record.

The other major reason for opposition to the proposed rule concerned identifying the U.S. seller or principal as the "exporter of record" in EX WORKS (EXW) transactions. EXW is a "term of sale" whereby the foreign buyer takes possession of the merchandise in the United States, and the foreign buyer takes responsibility for facilitating the export of the merchandise out of the United States. including export documentation responsibility. The major concern the U.S. sellers presented. when required to be listed as the "exporter of record" in these transactions. is that the U.S. seller does not have effective control over the merchandise once it is turned over to the foreign buyer's agent. The U.S. seller does not want to be held liable for any export control violations that may occur in such a transaction.

The proposed Census Bureau export regulations do not intend to interfere with the terms of sale between the

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PHOENIX INTERNATIONAL
1979-1999

November 12, 1999

Sharron Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
Room 2705
14th Street and Pennsylvania Avenue NW
Washington, D.C. 20230

Re: Comments on proposed rules

Dear Ms. Cook,

As an international freight forwarder we are glad to see such clarity in the responsibilities of all parties involved in an export transaction as detailed in the proposed regulations. So many times we have encountered exporters who refuse to take the responsibility of export compliance. They leave us forwarders to take our best guess on how to classify their product, We see these proposed regulations as the beginning of the end of those days- If the shipper tries to make us assume responsibility for classification again, we will soon have firm ground to stand on.

Our one concern with the proposed regulations relates to obtaining the export power of attorney. Our efforts in the past to obtain powers of attorney have always fallen short largely because we have not had a firm regulation to stand behind. There seems to be varying schools of thought as to who can sign the export power of attorney. If you ask a Customs employee, more than likely they will tell you an officer of the company must sign it. The BXA's guidelines, "Responsibility of the Freight Forwarder" says it can be signed by an officer or other employee of the company. We prefer that any company employee be able to sign the POA as this greatly increases our possibility of obtaining one and reduces the time it takes to obtain one. The proposed rules make no mention of who may sing the POA nor does the proposed Census rules. Thus, if these rules stand as is, when

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the documentation clerk of an exporter asks us if he/she can sign the POA we will have to tell them, "Your Company will have to decide who has authority to sign the form". Because exporters will choose to be extra cautious with new regulations looming over them, they will probably pass the POA to an officer to sign, Then the POA starts its journey up the corporate ladder, possibly to another state, where it sits in a bin until a particular officer arrives back from a business trip- Thus, if we do get it back, it is probably two weeks after the shipment has had to be shipped Our thoughts are that if a shipping clerk is able to sign box 23 of the SED then they should also be able to sign an export POA. BXA may feel this way also but if you do not convey it in the new regulations it will probably not be interpreted that way.

Please consider this need for clarification when composing the final rules.
Sincerely,

Blake Williams
Export Compliance Manager

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5 pages

BALZERS UND LEYBOLD

Balzers und Leybold Deutschland Holding AG, Postfach 1555 D-63405 Hanau
Sharron Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
Room 2705, 14th Street
and Pennsylvania Avenue, N.W.
Washington, D.C. 20230
USA

Ihr Zeichen
Ihre Nachricht vom
Unsere Tel.-Nr. **06181/34-I 5 66**
Unsere Fax.-Nr. 06181/34-13 **10**
Unser Zeichen **SE-Dr.Her/R** br131
Datum **22 October 1999**

Comment regarding Fed. Reg., Oct. 4, 1999, page 53854
Parties to a Transaction and their responsibilities, Routed Export Transactions, Shipper's Export Declarations, and Export Clearance

Ladies and Gentlemen,

Being a foreign OEM Corporation and therefore a target for U.S. regulations, we like to comment on the importance of ECCN denominations, the value of Destination Control Statements and the applicant agent.

1) ECCNs, important for Customs and Exporters

The Department of Commerce eventually has changed its mind and cast into law a shrewd proposition made to the new EAR a few years ago: Fed. Reg. March 1996, page 12728: *„one commenter recommended that we require that exporters show the ECCN on the SED for all exports ...".*
This move is not just one of the many formalities usually imposed on exporters -this one will turn out before long as a masterstroke of the authorities for an automated export surveillance. Why that?

1.1 Intelligent Software reads SED's

Provided that an intelligent Custom's software -taking into account the itemized Reason for Control provisions of every single of the 450 ECCNs of the CCL, combined with all Country Chart and License Exceptions prescriptions, including Schedule B-description of commodities – is scrutinizing all the detailed statements which are required on the SED: possible deficiencies, at least questions will emerge within seconds.
Mainly exporters of supposed „No License Required" exports will get alarmed from Customs backfire.

Example 1:
Heat treatment furnaces are produced for decades and are EAR 99. An exporter dispatches graphite spare parts to France. The alleged Customs software gives green light if the SED shows either a License Number or refers to „General License § 110.25“ Not only ECCN OCO05 [1], but also 1 Cl 07a may come into consideration for graphite parts.

Example 2:
A more recent development is ,,Diamond like Carbon” in thin protective layers on a number of high tech-products. Wheras the products are EAR 99 i.e. not meantioned in the CCL, the coating technology is controlled to all countries except Canada. Again the Customs software will look out for a License Number on the SED. This also raises the question how Customs controls the e-mails of U.S. companies for their subsidiaries in Europe regarding 2E003f, see Fed. Reg. July 23, 1999, page 40106. Do all exporters of EAR 99 products read the Federal Register?

The pitfalls for exporters who are not acquainted with the regulations are numerous, but one information is pre-eminent: is the item covered by an ECCN or is it EAR 99? Before any export – or reexport – starts, this number must be known.
Having set out this scenario, we come to our plea and

2) Recommendation to BXA

It should be made **mandatory,** that the relevant **ECCNs should be printed** not only on the SED for all listed items, but also **on the invoice** and relevant documents destined for customers abroad.
Once the U.S. exporters will be used to put the ECCNs on the SED it is not a big step for them to print the already available numbers also in the invoice, exactly denominating the relevant items.
Also the foreign importer needs the ECCN, because he might want to „incorporate, rackmount, cable connect“ U.S. products , or reexport them unchanged. Having this information, the reexporter only has to apply his national export laws and then filter out in addition from the United States literature 15 CFR Part 730 et al / 31 CFR Part 500 et seq / 10 CFR parts 110 and 8101 22 CFR Part 121 what he needs to do in global business if U.S. items or U.S. citizens are involved.
Overall result: **The knowledge of** classification: **ECCN** or EAR 99 **is indispensable** but sufficient in reexport cases. Many companies (in USA and Europe) give the information automatically on their invoices. The German company Siemens even states the EU and [2] U.S. classification.

3) Destination Control Statement

Since the Fed. Reg. of March 25, 1996 was published, § 758.6 (a) requires a DCS as a **„must"** for ECCNs controlled under NS and NP. In addition, a DCS **may** be entered ***. . . . for which no DCS is required.***

This „may" has been excessively used by U.S. exporters – any Fed. Ex, UPS, DHL – Airway-Bill bears a preprinted DCS. Printing a DCS, often prefixed by „NLR" has become a standard in the order processing of the U.S. exporting community – and, I learnt from U.S. forwarding agents that U.S. Customs **always** want to see the DCS. As a matter of fact, the warning-value of a DCS on U.S. invoices for the receiving party in Europe is practically zero.

The new proposed § 758.5 (Fed. Reg. Oct. 4, 1999) leaves it open to speculation if exporters still **may** enter a DCS . . . for exports for which no DCS is required. It will open the turf for enforcement lawyers, especially since the strange provisions of the present § 758.6 (f) will disappear: There will again be room for interpretation...

In EC-countries (since 1995) DCS like statements are prescribed in export cases **only** for listed items, and it is an offense to use them on other items. Because of the European experience the importers believed at first, that the U.S. DCS has the same information value, i.e. that it would signal listed items.

However, in the meantime any company in Europe is used to the inflation of DCS-statements (coming from the U.S.) for all and everything. Therefore the DCS basically has aquired the same status as ,,made in USA".

For those EC-companies, which comply with the extraterritorial U.S. law, the knowledge that something is ,,made in USA" is enough information, especially if no reexport is intended. They know that all U.S. products are subject to U.S. regulations, and the current DCS provides no iota of further information.

As proof just take the famous Iran Air case Fed. Reg. August 28, 1992, page 39178. On page 39180 read: *„10. The invoice from Fluke (Germany) to Iran Air did not contain the destination control statement that diversion contrary to U.S. law was prohibited'.* In the view of the Commerce Department this knowledge of the DCS was not necessary: Iran Air was liable and eventually sentenced for an unauthorized reexport.

4) The U.S. applicant agent should be abolished

Over the decades U.S. products for hundreds of billions of U.S. Dollars have been exported, which are now foreign property but stay nevertheless forever subject to the EAR. As you read these lines Microsoft Software like Windows 95 etc. is permanently being sold in all kinds of shops around the world around the clock (ECCN 5D002; TSU).

If a foreign farmer wants to sell to Cuba his historical U.S. made Mc Cormick threshing machine or if a foreign manufacturer wants to deliver to Syria a high tech Compact Disc Coating Machine with nothing in it from the U.S. than a Microsoft Disk Operating System, then he needs a reexport license. Neither Mc Cormick (do they still exist?) nor the European reseller of the reseller . . . of Microsoft is a „party in interest".

This latter one must hire a U.S. citizen, because the applicant for the reexport license **must be a U.S. agent** [§ 748.4.(b)(l)] who, among other things, will never loose his responsibilities versus the U.S. Government. He even may not get the reexport license which BXA might send directly to the foreign principal party in interest [748.5.(b)].

This famous „agent" was already described in the new EAR, Fed. Reg. March 25, 1996, page 12813/14 – but to our knowledge no U.S. citizen has ever advertized abroad to offer such ,,agent-service". There might be not many applications to reexport U.S. items which are already abroad – so BXA should be brave enough to stand direct contact with such **foreign** applicants.

5) Final Remark

As shown, the one and only information a European exporter needs is the ECCN; **E**xport Control Classification Number. The simple Prefix ECCN before the actual Number implies in addition that the product is made in USA. Thus the U.S. Destination Control Statement is superfluous.
In most cases the U.S. ECCN may be identical with the European number as printed in the European List of Dual Use Goods (ANNEX I; List referred to Article 2 of Decision 94/942/CFSP and Article 3(1) of Regulation (EC) No 3381/94).

Yet care is needed in each case because, for example
- there are other U.S. unilateral 900 Numbers on the CCL than exist in some European States,
- the CCL does not contain the 400-Numbers (Australia Group) like ANNEX I,
- the CCL contains some additionals like 1 E351, 1 E355 etc. and,
- dangerously, 1 C350 differs in thesubsections.

Apart from some other odds like 0C005/0C004 and the differing publication dates of CCL-related data in the Federal Register and the European Official Journal, there do exist enormous differences, however, in terms of the American NLR and License Exceptions Provisions compared to the few comparable European General Licenses. There is no level playing field. European exporters are
- first: far away from the privileges that U.S. exporters are accorded by their Government
- second: bothered by U.S. extraterritorial laws which should be either dropped or suitably counteracted by EU – and other Governments.

Best regards,

Balzers und Leybold Deutschland Holding AG
Export Control Department

Bernhard Herkert

ppa. Dr. Herkert

Export Control Manager

[1] In Europe OCO05 was changed into OCO04 and reworded; see OJL 92/1 of March 25, 1998

[2] See Fed. Reg. March 25, 1996, page 12731: *,,one commenter stated that unless the U.S. and EC system are identical, there will still be need for exporters to classify U.S. and EC separately".*
Such provident view is still valid, since the EC-List and the CCL are always differing, example: the large revisions to the CCL of Fed. Reg. July 23, 1999, page 40106, were published in the EU Official Journal L 73 Vol. 42 already on March 19, 1999.

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December 2, 1999

Sharron Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
Room 2705
14th Street and Pennsylvania Avenue, N.W.
Washington, D.C 20230

Re: Docket No. 990709186-9186-01: Parties to a Transaction and Their Responsibilities; Routed Export Transactions, Shipper's Export Declarations, and Export Clearance (Notice of Proposed Rulemaking)

Dear Ms. Cook:

Caterpillar Inc. (Caterpillar) welcomes the opportunity to comment on the Bureau's supplementary notice of proposed rulemaking (NPRM) relating to the Shipper's Export Declaration (SED), as published in the *Federal Register* (64 Fed. Reg. 53,854) of October 4, 1999. Since the Bureau of the Census (Census) and the Bureau of Export Administration (BXA) simultaneously issued notices of proposed rulemaking on the responsibilities of the parties to an export transaction, and since the regulations work together, this letter provides comprehensive comments on both notices of proposed rulemaking, although it has been filed separately with each agency.

