

**Bureau of Industry and Security, Commerce****§ 748.3**

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(3) Bureau of Industry and Security, Western Regional Office, Northern California Branch, U.S. Department of Commerce, 160 W. Santa Clara Street, Suite 725, San Jose, CA 95113, Tel: (408) 998-8805 or (408) 998-8806, Fax: (408) 998-8677.

(b) For the convenience of foreign consignees and other foreign parties, certain BIS forms may be obtained at U.S. Embassies and Consulates throughout the world.

[61 FR 12812, Mar. 25, 1996, as amended at 69 FR 5690, Feb. 6, 2004; 70 FR 22249, Apr. 29, 2005; 72 FR 3945, Jan. 29, 2007; 73 FR 36, Jan. 2, 2008; 73 FR 49330, Aug. 21, 2008; 76 FR 40604, July 11, 2011; 78 FR 13469, Feb. 28, 2013]

**§ 748.3 Classification requests, advisory opinions, and encryption registrations.**

(a) *Introduction.* You may ask BIS to provide you with the correct Export Control Classification Number (ECCN) down to the paragraph (or subparagraph) level, if appropriate. BIS will issue you a determination that each item identified in your classification request is either described by an ECCN in the Commerce Control List (CCL) in Supplement No. 1 to Part 774 of the EAR or not described by an ECCN and, therefore, an "EAR99" item. These classification determinations issued by BIS are not U.S. Government determinations that the items described therein are "subject to the EAR," as this term is defined in § 734.3 of the EAR. Those who request commodity classifications and advisory opinions should have determined that the items at issue are not subject to the exclusive export control jurisdiction of one of the other U.S. Government agencies listed in § 734.3(b) of the EAR. If requested, for a given end-use, end-user, and/or destination, BIS will advise you whether a license is required, or likely to be granted, for a particular transaction. Note that these responses do not bind BIS to issuing a license in the future. This type of request, along with requests for guidance regarding other interpretations of the EAR, is com-

monly referred to as an "Advisory Opinion." The encryption provisions in the EAR require the submission of an encryption registration or classification request in accordance with § 740.17(d) of the EAR in order for certain items to be eligible for export and reexport under License Exception ENC (see § 740.17 of the EAR) or to be released from "EI" controls (see §§ 742.15(b)(1) and 742.15(b)(3) of the EAR).

(b) *Classification requests.* Submit classification requests in accordance with the procedures in § 748.1.

(1) Each Classification Request must be limited to six items. Exceptions may be granted by BIS on a case-by-case basis for several related items if the relationship between the items is satisfactorily substantiated in the request. Classification requests must be supported by any descriptive literature, brochures, precise technical specifications or papers that describe the items in sufficient technical detail to enable classification by BIS submitted as PDF files attached to the SNAP-R submission unless a paper submission is authorized pursuant to § 748.1 of the EAR.

(2) When submitting a classification request, you must complete Blocks 1 through 5, 14, 22(a), (b), (c), (d), and (i), 24, and 25 on the application. You must provide a recommended classification in Block 22(a) and explain the basis for your recommendation based on the technical parameters specified in the appropriate ECCN in Block 24. If you are unable to determine a recommended classification for your item, include an explanation in Block 24, identifying the ambiguities or deficiencies that precluded you from making a recommended classification.

(3) BIS assigns each of its commodity classifications a Commodity Classification Automated Tracking System (CCATS) number. Neither the BIS classification nor the CCATS number may be relied upon or cited as evidence that the U.S. Government has determined that the items described in the commodity classification determination are subject to the EAR (See 15 CFR 734.3).

(c) *Advisory Opinions.* Advisory opinion requests must be in writing and be

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submitted to the address listed in § 748.1(d)(2). Both your letter and envelope must be marked "Advisory Opinion."

(1) Your letter must contain the following information if you are requesting guidance regarding interpretations of the EAR:

(i) The name, title, and telephone and facsimile numbers of the person to contact,

(ii) Your complete address comprised of street address, city, state, country, and postal code; and

(2) If you are requesting BIS to determine whether a license is required, or the licensing policy related to a particular end-use, end-user, and/or destination, in addition to the information required in § 748.3(c)(1) you must also include:

(i) All available information on the parties to the transaction and the proposed end-use or end-user,

(ii) The model number for each item, where appropriate,

(iii) The Export Control Classification Number, if known, for each item; and

(iv) Any descriptive literature, brochures, technical specifications or papers that describe the items in sufficient technical detail to enable BIS to verify the correct classification.

