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Via E-mail

Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
14th Street & Constitution Ave., NW
Washington, DC 20230

Subject: Comments on *Proposed Revisions to the Support Documents Requirements of the Export Administration Regulations in Response to Executive Order 13563 Retrospective Regulatory Review*

Reference: RIN 0694-AG00

Dear Sir or Madam:

On April 8, 2014, BIS published a proposed rule titled *Proposed Revisions to the Support Documents Requirements of the Export Administration Regulations in Response to Executive Order 13563 Retrospective Regulatory Review*, 79 Fed. Reg. 19,552 (Apr. 8, 2014) (hereinafter, "Proposed Rule"). We are writing to provide comments on the Proposed Rule.

Most importantly, we suggest that BIS reconsider the proposal to eliminate the Import Certificate ("IC"). Instead, exporters should have the option of providing an IC, with certain modifications, for license applications that require support documentation. In addition, we are providing comments on proposed changes to the *Statement by Ultimate Consignee and Purchaser* and proposing a revised definition for "Ultimate Consignee" – a defined term in EAR §748.5 that is not currently addressed in the Proposed Rule but is directly relevant to the proposed changes in support document requirements.

1. BIS Should Retain the Import Certificate as an Alternative to the *Statement by Ultimate Consignee and Purchaser* rather than Eliminating it Entirely

The most significant change in the Proposed Rule is to eliminate the IC requirement in EAR §§748.9 and .10 and, instead, require U.S. applicants to furnish an executed *Statement by Ultimate Consignee and Purchaser* (hereinafter, "BIS-711") for any license application where a support document is required. The principal reasons offered in support of the proposed change are:

- It would "significantly reduce burden and improve timeliness for shipping under an approved license" and

- The utility of the IC has diminished because "it lacks an affirmative statement on the actual end use of the item by the ultimate consignee or end user."

Notwithstanding the effort invested in drafting the Proposed Rule, for the reasons set forth below, we respectfully request that BIS *not* eliminate the IC entirely. Rather, BIS could address its concerns regarding the lack of end use information on the IC *and* the concerns of exporters that desire an administratively workable system by retaining the IC – with certain modifications – as an *alternative* support document to the BIS-711.

A. Some U.S. Exporters Prefer the IC process and Find it Easier and More Efficient than the BIS-711 Process

It does not appear that BIS has considered the fact that some U.S. exporters and their foreign affiliates, in compliance with current requirements under EAR §748.10, have established timely and efficient procedures for obtaining ICs from foreign governments.

For example, one of our clients works closely with its foreign parent to facilitate exports of military and defense-related items and services from the United States to a country that is a close ally of the United States. The foreign parent has worked closely with the foreign government agency that issues ICs to establish guidelines and processes for obtaining such documents. This working relationship is based, in part, on the foreign government's reputation as a reliable importer and exporter. As a result, the foreign parent normally can obtain an IC in a very short amount of time to support a Commerce license application. We have been advised that this process is much less complicated and time consuming for the foreign parent than trying to obtain a completed and signed BIS-711 from one or more ultimate consignees.

Furthermore, the IC is a standardized international document. Foreign government agencies that issue ICs understand its purpose and how it must be completed. In contrast, the level of knowledge regarding the EAR and U.S. export control requirements in general among foreign companies can vary widely. In many cases, ultimate consignees in foreign countries have very circumscribed roles in a given export transaction, and may have limited knowledge of EAR requirements. This frequently results in a reluctance to sign a U.S. Government-issued form, the purpose of which the foreign company does not fully understand.

Other aspects of the current IC requirements in EAR §748.9 and .10 that are perceived as burdens by some U.S. applicants could be resolved with minor modifications to the IC requirements and therefore do not necessitate elimination of the IC as a whole.

(1) Requirement to Provide IC Number in License Application

In accordance with EAR §748.9(c)(1), Block 13 of the *Multipurpose Application Form* (BIS-748) requires that the U.S. applicant enter the IC number and identify the country that

issued the IC in the license application for transactions that require an IC. Thus, it is generally understood that the IC must be issued before the U.S. applicant can even submit a license application.

Although preferable to completion of the BIS-711, this requirement can cause unnecessary delay in the licensing process. However, it can easily be remedied. BIS could change EAR §749.9(c)(1) to eliminate the requirement to have an IC prior to submission of a license application. Instead, BIS could require that no *shipments* can occur under an approved export license that requires an IC until the exporter obtains documentation that the IC has been issued by the foreign government. Although the IC constitutes a certification from a foreign government that it will regulate any exports of the items covered, obtaining an IC – from the foreign purchaser's perspective – is usually an administrative task. Moreover, we understand that foreign governments rarely decline to furnish the IC. Thus, the export licensing process can be facilitated by allowing the U.S. Government's review of the license application to occur while the foreign government processes and issues the IC.