Caterpillar is a leading manufacturer of construction equipment, engines, and engine electrical power systems, with exports totaling over $6.0 billion annually. Caterpillar manages product and parts distribution from over 80 facilities worldwide, and has been a worldwide innovator in developing a seamless, electronic interface with its freight forwarder, AEI. Under the current Foreign Trade Statistics Regulations, Caterpillar is the exporter of record for about 95 percent of our sales. On other sales for which the terms are free alongside ship (FAS) and ex works (EXW), we provide a copy of the commercial invoice to the buyers' nominated forwarder with all the information needed to file an SED, including the Schedule B number.

Caterpillar urges BXA not to adopt the proposed regulations in their current form for the reasons set forth below. In short, the proposed regulations (1) abrogate the terms negotiated between the parties to an EXW or FAS transaction by improperly shifting to the U.S. manufacturer the financial and legal burden of filing the SED and complying with other export requirements; (2) improperly suggest that the U.S. principal party in interest has some

supervisory responsibility over the foreign principal party in interest's forwarding agent; (3) ignore commercial realities; (4) obscure, rather than clarify, legal obligations; and (5) will result in U.S. manufacturers being accused erroneously of export violations.

Moreover, both agencies can meet their objectives while still addressing industry concerns by simply adding an additional field to the SED to capture the desired information relating to the "U.S. principal party in interest."

ARGUMENTS:

1. The Prouosed Regulations Abrogate the Terms Negotiated between the Parties to an EXW or FAS Transaction by Improperly Shifting to the U.S. Manufacturer the Financial and Legal Burden of Filing the SED and Complying with Other Export Requirements

In the preamble to the supplementary notice of proposed rulemaking, Census states: "The proposed Census Bureau export regulations do not intend to interfere with the terms of sale between the foreign buyer and the U.S. seller in the export transaction." 64 Fed. Reg. at 53,862. Yet the proposed regulations do precisely that. The international trading community has codified the interpretation of trade terms defining the rights and obligations of buyers and sellers in international transactions, the most current version of which is INCOTERMS 1990. This codification simplifies export transactions and clarifies which party is responsible for the various aspects of an international transaction, based on the terms of sale.

Under INCOTERMS 1990, the seller in EXW and FAS transactions must "render the buyer, at the latter's request, risk and expense, every assistance in obtaining any export license or other authorization necessary for the exportation of the goods." International Chamber of Commerce, **INCOTERMS** 1990 at 18, 32 (1990). The seller must also render the buyer, at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages issued or transmitted in the country of origin which the buyer may require for the exportation of the goods. Id. at 22, 36. It is the buyer's responsibility in an ex works transaction to "obtain at his own risk and expense any export and import license or other official authorization and [to] carry out all customs formalities for the exportation and importation of the goods and, where necessary, for their transit through another country." Id. at 19, 33; see also International Chamber of Commerce, **INCOTERMS IN PRACTICE** at 37 (Charles Debattista, Ed. 1995) ("In EXW and FAS terms, the buyer must obtain the export license").

The proposed regulations abrogate any EXW and FAS terms negotiated by the parties by requiring the U.S. manufacturer to file the SED in most transactions, and by placing the primary responsibility for compliance with BXA requirements on the U.S. manufacturer, unless the U.S. manufacturer obtains from the foreign principal party in interest a writing wherein the foreign principal party in interest expressly assumes responsibility for determining licensing requirements and obtaining licensing authority. The objective of INCOTERMS is to eliminate the need for express provisions governing each party's responsibilities by codifying them in

succinct terms such as "EXW" or "FAS." The proposed regulations limit the usefulness of INCOTERMS and conflict with international law, which provides that a party who buys EXW or FAS is responsible for obtaining licenses, including BXA licenses, and for completing all export and import formalities, such as the SED or AES record.'

When goods are sold ex works, the U.S. manufacturer loses control over the goods once they leave the factory, and therefore is unable to ensure that an SED or AES record is filed. Census suggests in the "Response to Comments and Proposed Action" to the NPRM, see 64 Fed. Reg. at 53,862, that in a routed export transaction the U.S. principal party in interest will only be required to provide the foreign principal party in interest's designated agent with certain information. Yet the proposed regulations do not amend 15 C.F.R. § 30.1, which provides that the "Shipper's Export Declaration shall be filed by *exporters or their agents"* (emphasis added). Under the proposed regulations, the U.S. manufacturer will generally be the exporter in EXW and FAS transactions, and thus, pursuant to 15 C.F.R. § 30.1, will bear the legal and financial burden of filing the SED, even though the U.S. manufacturer has no contractual relationship with the forwarder preparing the SED in such instances, and even though the U.S. manufacturer will lack basic information needed to complete the SED, such as consignee, exporting carrier, and final foreign destination.

Census's intent to abrogate the intent of the parties in EXW and FAS transactions by shifting the burden for filing the SED to the U.S. manufacturer is further evidenced by its failure to amend 15 C.F.R. § 30.11, which provides that Customs and Census officials may require *exporters* to produce for inspection or copying the shipping documents, invoices, orders, packing lists, correspondence and other documentation bearing on the exportation. Again, the U.S. manufacturer in EXW and FAS transactions will generally be the exporter under the proposed regulations and yet will not have access to many of these documents.

2. The Preamble to the Proposed Regulations Improperly Suggests that the U.S. Principal Party in Interest Has Some Supervisory Responsibility over the Foreign Principal Party in Interest's Forwarding Agent

The "Response to Comments and Proposed Action" section of the *Federal Register* notice states:

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[1] If Commerce imposes a penalty in a situation where the U.S. manufacturer does not have an express assumption of responsibility from the foreign principal party in interest, and yet fails to obtain a required license, the proposed regulations will affect any civil litigation between the parties relating to financial liability for the penalty. The U.S. manufacturer will point to the EXW term in the contract as evidence that the foreign principal party in interest is liable for the export violation and resulting penalty, while the foreign principal party in interest will point to BXA's regulations as evidence that the U.S. manufacturer is responsible for the violation. This contradiction will likely result in litigation over who is liable for the penalty.

> In a routed export transaction, the forwarding agent is responsible for: (A) Obtaining a power of attorney or written authorization from the foreign principal to act on its behalf; (B) Upon request, providing the U.S. principal party in interest with appropriate documentation verifying that the information provided by the U.S. principal party in interest was accurately reported on the SED or AES record; and (C) maintaining the documentation to support the information reported on the SED or AES record.

64 Fed. Reg. at 53,863. As proposed, 15 C.F.R. § 30.4(c) imposes only one of these responsibilities on the forwarding agent: the requirement to obtain a power of attorney from the foreign principal. The forwarding agent is not required to provide the U.S. principal party in interest with appropriate documentation verifying that the information provided by the U.S. principal party in interest was accurately reported on the SED or AES record and none of the parties is responsible for maintaining documentation to support the information reported on the SED or AES record.

Moreover, any requirement that the forwarder provide appropriate documentation to the U.S. principal party in interest verifying that the information provided by the U.S. principal party in interest was accurately reported on the SED or AES record implies that the U.S. principal party in interest--the U.S. manufacturer--is somehow responsible for ensuring that the information it gives the forwarder is accurately reported. This suggestion is improper since the forwarder acts as agent for the foreign principal party in interest in a routed export transaction. Since the U.S. principal party in interest does not have a contractual relationship with the forwarder, it cannot be liable for the forwarder's failure to report the information as provided by the U.S. principal party in interest. If the U.S. and foreign principal parties in interest disagree as to the proper information to be reported on the SED or AES record, the forwarder, as agent for the foreign principal party in interest, must follow the instructions of the foreign principal, while still "providing the U.S. principal party in interest with appropriate documentation verifying that the information provided by the U.S. principal party in interest was accurately reported on the SED or AES record." Far from clarifying the responsibilities of the forwarder, the proposed regulations would impose conflicting responsibilities by failing to recognize that reasonable parties can disagree with respect to the proper information to be reported on the SED or AES record. Furthermore, a freight forwarder may have valid reasons for disregarding the information provided by the U.S. manufacturer in favor of information provided by the foreign buyer, as in cases where the foreign buyer has arranged for the goods to be modified after leaving the factory.

3. The Proposed Regulations Ignore Commercial Realities

Under the NPRM, Census proposes to redefine "exporter" as the "U.S. principal party in interest in the transaction," which in turn is defined as "the person in the United States that

receives the primary benefit, monetary or otherwise, of the export transaction." However, "exporter" is a precise term with an established commercial meaning that differs from Census's definition. The exporter is "an individual or company that transports goods or merchandise from one country to another in the course of trade." Edward G. Hinkelman, **DICTIONARY OF INTERNATIONAL TRADE** at 80 (3rd ed. 1999). The exporter is the party who has the power and responsibility for determining and controlling the sending of the items out of the United States. By attempting to redefine an established commercial term, Census will only confuse people and make it more difficult for them to comply with the various regulatory schemes governing exports.

In addition, it is the commercial practice of freight forwarders to equate the "exporter" listed in Block la of the SED with the "shipper" block on the bill of lading. Census recognizes this practice in its own regulations, which state that the "arrangement of Form 7525-V-Alternate (Inter-modal) conforms to and is designed for simultaneous preparation with various other shipping documents commonly used, such as the dock receipt, short form bill of lading, etc." 15 C.F.R. § 30.3. This practice will cause errors if "exporter" is redefined as proposed in the NPRM, which would make the U.S. manufacturer the exporter for purposes of the SED, even when the goods are sold EXW or FAS. However, in EXW or FAS transactions, the foreign buyer contracts for transportation of the goods to the foreign port of destination and is therefore the proper party to be listed as "shipper" on the bill of lading. If the proposed regulations are adopted, freight forwarders will no longer be able to easily determine who the shipper is by reviewing the SED and may erroneously list the U.S. principal party in interest as the shipper on the bill of lading.

Caterpillar has developed a worldwide, automated relationship with one broker/freight forwarder: AEI. Caterpillar's and AEI's systems are integrated to permit seamless, paperless processing. This relationship allows Caterpillar to transmit electronically to AEI on shipments for which Caterpillar is the actual exporter. AEI uses this transmission to move the goods and file an SED via AES-Option 4. By requiring Caterpillar to file SEDs for shipments in which the freight forwarder is selected by the foreign buyer, Commerce will force Caterpillar to revert to paper processing, at a substantial cost. Commerce's proposed regulations are contrary to efforts by business to move to seamless, electronic logistics systems.

4. <u>The Proposed Regulations Obscure, Rather than Clarify, Legal Obligations</u>.

The definition of "exporter" in Census's and BXA's NPRMs differ from each other and from the commercial meaning. Commercially, the exporter is the person who causes goods to be exported and assumes legal responsibility for that act, including filing the SED and obtaining any required export license. Under the definition of exporter proposed by Census, the exporter is usually the U.S. manufacturer, unless the foreign principal party in interest is in the United States when signing the SED. Under BXA's proposed 15 C.F.R. Part 772, the exporter would be "the person in the United States who has the authority of a principal party in interest to determine and control the sending of items out of the United States." Under BXA's proposed 15 C.F.R. § 758.2,

in routed export transactions, the U.S. principal party in interest is the exporter (even though the U.S. manufacturer in an EXW or FAS transaction does not have authority to "determine and control the sending of the items out of the United States") and is responsible for licensing unless the U.S. principal party in interest obtains a writing from the foreign principal party in interest wherein the foreign principal party in interest expressly assumes responsibility for licensing.

These conflicting definitions will only cause confusion. It is unclear what happens if a U.S. manufacturer obtains from the foreign principal party in interest a writing wherein the foreign principal party in interest expressly assumes responsibility for licensing, but then BXA determines that a different party is the proper U.S. principal party in interest. The foreign principal party in interest may be able to defend against a penalty imposed for a licensing violation on the ground that licensing was the responsibility of the U.S. principal party in interest, *i.e.*, the party as determined by BXA, which did not obtain an express assumption of responsibility for licensing from the foreign principal party in interest. Similarly, the regulations are ambiguous regarding what happens if BXA determines that a party other than the one who provided the writing is the proper foreign principal party in interest. To avoid fostering litigation regarding these matters, both Census and BXA should adopt definitions of "exporter" that are mutually consistent, and consistent with the commercial meaning of this term.

The definition in 15 C.F.R. § 30.7 of "U.S. principal party in interest" is also ambiguous. A principal purpose for selling goods ex works is to permit the foreign buyer to take control of the goods prior to exportation. The foreign buyer may wish to take control of the goods in order to have them modified by a third party in the United States prior to exportation. It is unclear in such cases whether the manufacturer or the party that modified the goods is the "U.S. principal party in interest." It would be difficult for the manufacturer to comply with proposed 15 C.F.R. § 30.4(c)(2) in such cases, since even minor modifications can result in a change in the Schedule B description of the commodities; the domestic, foreign or FMS code; and the Export Control Classification. Moreover, the foreign buyer may elect to export the goods in quantities that differ from the purchased quantities. As proposed, 15 C.F.R. § 30.7 imposes a legal obligation on the U.S. manufacturer, and makes the manufacturer liable for failure to comply with that legal obligation, even though the manufacturer may not have the required information.