(3) Requests for Validated End-User authorization should be submitted in accordance with the provisions set forth in § 748.15 and Supplement Nos. 8 and 9 to this part.

(4) Advisory opinions are limited in scope to BIS's interpretation of EAR provisions. Advisory opinions differ from commodity classifications in that advisory opinions are not limited to the interpretation of provisions contained in the Commerce Control List. Advisory opinions may not be relied upon or cited as evidence that the U.S. Government has determined that the items described in the advisory opinion are not subject to the export control jurisdiction of another agency of the U.S. Government (See 15 CFR 734.3).

(d) *Classification requests and encryption registration for encryption items.* A classification request or encryption registration associated with encryption items transferred from the U.S. Munitions List consistent with

Executive Order 13026 of November 15, 1996 (3 CFR, 1996 Comp., p. 228) and pursuant to the Presidential Memorandum of that date may be required to determine eligibility under License Exception ENC or for release from "EI" controls. Refer to Supplement No. 5 to part 742 of the EAR for information that must be included in the encryption registration, which must be submitted in support of certain encryption classification requests and self-classification reports. Refer to Supplement No. 6 to part 742 of the EAR for a complete list of technical information that is required for encryption classification requests. Refer to § 742.15(c) and Supplement No. 8 to part 742 of the EAR for information that is required to be submitted in a self-classification report. Refer to § 742.15(b) of the EAR for instructions regarding mass market encryption commodities and software, including encryption registration, self-classifications and classification requests. Refer to § 740.17 of the EAR for the provisions of License Exception ENC, including encryption registration, self-classifications, classification requests and sales reporting. All classification requests, registrations, and reports submitted to BIS pursuant to §§ 740.17 and 742.15(b) of the EAR for encryption items will be reviewed by the ENC Encryption Request Coordinator, Ft. Meade, MD.

(e) *Classification requests to confirm that a "part," "component," "accessory," "attachment," or "software" is not "specially designed."* (1) *Scope.* If you have a "part," "component," "accessory," "attachment," or "software" that is "specially designed" on the basis of paragraph (a)(1) or (2) of the "specially designed" definition in § 772.1 of the EAR, you may submit a request in accordance with the procedures in § 748.1 to confirm that the item is not "specially designed" provided you meet the following criteria:

(i) The "part," "component," "accessory," "attachment," or "software" does not meet the criteria of exclusion paragraph (b)(3) of the "specially designed" definition, but would meet the criteria if the minor changes in form or fit were determined to be insignificant by the U.S. Government.

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(ii) The performance capabilities of the “part,” “component,” “accessory,” “attachment,” or “software” are the same as those of a “part,” “component,” “accessory,” “attachment,” or “software” that would meet the criteria of exclusion paragraph (b)(3) of the definition of “specially designed” in §772.1 of the EAR.

(2) *Information to be provided.* Applicants wishing to submit a CCATS requesting confirmation that a “part,” “component,” “accessory,” “attachment,” or “software” is not “specially designed” must submit classification requests in accordance with the procedures in §748.1 and general provisions regarding submitting classification requests in §748.3(b). In addition, applicants must submit additional information identified in this paragraph (e)(2).

(i) The classification request must indicate in Block 24 or in a separate PDF attachment included with the CCATS submission that the “part,” “component,” “accessory,” “attachment” or “software” would meet the criteria in paragraph (e)(1)(i) and (ii) of this section;

(ii) A detailed explanation must be provided regarding all changes in form and fit; *and*

(iii) A rationale must be provided that explains why such changes in form and fit should be treated as minor or insignificant in terms of their role in the performance capabilities of the enumerated item.