Indeed, BIS Licensing Officers often accomplish this same result administratively as an accommodation to U.S. applicants. License applications that require ICs routinely are accepted and processed while the foreign purchaser works to obtain the IC. Such applications are either held without action until the IC is obtained, or – in some cases – the license is approved subject to a condition that no shipments can be made until the U.S. applicant receives the required IC.

(2) Requirement for an Original IC Prior to Export

EAR §748.9(c)(1) requires that a U.S. exporter obtain the *original, manually-signed* IC from the foreign purchaser prior to making any exports under a license.

This requirement could be eliminated or replaced with a requirement to obtain an electronic copy of the IC. It is not clear what purpose is served by a requirement to obtain an original document. Moreover, in an increasingly digital age, it can often be difficult to tell the difference between the original and a color copy of a document. BIS seems to recognize that obtaining an original, manually-signed support document has diminished importance because it proposes to amend the requirements applicable to BIS-711s to "remove references to wording such as 'original statement' and 'manually signed original' … to allow for the use of electronic signatures." The same updated approach should be applied to the IC.

B. To Supplement the IC, BIS Should Require a U.S. Exporter to Obtain an Affirmative, Written Statement of End Use from the Purchaser or Ultimate Consignee

Most countries that issue ICs use a version of the standard International Import Certificate which does not provide information on the end use of the items identified therein. BIS cited the lack of end use information as an example of how the IC has lost its utility and, therefore, as a reason to eliminate the IC.

If the IC is retained as an option, BIS could resolve this issue by simply imposing a requirement that a U.S. applicant that opts to provide an IC as support documentation for a license application must also obtain an affirmative statement of end use from the purchaser or ultimate consignee. For exports of "600 Series" products, this would maintain consistency with ITAR licensing requirements, where a U.S. applicant must provide a written statement of end use from the foreign purchaser to support a DSP-5 permanent export license application.

The requirement to obtain end use information from the purchaser or ultimate consignee should be flexible so as to allow companies to integrate the requirement into their order processing and export compliance systems. For example, some companies may prefer to obtain end use information in a separate, stand-alone document. Others may prefer that the statement of end use be included directly in contracts or purchaser orders. The form of the end use statement should not matter, so long as it is an affirmative statement of end use signed by a "responsible official," as currently defined in EAR §748.11(d)(1). The requirement to obtain a statement of end use would *not* be a requirement imposed on all U.S. exporters; only those that choose to furnish an IC as support document for a license application instead of a BIS-711.

A requirement to obtain an affirmative statement of end use from the purchaser or ultimate consignee also is consistent with the level of documentation many U.S. exporters already require from their foreign customers – regardless whether the EAR requires an IC or BIS-711. U.S. exporters routinely obtain some type of end use statement or written certification from foreign purchasers as a means to document compliance with various EAR requirements – particularly licensing requirements based on knowledge of restricted end use applications, as set forth in EAR Part 744.

In conclusion, complying with the IC requirements – modified as described above – would not be burdensome and time consuming for exporters that chose this option. To the contrary, for some exporters reliance on the IC is an established and workable procedure to support licensed exports. The absence of end use information in the IC can easily be remedied by modifying the current regulations to require a supplemental statement of end use from the purchaser or ultimate consignee. Moreover, the IC does serve an important function; it notifies a foreign government that national-security controlled items are being imported and it constitutes a commitment by the foreign government to take responsibility for any subsequent exports of the items. Retaining the IC as an alternative to the BIS-711 would satisfy *both* exporters that do not wish to use the IC and those that prefer it.

2. BIS Should Provide Clarification on Criteria for Identifying the Ultimate Consignee in Export Transactions

Regardless of whether the IC is retained as an alternative support document for the BIS-711, BIS should consider providing additional clarification and/or criteria for identifying the "Ultimate Consignee" in an export transaction. We understand that the Proposed Rule does not seek to modify the definitions of the "Parties to the Transaction" in EAR §748.5. However, we believe that providing such guidance is critical because the determination directly affects which foreign entity (in addition to the Purchaser) is required to execute the BIS-711.

Currently, EAR §748.5 defines the "Ultimate Consignee" as follows:

> 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.

Under this definition, the Ultimate Consignee is determined by identifying which foreign party receives the exported items. In other words, the Ultimate Consignee is determined based on where the exported goods are delivered, rather than by analyzing which foreign party owns the goods or has the legal authority to direct the disposition of the exported goods.

The problems with the current definition are highlighted by the following examples. Assume a foreign company ("Company X") is involved in purchasing and reselling "600 Series" parts and components to customers in support of a foreign government program. If Company X places purchase orders with a U.S. manufacturer, then it is clearly the "Purchaser."

- Scenario 1: If the U.S. exporter delivers the items to Company X, then Company X appears to satisfy the current definition of "Ultimate Consignee" because it "receives" the exported items. This is the case even if Company X will immediately resell the items to its customer.

