

DEPARTMENT OF COMMERCE**Bureau of Industry and Security****15 CFR Parts 736, 740, 742, 744, 748, 752, 760, and 772**

[Docket No. 080220216–81424–03]

RIN 0694–AD59

Conforming Changes to Certain End-User/End-Use Based Controls in the EAR; Clarification of the Term “Transfer” and Related Terms as Used in the EAR**AGENCY:** Bureau of Industry and Security, Commerce.**ACTION:** Final rule.

SUMMARY: In this final rule, the Bureau of Industry and Security (BIS) is amending the Export Administration Regulations (EAR) by making conforming changes in certain end-user/end-use controls in the EAR to ensure that the terminology used to describe each type of end-user/end-use control is consistent, to the fullest extent possible, with the terminology in other such controls in the EAR. The amendments in this rule clarify that a party cannot proceed with an export, reexport, or transfer (in-country) that is in transit at the time the party is informed by BIS that a license is required (in accordance with certain end-user/end-use controls in the EAR), unless that party first obtains a license from BIS authorizing the completion of the transaction. These changes are intended to enhance the ability of BIS to stop items subject to the EAR, including items not on the Commerce Control List, from being exported, reexported or transferred (in-country) when there is an unacceptable risk that such items will be used in, or diverted to, any of the proliferation activities specified in certain sections of the EAR. This rule also amends the EAR by revising the definition of the term “transfer” and certain related terms, to provide greater clarity regarding these provisions. BIS published these amendments in proposed form in the **Federal Register** with a request for comments.

DATES: This rule is effective: November 18, 2008.**ADDRESSES:** Written comments on this rule may be sent to the **Federal Register** eRulemaking Portal: <http://www.regulations.gov>, or by e-mail to publiccomments@bis.doc.gov. Include RIN 0694–AD59 in the subject line of the message. Comments may be submitted by mail or hand delivery to Timothy Mooney, Office of Exporter Services, Regulatory Policy Division,

Bureau of Industry and Security, U.S. Department of Commerce, 14th St. & Pennsylvania Avenue, NW., Room H2705, Washington, DC 20230, *Attn:* RIN 0694-AD59; or by fax to (202) 482–3355.

Send comments regarding the collection of information to Jasmeet Seehra, Office of Management and Budget (OMB), by e-mail to jseehra@omb.eop.gov, or by fax to (202) 395–7285; and to the Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, 14th St. & Pennsylvania Avenue, NW., Room H2705, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Timothy Mooney, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce; by *telephone:* (202) 482–2440; or by *fax:* 202–482–3355.

SUPPLEMENTARY INFORMATION:**Background***Conforming Changes to Certain End-User/End-Use Based Controls in the EAR*

Part 744 of the EAR deals with the end-user and end-use based control policy under the EAR. Section 744.3 prohibits exports, reexports and transfers (in-country) of items subject to the EAR to certain missile-related end-uses. Section 744.4 prohibits exports, reexports and transfers (in-country) of items subject to the EAR to certain chemical and biological proliferation activities. Section 744.6 prohibits certain activities by U.S. persons in support of certain nuclear, missile, chemical, or biological end-uses. Section 744.2 prohibits exports and reexports of items subject to the EAR to certain nuclear proliferation activities. This rule adds transfer (in-country) to the scope of the prohibition set forth in § 744.2 to ensure that the language in that section conforms with the language in §§ 744.3, 744.4 and 744.6.

Within each of these sections of part 744, there is a paragraph (b) that includes “is informed” provisions that set out the requirements of what persons need to do once they are informed by BIS that their transactions would be subject to the prohibitions set forth in §§ 744.2, 744.3, 744.4 or 744.6. Prior to publication of this rule, there were minor differences in the terminology used to describe the end-user/end-use controls in each of these sections. This rule amends the end-user/end-use controls in these sections of part 744 to ensure that the terminology used in any one of these sections conforms, to the fullest extent possible, with the terminology used in the other sections.

These changes are intended to make the end-user/end-use controls in part 744 of the EAR more consistent as well as transparent, so that members of the public can more clearly understand their obligations under the EAR.

In addition, this rule adds new provisions to § 744.1 to clarify that a party cannot proceed with an export, reexport, or transfer (in-country) that is in transit at the time the party is informed by BIS that a license is required (in accordance with the end-user/end-use controls in §§ 744.2, 744.3, 744.4 or 744.6 of the EAR), unless that party first obtains a license from BIS authorizing the completion of the transaction. This rule clarifies that once a person “is informed” by BIS that a transaction is subject to one of the prohibitions in §§ 744.2, 744.3, 744.4 or 744.6, a person would be required to apply for authorization from BIS before proceeding with the transaction. This rule further amends the EAR to clearly explain the steps a person must take if an item included in such a transaction is already in transit when a person “is informed” by BIS.

These changes to part 744 are intended to enhance the ability of BIS to stop items subject to the EAR, including items not on the Commerce Control List, from being exported, reexported or transferred (in-country) when there is an unacceptable risk that such items will be used in, or diverted to, any of the proliferation activities specified in §§ 744.2, 744.3, 744.4 and 744.6 of the EAR.

This clarification is consistent with UN Security Council Resolution 1540 (2004), which includes binding obligations on all UN Member States to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials. UNSCR 1540 stipulates that States are to establish, develop, review and maintain appropriate effective national export and transshipment controls over such items, including appropriate laws and regulations to control export, transit, transshipment and reexport; and to establish and enforce appropriate criminal or civil penalties for violations of such export control laws and regulations.