Another reason foreign buyers elect to purchase ex works is to consolidate purchases from various U.S. manufacturers for export. Currently, Census requires an SED or AES record for each "shipment," and defines "shipment" as "all merchandise moving from one exporter to one consignee on one exporting carrier," see **CORRECT WAY TO FILL OUT THE SHIPPER'S EXPORT DECLARATION.** The proposed regulations leave unclear whether Census intends to continue this practice, which would result in the filing of numerous SEDs for each consolidated shipment, thereby increasing the cost of buying goods in the United States.

Additional ambiguity is introduced by the provision in 15 C.F.R. § 30.7 making a foreign entity the exporter, if in the United States when signing the SED.[2] Section 30.7 states: "In situations when a foreign principal party in interest who does not possess an EIN or SSN operates from within the U.S. to facilitate its own export, no EIN or SSN reporting requirement applies." Section 30.7 does not clarify when a foreign party's presence in the United States is such that it becomes the exporter for purposes of 15 C.F.R. § 30.7. In cases where the U.S. manufacturer sells goods to a foreign government EXW or FAS and deals with embassy personnel to complete the sale, it is unclear whether the presence of the foreign country's embassy in the United States means that the foreign principal party in interest is operating from within the United States to facilitate its own export. The vagueness of the regulation leaves the U.S. manufacturer and the foreign buyer in doubt as to who is the exporter in such situations.

Further, it is unclear who the exporter is for in-transit shipments. This party has commonly been a freight forwarder. However, the proposed regulations make plain that the "forwarding agent is rarely the 'exporter' in box la of the SED," yet provide no guidance on who the U.S. principal party in interest will be in transactions in which the seller and buyer are often both foreign. (It is unclear why this proposed regulation refers to box la of the SED as if it only applied to Form 7525-V, since it appears that the regulations are also intended to apply to Form 7525-V-Alternate (Inter-modal) and Form 75 13 for in-transit shipments.)

Not only are the regulations ambiguous and confusing, the forms themselves contain additional wording that will further confuse which party should be listed as the exporter. Block 2 of Form 7525-V-ALT (Inter-modal) requests the identity of the "Exporter (Principal or seller-licensee and address including ZIP Code)." Under the proposed regulations, the exporter for SED purposes and licensee for BXA purposes will be different for certain routed export transactions. The parenthetical wording, however, suggests that the exporter and licensee are the same. Similar confusion will result from wording on Form 75 13, Shipper's Export Declaration for In-Transit Goods. Block 4 of Form 75 13 requests the identity of the "Exporter (actual shipper or agent)." Under the proposed regulations, the exporter for SED purposes and the shipper will be different in EXW and FAS transactions. Moreover, the entire layout and wording of both forms suggest that the "agent" listed therein is the exporter's agent.[3] However, in EXW and FAS transactions, the agent listed on the SED or AES record will be acting on behalf of the foreign principal party in interest. These forms must be amended in light of the proposed regulatory changes.

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[2] Since 15 C.F.R. § 30.7(d)(l) permits a foreign entity to sign the SED, 15 C.F.R. § 30.4(a) should provide as follows: "The person who signs the SED must be in the United States at the time of signing. That person, whether ~~the U.S.~~ a principal party in interest or agent, is responsible for the truth ."

[3] Although Census has proposed amending 15 C.F.R. § 30.7(e) to provide that the forwarding agent named on the SED or AES record is the duly authorized agent of "a principal party in interest or the foreign principal party in interest," only amendment of the forms will fully eliminate the ambiguity. Moreover, it is redundant to refer to "a principal party in interest" and "the foreign principal party in interest" since the foreign principal party in interest is a principal party in interest.

5. The Proposed Regulations Will Result in U.S. Manufacturers Being Accused Erroneously of Export Violations

In routed transactions in which the foreign principal party in interest has assumed responsibility for licensing in writing, the U.S. principal party in interest will appear as the exporter on the SED or AES record, although the foreign principal party in interest or its agent will be responsible for licensing. However, the U.S. Customs Service's selectivity programs run against the information contained in the SED or AES record. Therefore, if a licensing violation occurs, Customs will likely associate that violation with the exporter of record listed on the SED or AES record, *i.e.*, the U.S. manufacturer. Although a company may be able to exonerate itself by producing documentation demonstrating that it was not responsible for licensing, its own exports may be targeted for examination before the matter can be clarified. Indeed, selectivity criteria may be entered against the U.S. manufacturer listed on the SED or AES record, even *though the U.S. manufacturer had no responsibility for determining licensing requirements.* A freight forwarder contacted about the shipment may erroneously contact the exporter listed on the SED, since it will not be apparent from the SED itself that the freight forwarder is acting on behalf of the foreign principal party in interest, not the U.S. principal party in interest. A company that has chosen to avoid the burden of export licensing for certain shipments should not bear the risk and expense of defending itself against erroneous allegations of export violations, or fielding inquiries from freight forwarders, merely because it appears as the exporter of record on the SED or AES record.

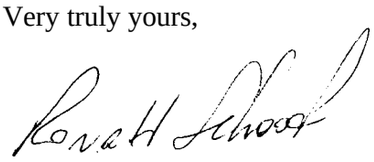
CONCLUSION:

The proposed regulations are ambiguous and internally inconsistent, and fail to recognize the commercial reality that when goods are sold ex works, the U.S. manufacturer loses control over the goods once they leave the factory. The goods may be modified or consolidated with other goods prior to exportation from the United States. The proposed regulations fail to recognize that the U.S. manufacturer in EXW and FAS transactions is unable to complete the SED since the U.S. manufacturer does not have basic information about the goods at the time of export. In such transactions, it is the foreign buyer who controls and determines the sending of the goods out of the United States, and who has or can obtain the information necessary for completion of the SED.

If Commerce believes that the accuracy of international trade statistics will be improved by collecting data on the U.S. manufacturer, it should create a new field on the SED and AES record to accommodate this information. Creation of a new field will allow Customs selectivity criteria to continue to run against the party who has the authority to determine and control the sending of the items out of the United States, and to associate any violations with that party. A separate field on the SED or AES record will also permit freight forwarders to easily identify the party to whom they should direct inquiries regarding the exportation.

Caterpillar urges BXA not to adopt the proposed regulations, and to meet with industry representatives to develop a rule that addresses both the statistical needs of the U.S. Government and the business needs of international traders.

Very truly yours,



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December 1, 1999

Ms. Sharron Cook
Regulatory Policy Division
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Bureau of Export Administration
Room 2705
14th Street and Pennsylvania Ave., N.W.
Washington, D.C.

Re: Comments on BXA Proposed Rule Dated October 4, 1999 to Amend the Export Clearance Regulation, FR Vol. 64, 53853

Dear Ms. Cook:

Intel Corporation in Santa Clara, California is a major supplier of integrated circuits, boards, systems and software product to the computer, commercial, and industrial and telecommunications industries, which use them to product a variety of products.

Intel Corporation is a member of the American Electronics Association (AEA) and participated in drafting comments regarding this proposed Regulation. Additionally, Intel is represented on the Regulations and Procedures Technical Advisory Committee (RPTAC) and also participated in drafting RPTAC's comments.

Intel would like to thank you for this opportunity to comment on the proposed amendment to the Export Clearance Regulation and would also like to take this opportunity to reiterate concerns regarding the following issues identified in comments submitted in detail by AEA and RPTAC:

1) The burdens imposed by new requirements to list ECCN's for all items having a classification other than EAR99.

2) The requirement to obtain written acknowledgements from parties identified on a license "when required by the license".

3) The requirement for the U.S. principal party in interest in a routed transaction, to obtain an additional undertaking from foreign buyers regarding licensing obligations above and beyond contract provisions which specify EX WORKS, per Incoterms 2000.

4) The liability issues related to the requirement, upon request, for the U.S. principal party in interest to provide the foreign principal in interest with the ECCN or sufficient technical information to classify an item.

Intel commends the efforts of BXA to solicit industry input on this important regulation and further hopes that the concerns identified above will be addressed prior to publication of the final rule.

Respectfully,

Sandee Vincent
Export Administration Manager

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Lucent Technologies
BellLabsInnovations

December 2, 1999

Ms. Sharron Cook
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Washington, D.C. 20230

RE: Comments on Proposed Rule Concerning "Partics to a Transaction and Their Responsibilities, Routed Export Transactions, Shipper's Export Declarations and Export Clearance"

Dear Ms. Cook:

Lucent Technologies respectfully submits thc following comments on the Proposed Rule, "Parties to a Transaction and Their Responsibilities, Routed Export Transactions, Shipper's Export Declarations, and Export Clearance", that the Bureau of Export Administration published on October 4, 1999 (Fedcral Rcgistcr /Vol. 64, No. 191, pg. 53854).

We note that the Preamble to the proposed rulc states that its primary objective of this change is to promote flcxibility so that partics to transactions may structure their transactions freely. Howcvcr, many of the changes identified in the proposed rule create an additional regulatory burden and add to the complexity of the Export Administration Rcgulations.

Specific **Comments**

732.5(a)(1)(i) License number and expiration date and 758.1(g) the SED.

Requiring the expiration date of a license to bc rccordcd on the Shipper's Export Declaration when filcd manually but not when filed under the Automated Export System is unwarranted. Both the SED and the AES electronic equivalent are defined as "an export control document." Therefore, the requirement to include the licensc expiration date on manually filed SEDs should be eliminated in thc cfforts to streamlinc the regulations.

732.5(a)(2) Item description and 758.1 (g)(1) Specific information rcquircmcnts for licensed exports.

Part 732.5(a)(2) states "You must enter an itcm description identical to the item description on the license when a license is required, ***or*** enter an itcm dcscription sufficient in detail to permit review by the US Government and verification of thc Schedule B Number (or Harmonized Tariff Schedule number)." Likewise, Part 758.1(g)(1); sentcnce two, stales "The item description on the licensc must be stated in Commerce Control List terms,, ***which may be inadequate*** to mcet

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Census Bureau requirements. In this event, the item description you place on the SED or AES equivalent must be given in enough additional detail to permit verification of the Schedule B Number (or Harmonized Tariff Schedule number) (e.g., size, material or degree of fabrication)." This creates confusion in regards to the item description. How does the exporter know when such an item description is inadequate?

We recommend that each section be modified as follows:

> 732.5(a)(2) *Item description.* "You must enter an item description in sufficient detail to permit review by the US Government and verification of the Schedule B Number (or Harmonized Tariff Schedule number)." .
> 758.1(g)(1), second sentence. "... The item description you place on the SED or AES equivalent must be given in sufficient detail to permit review by the US Government and verification of the Schedule B Number (or Harmonized Tariff Schedule number) (e.g., size, material or degree of fabrication)."

732.5(a)(3) and 740.1(d) Entering the ECCN.

The proposed regulation would require all items of a shipment exported under clearance symbol NLR to be classified simply because the items are identified on the Commerce Control List (i.e., all items except those classified as EAR99). However, there is no apparent justification to support such a significant burden to the exporter.

The Export Administration Regulations (EAR) was structured in a way that links the classification and the destination. Items classified under the 900 Series (i.e., xx99x), only require a license to an AT1 destination. Therefore, it is unnecessary to classify each item of a shipment that is NOT going to an AT1 country.

In 1996 the BXA introduced the concept of No License Required (NLR) to streamline the export clearance process. It is inconsistent with BXA's streamlining efforts to implement a requirement that the ECCN be listed for all transactions. Under the present language in the EAR § 758.3(h)(2), the ECCN must be entered on the SED when shipping under a License, under License Exceptions GBS, CIV, LVS, or under NLR and the item is controlled for CW or NS Column 2 reasons. These requirements already reflect a reasonable "short list" of areas of concern. We urge the BXA to avoid reimposing requirements that have been eliminated in previous streamlining efforts.

Many companies take a conservative yet cost effective approach to classification. That is, items that are not controlled for national security, missile technology, nuclear nonproliferation, or chemical biological concern, default down to unilateral controls under the 900 Series. The resource efforts and cost to differentiate between items that are classified under the xx99x entries and items under EAR99 cannot be justified. This is a simple approach that allows minimum interpretation ofregulations that presently applies to only one destination (i.e., Syria). Moreover, the xx99x entries *on* the Commerce Control List are so "out-of-date" that the control language no

longer makes sense and in many instances, does not apply to the items being exported. For example, 3B991(b)(2)(c) controls "equipment, other than general purpose computers, especially designed for computer aided design (CAD) of semiconductor devices or integrated circuits." This type of equipment (specially designed workstations dedicated to designing only semiconductor devices or integrated circuits) was abandoned by the industry in the late 1970's and early 1980's. Today, the functionality resides in the software and operates on a general purpose computers or workstation. The xx99x entries were written using the same language that was rejected or changed by the multilateral organizations (i.e., the Wassenaar Arrangement, the Nuclear Suppliers Group, the Missile Technology Control Regime and the Australia Group) when they determined that the controls and language were outdated, no longer applicable or confusing. Therefore, we recommend that the provision remain as presently stated in the EAR. However, an alternative would be to require the ECCN only for transactions requiring a export license or when a license exception is used to overcome a licensing requirement.