- Scenario 2: If Company X instructs the U.S. exporter to ship the items directly to its customer, then Company X arguably is no longer the "Ultimate Consignee" because it does not "receive" the exported items. In this case, there is an argument that the customer of Company X is the "Ultimate Consignee."

The Ultimate Consignee in a licensed export transaction assumes responsibility for the use and subsequent disposition of the exported items. This is especially true for transactions where a BIS-711 is required and the Ultimate Consignee is require to make several certifications regarding its use and disposition of the items. Identifying the Ultimate Consignee, therefore, should depend on factors more substantive than the identity of the party that receives possession of goods to be exported from the United States.

We suggest modifying the definition of "Ultimate Consignee" so that it identifies the ultimate consignee as the foreign entity that has the authority to direct and control the movement or disposition of the exported items. A proposed new definition of "Ultimate Consignee" in EAR §748.5 is as follows:

> The principal party in interest located abroad who receives title or ownership of the exported or reexported items and has the authority to direct the delivery or shipment of the exported or reexported items.

Under this definition, Company X in the example discussed above would be the "Ultimate Consignee" under both Scenario 1 and 2 because it receives title to the exported items (*i.e.*, it purchased them from the U.S. exporter) and it has the authority and responsibility to direct the delivery of the item – either to itself or to a specific customer. If this proposed export

was one for which a BIS-711 was required Company X would be the only foreign party that was required to execute the document.

This proposed definition also is logically consistent with the definition of "exporter" in EAR §772.1. The "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.

The key criterion for determining the "exporter" is identifying which person has the authority to direct or control the movement of the goods out of the United States. It is not based on the last person to possess the goods, or the person that manufactures the goods. The reason for this is to ensure that the responsibility for complying with EAR licensing requirements falls on the U.S. person that is most responsible for the export. The same reasoning should apply when identifying the Ultimate Consignee.

3. Miscellaneous Comments Concerning the Proposed BIS-711

Set forth below are comments on the remainder of the Proposed Rule that pertain mostly to the contents of the BIS-711.

A. BIS Should Ensure that the Content of the BIS-711 Form and Letter are Consistent

In the existing regulations and in the Proposed Rule, there are differences between the requirements and certifications contained in the two forms by which information in the *Statement by Ultimate Consignee and Purchaser* can be provided – the standard Form BIS-711 ("Form") and a letter ("Letter"). The information required for each method should be consistent so that there is no benefit/extra burden for choosing one method over the other.

Some of the differences between the two methods are as follows:

- The instructions for preparing the Letter include a requirement to indicate whether the Letter is for a single transaction or for multiple transactions (up to two years). The Form does not contain any mention of the single/multiple transaction option.

- The instructions for the Letter require the Letter to identify the name of the U.S. applicant in the certifications in proposed EAR §748.11(c)(ii). This information is not required for the Form. (And this information should not be required, as a single Form/Letter might be used to support more than one application from more than one exporter.)

- The Form is limited to actions in a single country (*i.e.*, Block 1). BIS expressly states that identifying a country or countries for sale or distribution of items has no effect (and is not authorized) unless included in the license application. The Letter offers

the opportunity to name any country in the certifications (*see, e.g.*, proposed 748.11(c)(ii)(C) & (D)). The Letter should be limited to the country of residence for the Ultimate Consignee, similar to the Form.

- The Form requires the Purchaser/Ultimate Consignee to identify whether it received any assistance in preparing the form. If this is retained, the same requirement should apply to the Letter

B. BIS Should Clarify Which Party Signing the BIS-711 has a Duty to Report Changes

Both the current regulations and the Proposed Rule impose a requirement that the foreign Purchaser and/or Ultimate Consignee report any changes in information on the BIS-711 to the U.S. applicant. Specifically, proposed EAR §748.11(b)(5)(iii) states that the "consignee and/or purchaser must submit information that is true and correct to the best of their knowledge and must promptly send a new statement to the applicant if changes in the facts or intentions contained in their statement(s) occur after the statement(s) have been forwarded to the applicant."

If the Purchaser and Ultimate Consignee are different entities but sign a single BIS-711 Form, the proposed regulation is not clear as to which party is responsible for reporting changes to the applicant. Is the Purchaser responsible for notifying the U.S. applicant if it learns of a change in how the Ultimate Consignee will be using or disposing of the items? If the Purchaser does not provide such notification, can it be held liable for the actions of the Ultimate Consignee?

The bulk of the substantive information on the form is reported by the Ultimate Consignee. The Purchaser may sign the BIS-711 Form, but does not report any independent information. Unless the scope of the Purchaser's responsibilities to report new or changed information is clarified (and limited), providing a single BIS-711 Form could be problematic for many foreign purchasers.

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If you have any questions concerning these comments, please contact the undersigned at (202) 293-1600 or via email at mcormaney@lukscormaney.com

Sincerely,

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