Through this clarification, the United States is continuing to carry out its commitment to the Proliferation Security Initiative (PSI) Statement of Interdiction Principles, which states that PSI partners will work to strengthen their relevant national legal authorities where necessary and not to allow any persons subject to their jurisdiction to

transport or assist in the transport of any cargoes of weapons of mass destruction (WMD), their delivery systems, or related materials to or from states or non-state actors of proliferation concern. The PSI is a global effort that aims to stop shipments of WMD, their delivery systems, and related materials flowing to or from states or non-state actors of proliferation concern. Announced by President Bush on May 31, 2003, the PSI stems from the National Strategy to Combat Weapons of Mass Destruction issued in December 2002. That strategy recognizes the need for more robust tools to defeat the proliferation of WMD around the world, and specifically identifies interdiction as an area where greater focus will be placed. The PSI is a set of activities, not a formal treaty-based organization, that focuses on establishing greater coordination among its partner states when a particular action is needed.

This rule makes the following specific revisions to the EAR:

1. In § 744.1 (General Provisions), this rule amends paragraph (a)(1)(Introduction), by adding “transfer (in-country)” to specify clearly that the prohibitions in §§ 744.2, 744.3, 744.4 and 744.6 also apply to such scenarios. This rule also amends paragraph (b)(2) (Determine Applicability), by adding a sentence at the end of that paragraph that states “For exports, reexports or transfers (in-country) that are in transit at the time you are informed by BIS that a license is required in accordance with §§ 744.2(b), 744.3(b), 744.4(b) or 744.6(b) of the EAR, you may not proceed any further with the transaction, unless you first obtain a license from BIS (see part 748 of the EAR for instructions on how to apply for a license).” This rule also amends paragraph (a)(1) by adding “transfer (in-country)” to specify clearly that the prohibition specified in § 744.5 (Restrictions on Certain Maritime Nuclear Propulsion End-Uses) also applies to such scenarios.

2. In § 744.2 (Restrictions on Certain Nuclear End-Uses), this rule amends paragraph (a) (General Prohibition) by clarifying that this prohibition in § 744.2 also applies to transfers (in-country) to conform with the language used in §§ 744.3, 744.4 and 744.6. In paragraph (b) (Additional Prohibition), this rule amends the heading to clarify that this paragraph applies an additional prohibition “on persons informed by BIS”. Also in paragraph (b), this rule amends the “is informed” provisions to conform with the “is informed” provisions in §§ 744.3, 744.4 and 744.6. Specifically, the rule removes the phrase “exporters or reexporters”,

replaces it with the term “persons” in three locations, and adds the phrase “transfer (in-country)” to clarify that this prohibition also applies to transfers (in-country). Also in paragraph (b), this rule adds the phrase “or for the export, reexport, or transfer (in-country)” before the phrase “of specified items” in the first sentence, among other minor changes, to conform with §§ 744.3, 744.4 and 744.6.

3. In § 744.3 (Restrictions on Certain Rocket Systems (Including Ballistic Missile Systems And Space Launch Vehicles And Sounding Rockets) and Unmanned Air Vehicles (Including Cruise Missile Systems, Target Drones And Reconnaissance Drones) End-Uses), this rule amends paragraph (a) (General Prohibition) by inserting the word “that” after the phrase, “* * * or transfer you know” and by deleting the word “the” in the phrase “at the time of export” to conform with §§ 744.2, 744.4 and 744.6. In paragraph (b) (Additional Prohibition), this rule amends the heading to clarify that this paragraph applies an additional prohibition “on persons informed by BIS”. Also in paragraph (b), this rule amends the “is informed” provisions by adding the word “persons” in two locations, by adding the phrase “(in-country)” after the word transfer and by adding the phrase “or for the export, reexport, or transfer (in-country)” before the phrase “of specified items” in the first sentence, among other minor changes, to conform with §§ 744.2, 744.4 and 744.6.

4. In § 744.6 (Restrictions on Certain Activities of U.S. Persons), this rule amends paragraph (a) (General Prohibition) to conform with §§ 744.2, 744.3 and 744.4 by adding the phrase “(in-country)” after the word “transfer” in paragraphs (a)(1)(i) and (a)(1)(ii) and in paragraph (a)(3) to clarify that this prohibition in § 744.6 also applies to transfers (in-country). In paragraph (b) (Additional Prohibitions on U.S. persons informed by BIS) this rule updates the “is informed” provisions to conform with §§ 744.2, 744.3 and 744.4; specifically by adding the phrase “by specific notice” after the word “individually” in the first sentence and by removing the term “exporter” and replacing it with the term “U.S. persons” in the last sentence.

5. In § 744.5 (Restrictions on Certain Maritime Nuclear Propulsion End-Uses), this rule amends paragraph (a) (General Prohibition) by clarifying that this prohibition in § 744.5 also applies to transfers (in-country). With this final rule, this paragraph (a) prohibits the exports, reexports, and transfers (in-country) of items subject to the EAR to

defined nuclear maritime end-uses in § 744.5.

