

## RECORD OF PUBLIC COMMENTS

### PROPOSED RULEMAKING: *Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party*

Publication in the *Federal Register*: February 6, 2014 (79 FR 7105)  
Comments due April 7, 2014

	SOURCE	SIGNER(S) OF COMMENT	DATE	NUMBER OF PAGES
1.	Individual commenter	C. Dalton	2/23/14	1
2.	Individual commenter	Ana Garcia	3/16/14	3
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8.	NCBFAA	Darrell J. Sekin	4/3/14	7
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<b>TOTAL</b>				<b>34</b>

RIN 0694-AF67

## Delegation of Licensing Requirements Determination and Licensing Responsibility to a Foreign Principal Party

Here are my comments:

**1**

"Foreign Principal Party" is not specifically defined despite being central to this proposed rule. A definition in 772 would help.

Also, a suggestion for the following definition in 772:

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

There may be more than one sale involved, so adding "export" will help. And adding "(USPPI)" and "(FPPI)" will improve understanding.

**2**

In 758.3(b)(1) can BIS clarify by adding "Electronic writing (such as an email) is acceptable."? And what must the writing include? Name, Company, Title, Date, etc.?

**3**

In 758.3 can BIS replace "does not in and of itself relieve any party of responsibility for compliance with the EAR" with "does not in any way relieve any party of its obligation to comply with the EAR."? Obligation is more appropriate when referring to the EAR as a whole.

Thank you.



C. Dalton

## Sharron Cook

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**From:** Ana Garcia <anagarciapr@hotmail.com>  
**Sent:** Sunday, March 16, 2014 9:51 AM  
**To:** Robert Monjay  
**Subject:** Foreign Principal Party Controlled Export Transaction - proposed rule - RIN 0694-AF67  
- comment tracking 1jy-8azp-sq1v

Dear Mr. Monjay,

With respect to Foreign Principal Party Controlled Export Transaction proposed rule, these proposed rules are intended to facilitate enhanced public understanding of the EAR by eliminating perceived discrepancies between the EAR and the Bureau of the Census's Foreign Trade Regulations (FTR) with respect to the definition of a "routed export transaction." The proposed rule clearly state the FPPI is responsible of filing the EEI and also responsible of determining and obtaining export licenses. I don't think this rule takes into consideration the ICC Inco-terms rules.

The only Inco-term that states the FPPI is responsible of filing the EEI is EXW. What about when the terms are FOB US port or FCA consolidation point in USA or DAF border in Mexico/Canada... ? who is responsible of filing the EEI?

I think people should not assume that the FPPI is responsible, it should be clearly stated on the proposed rule that in a Foreign Principal Controlled Export Transaction (FPCET), the FPPI is responsible of filing the EEI regardless of the Inco-terms agreed upon the USPPPI and FPPI, or something to that effect.

Incoterms play a very important role in determining who is responsible of the transportation charges and liabilities. Inco-terms also states who is responsible of filing export customs clearance... this is an international trading rule implemented by the ICC, and is followed by all foreign countries. Routed Transactions contradicts the ICC rules, causing confusion to the US and Foreign entities.

Below is a commonly used statement that attest the FPPI responsibilities, however there is no clear mention of the responsibility of obtaining licenses, nor state they are responsible of filing the EEI regardless of the Incoterms agreed upon the USPPPI and FPPI.

Is there a more complete/clear form/letter you can recommend to use that covers all matters pertaining to the Foreign Principal Party Controlled Export Transaction proposed rule?

Regards,

Ana Garcia

Written Authorization to Prepare or Transmit

Shipper's Export Information for a

Routed Export Transaction

Know all men by these presents, that \_\_\_\_\_,

(Name of Foreign Principal Party in Interest / FPPI)

the FOREIGN PRINCIPAL PARTY IN INTEREST, organized and doing business under the laws of the

State or Country of \_\_\_\_\_, and having an office and place of business at

\_\_\_\_\_

\_\_\_\_\_

(Address of FPPI)

hereby authorizes \_\_\_\_\_, having its principal place of business

(Name of US Freight Forwarder or Agent)

at \_\_\_\_\_

to act for and on its behalf as a true and lawful agent and attorney of the Foreign Principal Party in Interest (FPPI)

for and in the name, place and stead of the Foreign Principal Party in Interest, from this date, in the United States

either in writing, electronically, or by other authorized means to:

Act as Forwarding Agent for Export Control, Census Reporting and Customs purposes. Make, endorse or

sign any Shipper's Export Declaration, AES transmissions or other documents (based on the information obtained from the

exporter or other parties involved in the transaction) or to perform any act which may be required by law or regulation

in connection with the exportation or transportation of any merchandise on behalf of the Foreign Principal Party in Interest.

The Foreign Principal Party in Interest hereby certifies that all statements and information contained in the documentation provided to the authorized agent and relating to the exportation will be true and correct. Furthermore, the Foreign Principal Party in Interest understands that civil and criminal penalties may be imposed for making false or fraudulent statements, or for the violation of any United States laws or regulations on exportation.

This power of attorney is to remain in full force and effect until revocation in writing is duly given by the Foreign Principal Party in Interest and received by the Authorized Agent.

IN WITNESS WHEREOF, \_\_\_\_\_

(Full name of FPPI, YOUR COMPANY)

presents to be sealed and signed:

Signature: \_\_\_\_\_

(Must be Officer of the Company)

Name : \_\_\_\_\_

Capacity (title): \_\_\_\_\_

# PUBLIC SUBMISSION

<b>As of:</b> January 05, 2015
<b>Received:</b> March 16, 2014
<b>Status:</b> Pending_Post
<b>Tracking No.</b> 1jy-8azp-sq1v
<b>Comments Due:</b> April 07, 2014
<b>Submission Type:</b> Web

**Docket:** BIS-2014-0004

Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party

**Comment On:** BIS-2014-0004-0001

Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party

**Document:** BIS-2014-0004-DRAFT-0001

Comment on FR Doc # 2014-01176

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## Submitter Information

**Name:** Anonymous Anonymous

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## General Comment

These proposed rules are intended to facilitate enhanced public understanding of the EAR by eliminating perceived discrepancies between the EAR and the Bureau of the Census's Foreign Trade Regulations (FTR) with respect to the definition of a "routed export transaction." The proposed rule clearly state the FPPI is responsible of filing the EEI and also responsible of determining and obtaining export licenses. I don't think this rule takes into consideration the ICC Inco-terms rules.

The only Inco-term that states the FPPI is responsible of filing the EEI is EXW. What about when the terms are FOB US port or FCA consolidation point in USA or DAF border in Mexico/Canada... ? who is responsible of filing the EEI?

I think people should not assume that the FPPI is responsible, it should be clearly stated on the proposed rule that in a Foreign Principal Controlled Export Transaction (FPCET), the FPPI is responsible of filing the EEI regardless of the Inco-terms agreed upon the USPPPI and FPPI, or something to that effect.