748.4(a) License Applicant and 748.4(b) Disclosure of parties on license applications and the power of attorney.

The proposed regulations attempt to categorize the individuals that are party to a transaction in such a way that it causes confusion and does not recognize business realities. In particular, this section appears to limit the responsibilities for each party to the transaction. For example, the proposed regulation states that the license applicant must be the exporter, who is the principal party in interest with the authority to determine and control the sending of items out of the United States. In the case of a routed transaction, the freight forwarder, as the duly authorized agent, becomes the principal party in interest under a power of attorney from the foreign principal party in interest. If the freight forwarder does not have a power of attorney, responsibility for determining the US export licensing requirements defaults back to the foreign principal party in interest. (See Federal Register, Background, paragraph three.)

Another example is the definition of Purchaser. The regulations define the purchaser as the person abroad who has entered into a transaction to purchase an item for delivery to the ultimate consignee. However, if the purchaser resides in the United States, this party to the transaction would not be identified. Due to the unnecessary and confusing complexity, we recommend that such limiting criteria be delctcd.

750.7(d). Written acknowledgment of conditions.

The provision raises serious concerns given the extraterritorial extension of the EAR. In some countries, it may be illegal to provide this type of acknowledgment. Most destinations outside the U.S. view this assertion of extraterritorial jurisdiction over r&exports of U.S.-origin items as illegal under international law. Canada, and the United Kingdom have imposed blocking statutes and orders that make it unlawful to comply with U.S. export control requirements that conflict with their laws. Requiring a written acknowledgment of conditions will undermine the laws of the buyer's country and negatively impact U.S. competitiveness. Such a provision will also result in competitive disadvantage and loss of business for U.S. exporters. In order for US industry to

remain strong and competitive, US companies must be able to do business globally and hence, comply with all trade laws. Buyers will choose other suppliers who do not require such written acknowledgment. Therefore, this provision should be deleted.

758.1 (d) Notation on export documents Requirements.
Part 758.1 (b)(l) states that a Shipper's Export Declarations must be submitted for all shipments authorized under a license. In 758.1(d): *Notation on export documents for exports exempt from SED requirements*, the end of the first sentence states, "... *i.e., either the number of and expiration date of a license issued by BXA*, ..." This suggests that there may be instances where a license is issued and filing of the SED or AES electronic equivalent is not required. We recommend that this part of 758.1(d) be deleted. See also 758.1 (i).

758.1(g) Export control information requirement on the SED or AES electronic equivalent
Based upon the comments above referencing 732.5(a)(1) and 758.1 (g)(l), it is our belief that three subparagraphs under 758.1(g) can be combined into one paragraph. Combining these three subparagraphs would be consistent with efforts to streamline the regulations.

758.2(c) Routed Export Transactions
Lucent Technologies supports the clarification in the regulations stating in a note to proposed EAR § 758.2(c) that the listing of "Exporters" in Box (la) of the Shipper's Export Declaration is for statistical purposes only. Moreover, we also support the clarification that states, "that for purposes of licensing responsibility under the EAR, the U.S. agent of the foreign principal party in interest may be the exporter, regardless of who is Listed in Block (1 a) of the SED." However, we remain concerned that the suppliers would be held responsible in "routed transactions" for violations committed by forwarding agents over which the suppliers would have no control in a routed export transaction.

758.2(d) Information Sharing Requirements
Under proposed EAR Section 758.2(d), a U.S. supplier would be required, upon request, to provide the foreign Principal Party in Interest and their U.S. agent, with the ECCN or with sufficient technical information to classify an item. These information-sharing requirements appear to hold the U.S. supplier liable for incorrect classifications or inaccurate technical information provided to foreign buyers and their U.S. agents to comply with this proposed provision. For routed export transactions the proposed regulation should indicate that the foreign principal party in interest is ultimately responsible for classifications.

The export control list(s) was developed by government officials: to identify certain types of goods and technology that might find their way into the hands of undesirables and used contrary to national security or foreign policy interests. Suppliers should not be held responsible to determine the ECCN or provide "sufficient" information to determine licensing requirements for non-related parties. AL a minimum, we recommend that this requirement be limited to parties that are directly related to an export transaction.

Many US manufacturers sell solely in the US. Under the proposed regulations, if their goods become a part of an export transaction, the US manufacturer would be responsible to provide the ECCN or provide technical information that is "sufficient" to determine the classification. However, the US manufacturer would not know if the information was sufficient. Therefore, the requirement for a US supplier who is not party to a transaction, to provide the foreign Principal Party in Interest and their U.S. agent, with the ECCN or with sufficient technical information to classify an item should be deleted.

Another problem with this requirement is the ability to export foreign manufactured goods. This new requirement would hold a US supplier of foreign goods liable for supplying the ECCN or sufficient information to determine the classification. Again, the US supplier (re-seller of foreign goods) can not always obtain such information from a foreign manufacturer.

This provision is written with the assumption that the U.S. Principal Party in Interest is a manufacturer. A re-seller will have no more ability to provide such information or perform export classifications to determine licensing requirements than the foreign Principal Party in Interest. The regulation should state/clarify that the freight forwarder, when acting as agent for a foreign buyer, has an obligation to determine the legal authority 'for exporting a product from a credible source. This will eliminate the mandate that the manufacturer be the source of the technical information.

In conclusion, we strongly recommend' that the government avoid confusing terms such as "principal party in interest," that are not commonly used in business transactions. The regulations are complex as presently written and there is no need to make them more convoluted. Instead, we recommend that the US govenunent use common everyday terms such as "buyer and seller."

Sincerely

Jerald R. Beiter
Lucent Technologies
International Global Trade Manager

Copy to:
C. Harvey Monk, Jr.
Chief, Foreign Trade Division
U.S. Census Bureau

EOR 17
1 page

November 15, 1999

Ms. Sharon Cook
Regulatory Policy Division
United States Department of Commerce
Bureau of Export Administration
14th and Pennsylvania Avenue
Room 2096
Washington, DC 20004-2601

Dear Ms. Cook:

The purpose of this letter is to confirm our conversation of this morning concerning Part 762.5 of the Export Administration Regulations (EAR). I asked if DHL would be in compliance with the EAR if its documents were imaged by one software program and then transferred to another software program to have a reference number placed in the margin. I had called to verify that this would not be considered altering the image. Your response was that we would be in compliance and that the only thing the EAR was referring to was the altering of the actual document itself.

If this is not a correct interpretation, please advise me of any additional clarification.

Thank you for your courtesy and cooperation with regard to this matter.

Sincerely,

Lori Wilson-VanHouten

LORI WILSON-VAN HOUTEN
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2 pgs

November 23, 1999

Sharron Cook, Regulatory Policy Division, Office of Export Controls
Bureau of Export Administration
Room 2705, 14th Street and Pennsylvania Avenue N.W.
Washington, D.C. 20230

Re: Docket No. 990709186-9186-01, Proposed Rule to Revise the Export Administration to Clarify the Responsibilities of Parties to an Export Transaction and Routed Export Transaction

Dear Ms. Cook:

The Eastman Kodak Company is pleased to provide comments on the proposed rule revising the Export Administration Regulations to simplify and clarify the export clearance process and facilitate export compliance. The Eastman Kodak Company is a strong advocator of Export Administration Regulations that strengthen U.S. national security, foreign policy, and flexible export transaction process that promotes export trade.

The Commerce Department is to be commended for the changes that were made to simplify the proposed regulations by eliminating redundant information (reduction of several thousands words) and by improving the clarity in definitions and responsibilities for parties to an export transaction, especially a routed (exworks) export transaction.

In general, the Eastman Kodak Company agrees with the proposed regulations. However, listed are a few topics that we feel need resolution, information, and clarification:

1. **Issue:** The Eastman Kodak Company is opposed to having the name of the U.S. principal party in interest identified in block (1a) of the Shipper's Export Declaration in a routed (exworks) export transaction, when the foreign principal party in interest has provided written authority to a U.S. agent to act on their behalf. The current SED provides no clear identification of the exporter of record in a routed export transaction. This lack of clarity on the SED form in a routed export transaction, when the U.S. forwarding agent is the exporter, causes an unreasonable time burden on the U.S. principal party in interest (i.e. U.S. manufacturer, seller) to be the first contact point by law enforcement regarding compliance issues. This situation is unacceptable and will add cost to the export process.

   Recommendation: The addition of a new block on the SED form for the U.S. principal party in interest to the export transaction will ensure accurate and correct trade statistics. This will allow block 1a to accurately display the exporter as the person in the United States who is or has the authority of the principal party in interest to the export transaction to determine and control the

sending of items out of the United States. This proposal allows the U.S. Forwarding Agent, in a routed export transaction, to be the exporter in block 1a when the U.S. Forwarding Agent has written authority from the Foreign Principal Party in interest to provide export services on their behalf. This improvement to the SED form would eliminate confusion and enable Law Enforcement to start with the correct exporter in all exports transactions, especially a routed export transaction. The adoption of this recommendation to add a block to the SED for U.S. principal party in interest will save time for all involved in a routed export transaction and allow for one common definition of exporter between the Census Bureau and Commerce Departments.

2. **Request for information:** The final ruling should include examples of what is considered an acceptable "writing" from the foreign principal party in interest to the U.S. principal party in interest in a routed transaction (i.e. contractual agreement, email, etc).

3. **Clarification required:** In a routed export transaction, clarify if the U.S. principal party in interest, for record purposes, is required to get a written statement from the U.S. agent confirming the agents acceptance of responsibility to act on behalf of the foreign principal party in interest. The Eastman Kodak Company feels this type of additional burden on the U.S. principal party in interest, if required, would significantly delay the export process and be restrictive to export trade.

Eastman Kodak Company feels that the above comments are consistent with the Census Bureau and Commerce Departments objectives for the proposed regulations to be clear and understandable for export compliance reasons and still allow for the alignment of responsibilities to parties in interest to an export transaction to ensure accurate and correct statistical data.

Thanks you again for the opportunity to provide input.

Thomas C Fung ate

Director, Export Regulations, Eastman Kodak Company

EOR 19
4 pgs

Halliburton Company
SERVING THE ENERGY INDUSTRIES WORLDWIDE

1 December 1999

Sharron Cook, Regulatory Policy Division, Office of Export Controls
Bureau of Export Administration
Room 2705, 14th Street and Pennsylvania Avenue N.W.
Washington, D.C. 20230

Re: Docket No. 990709186-9186-01. Proposed Rule to Revise the Export Administration to Clarify the Responsibilities of Parties to an Transaction and Routed Export Transaction

Dear Ms. Cook:

Halliburton Company is pleased to provide comments on your October 4, 1999 proposed rule amending the U.S. Export Administration Regulations (EAR). As you may know, Halliburton, headquartered in Dallas, is one of the world's largest diversified energy services, engineering maintenance, construction and energy equipment companies.

Halliburton commends your efforts to simplify and clarify the export clearance process and facilitate compliance. We appreciate your work to promote flexibility for parties subject to the EAR in the structuring export transactions, and your work in developing definitions that will allow all parties to better understand their responsibilities for export compliance. Finally, your efforts to coordinate this exercise with the Census Bureau will provide consistency and additional clarity.

After thorough review of your proposed rule, we have a few comments for your consideration:

1. **Issue.** Halliburton is opposed to having the name of the U.S. Principal Party in Interest identified in block (la) of the Shipper's Export Declaration (SED) in a routed (exworks) export transaction, when the Foreign Principal Party in Interest has provided written authority to a U.S. agent to act on their behalf. The current SED provides no clear identification of the exporter of record in a routed export transaction. This lack of clarity on the SED form in a routed export transaction, when the U.S. forwarding agent is the exporter, causes an unreasonable time burden on the U.S. Principal Party in Interest (i.e. U.S. manufacturer, seller) to be the first contact point by law enforcement regarding compliance issues. This situation is unacceptable and will add cost to industry when participating in a routed export transaction when the forwarding agent is the exporter.

Recommendation: The addition of a new block on the SED form for the U.S. Principal Party in Interest to the export transaction will ensure accurate and correct trade statistics. This will allow block (la) to accurately display the exporter as the person in the United States who is or has the authority of the principal party in interest to the export transaction to determine and control the sending of items out of the United States. This proposal allows the U.S. Forwarding Agent, in a routed export transaction, to be the exporter in block (la) when the U.S. Forwarding Agent has written authority from the Foreign Principal Party in Interest to provide export services on its behalf This improvement to the SED form would eliminate confusion and enable law enforcement to start with the actual exporter in all exports transactions, especially a routed export transaction. The adoption of this recommendation to add a block to the SED for U.S. Principal Party in Interest will save time for all involved in a routed export transaction and allow for one common definition of exporter between the Census Bureau and Commerce Department.

2. **Reauest for information:** (758.2 (c)) The final ruling should include examples of what is considered an acceptable "writing" from the Foreign Principal Party in Interest to the U.S. Principal Party in Interest in a routed transaction (i.e. contractual agreement, email, etc).