(3) *U.S. Government Review.* Commodity classification requests submitted pursuant to §748.3(e) are reviewed by the Departments of Commerce, State and Defense. A consensus determination is required to confirm that a “part,” “component,” “accessory,” “attachment,” or “software” is not “specially designed” on the basis of this paragraph. The interagency review process will ensure U.S. national security and foreign policy interests are evaluated prior to any confirmation pursuant to §748.3(e). The interagency review will consider on a case-by-case basis whether a particular “part,” “component,” “accessory,” “attachment,” or “software” is “specially designed” taking into account all the following:

(i) The insignificance of the changes in form and fit;

(ii) The overall role of the “part,” “component,” “accessory,” “attachment,” or “software” in the performance capabilities of the enumerated or otherwise described item that it is used in or with;

(iii) How substantively common it is to the other “part,” “component,” “accessory,” “attachment,” or “software” that would meet the paragraph (b)(3) criteria;

(iv) Whether such a confirmation would be consistent with U.S. Government multilateral export control regime commitments; *and*

(v) Any other criteria that may be relevant in determining whether the “part,” “component,” “accessory,” “attachment,” or “software” is “specially designed,” including an evaluation of how such a confirmation may affect U.S. national security and foreign policy interests.

(4) *CCATS response.* The BIS response to the CCATS request will reflect the interagency consensus determination and the response will be made in accordance with the procedures in §§748.1 and 748.3(b). In addition, the BIS response will indicate one of the following:

(i) The “part,” “component,” “accessory,” “attachment,” or “software” is not “specially designed” on the basis of being within the scope of paragraph (b)(3) because the changes in form and fit have been determined by the U.S. Government to be minor or insignificant. In such cases, the new classification, which may be EAR99 or in another ECCN entry that does not use “specially designed,” will be provided as part of the BIS response;”

(ii) The request under §748.3(e) has been denied and the “part,” “component,” “accessory,” “attachment,” or “software” continues to be classified under a “specially designed” ‘catch-all’ (see the definition of “specially designed” in §772.1 of the EAR). The response will also include a determination regarding where the “specially designed” “part,” “component,” “accessory,” “attachment,” or “software” is classified on the CCL; or

(iii) Returned without action (RWA) because insufficient information was

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provided or information was not provided in a timely fashion. These requests will be reviewed closely, and they will likely require additional follow up questions of applicants, so responding to such requests in a timely fashion will be an important part of the process to ensure such requests are considered by the U.S. Government.

NOTE TO PARAGRAPH (e): Although these requests for confirmation that an item is not “specially designed” are also reviewed by the Departments of State and Defense, similar to § 748.3(b)(3), the public is reminded that neither the BIS classification nor the CCATS number may be relied upon or cited as evidence that the U.S. Government has determined that the “parts,” “components,” “accessories,” “attachments” and “software” described in the commodity classification determination or a release made from “specially designed” pursuant to § 748.3(e) are subject to the EAR (see § 734.3 of the EAR).

[61 FR 12812, Mar. 25, 1996, as amended at 61 FR 68585, Dec. 30, 1996; 62 FR 25461, May 9, 1997; 65 FR 62609, Oct. 19, 2000; 67 FR 38868, June 6, 2002; 68 FR 35785, June 17, 2003; 70 FR 8249, Feb. 18, 2005; 72 FR 33659, June 19, 2007; 73 FR 49330, Aug. 21, 2008; 75 FR 36499, June 25, 2010; 75 FR 45054, Aug. 2, 2010; 78 FR 22724, April 16, 2013; 78 FR 61745, Oct. 3, 2013]

### § 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 the U.S. principal party in interest with the authority to determine and control the sending of items out of the United States, except for Encryption License Arrangements (ELA) (see § 750.7(d) of the EAR). 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 § 758.3(b) and (d) of the EAR.

(3) *Reexport transactions*. The U.S. or foreign principal party in interest, or

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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, unless there is a preexisting relationship by ownership, control, position of responsibility or affiliation. 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 of the application. 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*—(i) *Requirement*. An agent must obtain a power of attorney or other written authorization from the principal party in interest, unless there is a preexisting relationship by ownership, control, position of responsibility or affiliation, prior to preparing or submitting an application for a license, when acting as either:

(A) An agent, applicant, licensee and exporter for a foreign principal party in interest in a routed transaction; or

(B) An agent who prepares an application for export on behalf of a U.S. principal party in interest who is the actual applicant, licensee and exporter in an export transaction.

(ii) *Application*. Block 7 of the application (documents on file with applicant) must be marked “other” and Block 24 (Additional information) must be marked “748.4(b)(2)” to indicate that