

**PART 768—FOREIGN AVAILABILITY  
DETERMINATION PROCEDURES  
AND CRITERIA**

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SUPPLEMENT NO. 1 TO PART 768—EVIDENCE OF FOREIGN AVAILABILITY

SUPPLEMENT NO. 2 TO PART 768—ITEMS ELIGIBLE FOR EXPEDITED LICENSING PROCEDURES [RESERVED]

AUTHORITY: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

SOURCE: 61 FR 12915, Mar. 25, 1996, unless otherwise noted.

**§ 768.1 Introduction.**

In this part, references to the Export Administration Regulations (EAR) are references to 15 CFR chapter VII, subchapter C.

(a) *Authority.* Pursuant to sections 5(f) and 5(h) of the Export Administration Act (EAA), the Under Secretary of Commerce for Export Administration directs the Bureau of Industry and Security (BIS) in gathering and analyzing all the evidence necessary for the Secretary to determine foreign availability.

(b) *Scope.* This part applies only to the extent that items are controlled for national security purposes. This part does not apply to encryption items that were formerly controlled on the U.S. Munitions List and that were transferred to the Commerce Control List consistent with E.O. 13026 of November 15, 1996 (61 FR 58767) and pursuant to the Presidential Memorandum of that date, which shall not be subject to any mandatory foreign availability review procedures.

(c) *Types of programs.* There are two general programs of foreign availability:

(1) *Foreign availability to controlled countries.* In this category are denied license assessments (see §§ 768.4(b) and 768.7 of this part) and decontrol assessments (see §§ 768.4(c) and 768.7 of this part).

(2) *Foreign availability to non-controlled countries.* In this category are denied license assessments, decontrol assessments, and evaluations of eligibility for expedited licensing (see § 768.8 of this part).

(d) *Definitions.* The following are definitions of terms used in this part 768:

*Allegation.* See foreign availability submission.

*Assessment.* An evidentiary analysis that BIS conducts concerning the foreign availability of a given item based on the assessment criteria, data gathered by BIS, and the data and recommendations submitted by the Departments of Defense and State and other relevant departments and agencies, TAC committees, and industry.

*Assessment criteria.* Statutorily established criteria that must be assessed for the Secretary to make a determination with respect to foreign availability. They are, available-in-fact, from a non-U.S. source, in sufficient quantity so as to render the control ineffective, and of comparable quality. (See § 768.6 of this part).

*Available-in-fact.* An item is available-in-fact to a country if it is produced within the country or if it may be obtained by that country from a third country. Ordinarily, items will not be considered available-in-fact to non-controlled countries if the items are available only under a validated national security license or a comparable authorization from a country that maintains export controls on such items cooperatively with the United States.

*Claimant.* Any party who makes a foreign availability submission, excluding TACs.

*Comparable quality.* An item is of comparable quality to an item controlled under the EAR if it possesses the characteristics specified in the Commerce Control List (CCL) for that item and is alike in key characteristics

that include, but are not limited to: (1) Function; (2) technological approach; (3) performance thresholds; (4) maintainability and service life; and (5) any other attribute relevant to the purpose for which the control was placed on the item.

*Controlled countries.* Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Cambodia, Cuba, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Laos, Latvia, Lithuania, Moldova, Mongolia, North Korea, Romania, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, Vietnam and the People's Republic of China.

*Decontrol.* Removal of license requirements under the EAR.

*Decontrol assessment.* An assessment of the foreign availability of an item to a country or countries for purposes of determining whether decontrol is warranted. Such assessments may be conducted after BIS receives a foreign availability submission or a TAC certification, or by the Secretary's own initiative.

*Denied license assessment.* A foreign availability assessment conducted as a result of a claimant's allegation of foreign availability for an item (or items) that BIS has denied or has issued a letter of intent to deny a license. If the Secretary determines that foreign availability exists, BIS's approval of a license will be limited to the items, countries, and quantities in the allegation.

*Determination.* The Secretary's decision that foreign availability within the meaning of the EAA does or does not exist. (See § 768.7 of this part).

*Expedited licensing procedure eligibility evaluation.* An evaluation that BIS initiates for the purpose of determining whether an item is eligible for the expedited licensing procedure. (See § 768.8 of this part).

*Expedited licensing procedures.* Under expedited licensing procedures, BIS reviews and processes a license application for the export of an eligible item to a non-controlled country within statutory time limits. Licenses are deemed approved unless BIS denies within the statutory time limits (See § 768.8 of this part).

*Foreign availability submission (FAS).* An allegation of foreign availability a

claimant makes, supported by reasonable evidence, and submits to BIS. (See § 768.5 of this part).

*Item.* Any commodity, software, or technology.