3. **Clarification Required:** In a routed export transaction, clarification is needed as to whether the U.S. Principal Party in Interest, for record purposes, is required to get a written statement from the U.S. agent confirming the agent's acceptance of responsibility to act on behalf of the Foreign Principal Party in Interest. Halliburton feels this type of additional burden on the U.S. Principal Party in Interest, if required, would significantly delay the export process and be restrictive to export trade. The following underlined, **Bold** words should be added to 758.2 (c) :

"The U.S. principal party in interest is the exporter and must determine licensing authority (License, License Exception, or NLR), and obtain the appropriate license or other authorization, unless the U.S. principal party in interest obtains from the foreign principal party in interest a writing wherein the foreign principal party in interest expressly assumes responsibility for determining licensing requirements and obtaining license authority, **and making** the U.S. agent of the foreign principal party in interest the exporter for EAR purposes. **The U.S. principal party in interest is not reauired to obtain any further written statement from the U.S. Agent of the Foreign Principal Party in Interest."**

4. **Issue-:** (740.1 and 732.5(a)(3)} The new requirement for placing the Export Control Classification Number (ECCN) on the SED places an undue burden on the Halliburton engineering business units. In 1996, the Bureau of Export Administration simplified the Export Administration Regulations (EARs) to help industry by clarifying the regulations and streamlining the steps needed to make licensing determinations. Those changes were of great benefit to industry, and industry has used these changes to simplify their own internal control programs (ICPs) while remaining fully compliant with the law.

The following information is presented to show how the October 4, 1999 proposed rule regarding the work processes of engineering firms differ greatly from those of a manufacturing firm. The latter has an inventory of goods, which can be classified under an ECCN or EAR99 and put into an export compliance matrix. In fact, these firms must classify their goods as many of these companies sell to customers who will require that information to export to various countries around the world. However, an engineering firm usually does not manufacture the items it exports. The items exported vary from project to project due to the type of plant (i.e. specifically fabricated for that plant), the client's requirements, and the availability of a newer item at the time of a project, not previously available. It is very difficultand actually not practical to maintain an ECCN matrix of items.

Therefore, an engineering firm must take a somewhat different approach to its ICP that is more in line with its work process. Since the country of destination is known for any given project, this approach allows for concentration only on those ECCNs that are controlled to the "project country". An example follows: The ICP of an engineering company begins with a known "project country". At project kickoff, the project engineers develop a control list specific to that country. All items to be exported to the project are reviewed against all ECCNs that are controlled for that country. Items are labeled with the applicable ECCN, and required licenses are obtained. Items that are clearly EAR99 or could possibly fall into an ECCN not controlled to the "project country" are immediately labeled "NIX". No further review is required to determine if those items in fact fall into the "non-controlled" ECCNs, which in the worse case scenario, would still end up NLR. The NLR notation remains with the item throughout the entire procurement process until it finally reaches the freight forwarder who uses that information for the SED Item 21.

To require an engineer to take the time to determine EAR99 vs ECCN for an ECCN not controlled for the country of destination is unnecessary, would create an undue cost on the company, and would not enhance an already fully compliant ICP. Moreover, such research and entry will add cost and erode global competitiveness. Specific examples of how this type of research would have a negative impact on the work process follow.

EXAMPLES

ECCN 2A292 Piping, fittings and valves made of, or lined with, stainless steel, copper-nickel alloy, or other alloy steel containing 10% or more nickel and/or chromium.
Country Chart NP column 2, and AT column 1.

Items controlled by this ECCN would not be a project consideration for export to countries not identified by the Commerce Country Chart (Part 738, Supp. 1) as being controlled.

Our U.S. purchased pipe/valves are normally grouped in bulk for ail sizes and pipe schedules (wail thickness). Should this provision be adopted, our engineers would be required to create a subgroup of U.S. purchased pipe/valves to separately consider ail pipe 8" and larger made of the controlled pipe materials, and of a pipe thickness sufficient to meet the ECCN control criteria. Then after these analyses were performed, no license would be required.

ECCN 2B350 Chemical manufacturing facilities and equipment, (as follows). Country Chart CB column 3, and AT column 1.

Items controlled by this ECCN would not be a project consideration for export to countries not identified by the Commerce Country Chart (Part 738, Supp. 1) as being controlled.

Items controlled by this ECCN have the following determinative criteria: the material being used to contain the process fluids and size parameters. Should this SED regulation be adopted, our engineers would be required to separately identify vessels fabricated to the specified ECCN dimensions of the controlled materials. Then after these analyses were performed, no license would be required.

Recommendation: While we understand that the placement of ECCNs on the SED would be used as a tool for Export Enforcement, we feel that an undue burden would be placed on those exporters whose current ICPs assure proper licensing determinations for all exports. We recommend Export Enforcement continue to use their existing procedures for reviewing SEDs. NLR notations should be questioned as necessary when exports involve sensitive items going to countries of high level concern.

Halliburton feels that the above comments are consistent with the Commerce Department's objectives to simplify and clarify the export clearance process and facilitate compliance. We feel the above comments will help the Department of Commerce reach its objectives by assuring each party clearly understands who the "exporter" is (consistency with Census), what type of written communication is acceptable and required from the party assuming export compliance responsibilities, and by allowing company flexibility, not only in structuring export transactions, but in setting up an ICP that both 1) fits its work process (cost efficient) and 2) is the best approach for the company to assure proper classifications and licensing determinations are made.

Thank you for the opportunity to provide comments to these proposed regulations.

Sincereiy,

Regina M. Piazza
Export Compliance Specialist

EOR 20
3 pgs

1007 Market Street
Wilmington, DE 19898

November 29, 1999

Ms. Sharron Cook
Regulatory Policy Division
Office of Exporter Services
Department of Commerce
Bureau of Export Administration
Room 2705
1 4th Street & Pennsylvania Avenue, N. W.
Washington, DC 20230

SUBJECT:
DEPARTMENT OF COMMERCE
BUREAU OF EXPORT ADMINISTRATION
PARTIES TO A TRANSACTION AND THEIR RESPONSIBILITIES,
ROUTED EXPORT TRANSACTIONS, SHIPPER'S EXPORT DECLARATIONS,
AND EXPORT CLEARANCE

E. I. DuPont de Nemours and Company appreciates the opportunity to make comments with regard to the proposed rule to revise the Export Administration Regulations to clarify the responsibilities of parties to an export transaction, the filing and use of Shipper's Export Declarations, Destination Control Statements requirements and other export clearance issues.

PARTIES TO A TRANSACTION AND THEIR RESPONSIBILITIES

Although it is the intent of the Bureau of Export Administration to amend the regulations in such a way as to provide freedom to structure export transactions so that responsibilities can be defined among the parties to the transaction while still meeting national security and foreign policy objectives, the proposed regulations really do not grant U.S. sellers/manufacturers that freedom. It appears that these regulations, when reviewed with those of the Bureau of Census, pre-assign responsibilities and offer no significant changes from the previous draft proposal. In addition, the current proposal does not clearly address non-licensed "routed transactions" (e.g., EAR 99 items or license exceptions) which leaves them open to interpretation; and is specifically the area most objectionable.

To restate as briefly as possible the reasons why this change is significant to DuPont:
1. We do not want to give our power of attorney and/or EIN number to a freight forwarder when we have no knowledge of them or their level of expertise.
2. We want to be sure that our SED transactions are recoverable and meet the EAR recordkeeping requirements (without receiving paper/facsimile copies).
3. We will incur additional expense if we allow only our contracted freight forwarder (not the customer-named freight forwarder) to prepare the SED on our behalf.

4. The proposed regulations assign responsibilities for a "routed transaction" that are not in keeping with the INCO terms for ex-works transactions. As the exporter, responsibilities will be incurred by the seller for product that we no longer own, have not tendered to the carrier, and have no legal right to represent the foreign party's interest (that would be the freight forwarder to whom they gave a power of attorney) should anything happen with the product in-transit.

We do understand that the intent of the proposed regulation is to assure that all transactions meet the Export Control Regulations and provide the proper Foreign Trade statistics. We believe that the current regulations could be made to meet these criteria by simply adding more specific requirements for sellers (not exporters) and freight forwarders when they represent a foreign party. Leaving the actual roles and responsibilities to be agreed upon (in writing if necessary) by the parties to the transaction.

ROUTED EXPORT TRANSACTIONS

The proposed regulations (Part 748.4(a)(2) Routed Export Transactions address only those transactions where a license is required and are silent on those where "no license is required". We have presumed, therefore, that since the proposal maintains the premise that the U.S. seller will be the principal party in interest and will be the exporter on the SED (after all there is really only one block on the SED) for "routed transactions", this should be made as clear as possible since there really is no option.

SHIPPER'S EXPORT DECLARATION

BXA's regulations Part 732.5 Steps regarding Shipper's Export Declaration (SED), Destination Control Statement, and recordkeeping.
(a) Step 27: Shippers Export Declaration – Exporters or agents authorized to complete the SED, or to file SED information . . . does not define whether or not a Power of Attorney or Letter of Instruction is required for "agents authorized to complete the SED"; i.e., what constitutes authorization? This is further confused by Part 758.1 (j) Power of Attorney or other written authorization, and Part 758.2(e) which only addresses power of attorney or other written authorization for a forwarding or other agent concerning their representation of a foreign party in interest.

(b) Step 28 – Destination Control Statement – This section clearly defines that the person responsible for preparing the various documents has the responsibility for entering the DCS

(c) Step 29 – Recordkeeping – This section does not clearly define who is responsible for recordkeeping regarding the SED. We believe that the person responsible for submitting the SED should also be responsible for producing the information upon request and meeting the rec requirements as defined. One of the major attributes for electronic reporting is so that one does not have to keep paper copies or facsimiles.

RESPONSIBILITIES OF PARTIES TO A TRANSACTION

Although Part 758.2 Responsibilities of Parties to the Transaction indicates that parties may delegate functions and tasks, reality is that BXA's regulations default to Census with regard to who will be listed in Block la of the SED. Both BXA and Census define the exporter as the U.S. principal party in interest, generally the seller, manufacturer, order party or foreign entity (if in the U.S. when signing the SED). This mandate is made regardless of all of the comments that BXA and Census received defining the responsibilities of parties under ex-works INCO terms.

Also, in part (d) Information sharing requirements, the responsibilities for what the U.S. principal party in interest must provide to the foreign principal party or the foreign principle's agent is defined. However, there is no mention of the fact that a U.S. principal party in interest may elect to submit SED information themselves when they are named the "exporter' in a routed unlicensed transaction nor is there information on what the foreign principal party (or more likely their agent) must provide to the U.S. principal party. We believe that this could work either way and that pertinent responsibilities should be clearly defined including recordkeeping.

EXPORT CLEARANCE

Part 758.4(e) Procedures for unscheduled unloading – This section appears to adequately address the various circumstances, but we have a concern over the instance (2)(i) When items are unloaded in a country to which the items would require a license issued by BXA, in this case the regulations say that the carrier must inform the exporter. In the case of a "routed transaction" where the items did not initially require a license but now they do; the "exporter" is put in the position of responsibility for these goods; when in fact, they no longer own the goods, did not tender the goods to the carrier; and according to the ex-works terms should not bear any risks or costs for the goods after they have been made available to the foreign party's agent. Regardless, BXA's regulations give the **exporter** 10 days to report to BXA. This regulation should be changed to specifically state that in the case of a "routed transaction; the foreign party's agent should be charged with those responsibilities since they have the authorization to act on behalf of the Foreign Principal Party.

Thank you again, for the opportunity to make comments on this draft.

Very truly yours,

Marcy Stewart

Marcella D. Stewart
Export Control Manager

EOR21
7pgs

Fina's Comment On BXA's Proposed Treatment Of Routed Export Transactions

Docket No. 99.0709 186-9 186-O 1
RIN 0694-AB88
Page 53854 - 53861

Fed. Reg. Vol. 64, No. 191 (Oct. 4, 1999)

To: Sharron Cook, Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
Room 2705
14th Street and Pennsylvania Ave., N.W.
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Submitted by:

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Filed November 19, 1999

Fina's Comment On BXA's Proposed Treatment Of Routed Export Transactions

Fina Oil and Chemical Company ("Fina") files this comment in response to the proposed regulations issued by the Bureau of Export Administration ("BXA") regarding the treatment of routed transactions ("BXA's Proposal"). BXA published its draft in the Federal Register on October 4, 1999. Fina is filing this comment before the December 3, 1999 deadline specified in BXA's Proposal.

Most of Fina's comments are in the form of questions. Fina asks questions hoping that BXA will clear up numerous ambiguities related to routed export transactions and will accommodate prevailing industry standards, including the use of the Incoterm Ex Works, in a contract of sale.

- ***Is BXA Outlawing Ex Works?***

A few months back, the International Chamber of Commerce (ICC) revised Incoterms to bring them in line with current international trade practices. The ICC revised many of the terms, but kept one term essentially in tact. That term is Ex Works (or EXW) and is particularly significant to the treatment of routed export transactions under BXA's Proposal.