Incoterms play a very important role in determining who is responsible of the transportation charges, liabilities, etc. Inco-terms also states who is responsible of filing export customs clearance... this is an international trading rule implemented by the ICC, that is followed by all foreign countries. Routed Transactions contradicts the ICC rules, causing confusion to the US and Foreign entities.



# PUBLIC SUBMISSION

<b>As of:</b> January 05, 2015
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Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party

**Comment On:** BIS-2014-0004-0001

Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party

**Document:** BIS-2014-0004-0002

Comment on FR Doc # 2014-01176

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## Submitter Information

**Name:** BG MN

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## General Comment

For section 758.3 (b) I would recommend the FPPI MUST assume responsibility for determining licensing requirements for a Foreign Principal Party Controlled Export Transaction, unless the USPPPI agrees to assume responsibility.

In a Foreign Principal Party Controlled Export Transaction (routed export transaction) the FPPI and their U.S. Agent are in total control of the export and therefore should be required to assume licensing responsibility. The USPPPI has no control over the movement of the shipment, and may have little or no knowledge of the actual recipient of the goods.

If the FPPI and their U.S. Agent refuse to assume licensing responsibility, the current and proposed regulations do not impose any requirement on the FPPI or their U.S. Agent to provide the USPPPI with information on the recipient and end use of the goods to make a qualified licensing determination and to conduct appropriate denied parties screenings. The proposed regulations only require the sharing of the ultimate country of destination and destination port, which are not adequate to make a licensing determination. In many transactions where the FPPI is shipping directly to their customer, the FPPI wishes to treat the customer's name and address as "company confidential." Unless the FPPI is willing to reveal their "company confidential" information to the USPPPI, the FPPI must be required to assume licensing responsibility.

Also, the USPPPI has no way of knowing if a Foreign Principal Party Controlled Export

Transaction is diverted en-route. There is nothing in the regulations requiring an FPPI or their U.S. Agent to inform the USPPI if a diversion occurs, which is yet another reason to require the FPPI and their U.S. Agent to assume licensing responsibility.

# PUBLIC SUBMISSION

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**Docket:** BIS-2014-0004

Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party

**Comment On:** BIS-2014-0004-0001

Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party

**Document:** BIS-2014-0004-DRAFT-0003

Comment on FR Doc # 2014-01176

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## Submitter Information

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## General Comment

The Proposed Rule makes three important changes to the Export Administration Regulations (EAR):

1. It replaces the term "routed export transaction" with "foreign principal party controlled export transaction," to distinguish the term from "routed export transaction" as separately defined in the Census Bureau's Foreign Trade Regulations (FTR);
2. It clarifies existing responsibilities of parties involved in such export transactions where a Foreign Principal Party in Interest (FPPI) assumes responsibility for an export; and

It refines certain procedures for such transactions, whereby the US Principal Party in Interest (USPPI) assigns export responsibility to the FPPI and its US agent.

So, we're all clear now right? Wrong!

Although the above is all very nice and somewhat helpful, it does absolutely nothing to indemnify the poor U.S. Agent that has willingly or "unwillingly", knowingly or

“unknowingly” become the Exporter under these regulations.

This is something that you may or may not be aware of. Nowhere in the regulations does it state that the authorized agent must be a party to, or aware of this written agreement.

Therefore, the responsibility transfers from the FPPI to their authorized U.S. Agent with ~OR~ without their knowledge. It is true.

The agreement is often a covert paragraph as part of the general sales contract, and even when as a separate writing, and it is usually not fully understood by the FPPI and since most "routings" are agent to agent it almost never communicated to the responsible US agent. On behalf of the OTI Industry, kindly include this to be addressed in the proposed rule change.

## Sharron Cook

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**From:** Mark Nolan <Mark.Nolan@FutureElectronics.com>  
**Sent:** Tuesday, March 25, 2014 10:32 AM  
**To:** PublicComments  
**Cc:** Peter Liston; Frank Campagna; Robert Monjay  
**Subject:** RIN 0694-AF67

Commentary in regards to RIN 0694-AF67

Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party

Upon reading the proposed in the Federal Register from February 6th 2014, Future Electronics wishes to raise the following....

If the FPPI will now be enabled to make license determination through their appointed freight forwarder or agent, would said agents also be empowered to directly file the export through AES direct under their own EIN numbers? We ask this question because under current RTA guidelines the license determination still resides with the USPPI who would either file the AES with a valid POA from the FPPI; or provide the SED information to the FPPI's agent and have the agent file AES using the USPPI's tax EIN number.

There is cause for concern if the FPPI is allowed to make license determinations with their agent and still file the export through AES using the USPPI's EIN number and were to make a mistake. What would the incentive be to empower the FPPI's agent to make license determination if all the culpability were still to reside with the USPPI? Furthermore it seems like in a post shipment audit environment it could be difficult to look at export records and then determine in which cases the FPPI's agent made license determination unless they filed the AES themselves.

The way I read the proposed rule and given the current environment I cannot imagine a scenario whereby it would make any sense to let the FPPI's agent ever make license determination if they weren't wholly responsible for the AES declaration out of the country. If I'm misunderstanding the proposed further clarification would be appreciated.

Best regards,

Mark Nolan

Directeur adjoint - Conformité commerciale mondiale

Associate Director - Global Trade Compliance

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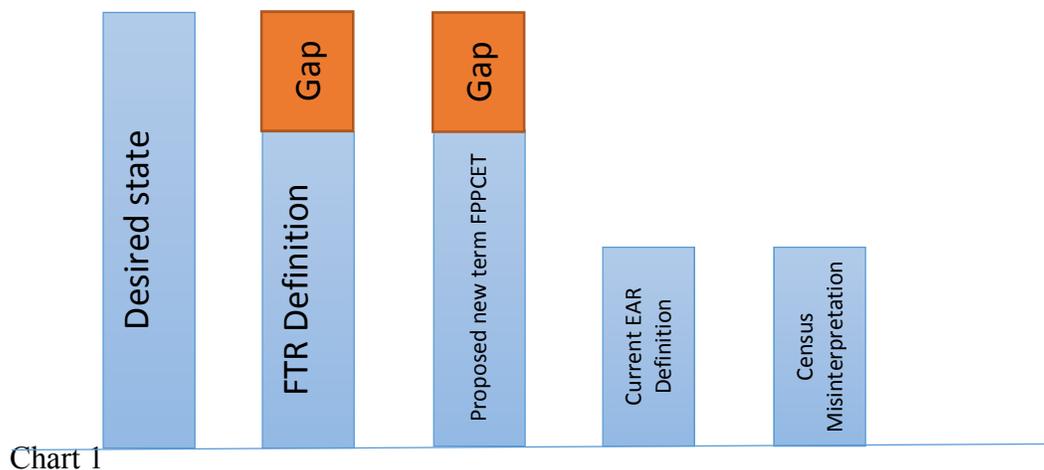
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March 25 2014

Frank Duan  
Export Compliance Professional  
[Frankduan2006@yahoo.com](mailto:Frankduan2006@yahoo.com)

Re: Comments on 79 FR 7105, February 6 2014  
RIN 0694-AF67

In commenting 79 FR 7105, I submit this analysis of routed export transaction and related issues and confusions. This comment, using holistic approach, analyzes not only the EAR proposed new rule for Foreign Principle Party Controlled Export Transaction (FPPCET), but also the Foreign Trade Regulation (FTR) definition of Routed Export Transaction. The goal is to identify the root cause of the confusion and suggest that the proposed new rule is supposed to provide clarification and solution. Chart 1 illustrates the current state of the confusion of routed export transaction.