Revisions to Definitions of Transfer and Related Terms

In § 772.1 (Definitions of Terms as Used in the Export Administration Regulations), this rule revises the term “transfer” to clarify that the term merely refers to a conveyance of items. This rule further clarifies the definition by including the definition of “in-country transfer/transfer (in-country)” as an ancillary definition to the term “transfer”, referring to the conveyance of items within a single foreign country. These revisions will provide greater clarity regarding the meaning of these defined terms under the EAR. In a note at the end of these definitions, this rule adds cross references to §§ 750.7(c) (Changes to a license) and 764.2(e) (Acting with knowledge of a violation). The term “transfer” may also be included on licenses issued by BIS. In that regard, these cross references are a reminder to persons involved with items authorized by a BIS license that changes that can be made to a BIS license are the non-material changes described in § 750.7(c). In addition, persons should be aware that any person that knowingly makes a material change to a BIS license without proper authorization would violate § 764.2(e) of the EAR.

This rule also corrects several places in the EAR where the term “transfer” is used, but the intended meaning is “transfer (in-country)” or “in-country transfer”. Specifically, references to the term “transfer” in § 736.2, General Order No. 2 to Supp. No. 1 to part 736, §§ 740.5, 740.7, 740.9, 740.11, 744.3, 744.4, 744.6, Supp. No. 2 to part 748, §§ 752.5, 752.8, 752.16, and Supplement No. 3 to part 752 are clarified with this rule. This rule also clarifies that the term “retransfer” means “in-country transfer” by replacing the term “retransfer” with the term “transfer (in-country)” in §§ 740.11, 740.17, 742.15, 752.5 and Supp. No. 3 to part 752. This rule also removes one outdated reference to “re-transfer” in Supp. No. 5 to part 742 because it is not needed. This rule also clarifies that the terms “transferred” and “transfer”, in the context of §§ 760.1 and 760.3, mean “assigned to” and “assignment”, respectively.

Comments and Responses

BIS received one public comment, which addressed four aspects of the proposed rule. A summary of this public comment and BIS responses appear below.

Comment 1: Transfer Provisions Under the Ear Should Be Removed or at Least Limited to "U.S. Person" Activities Under § 744.6

The proposed changes to part 744 were intended to make certain conforming changes to certain end-user and end/use based controls under the EAR. The public comment to make § 744.2 conform with §§ 744.3 and 744.4 by removing the transfer (in-country) prohibition from these other end-use controls would be contrary to U.S. export control interests. Adopting this public comment for making the end-use controls under part 744 conform in this way would make it be permissible under the EAR for foreign nationals to "knowingly" transfer (in-country) items that are subject to the EAR to prohibited end-users that are involved in prohibited missile technology or chemical and biological end-uses.

BIS tries as much as possible to narrow controls under the EAR, especially those that have extraterritorial reach, to those controls that are most critical to protecting U.S. export control interests. The end-use controls in part 744, especially those under §§ 744.2, 744.3, 744.4 and 744.6 are critical to protecting U.S. non-proliferation control interests. By making this conforming change to § 744.2, along with the other conforming changes to certain end-use controls in part 744, BIS is taking a positive step to enhance U.S. national security by helping to better ensure that items subject to the EAR are not being "knowingly" supplied to persons involved in certain prohibited nuclear end-uses.

Comment 2: Transfer Provisions Under the EAR Are Extraterritorial

Given that the EAR controls "items" that are subject to the EAR no matter where they are located in the world, by its inherent nature the EAR is extraterritorial in its reach. In some cases, EAR restrictions extend to "items" that are subject to the EAR that are located within a foreign country, such as the provisions dealing with transfers (in-country). Another example of the extraterritorial reach of the EAR would be when an "item" that is subject to the EAR is located in a foreign country, but was illegally exported to that foreign country. Under § 764.2(e) a person that had "knowledge" of that violation would be prohibited from being involved with that "item" that was subject to the EAR that was involved with a violation of the EAR. This would extend to certain activities, such as servicing that "item" that was

subject to the EAR that was involved in a violation of the EAR.

The jurisdiction of the EAR follows the "item" that is subject to the EAR. In certain limited cases, the jurisdictional reach of the EAR extends even further, such as the end-use control under § 744.6. However, because these end-use controls extend beyond "items" that are subject to the EAR (e.g., applying to certain foreign origin items and certain activities), these end-use controls are only applicable to "U.S. persons". In these cases the EAR jurisdiction is being asserted over the "U.S. person" which allows for a broader EAR jurisdiction to apply. Any other extraterritorial application of the EAR will always be tied to an "item" that is subject to the EAR. The end-use controls in part 744, especially those end-use controls under §§ 744.2, 744.3, 744.4 and 744.6 are broad in scope given that they apply to all items that are subject to the EAR. However, each of these end-use controls is targeted by including a required "knowledge" element to trigger the end-use control. For the end-use control in § 744.2, this control is further targeted by carving out countries that are listed in Supplement No. 3 to Part 744 and by specifying the types of nuclear end-uses that are of concern to the U.S. Government under § 744.2.

Lastly, BIS would note that no foreign governments submitted public comments regarding this proposed rule. Also when the transfer (in-country) provisions were added to §§ 744.3 and 744.4, other governments around the world did not voice complaints to BIS. In contrast, since that time, various countries around the world have increasingly worked with the USG in various international forums, such as the Proliferation Security Initiative (PSI) to help stem the flow of WMDs and many countries have adopted additional restrictions within their own export control systems to help stem the proliferation of WMDs.