The BXA states in its introductory remarks that its "primary objective is to promote flexibility so that parties to transactions subject to the EAR may structure their transactions freely, consistent with national security and foreign policy objectives." BXA's Proposal also claims that "parties are free to structure transactions as they wish, and to delegate functions and tasks as they deem necessary, as long as the transaction complies with the EAR."[1] However, BXA never mentions Ex Works and it is not clear whether BXA intends to accommodate Ex Works transactions. As a result, numerous questions remain, all creating a potential conflict for exporters who want to take advantage of this particular Incoterm, but are unsure whether they would violate the EAR in the process. Further clarification is important because exporters need to know where existing industry standards fall short of BXA regulatory demands.

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[1] BXA's Proposal, §758.2(a).

- ***Are Routed Export Transactions The Same As Ex Works Transactions?***

BXA's Proposal defines a routed export transaction as "a transaction where the foreign principal party in interest authorizes a U.S. forwarding or other agent to facilitate export of items from the United States."[2] This definition resembles the ICC's official description of Ex Works, which reads:

> the seller delivers when he places the goods at the disposal of the buyer at the seller's premises or another named place (i.e. works, factory, warehouse, etc.) not cleared for export and not loaded on any collecting vehicle. This term thus represents the minimum obligation for the seller, and the buyer has to bear all costs and risks involved in taking the goods from the seller's premises . . . This terms should not be used when the buyer cannot carry out the export formalities directly or indirectly.3

Both definitions clearly impose on the foreign principal party in interest/buyer responsibility for performing all export formalities. However, it is not clear whether there is difference between the two definitions or what the difference amounts to. Fina requests further clarification.

- ***Does Ex Works In The Contract Of Sale By Itself Suffice As A Writing Under §758.8?***

BXA's Proposal reads:

> The U.S. principal party in interest is the exporter and must determine licensing authority (License, License Exception, or NLR), and obtain the appropriate license or other authorization, unless the U.S. principal party in interest obtains from the foreign principal party in interest a writing wherein the foreign principal in interest expressly assumes responsibility for determining licensing requirements and obtaining license authority, making the U.S. agent

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[2] Id. at 3772.

[3] Incoterms 200Q (International Chamber of Commerce 1999). p. 27.

> of the foreign principal party in interest the exporter for EAR purposes.4

It is not clear whether the use of Ex Works (or EXW) alone in the sales contract satisfies this obligation. Fina requests that BXA clearly explain whether Ex Works alone in a contract for sale can constitute "a writing wherein the foreign principal in interest expressly assumes responsibility for determining licensing requirements and obtaining license authority." If the answer is no, Fina requests that BXA explain how and why Ex Works is insufficient and what additional writing or document is required.

Requiring that the contracting parties execute a document in addition to the sales contract or adopt additional contractual language creates the likelihood for future disputes and thus defeats the purpose behind Incoterms. As the ICC explains:

> The global economy has given businesses broader access than ever before to markets all over the world. Goods are sold in more countries, in larger quantities, and in greater variety. But as the volume and complexity of international sales increase, so do possibilities for misunderstandings and costly disputes when sales contracts are not adequately drafted. Incoterms, the official ICC rules for the interpretation of trade terms, facilitate the conduct of international trade. Reference to Incoterms 2000 in a sales contract defines clearly the parties' respective obligations and reduces the risk of legal complications.5

Incoterms were devised and are used so that parties do not have to rely on any additional, outside source to interpret certain rights and obligations under the contract of sale. As the ICC warns:

> In practice, it frequently happens that the parties themselves by adding words to an Incoterm seek further precision than the term could offer. It should be underlined that Incoterms give no guidance

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[4] BXA's Proposal, § 758.8.

[5] Incoterms 2000, p. 4.

whatsoever for such additions. Thus, if the parties cannot rely on a well-established custom of the trade for the interpretation of such additions they may encounter serious problems when no consistent understanding of the additions could be proven.6

By using Ex Works, the parties already decided specifically and in writing that the foreign buyer is responsible for export clearance and licensing. It would be superfluous, and would defeat the purpose behind Incoterms, for the BXA to force the buyer and seller to execute a second document or insert additional language stating, in effect, "we mean what we agreed to in the sales contract."

- ***Does Information Sharing Change The Allocation Of Risks, Expenses, Or Obligations Under Ex Works?***

The "information sharing requirements" under BXA Proposal read:

In routed export transactions where the foreign principal party in interest assumes responsibility for determining and obtaining licensing authority, the U.S. principal party in interest must, upon request, provide the foreign principal party in interest and its forwarding or other agent with the Export Control Classification Number (ECCN), or with sufficient technical information to determine classification. In addition, the U.S. principal party in interest must provide the foreign principal party in interest or the foreign principal's agent any information that it knows will affect the determination of license authority. 7

Under Ex Works, the seller must "render the buyer, at the latter's request, risk and expense, every assistance in obtaining, where applicable, any export license or other official authorization necessary for the export of the goods."8 Is the U.S. principal party in interest's obligation different or greater than the seller's obligation under

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6Id. at p. 19.

7BXA's Proposal, §758.2(d)

8Incoterms 2000, p. 28, The Seller's Obligations, A2.

Ex Works?

- ***Who Has Export Liability For The Accuracy Of Shared Information?***

Under Ex Works, the buyer is supposed to assume the risk, and thus the export liability, for any information provided to it by the seller. The buyer thus has an incentive to perform its own due diligence and verify the information's accuracy through independent means. Is there a corresponding obligation and incentive on the foreign principal party in interest under BXA's proposal? If there is no such obligation, what then does BXA mean when it claims that the foreign principal party in interest's agent has primary export liability in routed export transactions?

- ***Who Funds The Foreign Principal/Buyer's Request For Information?***

Under Ex Works, the buyer is supposed to pay for any export-licensing/clearance information it requests from the seller. The costs can be substantial and can include forwarder fees, consulting or legal fees, copying, and administrative costs. However, it appears that. under BXA's proposal, the U.S. principal party in interest (i.e., the seller) must fund this process.

- ***Must The U.S. Principal Party In Interest Honor And Pay For All Information Sharing Requests?***

The BXA Proposal requires that a U.S. principal party in interest provide to the foreign principal party in interest"sufficient technical information" to determine classification, and provide to the foreign principal agent "any information that it knows will affect the determination of license authority." However, the nature of this information is not clear. What if the foreign principal party requests information that is either proprietary or does not exist? What if the information is readily available from public sources of information?

Fina argues that the party performing the export formalities should not have access to the seller's proprietary information and should not be able to force the seller to assemble information that is readily available through other means. The

U.S. principal party in interest/seller should not be required to do the homework for the foreign principal in interest or its agent. Fina thus suggests that the U.S. principal party in interest/seller be required to provide only information that already exists, is non-proprietary, and is not readily available elsewhere.

This document was prepared on Wordperfect for the Macintosh and is found on OG's computer/O's Stuff/Client/Fina/SED Comment/2nd Comment/"BXA Comment"

EOR 22
3pgs

Expeditors®

November 16, 1999

Expeditors International
of Washington, Inc.

849 Thomas Drive
Bensenville, IL 60106

Tel 630 595-3770
Fax 630 350-1905

Ms. Sharron Cook
Regulatory Policy Division, Office of Exporter Services
Bureau of Export Administration, Room 2705
14th Street and Pennsylvania Avenue, N. W.
Washington, D.C. 20230

RE: Comments on Proposed Rulemaking - Exporter of Record

Following are comments submitted on behalf of Expeditors International of Washington Inc. These comments.are being submitted to both agencies, Bureau of Census and Bureau of Export Administration.

Summary:

1. Request for clarification regarding information supplied by fonvarder
2. Request for clarification regarding AES requirements and Census proposed rules.
3. Comment on BXA's new definition of Exporter
4. Scenario's not covered in the proposed rulemaking
5. Request related to determining Final Rule date

1. Request for clarification

Re: In the "Response to Comments and Proposed Actions" section Federal Register page 53863, first column, second paragraph after Note, second sentence - reads: "(B) Upon request, providing the U.S. principal party in interest with appropriate documentation verifying that the information provided by the U.S. principal party in interest was accurately reported on the SED or AES record. "

I couldn't find this requirement stated anywhere in the proposed Census or BXA regulations. Can you please cite where it is documented, or add it if isn't documented? I feel this needs to be explicitly stated in the regulations somewhere. to avoid misinterpretation by forwarders and exporters on what information the US Principal Party in Interest is entitled to in a routed transaction where the foreign principal party in interest authorizes the forwarder to prepare the SED.

2. Request for clarification regarding AES requirements and Census proposed rules.

30.4(c)(3)(ii)inc udes "bill of lading/airway bill number" as information the forwarding agent is responsible for providing in the SED or AES record. Currently, this information is not required in the AES record, but it is required in block #3 on the paper SED. Are you planning to make the bill of lading or air waybill number required in the AES record, or is the implication here (by the word "or") that it is required only on the paper SED.

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3. Comment on BXA's new definition of Exporter, and request to add clarifying text.

In BXA's proposed regulation, Part 772, the Exporter is defined as follows:

> "The person in the United States who has the authority of a principal party in interest to determine and control the sending of items out of the United States. For purposes of completing the SED or filing export information on the Automated Export System (AES), the exporter is the U.S. principal party in interest (see Foreign Trade Statistics Regulations, 15 CFR part 30)."

BXA's definition implies that the U.S. principal party in interest is never the (BXA) exporter, and that it would always be the forwarder. However, in the Background section of the Federal Register Notice containing the Proposed rule, BXA states on page 53854, second column at the end of the first paragraph:

> "This proposed rule provides that when the foreign principal party expressly assumes responsibility in writing for determining license requirements and obtaining necessary authorization, that foreign party must have a U.S. agent who becomes the "exporter" for export control purposes. Without such a written undertaking by the foreign principal, the U.S. principal is the exporter, with all attendant responsibilities."

BXA's new definition of Exporter and the above referenced statement are inconsistent. It would be clearer if the BXA definition of Exporter read:

> "The U.S. principal party in interest, or in a routed transaction, the person in the United States who has the authority of a foreign principal party in interest to determine and control the sending of items out of the United States. For purposes of completing the SED or filing export information on the Automated Export System (AES), the exporter is the U.S. principal party in interest (see Foreign Trade Statistics Regulations, 15 CFR part 30)."

4. Scenario's not covered in the proposed rulemaking

It is common practice in routed transactions, for the foreign consignee to request that the forwarder combine multiple orders from various U.S. vendors, on one bill of lading. It would be helpful if the proposed regulations included a section on this type of shipment, and clarify the following points:

- If the "shipment" consists of non-licensable items supplied by multiple vendors, all under the same Schedule B number, and the total value of the commodity in the orders combined is over $2500, but the value supplied by each individual vendor is under $2500, does an SED have to be supplied for each vendor's order?

- When multiple orders from multiple vendors are combined under one bill of lading, and each order includes items that must be reported on an SED, in the AES record, would each vendor's items be reported under a separate transaction number (i.e. unique reference number)?

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- When multiple vendors' orders are combined in one shipment (due to multiple vendors), and the SED exemption legends vary, must the bill of lading or other loading document list an exemption legend for each of the vendor's SED's? for Example:

  Vendor A: NDR 30.55h
  Vendor B: AES EIN-SRN
  Vendor C: AES EIN-SRN
  Vendor D: NDR 30.55h
  Vendor E: AES-EIN-SRN
  etc..

- On shipments exempt from SED requirements, BXA is requiring (758.1 (d)) that the air waybill or bill of lading, or other loading document, include the export authority symbol, is. Either the applicable license exception symbol, or NLR designator. Should this necessarily or preferably, be a part of the SED exemption legend? Multiple License Exception Symbols and/or NLR could be applicable on one shipment. Does BXA want them all shown? Together with, or separate from the Census SED Exemption legend?

  Additionally, I would like to request that BXA add a clarification in 758.1 (d) stating that the export authority symbol only be required on items exempt from SED filing, and not when the items are filed via AES (since the applicable export license number, license exception symbol, or NLR is available in the AES record).

5. Request related to determining Final Rule date

Since the proposed changes will require significant programming changes to our export processing and AES software, and subsequent training, we would like to request that you allow at least 90 days for the implementation date after the Final Rule is published.

Thank you for reviewing these requests, and I look forward to your response.

Sincerely,

Anne B. Mesagna
Director, Export Compliance and Systems
Expeditors International of Washington, Inc.