Explanation of each Bar:

- Desired State: It is the ultimate goal
  - Regulations are to be interpreted correctly
  - Exporters have clear understanding of FPPCET and routed export transaction
  - Exporters can control the type of export transaction, not be controlled by the transaction
  - No more waste in export process
- FTR definition: The FTR defines the routed export transaction correctly, but it has a gap for reaching to the desired state.
- Gap (Orange boxes): The gap represents the current situation that:
  - Non-compliance with the FTR definition §30.3(e), due to misunderstanding,
  - The FTR correctly defines the routed export transaction, but It is interpreted incorrectly by the exporters and the regulatory agencies,

- It is the goal of joint efforts between the Federal Government and the export community to close the gap.
- Proposed new term FPPCET (Foreign Principle Party Controlled Export Transaction): The proposed new term intends to be in line with FTR definition of routed export transaction. The proposed new rule may not reach to the desired state due to the gap.
- The Current EAR Definition (of routed export transaction): It has discrepancy to FTR definition
- Census Misinterpretation: Census interpreted FTR definition incorrectly and provided the wrong guidance.

### **Root Cause of the Confusion Needs to be Identified and Communicated to the Export Community**

The FTR definition of routed export transaction §30.3(e) is very straight forward, “*A routed export transaction is a transaction in which the FPPI authorizes a U.S. agent to facilitate the export of items from the United States and to prepare and file EEI.*” The definition requires two parallel elements to be present in order to meet the definition, e.g. “in which FPPI authorizes a US agent

1. to facilitate the export of item from the US (1<sup>st</sup> element), **and**
2. to prepare and file EEI (2<sup>nd</sup> element).

But this simple definition has caused confusion to US exporters and even regulatory agencies for many years since 2000 (65 FR 42556, July 10 2000 Final Rule). The current EAR definition of routed export transaction (EAR Part 772) is the result of the confusion. The root cause of the confusion is not the definition itself, neither are the mandatory requirements under routed export transaction. The root cause lies with the triggering reason for the routed transaction.

- Why there is a routed export transaction?
- What factors make the USPPI “has to” give away the responsibilities of filing EEI and applying for export license to the FPPI?
- Does the FTR really have a requirement that certain transactions must be routed?

If we can have the correct answers to the above questions, the easy solutions to the routed export transaction will be within reach.

### **Key to the Confusion: One element or two elements?**

Is one element or two elements required for routed transaction according to the FTR definition? Though this is not supposed to be a difficult question, the FTR definition provides crystal clear requirement of two elements. Unfortunately, this becomes a starting point of the confusion. Many US exporters and regulatory agencies got the answers wrong. One-element interpretation has been prevailing in the export community. By One-element interpretation, it means “as long as the FPPI authorizes a US agent to facilitate the export, it is routed”. The 2<sup>nd</sup> element - “prepare and file EEI” is ignored.

**In the export community**, because the word “facilitate” is not a defined word, exporters interpret the definition in all different ways. Here are a few real examples:

- If FPPI authorizes a freight forwarder for export shipment, it is routed
- If FPPI names a freight forwarder for export shipment, it is routed
- If FPPI selects the transportation method, it is routed
- If FPPI pays the international freight, it is routed.
- If FPPI controls the export shipment, it is routed. (The word “Control” is not defined)
- If the Incoterm is EXW, it is routed. (closest to the correct understanding)

**On the BIS side**, the current EAR definition simply requires one element, “A transaction where the foreign principal party in interest authorizes a U.S. forwarding or other agent to facilitate export of items from the United States.” (EAR Part 772)

The proposed rule intends to add a second element by giving the USPPPI an option to allow FPPI to be responsible for determining and applying for the license. *“Foreign Principal Party Controlled Export Transaction”* which is a transaction where an FPPI which is responsible for the export of items subject to the EAR, also assumes the authority and responsibility for licensing requirements (79 FR 7105). According to the proposed new definition, if FPPI is only responsible for the export of item, it is NOT a Foreign Principle Party Controlled Export Transaction (FPPCET). Only if the FPPI is responsible for the export and “ALSO assume the responsibility for licensing”, that makes the transaction a FPPCET. The proposed rule intends to be in line with FTR’s definition by requiring two elements. (Please refer to Chart 1)

**On the Census side**, the FTR defines the routed export transaction correctly, but it is interpreted incorrectly by the Census. Here is one example, “in a routed export transaction, the FPPI must facilitate the export and then authorize the USPPPI or a US agent to file the EEI.” And the Census further explains “If the FPPI authorizes a US agent to facilitate the export only, but does not authorize to file EEI, it cannot be exported, otherwise it would be a violation.” or in other instance, the Census interpreted exactly in the same way as current EAR definition, requiring only one element.

The word “then” is added between the two elements, it makes the two elements “cause and effect”, one element becomes the consequence of another. The misinterpretation makes the 2<sup>nd</sup> element (prepare and file EEI) a consequence of the first one. That means if there is the first one, then there must be a second one, this is wrong. The FTR definition requires two parallel elements. If there is only one element, it does not meet the definition, then it is not a routed transaction, but a normal export transaction. Please see Chart 2, A and B

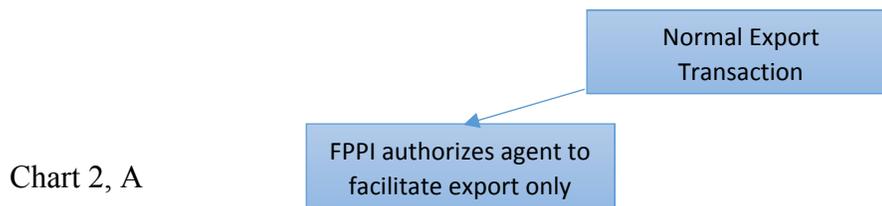


Chart 2, B



Let me illustrate it using an analogy example: (Everyone understands this analogy, the FTR definition has the same structure and same simple language, but most people failed to understand it.)

*A member of a millionaire's club is someone who is 21 years old and owns one million dollars.*

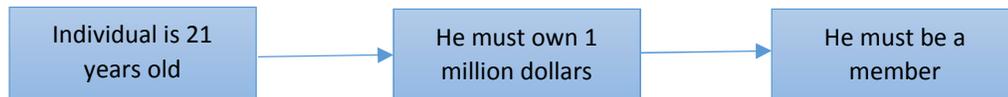
Interpretation 1 (Correct): Someone must meet the two requirements to become a member:

1. be over 21 years old, **and**
2. owns 1 million dollars

If one meets only one requirement, he cannot be a member.