Comment 3: Transfer Provisions Under the EAR Are Not Enforceable

BIS actively works with other countries to help enforce the EAR, including transfer provisions under the EAR. For example, as part of BIS's international efforts to achieve its enforcement mission, BIS sends experienced Department of Commerce Special Agents overseas as Export Control Officers (ECOs) at key U.S. embassies in Beijing, China; Hong Kong; Abu Dhabi, UAE; New Delhi, India; and Moscow, Russia. The principal mission of the ECOs is to ensure that U.S. dual-use goods entering their region are used in accordance with U.S. export control

laws and regulations. Compliance verification is accomplished through targeted end-use checks and by working with host governments and local businesses to ensure that they understand and comply with U.S. export laws and regulations, including any applicable transfer provisions under the EAR. ECOs also work with host governments and local businesses to provide information and appropriate training to facilitate better understanding of the EAR.

Comment 4: Guidance on Not Proceeding With an In-Transit Transaction at the Time You Are Informed by BIS Is Not Needed

The public comment noted that the proposed addition to § 744.1(b)(2) on not proceeding with an in-transit transaction at the time you are informed by BIS that a license is required is unnecessary and undesirable because the point is already covered more clearly in § 758.8(b).

BIS believes that this provision will provide a mechanism by which a party can apply for authorization to continue a transaction once they have been informed by BIS of such risk, as described in the license requirements in §§ 744.2, 744.3, 744.4 or 744.6, after the "export" has taken place (i.e., left the territory). This provision is needed given the restrictions in § 748.4(d)(2). Section 758.8(b) does not provide clear guidance regarding whether a party could apply for a license once they are informed under the provisions of §§ 744.2, 744.3, 744.4 and 744.6.

Changes From the Proposed Rule

After considering the one public comment received, BIS is implementing the proposed rule as was proposed without making any additional changes.

Savings Clause

Shipments of items removed from eligibility for a License Exception or export or reexport without a license (NLR) as a result of this regulatory action that were on dock for loading, on lighter, laden aboard an exporting or reexporting carrier, or en route aboard a carrier to a port of export or reexport, on November 18, 2008 pursuant to actual orders for export or reexport to a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export or reexport without a license (NLR) so long as they are exported or reexported before December 18, 2008. Any such items not actually exported or reexported before midnight, on December 18, 2008, require a license in accordance with this rule.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as extended by the Notice of July 23, 2008, 73 FR 43603 (July 25, 2008), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act.

Rulemaking Requirements

1. This final rule has been determined to be not significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid Office of Management and Budget Control Number. This final rule involves a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This collection has been approved by the Office of Management and Budget under control number 0694-0088, "Multi-Purpose Application," which carries a burden hour estimate of 58 minutes for a manual or electronic submission. This final rule is expected to have a minimal increase on the total number of license applications submitted to BIS. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to Jasmeet Sehra, Office of Management and Budget (OMB), and to the Regulatory Policy Division, Bureau of Industry and Security as indicated in the ADDRESSES section of this rule.

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

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 (5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are

not applicable. Therefore, this regulation is issued in final form. Although the formal comment period closed on June 17, 2008, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to one of the addresses listed in the ADDRESSES section of the preamble of this final rule.

List of Subjects

15 CFR Parts 736 and 772

Exports.

15 CFR Parts 740, 748 and 752

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

15 CFR Part 742

Exports, Terrorism.

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

15 CFR Part 760

Boycotts, Exports, Reporting and recordkeeping requirements.

■ Accordingly, parts 736, 740, 742, 744, 748, 752, 760, and 772 of the Export Administration Regulations (15 CFR parts 730-774) are amended as follows:

PART 736—[AMENDED]

■ 1. The authority citation for 15 CFR part 736 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 2151 note; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, May 13, 2004; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008); Notice of November 8, 2007, 72 FR 63963 (November 13, 2007).

■ 2. Section 736.2 is amended by revising the first sentence of paragraph (b)(10) to read as follows:

§ 736.2 General prohibitions and determination of applicability.

* * * * *

(b) * * *

(10) * * * You may not sell, transfer, export, reexport, finance, order, buy, remove, conceal, store, use, loan, dispose of, transport, forward, or otherwise service, in whole or in part, any item subject to the EAR and exported or to be exported with knowledge that a violation of the Export Administration Regulations, the Export Administration Act or any order, license, License Exception, or other authorization issued thereunder has

occurred, is about to occur, or is intended to occur in connection with the item. * * *

■ 3. General Order No. 2 to Supplement No. 1 to part 736, is amended by revising the last sentence of paragraph (b) to read as follows:

Supplement No. 1 to Part 736—General Orders

* * * * *

General Order No. 2

* * * * *

(b) * * * License conditions requiring written U.S. Government authorization for the reexport, transfer (in-country), or resale of items already exported or reexported remain in effect, and requests for BIS authorization to reexport, transfer (in-country), or sell such items will require interagency approval.

* * * * *

PART 740—[AMENDED]

■ 4. The authority citation for 15 CFR part 740 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 7201 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

■ 5. Section 740.5 is amended by revising the first and second sentences of paragraph (b)(1) to read as follows:

§ 740.5 Civil end-users (CIV).

* * * * *

(b) *Restrictions.*

(1) * * * You may not use CIV if you "know" the item will be or is intended to be exported, reexported, or transferred (in-country) to military uses or military end-users. Such exports, reexports, and transfers (in-country) will continue to require a license. In addition to conventional military activities, military uses include any proliferation activities described and prohibited by part 744 of the EAR.