Cc: Director, U.S. Census Bureau

EOR23
3 pgs

ACCA INTERNATIONAL

November 24, 1999

Ms. Sharon Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
U.S. Department of Commerce
Room 2705
14th and Pennsylvania Avenues, NW
Washington, DC 20230

Dear Ms. Cook:

This statement is submitted by the Air Courier Conference of America ("ACCA") in response to the Bureau of Export Administration's (BXA) solicitation of public comments in the *Federal Register* (64 Fed. Reg. 53854) regarding its proposed rule clarifying the responsibilities of parties to export transactions. ACCA is the trade association representing the air express industry; its members include large firms with global delivery networks, such as DHL Worldwide Express, Federal Express, TNT U.S. A. and United Parcel Service, as well as smaller businesses with strong regional delivery networks, such as Aramex, Midnite Express and World Distribution Services. Together, our members employ approximately 510,000 American workers. Worldwide, ACCA members have operations in over 200 countries; move more than 25 million packages each day; employ more than 800,000 people; operate 1,200 aircraft; and earn revenues in excess of $50 billion.

ACCA has comments regarding the following aspects of the proposed rule:

o 15 CFR 732.5(3)(b) Step 28: Destination Control Statement - states that the Destination Control Statement must be entered on the invoice and on the bill of lading, air waybill, or other export control document that accompanies the shipment from its point of origin in the United States to the ultimate consignee abroad. ACCA believes that the proposed rule should clarify that it is the responsibility of the exporter, not the carrier, to ensure that the Destination Control Statement is listed on the exporter's invoice. (Please note that, as a general matter, the air waybills of ACCA members include an appropriate Destination Control Statement.)

o 15 CFR 732.5(3)(c) Step 29: Recordkeeping - states that records of transactions subject to the EAR must be maintained for five years. ACCA believes the proposed rule should clarify that different record retention requirements apply to different parties in the transaction. Consistent with a February 25, 1999 letter from Hillary Hess of BXA to United Parcel Service, carriers are not required to retain all records, subject to the EAR, supplied

by the exporter. The five-year retention period for carriers does apply to SED completion on behalf of the exporter (all applicable records), AES transmission records, and SED information supplied by the exporter for AES transmissions.

o 15 CFR 750.7(d) Responsibility of the licensee - ACCA's interpretation of this provision is that the exporter/licensee is responsible for communicating license information to the carrier; the carrier is not responsible for determining license requirements for shipments.

o 15 CFR 758.1 note to paragraph (b) - Most of the in-transit shipments transported by ACCA members are unladen at **the first** port of arrival and move under a U.S. Customs bond (CF 7512) aboard another one of our aircraft to foreign soil. ACCA believes it should not be necessary to file **SEDs** for these shipments as they do not enter the commerce of the United States -- they are merely unladen in the United States from one aircraft to another. The note to paragraph **(b)** could cause thousands of shipments to be held in the United States pending contact to the foreign party to obtain the necessary SED information before the shipment could transit the U.S. In addition, in-transit information is currently presented via the export manifest for each outbound flight.

o 15 CFR 758.1 (d): Notation on export documents for exports exempt from SED requirements - ACCA believes that BXA should clarify that an exemption can be placed on the manifest, and does not need to appear on each air waybill.

o 15 CFR 758.1(f)(1)(2)(3): The SED or AES electronic equivalent is an export control document - ACCA believes that, consistent with our comments regarding other aspects of the proposed rule, carriers that are operating as a Data Entry Center and are transmitting SED data via AES are not responsible for determining whether the shipment requires a license or is subject to other EAR requirements. ACCA believes the rule should clarify the regulatory liability as it applies to carriers and exporters.

o 15 CFR 758.2(a): General responsibilities of parties to the transaction - ACCA believes the rule should clarify that exporters, not carriers, are responsible for determining whether their shipment is regulated by the EAR. If the exporter properly notifies the carrier of any license requirements, the carrier is responsible for correct processing. In addition, the carrier is responsible for Denied Party Screening as outlined in the EAR.

o 15 CFR 758.4(2): Unloading in a country where a license is required - The carrier can only be responsible for the information provided to it by the exporter. If the exporter does not indicate to the carrier that a shipment is licensable, the carrier will be unable to comply with this provision. Furthermore, many ACCA member shipments are consolidated, by the exporter, for movement to destination regional hubs. If a shipment is licensed by BXA, it would be in-bonded to the normal clearance point. However, unscheduled loading is not

possible to control and would therefore be impossible to report to BXA.

o **15 CFR 772: Definitions -** "Carriers" (also known as "Data Entry Centers") are considered service centers with regard to filing SED transmissions via AES. In this scenario, carriers are not considered to be the exporter or principal party, but are merely acting as a conduit for SED information. "Forwarding Agent," as defined by carriers, occurs when we complete information on behalf of the exporter (with proper authorization) in order to facilitate exportation. Otherwise, carriers do not act as a "Forwarding Agent. " Transmitting SED data to AES, in and of itself, does not constitute "forwarding."

Please contact me if you would like additional information from ACCA regarding these issues. Thank you for your consideration of these comments.

Sincerely,

Susan M. Presti
Executive Director

EOR 24
9 pgs

Regulations & Procedures Technical Advisory Committee

November 24, 1999

Sharron Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
Room 2705
14th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20230

Re: Comments On BXA Proposed Rule Dated
October 4, 1999 To Amend The Export Clearance Regulations

Dear Ms. Cook:

The Department of Commerce Regulations and Procedures Technical Advisory Committee (RPTAC) respectfully submits these comments on the Proposed Rule dated October 4, 1999 to amend the Export Clearance Regulations.

As you know, the RPTAC has communicated extensively with BXA and with the Bureau of the Census on this proposed rule. The RPTAC appreciates BXA's consideration of our concerns. We commend BXA for revising this proposed rule extensively since it was first proposed by the Census Bureau. The comments below reflect continuing RPTAC concerns over certain issues that we believe should still be addressed prior to issuance of the Final Rule.

1. **The Burdens Imposed by New Requirements to List All ECCNs Far Outweigh the Supposed Benefits -- Sections 732.5(a)(3), 740.1(d) and 758.1(g)(2) and (3).** The RPTAC continues to object to the proposed requirement that an ECCN be entered on the SED for all items having a classification other than EAR 99. The RPTAC believes that this proposed requirement would impose a significant administrative burden on exporters, with little resulting benefit to the government. The RPTAC understands that the primary concerns driving this proposed requirement are (1) ensuring that items are classified accurately and shipped only to authorized destinations, and (2) preventing the practice of some freight forwarders of preprinting SEDs with the NLR symbol. For the reasons stated below, the proposed change to the current rules will do little to address these concerns, but will overburden exporters.

    a. Product Classification. For many products, the primary classification can be determined for most of the free world. To make additional product classifications for products that are only controlled to AT 1 or AT2 countries is an unnecessary burden when the exporter knows

the goods are not destined for Syria. For example, if a company is shipping to Western Europe, most products can be shipped NLR. It might take a compliance expert ten minutes to make this determination. To require detailed product classification for a shipment to Western Europe imposes significant administrative burdens on the exporter (perhaps several additional hours to make the classification) without changing the licensing requirements or providing the government with any additional useful information.

b. Increased Administrative Burden. If products can be shipped NLR, requiring ECCN information within the order processing system in a company is an added burden which is not necessary. Export controls should relate to the specific transaction. The requirement for controls which cover the entire world should not be added to every transaction. Exporters who have an automated system and who have not programmed into it each and every ECCN will have to spend substantial time and money to reprogram the system. Others will have to invest in such a system. Controls should be implemented based upon requirements for that specific transaction, not for shipment to any possible destination in the world.

c. Incompatibility With EAR Provisions. The decision tree implementation in the EAR recommends a process of elimination approach. Therefore, if an exporter can determine that a product can be shipped NLR to the ultimate destination, to force further work towards a classification for the product to be shipped to other destinations would create work that is irrelevant. Under current EAR § 758.3(h)(2), the ECCN must be entered on the SED when shipping under a License; License Exceptions GBS, CIV, or LVS; or under NLR if the item is controlled for CW or NS Column 2 reasons. These requirements are reasonable and result in useful data to allow BXA to verify eligibility. Also, this burden was imposed as part of a check on the ability of exporters to export under License Exception products that had previously been controlled. However, for most shipments eligible for NLR or other License Exceptions, the entry of ECCN classifications on the SED will not provide particularly useful data to BXA.

d. The Change Will Create Trivial Violations with a Disproportionate Impact on Small Businesses. Exporters who fail to place ECCN XX99X on the SED for an NLR eligible export will be in violation of the revised EAR, but the violation will have no impact. It is not useful to micromanage export documentation so as to increase substantially trivial violations. Moreover, the increased burden will fall mainly on exporters of “uncontrolled products”, many of which

are small businesses that can determine which of their products require a license or an ECCN, but cannot afford the luxury of making irrelevant classifications.

e. The Change Will Not Affect Preprinted SEDs. Forwarders who wish to preprint SEDs will learn simply to add EAR99 in addition to NLR. This change will not address that problem.

Attached to this letter are two examples of the potential burdens that would be imposed on exporters by this proposal.

2. **BXA Should Delete or at Least Use With Caution the Section 750.7(d) Provision Indicating that License Conditions May Require Written Acknowledgment by the Ultimate Consignee.** The RPTAC appreciates BXA's revision of the proposed rule to state that licensees must obtain written acknowledgement of license conditions only "when required by the license." We remain concerned that this condition may be placed on too many licenses. Such a requirement can result in significant delays in processing orders and could have significant anti-competitive results for U.S. exporters.

   In addition, this requirement raises serious extraterritoriality concerns. European counsel routinely advise companies not to "agree" to abide by U.S. reexport control requirements in order to avoid contravening EU and other blocking legislation. Exporters and their customers have learned to navigate this minefield by notifying their customers as to particular U.S. restrictions, knowing that the customer does not intend to violate them but that the customer may create trouble for itself under its own laws if it "agrees" to comply with U.S. laws. The acknowledgment requirement would upset this balance in a way that only benefits the lawyers for both parties. The RPTAC therefore urges BXA to delete this provision, and to include such a requirement as a license condition only in rare cases (such as Safeguard Security Plans for computers to Tier III destinations), rather than as a matter of course.

3. **We Understand that a Contract Provision Specifying EX WORKS per Incoterms 2000 May be a Sufficient Written Undertaking for Section** 758.2(c). Under the proposed rule, in a routed transaction, the U.S. principal party in interest would remain responsible for licensing issues, "unless the U.S. principal party in interest obtains from the foreign principal party in interest a writing wherein the foreign principal party in interest expressly assumes responsibility for determining licensing requirements and obtaining license authority . . . ." Based on discussions with Assistant Secretary DeBusk at the September 14, 1999 RPTAC meeting, we understand that it is the position of BXA that the U.S. principal party in

interest is responsible for clarifying who has export licensing responsibilities. We understand that BXA is not compelling the use of any particular type of document or language to convey licensing responsibility. For example, depending upon the documentation, a reference to "EX WORKS" as defined by Incoterms 2000 may be sufficient to clarify licensing responsibility.

Incoterms, which are commonly used in transactions all over the world, provide that:

> 'EX-WORKS' means that the seller delivers when he places the goods at the disposal of the buyer at the seller's premises or another named place (i.e. works, factory, warehouse, etc.) not cleared for export and not loaded on any collecting vehicle.
>
> This term thus represents the minimum obligation for the seller, and the buyer has to bear all costs and risks involved in taking the goods from the seller's premises.
>
> . . . **This term should not be used when the buyer cannot carry out the export formalities directly or indirectly.**

(Lncoterms 2000, p. 27 (emphasis added).) In setting forth the Buyer's Obligations, the Incoterm's section on "ex works" expressly states that the **"buyer must obtain at his own risk and expense any export and import license or other official authorization** and carry out, where applicable, all customs formalities for the export of the goods. (Incoterms 2000, p. 29 (emphasis added)(footnote omitted).)

> Thus, where a contract specifies that the goods are being sold ex works as defined by Incoterms, there is no need for the EAR to require U.S. suppliers to obtain a separate writing specifying that the foreign buyer has assumed responsibility for export compliance. Moreover, if a contract specifies ex works but a separate writing is not obtained, the effect of such a regulatory requirement would be to frustrate the parties' intentions as expressed in the contract.

4. **Section 758.2(d) Imposes Burdens on the U.S. Principal Party in Interest Beyond What the Parties Have Agreed Is Reasonable.** The RPTAC is concerned that requiring a U.S. principal party in interest to provide the foreign principal party in interest with the ECCN (or sufficient technical information to determine classification) could expose the U.S. principal party in interest to strict liability for providing an incorrect classification that is believed to be correct. The U.S. principal party in

interest generally cannot guarantee the correctness of its classification and should not be subject to liability if the foreign principal party in interest chooses to rely on the classification. Moreover, this provision appears to be written only with manufacturers in mind. A reseller may have no more ability to provide this information than the foreign principal party in interest. The rule would thus shift to the U.S. principal party in interest a burden that it has not agreed to accept. The RPTAC urges BXA to amend this provision to state as follows:

> "In routed export transactions where the foreign principal party in interest assumes responsibility for determining and obtaining licensing authority, the U.S. principal party in interest shall, upon request and to the extent that it has such information, provide the foreign principal party in interest and its forwarding or other agent with the Export Control Classification Number (ECCN), or with sufficient technical information to determine classification. It is ultimately the responsibility of the foreign principal party in interest in a routed export transaction to ensure that the export complies with all applicable requirements of the Export Administration Regulations, including, as necessary, the accuracy of the product classifications."