Interpretation 2 (Wrong): If someone is 21 years old, then he must own 1 million dollars, then he must be a member of millionaire's club, please see Chart 3.

Chart 3

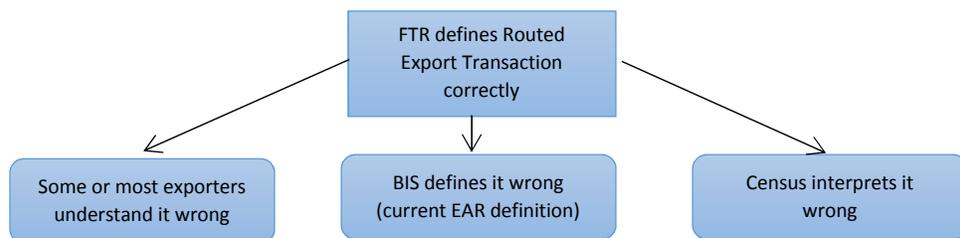


In Interpretation 1, if someone is over 21 years old, but does not own 1 million dollars, he simply cannot be the member of millionaire's club. This is exactly the way the FTR defines the routed export transaction. If the FPPI authorizes the US agent to facilitate the export, but does not authorize the agent to file EEI, it is not a routed transaction, but a normal export transaction.

In Interpretation 2 (wrong interpretation), if someone is over 21 years old, then he must own one million dollars, then he must be the member of the millionaire's club. The wrong logic is obvious in this analogy. Though it also requires two elements, it assumes that owning 1 million dollar is the consequence of being 21 years old. This is exactly how some exporters and Census interpreted the FTR definition.

The Chart 4 illustrates the current state of the confusion.

Chart 4



## Why Census recognized Routed Export Transaction as a subset of export transaction

Why there is a routed export transaction? What factors make the USPPPI “has to” give away the responsibilities of filing EEI and applying for export license to the FPPI? Without reviewing the evolution of the routed transaction, there is no way to answer these questions.

The term “routed export transaction” did not exist until 1998 when the Census Bureau proposed amending the Foreign Trade Statistics Regulations (FTSR), 15 CFR Part 30 to clarify exporters’ and forwarding agents’ responsibilities for providing and reporting information on the Shipper’s Export Declaration (SED). The Census Bureau posted the proposal on 63 FR 41979 on August 6 1998. On the paragraph of “Background”, Federal Register provides three examples of export transactions and emphasis on “(including EX Works)”, one of the statement reads “If a U.S. manufacturer sells merchandise for export to a foreign company (including Ex Works), the U.S. manufacturer must be listed as exporter on the SED.” (Please note why Ex-Works is mentioned here.)

In response to Census Bureau’s proposal, six-nine (69) comments were received by the Census and were published on 64 FR 53861. Some opposing comments are *“The other major reason for opposition to the proposed rule concerned identifying the U.S. seller or principal as the “exporter of record” in EX WORKS (EXW) transactions. EXW is a “term of sale” whereby the foreign buyer takes possession of the merchandise in the United States, and the foreign buyer takes responsibility for facilitating the export of the merchandise out of the United States, including export documentation responsibility. The major concern the U.S. sellers presented, when required to be listed as the “exporter of record” in these transactions, is that the U.S. seller does not have effective control over the merchandise once it is turned over to the foreign buyer’s agent. The U.S. seller does not want to be held liable for any export control violations that may occur in such a transaction.”*

The above paragraph spells out exactly the reason why routed export transaction is recognized. It is because that the Census Bureau addresses U.S. exporter’s concern over a situation that under Ex-Work the FPPI takes over the merchandise including export documentation responsibility (including EEI filing or possible license application).

If a shipment is not under Ex-Work, the USPPPI has no reason to pass the responsibilities of EEI filing and license application to the FPPI. Among eleven (11) Incoterms (Incoterms 2010), only Ex-Works has this requirement.

Over the years, the true triggering reason has been at limbo. Most exporters, who give away the responsibilities of filing EEI or applying for license to the FPPI, mistakenly believe it is the requirement of FTR or EAR that certain transaction must be routed, otherwise it would be a violation. Actually the FTR has no requirement that certain transaction must be routed. It is important to know that the FTR §30.3(e) is a definition, not a requirement, (though it is misinterpreted as a requirement).

## **The Disconnection between the Regulation and the Business Decision of Trade Terms**

Both Census and BIS do not want to get involved with the sales terms between the buyer and the seller. 64 FR 53861 states “Census Bureau export regulations do not intend to interfere with the terms of sale between the foreign buyer and the U.S. seller in the export transaction.” and 79 FR 7105 states “BIS structures its regulations to allow the parties in each transaction to structure the transaction as they see fit.” The Census does not want to make the regulations based on the Incoterms, which is not a law and has no binding effect. But unfortunately in case of routed transaction, without clarifying the entire picture, including Incoterms, to the US export community, the confusion may always exist.

The chart 5 depicts the build-up of the confusion:

- The exporter’s intention to follow the Incoterm (EX-works) requirement translates into a situation that prevents the exporter from filing EEI;
- The Census makes regulation based on the situation, not on the fact that the exporters follow the Incoterm’s requirement;
- Census does not want to get involved with the Incoterms;
- Without fully understanding the Incoterms, which is the root cause, no one can really understand why there is a routed export transaction, and why US exporters report export data to their own government that needs to be authorized by the foreign party? 15 CFR §30.3(e)(1).

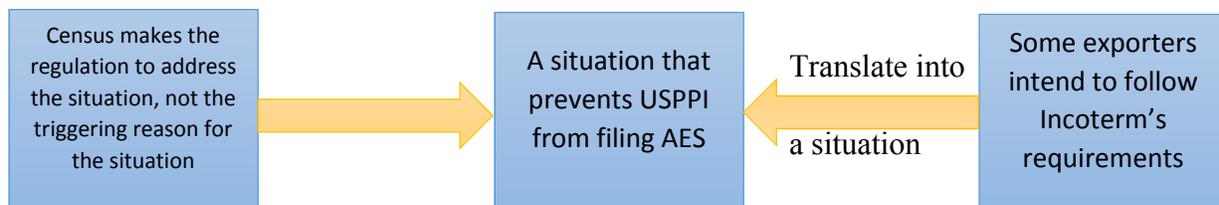


Chart 5

## **Exporters Need Guidance from the Government for Better Understanding**

The reason for the Federal regulations not being built on Incoterms is legitimate, because the Incoterms are not law, they do not have binding effect. Exporters are encouraged to follow the Incoterms as international customary rules in international trade, but it is at exporters’ discretion.

Due to the fact that the recognizing of routed export transaction by the Census did originate from the Incoterm, now we cannot build a wall between the regulation and the Incoterms. The disconnection between the regulations and the Incoterms is the root cause for the confusion. And this is where the export community needs help. Only when the root cause is identified and communicated to the export community, the US exporters will be able to:

- Determine by themselves whether it worth following the Incoterms requirements and causes such export process inefficiency.