* * * * *

■ 6. Section 740.7 is amended by revising paragraph (b)(5) to read as follows:

§ 740.7 Computers (APP).

* * * * *

(b) * * *

(5) License Exception APP does not authorize exports, reexports and transfers (in-country) for nuclear, chemical, biological, or missile end-users and end-uses subject to license requirements under § 744.2, § 744.3, § 744.4, and § 744.5 of the EAR. Such

exports, reexports and transfers (in-country) will continue to require a license and will be considered on a case-by-case basis. Reexports and transfers (in-country) to these end-users and end-uses in eligible countries are strictly prohibited without prior authorization.

* * * * *

■ 7. Section 740.9 is amended by revising paragraph (a)(2)(ix)(A) to read as follows:

§ 740.9 Temporary imports, exports, and reexports (TMP).

* * * * *

(a) * * *

(2) * * *

(ix) *Temporary exports to a U.S. subsidiary, affiliate or facility in Country Group B.* (A) Components, parts, tools or test equipment exported by a U.S. person to its subsidiary, affiliate or facility in a country listed in Country Group B (see Supplement No. 1 to this part) that is owned or controlled by the U.S. person, if the components, part, tool or test equipment is to be used for manufacture, assembly, testing, production or modification, provided that no components, parts, tools or test equipment or the direct product of such components, parts, tools or test equipment are transferred (in-country) or reexported from such subsidiary, affiliate or facility without prior authorization by BIS.

* * * * *

■ 8. Section 740.11 is amended by revising paragraph (c)(3) to read as follows:

§ 740.11 Governments, international organizations, and international inspections under the Chemical Weapons Convention (GOV).

* * * * *

(c) * * *

(3) *Confidentiality.* The application of the provisions of this paragraph (c) is subject to the condition that the confidentiality of business information is strictly protected in accordance with applicable provisions of the EAR and other U.S. laws regarding the use and transfer of U.S. goods and services.

* * * * *

PART 742—[AMENDED]

■ 9. The authority citation for 15 CFR part 742 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59

FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008); Notice of November 8, 2007, 72 FR 63963 (November 13, 2007).

■ 10. In Supplement No. 5 to Part 742 is amended by revising paragraph (3) to read as follows:

**Supplement No. 5 to Part 742—
Checklist on Encryption and Other
“Information Security” Functions**

* * * * *

3. For products that contain an “encryption component”, can this encryption component be easily used by another product, or accessed by the end-user for cryptographic use?

PART 744—[AMENDED]

■ 11. The authority citation for 15 CFR part 744 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008); Notice of November 8, 2007, 72 FR 63963 (November 13, 2007).

■ 12. Section 744.1 is amended by revising paragraphs (a)(1) and (b)(2) to read as follows:

§ 744.1 General provisions.

(a)(1) *Introduction.* In this part, references to the EAR are references to 15 CFR chapter VII, subchapter C. This part contains prohibitions against exports, reexports, and selected transfers to certain end-users and end-uses as introduced under General Prohibition Five (End-use/End-users) and Nine (Orders, Terms, and Conditions), unless authorized by BIS. Sections 744.2, 744.3, 744.4 prohibit exports, reexports and transfers (in-country) of items subject to the EAR to defined nuclear, missile, and chemical and biological proliferation activities. Section 744.5 prohibits exports, reexports and transfers (in-country) of items subject to the EAR to defined nuclear maritime end-uses. Section 744.6 prohibits certain activities by U.S. persons in support of certain nuclear, missile, chemical, or biological end-uses. Section 744.7 prohibits exports

and reexports of certain items for certain aircraft and vessels. Section 744.9 prohibits U.S. persons from providing technical assistance to certain foreign persons seeking to develop or manufacture certain encryption commodities or software. Section 744.10 prohibits exports and reexports of any item subject to the EAR to Russian entities, included in Supplement No. 4 of this part. Section 744.11 imposes license requirements, to the extent specified in Supplement No. 4 to this part on entities listed in Supplement No. 4 to this part for activities contrary to the national security or foreign policy interests of the United States. Sections 744.12, 744.13 and 744.14 prohibit exports and reexports of any item subject to the EAR to persons designated as Specially Designated Global Terrorists, Specially Designated Terrorists, or Foreign Terrorist Organizations, respectively. Section 744.16 sets forth the right of a party listed in Supplement No. 4 to this part to request that its listing be removed or modified. Section 744.19 sets forth BIS’s licensing policy for applications for exports or reexports when a party to the transaction is an entity that has been sanctioned pursuant to any of three specified statutes that require certain license applications to be denied. Section 744.20 requires a license, to the extent specified in Supplement No. 4 to this part, for exports and reexports of items subject to the EAR destined to certain sanctioned entities listed in Supplement No. 4 to this part. Section 744.15 describes restrictions on exports and reexports to persons named in general orders. In addition, these sections include license review standards for export license applications submitted as required by these sections. It should also be noted that part 764 of the EAR prohibits exports, reexports and certain transfers of items subject to the EAR to denied parties.