5. **The Provisions of 750.7 Should Provide Appropriate Levels of Responsibility When the EAR Allow Others to Use Licenses.** Section 742.15 provides useful authority for distributors and resellers to make shipments under the authority of Encryption Licensing Arrangements. This is helpful, but exporters have been left confused as to the appropriate levels of responsibility when using such authorization. An exporter who allows use of its license when specifically authorized to do so should not be liable for illegal exports outside of its control, unless the exporter knows that such illegal exports will occur. Accordingly, we suggest that the following sentence be added to Section 750.7: "Licensees will be responsible for exports by other parties authorized by the license or the EAR to export pursuant to the licensee's license if the exporter knows the circumstances of said exports."

6. **SED Provisions Should Exempt TSU as Well As TSR Exports.** Section 758.1(c)(5) and the corresponding provisions of the FTSR should exempt TSU exports as well as TSR exports. This is an oversight not corrected since the time that TSU was split from the old TSR without a written assurance (using the symbol GTDU). The inclusion of TSU will bring these provisions up to date to comport with how they applied prior to 1996.

The RPTAC appreciates the opportunity to provide these comments. We look forward to discussing these comments with BXA at the December 2, 1999 RPTAC meeting.

Respectfully submitted,

Walter E. Spiegel

Waiter E. Spiegel
RPTAC Chair

cc: RPTAC Members
Amanda DeBusk, Assistant Secretary
Roger Majak, Assistant Secretary
Iain Baird, Deputy Assistant Secretary
John Sopko, Deputy Assistant Secretary
Mark Menefee, Director, Office of Export Enforcement
Hillary Hess, Director, Regulatory Policy Division

Example One

Current Practices:

ABC Software Company:
Software product "D" — EAR99, general purpose with no encryption capabilities
Software product "E" — 5D992.a.2., contains password encryption only.

Current controls for EAR99 products and 5D992.a.2 products are exactly the same. Controls for 5D992.a.2 state Country Chart AT Column 2. The only country listed in AT2 is Sudan, which is under full embargo. (There is no "X" for Syria in the AT2 column.)

Therefore, for current practice at the time of order entry, order entry staff need only check for embargoed country, end-use, and end-user. The order entry form need not be completed differently for products "D" and "E". All products can be treated the same.

There are significant cost savings in order processing, data entry, and training of staff. At the time of shipment, all SED's would be completed the same:

Block 21 — NLR
Block 22 — Blank.

There are significant cost savings in completion of forms and training of shipping staff.

Proposed Change:

At the time of order entry, staff would have to designate EAR99 for product "D" and 5D992 for product "E" on the order entry document or screen.

This would require significant administrative review and training.

At the time of shipment, staff would designate product "D" as follows:

Block 21 — NLR
Block 22 — Blank

and product "E" as follows:

Block 21 — NLR
Block 22 — 5D992.

Conclusion:

Products "D" and "E" have the same level of control. Company ABC is implementing significant expenditure at the time of order entry and shipment and additional training. There is no appreciable gain for all of the additional expenditure when the two products are treated the same way for export control purposes.

This is only one example. All XX99X products would have similar results since

the Country Chart would state AT1 or AT2.

It is easier for the company to implement a special review for Syria instead of reconfiguring the entire order processing and shipping system to accommodate the export controls for just one country.

Example Two

Current Practices:

XYZ Chemical Company:
1,000 products — EAR99
5 products — 1C350 (non CW controlled items)

Currently, at the time of order entry, order entry staff determines if order contains one of five controlled chemicals and if an export license is required to that destination. If no X for CB2 on the Country Chart, then shipment can go under NLR.

At the time of shipment, all SED's would be completed as follows for NLR shipments:

Block 2 1 — NLR
Block 22 — Blank.

There are significant cost savings in completion of forms and training of order entry and shipping staff.

Proposed Change:

At the time of order entry, staff would have to designate EAR99 for most products and 1C350 for the five controlled products on the order entry document or screen, even for NLR shipments.

This would require significant administrative review and training and an additional control procedure either manually or within the software system.

At the time of shipment, staff would designate NLR shipments as follows:

Block 21 — NLR
Block 22 — Blank, or

Block 2 1 — NLR
Block 22 — 1C350.

Conclusion:

Company XYZ is implementing significant expenditure at the time of order entry and shipment and additional training. There is no appreciable gain for the additional expenditure when controlled and decontrolled products are treated the same way for export control purposes to Australia Group countries.

It is easier for the company to implement a special review to determine if an export license is necessary for that particular transaction. The proposal requires that the entire order processing and shipping system be reconfigured to accommodate the export controls for just a few controlled shipments.

EOR 25
2 pgs

ALCOA

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November 22, 1999

Sharon Cook, Regulatory Policy Division, Office of Export Controls
Bureau of Export Administration
Room 2705, 14th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20230

Subject: Federal Register Notice Dated October 4, 1999

Dear Ms. Cook:

I am writing in response to BXA's proposed changed to the Export Administration Regulations dealing with parties to a transaction and their responsibilities. I would like to commend BXA for the effort to clearly identify the responsibilities of all parties involved in an export transaction, working with the Census Bureau to harmonize the EAR and the Foreign Trade Statistics Regulations. However, there is still one area that I believe needs further revision before a final notice should be issued.

The proposed EAR allows for the U.S. agent or freight forwarder, working on behalf of a foreign buyer, to be the responsible party in control of an export (i.e. exporter) from the U.S. The proposed FTSR, however, requires that the U.S. principal party in interest be identified as the "exporter" on the Shipper's Export Declaration ("SED"). We believe that this is inconsistent and does not properly identify the party in control of the physical export,

Accordingly, we have proposed to Census that a new block be added to the SED form identifying the "manufacturer or seller". By adding this new block, Census will be able to collect accurate trade statistics on manufacturers and sellers, while also allowing the exporter box to accurately reflect the U.S. entity responsible for and in control of the export of items out of the US, This would then harmonize BXA's and FTSR's definition of exporter.

I hope that BXA will support this recommendation and continue to work with Census to effect the necessary change.

One final comment. We support the other changes issued in the proposed regulation of October 4, 1999. In particular, I believe that the new requirement to indicate the Export Control Classification Number ("ECCN") for all exports having a classification other than EAR99 is a sound proposal. By requiring the ECCN, all exporters, small to large, must be in a position to advise the specific ECCN for all of their products. At times in the past when we purchased products for resell, we found it difficult to obtain the ECCN from some companies. The proposed requirement should help to alleviate this problem in the future, and help insure that export shipments are conducted in accordance with the proper licensing authority.

Thank you for the opportunity to provide comment on your proposed change. Thank you also for listening to the prior comments of industry on this matter. Should you have any question please feel free to call.

Sincerely,

Herbert E. Riley Jr.

Herbert E. Riley, Jr.
Sr. Advisor, Trade Compliance

FOR 26
2 pages

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December 10, 1999

Sharron Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
Room 2705
14th St. and Pennsylvania Avenue, N.W.
Washington D.C. 20230

Re: Comments on BXA Proposed Rule dated October 4, 1999 to amend the Export Clearance Regulations.

Dear Ms. Cook,

Aries International respectfully submits our comments on the Proposed rule dated October 4, 1999 to amend the Export Clearance regulations.

Aries International, a tight forwarder, supports the BXA's proposed rule on clarifying the roles behveen the Various Principal Parties in Interest.

We would like to submit the following comments for your consideration.

Sections 732.5(a)(3), 740. I(d) and 758.1(g) 2 and 3. Aries International believes that the amount of effort that the proposed requirement of entering the ECCN number on each SED will be a significant burden for the Exporters. This burden will also be born by Freight Forwarders, as we will be required to reprogram each SKU for each customer in our Computer system. We believe that if Exporters properly classify the goods at a higher level. the individual customer can determine if they have products that have a potential violation if re-exported to specific countries. These few Exporters could choose to add the destination control statement with additional information regarding re-exports. In addition this regulation does not prevent a Freight Forwarder or an Exporter to preprint SEDS with NLR and the EAR99 symbol. The time it would take for Forwarders and Exporters to satisfy this requirement could be better utilized to ensure compliance in all other areas.

Much debate has been made over written authorization and whether EX-Works mentioned in the contract will be sufficient to comply with the written authorization requirement. It has been mentioned that the INCO Terms state:

> . . . . .This term should not be used when the buyer cannot carry out the export formalities Directly or indirectly.. . .

The reason this language is utilized in this INCO term is to inform a purchaser that if a country regulation does not allow an Exporter to perform Export Clearance the purchaser should not purchase the goods on an ex-works basis. In no way does this term of sale give any indication to either the forwarder or the shipper that the purchaser understands what the term of sale means or if the consignee has sufficient knowledge to classify goods and determine if a license is required.

Many times a mere clerk will be placing a purchase order with little knowledge of the commodity or of the United States Export Administration Regulations. Most small to medium size shippers are not knowledgeable about INCO Terms. This vague language and these misunderstandings are precisely why there is a need for these regulations and why the written authorization should not include the mere words Ex-Works.

The only other concern that we have is to ensure merchandise not requiring a license may be assembled as one shipment. I entered preliminary comments to both the BXA and to Census on September 10, 1999 stating this concern, along with my interpretation of the regulations, which I believe will allow assemblies. I would greatly appreciate confirmation of this matter.

Respectfully submitted,

Susan Kargel
Aries International

cc: Amanda DeBusk, Assistant Secretary
Roger Majak, Assistant Secretary
Iain Baird, Deputy Assistant Secretary
John Sopko, Deputy Assistant Secretary
Mark Menefee, Director, Office of Enforcement
Hillary Hess, Director, Regulatory Policy Division
Frank D'Ambra, President, Aries International
Joe Greco, V.P. Aries International

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December 10, 1999

BY HAND

Ms. Sharron Cook
Regulatory Policy Division
Office of Exporter Services
Bureau of Export Administration
Room 2705
14th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20230

Re: Sony Electronics Inc.: Comments on BXA's Proposed Rule of October 4, 1999

Dear Ms. Cook:

On behalf of our client Sony Electronics Inc, of Park Ridge NJ ("SEL"), I am submitting herewith the following brief comments on BXA's Proposed Rule to amend the Export Administration Regulations ("EAR") regarding "Parties to a Transaction and their responsibilities, Routed Export Transactions, Shipper's Export Declarations and Export Clearance" (the "Proposed Rule") as published in the *Federal Register* on October 4, 1999, 64 *Fed. Reg. 53854.* While the Proposed Rule requests that public comments be submitted by December 3, 1999, I understand that your Office will consider comments submitted through close of business today.

The Proposed Rule in its revision of EAR §758.1 (g)(3), and in similar revisions of several other EAR sections, would require that the ECCN be entered on the SED or AES filing for all items classified other than EAR 99. This is an important change to the current rule which requires the ECCN to be indicated only in connection with NLR shipments of NS-2 items or shipments made under License Exceptions GBS, CIV and LVS. This proposal would impose significant new burdens on SEL for the following reasons:

1. SEL from time to time makes in-transit shipments by air or truck under License Exception TMP. While these shipments are frequently made under bond, without an SED/AES tiling in accordance with FTSR § 30.55(e), occasionally the shipments are

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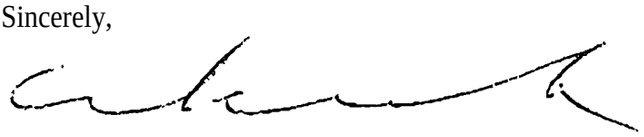
made without bond under an SED or AES filing with License Exception TMP indicated. SEL will incur added expense if it is required to classify the items in each such shipment in order accurately to report a required ECCN. Because of the large volume of SEL's in-transit traffic (all of which is related to the operation of its Mexican Maquiladora facilities), there would inevitably be heightened risks of mistakes and consequent enforcement actions.

2. SEL makes use of License Exception TMP from time to return unwanted items to its Japanese parent or items which have been sent by the Japnese parent temporarily to the U.S. for exhibition and demonstration, Under the Proposed Rule, it will now be necessary to undertake classification of these items to ensure the proper ECCN is reported. Again this results in added expense and the risk of error.

While the current EEC requirements for SED/AES filings make sense, it is difficult to understand the utility to BXA of these added ECCN requirements for items which are *temporarily* in the U.S. SEL, of course, will adjust its system to comply with the proposed rule if it becomes final, but, as noted above, this will require significant added expense which does not seem to be balanced by comparable advantages for the effective administration of the EAR, Accordingly, we urge that no change be made to the current rules for notation of the ECCN in SED/AES filings.

Thank you for your attention to these comments

Sincerely,



Evan R. Berlack
Counsel for Sony Electronics Inc.

cc: Charles P. Holland, Esq., Senior Counsel, Sony Electronics Inc.