- Always assume responsibilities to file EEI and to apply for export license regardless the Incoterms being used, then routed export transaction will no longer apply.
- Have a choice to select Incoterm FCA or other terms, instead of Ex-Work, and take the responsibilities to file EEI or license application. No routed export applies to them. Among 11 Incoterms, only Ex Works requires the foreign buyer to be responsible for the license and export clearance.
- Also reevaluate their decision of giving away the responsibilities of filing EEI to the foreign customer under Ex-Works requirements.

### **Conclusion and Suggestions**

It is my suggestion that EAR and FTR clarify that:

- USPPI has the primary responsibilities to apply for export license and to file EEI. The USPPI has the right to assume the responsibilities to apply for license or to file EEI, regardless the sales term being used or whoever facilitating the export shipment.
- EAR and FTR have no requirement that certain transaction must be routed or Foreign Principle Party controlled. It is the US exporter or USPPI's choice to make an export transaction routed or Foreign Principle Party controlled
- Under Incoterm Ex-works, if the USPPI takes the responsibilities of applying for license or filing EEI, the USPPI may, at his discretion, send a notice to inform the FPPI of the decision, no Power of Attorney or Written Authorization is needed from the FPPI.
- EAR and FTR should still have the requirements under FPPCET and Routed Export Transaction. In case of any USPPI insists on strictly following the Incoterm Ex-Works' requirement and allowing the FPPI to apply for license and/or file EEI, the USPPI and the FPPI must follow the requirements under FPPCET and/or the routed export transaction.

Finally, for information purpose, Incoterms 2010 states, Ex-Work is a term for domestic shipment, FCA is the term for export or international trade. So the entire routed export transaction is built on misunderstanding.

Thank you  
Very respectfully

Frank Duan

**Comments in response to the NPRM dated January 15, 2014: "Delegation of License Requirements, Determination of Licensing Responsibility to a Foreign Principal Party"**

**Docket No. 121025883-2583-01, RIN 0694-AF67**

The National Customs Brokers and Freight Forwarders Association of America Inc. ("NCBFAA") hereby submits these comments in response to the Department of Commerce Bureau of Industry and Security ("BIS") Notice of Proposed Rulemaking ("NPRM") regarding the delegation of license requirements and the determination of licensing responsibility to a Foreign Principal Party published in the Federal Register in this docket on February 6, 2014.

At the outset, while the NCBFAA understands the BIS goal to avoid confusion over the differing responsibilities of parties engaged in routed export transactions, we are concerned that the approach taken by the NPRM assumes that FPPIs are far more knowledgeable about the U.S. licensing process and its requirements than typically is the case. It is certainly true that major foreign corporations, such as aircraft and automobile manufacturers or pharmaceutical concerns, are appropriately sensitive to US export control issues and have affiliated corporate entities or agents in the U.S. that are knowledgeable about the specifications of products being exported to their overseas affiliates or principals. Those U.S. parties, even if they do not qualify as USPPIs (because they did not actually do the purchasing of the items being exported), are normally familiar with the items being exported and can accordingly properly and completely satisfy the data needs for any BIS (or ITAR) license.

However, it is also often the case - - based upon the experience of NCBFAA members - - that the large majority of FPPIs are not as knowledgeable and do not have that type of a support network in the U.S. These companies are not routinely purchasing licensable items from the U.S. with the frequency that would economically justify the investment to have full time assets in the U.S. involved in their licensing processes. Nor is it easy for them to find parties in the U.S. that would be able to assist them in the licensing process on an occasional, spot-time basis. So, while these FPPIs will typically work with U.S. forwarding agents to handle the transportation and submission of electronic export information ("EEI") through the Census Bureau's AES system, forwarders are also generally not sufficiently familiar with the specifications and intended uses of items requiring licenses as to be able to assist in that capacity.

The NCBFAA believes that it is important for BIS to understand, before permitting USPPIs engaged in the sale and export of licensable commodities to assign their responsibilities, that their FPPI customers will often not comprehend the nature of the obligations that are being transferred when they assume the obligation to perform the export formalities. While these FPPIs can properly rely on U.S. forwarding agents to be knowledgeable about the AES data requirements and the various export control laws, forwarders will normally not have the expertise or technical competency with respect to the specifications and uses of the products being exported to be the license applicants. Hence, most forwarders will not want to take on the responsibility of being the exporter of record precisely because (1) they do not have that expertise, (2) they necessarily must rely on the accuracy of the information being provided by the real parties in interest to the transaction (namely, the USPPI and the FPPI), and (3)

they do not want to be responsible for the consequences of any mistake that might be made. Forwarders are in the business of facilitating the transportation and documentary reporting requirements of items that can lawfully be exported, but are not normally expert in the initial licensing process of the items being exported.

So, the NCBFAA's primary position in this regard is that a person/party in the United States, specifically the USPPI or its U.S. agent, should maintain responsibility for United States Export Control, proper ECCN classification, license determination and license application to ensure those aspects of the applicable regulations are met.

We realize the current regulations allow the FPPI to undertake this responsibility. The NCBFAA commends the Bureau of Industry and Security ("BIS") for addressing and taking steps to clarify the often misinterpreted regulations regarding Routed Export Transactions and for highlighting the difference between the authorization to act as exporter under the EAR and the separate authorization requirement to file EEI under the FTR. But we are concerned that this proposal, particularly the proposed revisions to Section 758.3, will result in significant confusion among many FPPIs when they assume licensing responsibility due to the fact that the only agent they typically have -- the forwarder -- is not experienced, prepared or willing to take on that responsibility.

Accordingly, the NCBFAA urges BIS to carefully consider the implications of assigning this responsibility to foreign parties that often do not understand the potential consequences when they agree to relieve USPPI's of their responsibilities by assuming export licensing obligations.

NCBFAA believes that there are several areas in the proposed language that can be misinterpreted, and that this is the opportune time to add further clarification which will avoid questions and misinterpretations in the future.

We are addressing the following points in detail below:

1. The name "Foreign Principal Controlled Export Transaction"
2. Replacing the term "Foreign Principal Controlled Export Transaction" in place of "Routed Export Transaction"
3. Definitions
4. Delegation of Authority
  - a. Language "allows" vs. "assigns".
  - b. Including the U.S. agent in the acceptance process.
5. Data elements to be provided to the USPPI

#### **Detailed Comments:**

##### **1. THE NAME "FOREIGN PRINCIPAL CONTROLLED EXPORT TRANSACTION"**

The NPRM summary states that to enhance clarity, this proposed rule would remove the defined term "Routed Export Transaction" from the EAR and create a new term "Foreign Principal Party Controlled Export Transaction" to better define certain transactions, namely those in which the foreign principal party in interest ("FPPI") assumes the authority and responsibility for licensing requirements under the EAR.