* * * * *

(b) * * *

(2) *Determine applicability.* Second, determine whether any of the end-use and end-user prohibitions described in this part are applicable to your planned export, reexport, transfer (in-country) or other activity. See Supplement No. 1 to part 732 for guidance. For exports, reexports or transfers (in-country) that are in transit at the time you are informed by BIS that a license is required in accordance with §§ 744.2(b), 744.3(b), 744.4(b) or 744.6(b) of the EAR, you may not proceed any further with the transaction unless you first obtain a license from BIS (see part 748 of the EAR for instructions on how to

apply for a license). The provisions of § 748.4(d)(2) shall not apply to license applications submitted pursuant to a notification from BIS that occurs while an export, reexport, or transfer (in-country) is in transit.

* * * * *

■ 13. Section 744.2 is amended by revising paragraph (a) introductory text and paragraph (b) to read as follows:

§ 744.2 Restrictions on certain nuclear end-uses.

(a) *General prohibition.* In addition to the license requirements for items specified on the CCL, you may not export, reexport, or transfer (in-country) to any destination, other than countries in Supplement No. 3 to this part, an item subject to the EAR without a license if, at the time of export, reexport, or transfer (in-country) you know ¹ that the item will be used directly or indirectly in any one or more of the following activities described in paragraphs (a)(1), (a)(2), and (a)(3) of this section:

* * * * *

(b) *Additional prohibition on persons informed by BIS.* BIS may inform persons, either individually by specific notice or through amendment to the EAR, that a license is required for a specific export, reexport, or transfer (in-country), or for the export, reexport, or transfer (in-country) of specified items to a certain end-user, because there is an unacceptable risk of use in, or diversion to, the activities specified in paragraph (a) of this section. Specific notice is to be given only by, or at the direction of, the Deputy Assistant Secretary for Export Administration. When such notice is provided orally, it will be followed by a written notice within two working days signed by the Deputy Assistant Secretary for Export Administration. However, the absence of any such notification does not excuse persons from compliance with the license requirements of paragraph (a) of this section.

* * * * *

■ 14. Section 744.3 is amended:

- a. By revising paragraph (a) introductory text;
- b. By revising paragraph (b); and
- c. By revising paragraph (d)(1) to read as follows:

¹ Part 772 of the EAR defines “knowledge” for all of the EAR except part 760, Restrictive Trade Practices and Boycotts. The definition, which includes variants such as “know” and “reason to know”, encompasses more than positive knowledge. Thus, the use of “know” in this section in place of the former wording “know or have reason to know” does not lessen or otherwise change the responsibilities of persons subject to the EAR.

§ 744.3 Restrictions on certain rocket systems (including ballistic missile systems and space launch vehicles and sounding rockets) and unmanned air vehicles (including cruise missile systems, target drones and reconnaissance drones) end-uses.

(a) *General prohibition.* In addition to the license requirements for items specified on the CCL, you may not export, reexport, or transfer (in-country) an item subject to the EAR without a license if, at the time of export, reexport or transfer (in-country) you know that the item:

* * * * *

(b) *Additional prohibition on persons informed by BIS.* BIS may inform persons, either individually by specific notice or through amendment to the EAR, that a license is required for a specific export, reexport or transfer (in-country) or for the export, reexport, or transfer (in-country) of specified items to a certain end-user, because there is an unacceptable risk of use in, or diversion to, the activities specified in paragraphs (a)(1) or (a)(2) of this section. Specific notice is to be given only by, or at the direction of, the Deputy Assistant Secretary for Export Administration. When such notice is provided orally, it will be followed by a written notice within two working days signed by the Deputy Assistant Secretary for Export Administration. However, the absence of any such notification does not excuse persons from compliance with the license requirements of paragraphs (a)(1), (a)(2), or (a)(3) of this section.

* * * * *

(d) *License review standards.* (1) Applications to export, reexport or transfer (in-country) the items subject to this section will be considered on a case-by-case basis to determine whether the export, reexport or transfer (in-country) would make a material contribution to the proliferation of certain rocket systems, or unmanned air vehicles. When an export, reexport or transfer (in-country) is deemed to make a material contribution, the license will be denied.

* * * * *

■ 15. Section 744.4 is amended:

- a. By revising paragraph (a); and
- b. By revising paragraph (d)(1) to read as follows:

§ 744.4 Restrictions on certain chemical and biological weapons end-uses.

(a) *General prohibition.* In addition to the license requirements for items specified on the CCL, you may not export, reexport, or transfer (in-country) an item subject to the EAR without a license if, at the time of export, reexport, or transfer (in-country) you know that

the item will be used in the design, development, production, stockpiling, or use of chemical or biological weapons in or by any country or destination, worldwide.

* * * * *

(d) *License review standards.* (1) Applications to export, reexport, or transfer (in-country) items subject to this section will be considered on a case-by-case basis to determine whether the export, reexport, or transfer (in-country) would make a material contribution to the design, development, production, stockpiling, or use of chemical or biological weapons. When an export, reexport, or transfer (in-country) is deemed to make such a contribution, the license will be denied.

* * * * *

■ 16. Section 744.5 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 744.5 Restrictions on certain maritime nuclear end-uses.

(a) * * * In addition to the license requirements for items specified on the CCL, you may not export, reexport, or transfer (in-country) certain technology subject to the EAR without a license if at the time of the export, reexport or transfer (in-country) you know the item is for use in connection with a foreign maritime nuclear propulsion project.

* * * * *

■ 17. Section 744.6 is amended:

- a. By revising paragraph (a)(1)(i) introductory text;
- b. By revising paragraph (a)(1)(ii);
- c. By revising paragraph (a)(3); and
- d. By revising paragraph (b), to read as follows:

§ 744.6 Restrictions on certain activities of U.S. persons.