*Items eligible for non-controlled country expedited licensing procedures.* The items described in Supplement No. 2 to this part 768 are eligible for the expedited license procedures (See § 768.8 of this part).

*National Security Override (NSO).* A Presidential decision to maintain export controls on an item notwithstanding its foreign availability as determined under the EAA. The President's decision is based on his/her determination that the absence of the controls would prove detrimental to the national security of the United States. Once the President makes such a decision, the President must actively pursue negotiations to eliminate foreign availability with the governments of the sources of foreign availability. (See § 768.7 of this part).

*Non-controlled countries.* Any country not defined as a controlled country by this section.

*Non-U.S. source/foreign source.* A person located outside the jurisdiction of the United States (as defined in part 772 of the EAR).

*Reasonable evidence.* Relevant information that is credible.

*Reliable evidence.* Relevant information that is credible and dependable.

*Secretary.* As used in this part, the Secretary refers to the Secretary of Commerce or his/her designee.

*Similar quality.* An item is of similar quality to an item that is controlled under the EAR if it is substantially alike in key characteristics that may include, but are not limited to: (1) Function; (2) technological approach; (3) performance thresholds; (4) maintainability and service life; and (5) any other attribute relevant to the purpose for which the control was placed on the item.

*Sufficient quantity.* The amount of an item that would render the U.S. export control, or the denial of the license in question, ineffective in achieving its purpose. For a controlled country, it is the quantity that meets the military needs of that country so that U.S. exports of the item to that country would

not make a significant contribution to its military potential.

*Technical Advisory Committee (TAC).* A Committee created under section 5(h) of the EAA that advises and assists the Secretary of Commerce, the Secretary of Defense, and any other department, agency, or official of the Government of the United States to which the President delegates authority under the EAA on export control matters related to specific areas of controlled items.

*TAC certification.* A statement that a TAC submits to BIS, supported by reasonable evidence, documented as in a FAS, that foreign availability to a controlled country exists for an item that falls within the TAC's area of technical expertise.

[61 FR 12915, Mar. 25, 1996, as amended at 61 FR 68585, Dec. 30, 1996; 62 FR 25469, May 9, 1997]

#### § 768.2 Foreign availability described.

(a) *Foreign availability.* Foreign availability exists when the Secretary determines that an item is comparable in quality to an item subject to U.S. national security export controls, and is available-in-fact to a country, from a non-U.S. source, in sufficient quantities to render the U.S. export control of that item or the denial of a license ineffective. For a controlled country, such control or denial is "ineffective" when maintaining such control or denying a specific license would not restrict the availability of items that would make a significant contribution to the military potential of the controlled country or combination of countries detrimental to the national security of the United States (see sections 5(a) and 3(2)(A) of the EAA.)

(b) *Types of foreign availability.* There are two types of foreign availability:

- (1) Foreign availability to a controlled country; and
- (2) Foreign availability to a non-controlled country.

(NOTE TO PARAGRAPH (b) OF THIS SECTION: See § 768.7 of this part for delineation of the foreign availability assessment procedures, and § 768.6 of this part for the criteria used in determining foreign availability)

#### § 768.3 Foreign availability assessment.

(a) *Foreign availability assessment.* A foreign availability assessment is an evidentiary analysis that BIS conducts to assess the foreign availability of a given item according to the assessment criteria, based on data submitted by a claimant, the data gathered by BIS, and the data and recommendations submitted by the Departments of Defense and State and other relevant departments and agencies, TAC committees, and industry. BIS uses the results of the analysis in formulating its recommendation to the Secretary on whether foreign availability exists for a given item. If the Secretary determines that foreign availability exists, the Secretary will decontrol the item for national security reasons or approve the license in question if there is no foreign policy reason to deny the license, unless the President exercises a National Security Override (see § 768.7 of this part). The effect of any such determination on the effectiveness of foreign policy controls may be considered independent of this part.

(b) *Types of assessments.* There are two types of foreign availability assessments:

- (1) Denied license assessment; and
- (2) Decontrol assessment.

(c) *Expedited licensing procedures.* See § 768.8 of this part for the evaluation of eligibility of an item for the expedited licensing procedures.

[61 FR 12915, Mar. 25, 1996, as amended at 61 FR 68585, Dec. 30, 1996]

#### § 768.4 Initiation of an assessment.

(a) *Assessment request.* To initiate an assessment, each claimant or TAC must submit a FAS or a TAC Certification to BIS. TACs are authorized to certify foreign availability only to controlled countries. Claimants can allege foreign availability for either controlled or non-controlled countries.

(b) *Denied license assessment.* A claimant whose license application BIS has denied, or for which it has issued a letter of intent to deny on national security grounds, may request that BIS initiate a denied license assessment by