The NCBFAA agrees that separating out this subset of Routed Export Transactions, namely, those in which the FPPI has expressly assumed responsibilities under the EAR (using terminology in the current regulation) and clarifying the responsibilities, could be helpful. We do not believe, however, that the new name clearly describes this subset. In the context of an export transaction, the term “controlled” will generally be interpreted as controlling the physical movement of the cargo out of the country which, in terms of “FPPI controlled” is the definition of Routed Export Transaction, and not as the intended subset, controlling the license determination. NCBFAA recommends that the name should clearly describe the subset of activities that are covered by this regulation (i.e. the routed export transaction in which the FPPI assumes licensing responsibility under the EAR). Perhaps the more specific terms “Foreign Principal License Controlled Export Transaction” or “Foreign Principal as Exporter Export Transactions” would be more appropriate. Having said that, we will use the terminology as set forth in the NPRM in our further comments below:

## 2. REPLACING “ROUTED EXPORT TRANSACTION” WITH “FOREIGN PRINCIPAL CONTROLLED EXPORT TRANSACTION”

The NPRM has replaced the term “Foreign Principal Controlled Export Transaction” everywhere that “Routed Export Transaction” appears in the EAR. NCBFAA agrees with that replacement except in section 748.4(a)(2) which clearly refers to the full “Routed Export Transaction” In this section, it is stating that in a Routed Export Transaction, either the USPPI or the FPPI, through a U.S. agent, can apply for a license. In this context, the term should continue to read “Routed Export Transaction” as below:

~~**Foreign Principal Party Controlled Export Transaction:**~~ **Routed Export Transaction:** *In an export transaction where the foreign principal party in interest is responsible for the movement of the items out of the United States, either the U.S. principal party in interest or, when authorized by Sec. 758.3(b) of the EAR, the foreign principal party in interest's designated U.S. agent may apply for a license to export items from the United States. Prior to submitting an application, the U.S. 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 pursuant to Sec 758.3(b)(2) of the EAR.”*

## 3. DEFINITIONS

Considering that the EAR still references the full Routed Export Transaction in section 748.4(a)(2), the NPRM should include separate definitions in section 772.1; one defining all “Routed Export Transactions” and one defining the subset “Foreign Principal Controlled Export Transaction”. To help clarify this, we propose that BIS and Census take this opportunity to align the definition of “Routed Export Transaction” in both the EAR and FTR.

We further recommend that the EAR define separately “Forwarding Agent” and “U.S. Agent”.

Suggested language for consideration:

### a) Keep the new definition of “Foreign Principal Party Controlled Export Transaction”:

**Foreign Principal Party Controlled Export Transaction:** *A transaction meeting the requirements of Sec. 758.3(b), where the foreign principal party in interest assumes responsibility for determining licensing requirements and obtaining license authority through its U.S. agent. The assumption of responsibility for*



determining licensing requirements and obtaining license authority is only authorized when the foreign principal party in interest is responsible for the movement of the items out of the United States.

- b) **Add back a definition for Routed Export Transaction. Update the current definition to align with the new language in section 758.3(b):**

**Routed Export Transaction:** *An export transaction where the foreign principal party in interest is responsible for the movement of the items out of the United States.*

- c) **We further recommend that within the Department of Commerce, the Bureau of Industry and Security and the Census Bureau align their definitions of the full “Routed Export Transaction”.** *We propose that Census adopt the same language as the EAR, namely “an export transaction where the foreign principal party in interest is responsible for the movement of the items out of the United States. The current Census definition (15 CFR 30.1) that includes “and prepare and file the EEI” is actually conflicting with further language under FTR responsibilities which goes on to say that the FPPI can authorize a U.S. agent or the USPPI to file the EEI (15 CFR 30.3(e)) and that when an authorized USPPI files the EEI, it is still a Routed Export Transaction).*

- d) **Adjust the proposed definition of “forwarding agent”:**

**Forwarding Agent:** *The person in the United States who is authorized by a principal party to move the items from the United States. This may include air couriers or carriers. In Foreign Principal Party Controlled Export Transactions, the forwarding agent and the exporter may be the same for compliance purposes under the EAR.*

- e) **Add a definition for “U.S. Agent”. It is many times assumed that the authorized forwarding agent under the FTR is automatically the U.S. agent, but as noted elsewhere in the EAR, it could be another agent (section 758.3 “However, acting through forwarding or other agent...”)**

**U.S. Agent:** *The person in the United States who is authorized by the foreign principal party in interest and who agrees to perform the services required as exporter including determining licensing requirements and if necessary obtaining a license or other export authorization, subject to the requirements of section 758.3(b).*

#### 4. DELEGATION OF AUTHORITY

- a) **Language: “allows” vs. “assigns”**

We recommend that BIS revisit the language which goes back and forth between “allowing” the FPPI to take on the responsibility and the USPPI “assigning” the responsibility to the FPPI. As an example in section 758.3(b), it states that in the Foreign Principal Controlled Export Transaction a USPPI **may allow** the FPPI to assume responsibility, yet in section 758.3(b)(1) it states that the **USPPI may assign** the FPPI in writing the responsibility, which the FPPI must acknowledge. Perhaps “assigning” refers to the process required when the USPPI “allows”, but it is not clear whether BIS intends a different meaning to those two terms. In any event, the NCBFAA believes it is essential to avoid situations where a USPPI might interpret this to mean that they can freely assign this licensing responsibility in any routed export transaction, whether or not the FPPI understands the extent of the responsibility the USPPI seeks to transfer and whether or not it is



able to make informed decisions in accepting the responsibility or selecting the appropriate U.S. agent.

As discussed above, in general, the FPPI rarely, if ever, understands the responsibilities associated with assuming this role. In the experience of our members, when the FPPI receives a request to assume the role of exporter under the EAR, they believe that this is a routine U.S. requirement as opposed to an additional responsibility and therefore agree without question. They do not understand that they must separately authorize a U.S. agent to act on their behalf in this capacity or that there are significant technical facts and policy issues that *their* agent must satisfy to obtain an export license. They assume that the authorization to their freight forwarder to transport the goods and file EEI automatically covers the additional responsibilities under the EAR. In many cases, there already exists an authorization or agreement between the FPPI and their freight forwarder which may state that the forwarder will not act in the capacity of agent for EAR purposes should the FPPI assume the additional responsibility (currently “the writing”). The result is the existence of two mutually exclusive and conflicting agreements signed by the FPPI, again, highlighting their lack of understanding. Therefore, removing the possibility of conflicting or unintended interpretations is highly recommended.

**b) Including the U.S. agent in the acceptance process**

In most cases, the FPPI’s forwarding agent does not become aware that an FPPI has accepted the license determination responsibilities under the EAR until being notified by the USPPI at the time of export. Yet, as noted above, there is often already language in the forwarder service agreement or authorization stating that they do not offer those services. This highlights the lack of understanding by the FPPI and can also cause delays in transport while the forwarding agent and the USPPI come to an arrangement that satisfies each of their concerns.