(a) * * *

(1) * * *

(i) No U.S. person as defined in paragraph (c) of this section may, without a license from BIS, export, reexport, or transfer (in-country) an item where that person knows that such item:

* * * * *

(ii) No U.S. person shall, without a license from BIS, knowingly support an export, reexport, or transfer (in-country) that does not have a license as required by this section. Support means any action, including financing, transportation, and freight forwarding, by which a person facilitates an export, reexport, or transfer (in-country).

* * * * *

(3) Whole plant requirement. No U.S. person shall, without a license from BIS,

participate in the design, construction, export, reexport, or transfer (in-country) of a whole plant to make chemical weapons precursors identified in ECCN 1C350, in countries other than those listed in Country Group A:3 (Australia Group) (See Supplement No. 1 to part 740 of the EAR).

(b) *Additional prohibitions on U.S. persons informed by BIS.* BIS may inform U.S. persons, either individually by specific notice or through amendment to the EAR, that a license is required because an activity could involve the types of participation and support described in paragraph (a) of this section. Specific notice is to be given only by, or at the direction of, the Deputy Assistant Secretary for Export Administration. When such notice is provided orally, it will be followed by a written notice within two working days signed by the Deputy Assistant Secretary for Export Administration. However, the absence of any such notification does not excuse the U.S. person from compliance with the license requirements of paragraph (a) of this section.

* * * * *

PART 748—[AMENDED]

■ 18. The authority citation for 15 CFR part 748 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

■ 19. Supplement No. 2 to part 748 is amended by revising paragraph (c)(2), to read as follows:

Supplement No. 2 to Part 748—Unique Application and Submission Requirements

* * * * *

(c) * * *

(2) Security Safeguard Plan requirement. The United States requires security safeguards for exports, reexports, and transfers (in-country) of High Performance Computers (HPCs) to ensure that they are used for peaceful purposes. If you are submitting a license application for an export, reexport, or in-country transfer of a high performance computer to or within a destination in Computer Tier 3 (see § 740.7(c)(1) of the EAR) or to Cuba, Iran, North Korea, Sudan, or Syria you must include with your license application a security safeguard plan signed by the end-user, who may also be the ultimate consignee. This requirement also applies to exports, reexports, and transfers (in-country) of

components or electronic assemblies to upgrade existing “computer” installations in those countries. A sample security safeguard plan is posted on BIS’s Web page at <http://www.bis.doc.gov/hpcs/SecuritySafeguardPlans.html>.

* * * * *

PART 752—[AMENDED]

■ 20. The authority citation for 15 CFR part 752 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp. p. 219; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

■ 21. Section 752.5 is amended by revising the undesignated paragraph at the end of (c)(8)(ii) to read as follows:

§ 752.5 Steps you must follow to apply for an SCL.

* * * * *

(c) * * *

(8) * * *

(ii) * * *

“No chemicals or chemical equipment received under this Special Comprehensive License will be transferred, resold, or reexported to a destination or end-user that requires a license, unless the new end-user has been approved by the Bureau of Industry and Security, and in no case will the items be transferred, resold, or reexported to a party who is not the end-user.”

* * * * *

■ 22. Section 752.8 is amended by revising the last sentence of paragraph (a) to read as follows:

§ 752.8 SCL application review process.

(a) * * * In reviewing and approving a specific SCL request, BIS retains the right to limit the eligibility of items or to prohibit the export, reexport, or transfer (in-country) of items under the SCL to specific firms, individuals, or countries.

* * * * *

■ 23. Section 752.16 is amended by revising paragraph (a)(1)(v) to read as follows:

§ 752.16 Administrative actions.

(a)(1) * * *

(v) Require that certain exports, reexports, or transfers (in-country) be individually authorized by BIS;

* * * * *

■ 24. Supplement No. 3 to part 752 is amended by revising Block (8) paragraph (iv) to read as follows:

Supplement No. 3 to Part 752—Instructions on Completing Form BIS-752 “Statement by Consignee in Support of Special Comprehensive License”

* * * * *

Block 8: Disposition or Use of Items.

* * * * *

(iv) Item (d): Complete this Block if your company plans to transfer or resell within the country of import. State the end-use of your customers. If you plan to transfer to end-users that require prior approval by BIS, complete and attach Form BIS-748P-B, End-User Appendix.

* * * * *

PART 760—[AMENDED]

■ 25. The authority citation for 15 CFR part 760 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

■ 26. Section 760.1 is amended by revising the first and second sentences of paragraph (b)(4)(viii) to read as follows:

§ 760.1 Definitions.

* * * * *

(b) * * *

(4) * * *

(viii) At the request of country Y, A, an individual employed by U.S. company B, is assigned to company C as an employee. C is a foreign company owned and controlled by country Y. A, a U.S. national who will reside in Y, has agreed to the assignment provided he is able to retain his insurance, pension, and other benefits. * * *

* * * * *

■ 27. Section 760.3 is amended by revising the first sentence of paragraph (f)(4)(i) to read as follows:

§ 760.3 Exceptions to prohibitions.

* * * * *

(f) * * *

(4) * * *

(i) A, a U.S. individual employed by B, a U.S. manufacturer of sporting goods with a plant in boycotting country Y, wishes to obtain a work visa so that he may be assigned to the plant in Y. * * *

* * * * *

PART 772—[AMENDED]

■ 28. The authority citation for 15 CFR part 772 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

■ 29. Section 772.1 is amended by revising the definition of “transfer” to read as follows:

§ 772.1 Definitions of terms as used in the Export Administration Regulations (EAR).

* * * * *

Transfer. A shipment, transmission, or release to any person of items subject to the EAR either within the United States or outside the United States. *In-country transfer/transfer (in-country).* The shipment, transmission, or release of items subject to the EAR from one person to another person that occurs outside the United States within a single foreign country.

Note: This definition of transfer does not apply to § 750.10 or Supplement No. 8 to part 760 of the EAR. The term “transfer” may also be included on licenses issued by BIS. In that regard, the changes that can be made to a BIS license are the non-material changes described in § 750.7(c). Any other change to a BIS license without authorization is a violation of the EAR. See §§ 750.7(c) and 764.2(e).

* * * * *

Dated: November 10, 2008.
Christopher R. Wall,
Assistant Secretary for Export Administration.
 [FR Doc. E8–27226 Filed 11–17–08; 8:45 am]
BILLING CODE 3510–33–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1110

Certificates of Compliance

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Act (“CPSA”), at section 14(a) as amended by section 102(a) of the Consumer Product Safety Improvement Act of 2008 (“CPSIA”), Public Law 110–314, requires that, for products manufactured on or after November 12, 2008, manufacturers (including importers) and private labelers of the products certify that the products comply with all applicable CPSA consumer product safety rules and similar rules, bans, standards and regulations under any other laws administered by the Commission by issuing a certificate that accompanies the product and can be furnished to certain parties. The certificate must specify each such rule, ban, standard, or regulation with which the product must comply. In general, the certification must be based on a test of each product

or upon a reasonable testing program. Certificates and certification for certain children’s products must be based on testing by third party laboratories whose accreditation to do so has been accepted by the Commission. The third party testing requirements become effective on a rolling schedule as the Commission issues specific laboratory accreditation requirements. Section 14(a)(4) of the CPSA gives the Commission the authority where there is more than one manufacturer, importer, or private labeler to designate one or more of such entities as the person(s) who shall issue the required certificate and to relieve all others of that responsibility.

The final rule published today limits the parties who must certify to the U.S. importer and, in the case of domestically produced products, the U.S. manufacturer. It also specifies the requirements that an electronic certificate must meet.

DATES: Effective Date: This rule is effective November 18, 2008.

FOR FURTHER INFORMATION CONTACT: John “Gib” Mullan, Assistant Executive Director for Compliance and Field Operations, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814; e-mail: jmullan@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

The Commission is aware that, as a result of the extremely short deadline for complying with the new certificate requirement and its vast expansion over that previously required by section 14(a) (which applied only to products subject to consumer product safety standards under the CPSA) there is substantial confusion over what is required by way of certification.

The Commission has received thousands of inquiries as to how to comply, when to comply, what is required in support of the certification, and what form the certificate must take, as well as hundreds of requests to evaluate an individual product as to what existing and future bans, standards, regulations, or rules might apply to it. Commission staff has been unable to respond to many of these inquiries due to the press of the other very early multiple statutory deadlines imposed on the agency by the CPSIA.

The Commission believes that for the expanded § 14(a) certificate program to be implemented in a fair and orderly way and to produce the benefits intended by Congress, it must be streamlined, at least in its initial phase.

Accordingly, the Commission is exercising its authority under CPSA

section 14(a)(4) by issuing this immediately effective final rule designating the importer as the sole entity that must issue the certificate required by section 14(a) in the case of an imported product.¹ This certificate must be available to the Commission no later than the time when the product or shipment is available for inspection in the United States. The Commission is also designating the domestic manufacturer as the sole entity that must issue the certificate required by section 14(a) in the case of a domestically produced product. This certificate must be available to the Commission upon request before the product or shipment is introduced into domestic commerce.

Section 14(g)(3) of the CPSA as added by section 102(b) of the CPSIA requires that the certificates required by section 14(a) of the CPSA “accompany” each product or shipment of products subject to the certification requirements and be “furnished” to each distributor or retailer of the product. In addition, a copy of the certificate must be “furnished” to the CPSC upon request.

The final rule issued today provides that the requirements of section 14(g)(3) can be satisfied by providing the statutorily required certificate information by electronic means. The means by which the certificate may be provided in electronic form is specified.

This rule is being issued in immediate final form in recognition that the new, broader consumer product certification requirements established by CPSIA go into effect for products manufactured on and after November 12, 2008. The Commission expects that with time CPSIA’s expanded certification requirements will become more routine and it then would consider whether this rule needs to be revised based on actual experience.

The rule issued here is effective upon publication in the **Federal Register**.

II. Pertinent Statutory Provisions

Section 14(a)(1) of the CPSA, as amended by CPSIA, requires that the manufacturer (including the importer) and the private labeler, if any, of a product that is subject to an applicable consumer product safety rule under the CPSA, or similar rule, ban, standard, or regulation under any other Act enforced by the Commission issue a certificate of compliance.² This requirement applies

¹ The Commission voted 2–0 to issue this rule.

² CPSIA section 14(a)(2) imposes additional testing requirements to support certificates of compliance for “children’s products” as defined in section 3(a)(2) of Consumer Product Safety Act. Ninety days after the Commission issues those requirements for a given product or category of