NCBFAA therefore recommends that language be included requiring that the appointed U.S. agent expressly agree to and accept in writing the role of U.S. agent under the EAR on behalf of the FPPI. This would serve to demonstrate that all of the parties are in agreement and ensure that the important role of exporter under the EAR is assumed by properly experienced and willing entities.

NCBFAA therefore recommends that the language of section 758.3 be revised to include language consistent with the concept “to allow” and requiring that any U.S. agent is included in the process by confirming in writing that it offers the appropriate services and by expressly agreeing to act in that role on behalf of the FPPI. This could be done by requiring an authorization letter where the U.S. agent is required to sign its acceptance before any authorization by the USPPI to the FPPI can be valid, or by a separate writing.

We therefore recommend the following **changes** to the new language in section 758.3 Responsibilities of parties to the transaction:

- (1) *Written Assumption of Responsibility. **Should the U.S. principal party in interest allow the foreign principal party in interest to assume responsibility for determining licensing requirements and obtaining license authority, if necessary, the U.S. principal party in interest***



*shall assign the responsibility in writing. The foreign principal party in interest must provide the U.S. principal party in interest a written document that acknowledges the foreign principal party in interest's assumption of the responsibility and that identifies the U.S. agent of the foreign principal party in interest **that has been** authorized to act as exporter for export licensing **purposes and that has agreed to act in that capacity on behalf of the foreign principal party in interest.** One writing may cover multiple transactions between the same principals*

- (2) *Power of Attorney or Other Written Authorization. The foreign principal party in interest must designate an agent in the United States for a "Foreign Principal Party Controlled Export Transaction." The U.S. agent must **agree, in writing, to act in this capacity** and must obtain a power of attorney or other written authorization from the foreign principal party in interest before it may act on its behalf or apply for a license. Upon request, the foreign principal party in interest must provide the U.S. principal party in interest with a copy of the power of attorney or other written authorization **as well as the writing where the U.S. agent has expressly accepted the responsibility.***

***Note: A power of attorney or written authorization issued to allow filing of Electronic Export Information ("EEI") under the FTR (15 CFR 30.3(e)(2)) does not, in and of itself, constitute authorization to act as the U.S. agent under the EAR. Conversely, the power of attorney or written authorization assigning export control responsibility, does not constitute authority to file Electronic Export Information ("EEI") under the FTR (15 CFR 30.3(e)(2)). The assignment of export control responsibility and the authorization to arrange transportation and documentation requirements (including the filing of EEI) are two separate and distinct authorizations.***

## **5. DATA ELEMENTS TO BE PROVIDED TO THE USPPI (section 758.3(B)(3)(ii))**

The NCBFAA is concerned that there may be confusion as to which party is responsible for providing the additional data elements noted to the USPPI. As proposed, the language states that it is the "U.S. agent" authorized under the EAR that is to supply those data elements. However, this may or may not be the forwarding agent who was authorized to file the EEI under the FTR.

It is also important to mention that the proposed language states that the FPPI must authorize the U.S. principal party in interest to obtain from the FPPI additional data elements which are not included on the list of EEI data that must be provided to the USPPI in routed export transactions under the FTR 15 CFR 30.3(e)(2) and which the FPPI may not be willing to share for commercial reasons. There are significant commercial reasons why an FPPI may not wish to share that information with the USPPI and, to the extent it really is necessary for the USPPI to have access to these additional data elements, the FPPI must understand why the USPPI may ask for them. To the extent that FPPIs may have good commercial reasons not to share that information, this could have an adverse effect on U.S. exports as the FPPIs may look for other sources of supply in order to better protect their own customer base.

Consequently, the NCBFAA initially recommends that BIS consider whether it is really essential for the FPPIs to be required to provide all of these data elements.

To the extent BIS believes it is nonetheless essential that all of these data elements be provided to the USPPI in such transactions, the NCBFAA agrees that those data elements should not be provided to the



USPPI without the FPPI's express authorization. This would keep the decision to do so as a commercial agreement between the buyer and the seller, and avoid placing the forwarding agent filing the EEI in a conflict position. We therefore suggest that this section allow the U.S. agent to request a copy of this authorization before providing the additional data elements to the USPPI.

We therefore recommend the language to be adjusted as follows:

*The foreign principal party in interest must authorize the U.S. principal party in interest to obtain from the foreign principal party in interest's U.S. agent the following information, and direct its U.S. agent to provide such information to the U.S. principal party in interest **on request if the USPPI has provided the agent with a copy of the FPPI's authorization to release that information.***

This concludes the NCBFAA comments. We appreciate the opportunity to present our comments to the Bureau of Industry and Security and we hope that these comments will assist BIS in achieving a final rule that meets its objective of clarifying the responsibilities of this subset of Routed Export Transactions.

Sincerely,

A handwritten signature in black ink, appearing to read "A. S. [unclear]", written in a cursive style.



Regulatory Policy Division  
Bureau of Industry and Security  
U.S. Department of Commerce,  
Room 2099B  
14th Street and Pennsylvania Avenue NW  
Washington, DC 20230  
Refer to RIN 0694–AF67

April 4, 2014

We are writing to you today in reference to Federal Register Notice proposed rule, *Delegation of License Requirements, Determination and Licensing Responsibility to a Foreign Principal Party*, dated February 6, 2014. RIN 0694–AF67 [Docket No. 121025583–2583–01]

We want to thank the Bureau of Industry and Security (BIS) for taking up this subject that causes a great deal of misunderstanding for exporters and forwarders alike.

First of all, we want to thank BIS for trying to clarify the “Routed Export Transaction” definition. We do feel that this term can and should be used to describe an export transaction where the foreign principal party in interest is responsible for the movement of items out of the United States. We would like to see the same definition in the Foreign Trade Regulations (FTR) to be consistent and clear so exporters and forwarders alike will know exactly the type of transaction both agencies are referencing.

With that being said, the new term “Foreign Principal Party Controlled Export Transaction” does more accurately describe the situation under 15 CFR 758.3 (b) when the FPPI expressly assumes (in writing) the responsibility for determining licensing requirements and obtaining export authorizations through an U.S. agent.

We ask that BIS define U.S. agent under the Export Administration Regulations. It is not clear to us if BIS is referring to the forwarding agent or another party that may act as agent in this capacity.

We would also like to see the word “assign” removed. Assign indicates that something can automatically be assigned to another party without consent. As a forwarder, we have had situations in the past where USPPI’s have spoken to Commerce and then came back to us stating that we have to take on this responsibility under EAR 758.3(b). We then have to explain to them that Samuel Shapiro & Company, Inc. policy does not allow us to accept responsibility for license determination as authorized under the Export Administration Regulations (EAR) 758.3, even if such authorization is allowed or assigned as an U.S. Agent representing the Foreign Principal Party in Interest. As a part of normal forwarder services, many forwarders do not offer the services to perform the role of “exporter”.

It is problematic that there is no “writing” or authorization that includes the U.S. agent. It appears that the USPPI must provide an authorization to the FPPI and the FPPI must accept the written delegation and identify the U.S. agent to act as the exporter; but there is nothing about the U.S.

agent actually agreeing to be the exporter or taking on the responsibility that the USPPI and FPPI want to delegate to them. It is assumed that the forwarding agent or other agent would know about a “writing” or authorization if one is in place between the USPPI and FPPI, but this cannot be left to chance. There must be an authorization or “writing” where the U.S. agent agrees to accept responsibility for license determination and export authorizations. This cannot be presumed by the USPPI or the FPPI. It is a business decision for a forwarder or other agent to assume responsibility for license determination and authorizations. The FPPI may not be aware of U.S. regulations and they may think that the authorization to file the Electronic Export Information (EEI) also authorizes the agent to assume license responsibility, but it does not. For all of these reasons we urge BIS to include some type of authorization that must be signed and acknowledged by the U.S. agent or forwarder well in advance of the export out of the U.S. to ensure compliance with the EAR and to meet the transportation needs of the FPPI.

Under the Information Sharing Requirement in section 758.3(b) (3) (ii), we are concerned that these may conflict with the Foreign Trade Regulations under Census in a routed export transaction found in 15 CFR 30.3(e) (2). As a forwarder we have specific elements listed under the FTR that are provided by the USPPI and can be sent back to the USPPI once the EEI is filed through the Automated Export System (AES). Is Census aware and willing to concede to U.S. agents providing this additional information to the USPPI? It would also seem there would have to be some type of authorization from the FPPI before the agent can provide these elements to the USPPI, since the FPPI is directing this shipment for their benefit, not the USPPI in this situation.

Again, we wish to thank BIS for taking up this issue and we would be happy to provide further explanation if necessary.

Sincerely,

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# AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

*The Voice of the International Trade Community Since 1921*

April 7<sup>th</sup>, 2014

Submitted Via Federal eRulemaking Portal

<http://www.regulations.gov/>

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

Re: BIS- 2014-0004  
RIN 0694-AF67

REF: Comments on Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party; 79 Fed. Reg. 7105 (February 6, 2014)

Dear Sir or Madam:

On behalf of the American Association of Exporters and Importers (AAEI), the Association respectfully submits the following comments on Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party (the proposed regulation) published in the Federal Register at 79 Fed. Reg. 7105 on February 6, 2014.

## **I. Introduction**

AAEI has been a national voice for the international trade community in the United States since 1921. AAEI represents the entire spectrum of the international trade community across all industry sectors. Our members include manufacturers, importers, exporters, wholesalers, retailers and service providers to the industry, which is comprised of brokers, freight forwarders, trade advisors, insurers, security providers, transportation interests and ports. AAEI promotes fair and open trade policy. We advocate for companies engaged in international trade, supply chain security, export controls, non-tariff barriers, import safety and customs and border protection issues.

AAEI is the premier trade organization representing those immediately engaged in and directly impacted by developments pertaining to international trade. We are recognized as technical experts regarding the day-to-day facilitation of trade. We have commented extensively on Bureau of Industry and Security (BIS) practices and procedures, and look forward to continuing to provide BIS with the practical perspective our membership has in trade facilitation.

## II. Comments

### A. General Comments

AAEI supports the efforts of BIS to modify the Export Administration Regulations (EAR) to simplify the regulatory requirements inherent in routed export transactions. However the concept articulated in the proposed regulation, while potentially sound in theory, could be problematic for exporters and their filing agents to implement on a practical level.

In addition, while amending the EAR to replace the phrase "Routed Export Transaction" with Foreign Principal Party Controlled Export Transaction" ("FPPCET") may help to alleviate the confusion over similar terminology contained in the Bureau of the Census' Foreign Trade Regulations ("FTR"), this change to the EAR does not address the fundamental problems inherent with transactions of this type. It is the experience of our members that Routed Export Transactions are inherently problematic from an export controls compliance perspective and we have doubts whether this proposed change to the EAR will help alleviate these concerns.

### B. Specific Comments on Proposed Changes to section 758.3 Regarding Responsibilities of Parties to Transactions Subject to the EAR

First, AAEI agrees with the proposed change to section 758.3(a) of the EAR that will clarify that the USPPI is the exporter in all export transactions, except when the specific requirements of § 758.3(b) are met.

However, AAEI's members are very concerned that implementing the proposed changes to the information sharing requirement set forth in the proposed regulation will be problematic and unenforceable. Specifically, there are concerned about the *Information Sharing Requirements* set forth in section 758.3 (b)(3)(ii) which states in pertinent part:

The foreign principal party in interest ***must*** [emphasis added] authorize the U.S. principal party in interest to obtain from the foreign principal party in interest's U.S. agent the following information and direct its U.S. agent to provide such information to the U.S. principal party in interest, upon request:

- (A) Date of export;
- (B) Port of export;
- (C) Country of ultimate destination;
- (D) Destination port;
- (E) Method of transportation;
- (F) Specific carrier identification; and
- (G) Export authorization (e.g., license number, license exemption, or NLR designation).

It has been the experience of our members that many freight forwarders do not provide Electronic Export Information (EEI) filings to the U.S. Principal Party in Interest (USPPI), even when the freight forwarder is the USPPI's agent.

The proposed regulation requires the FPPI to direct its U.S. filing agent (normally the FPPI's freight forwarder) to provide the EEI to the USPPI. However, because the USPPI does not have any formal relationship with the FPPI's freight forwarder it is extremely difficult or impossible to obtain this information after the export transaction has occurred. While this is particularly problematic with small freight forwarders, many of our members have also experienced similar problems in obtaining EEI filings from large freight forwarders when the FPPI is responsible for the export transaction.

Following up with FPPI's agent to request EEI data often takes significant time and diverts much needed resources from more pressing export controls compliance matters. This needs to be taken into account in the "economic impact" analysis of this proposed regulation as this is likely to increase the burden on U.S. exporters.

In addition, our members are concerned by the lack of any enforcement guidance or mechanism in the proposed regulation in which to enforce the information sharing requirement mandated in 758.3 (b)(3)(ii). While that provision states that the FPPI must direct its U.S. agent to provide the required information to the FPPI, this raises many questions if the agent does not cooperate. For example, if the FPPI's agent fails to provide the data EEI data elements will there be any consequences? Could the FPPI or its agent be subject to an enforcement action by BIS's Office of Export Enforcement? Is there any way for the USPPI to bring this issue to BIS's attention? What if the EEI data is never provided and the product is diverted?

While we understand BIS's goal in making this change to the EAR we encourage BIS to reexamine this proposed regulation by discussing the practical issues in implementing these proposed changes with U.S. exporters and freight forwarders.

### **III. Conclusion**

AAEI appreciates the opportunity to submit comments on the proposed regulation. We would be pleased to meet with BIS to discuss our comments and concern in greater detail.

Sincerely,



Marianne Rowden  
President & CEO

**Comments in response to the NPRM dated January 15, 2014: “Delegation of License Requirements, Determination of Licensing Responsibility to a Foreign Principal Party”**

**Docket No. 121025883-2583-01, RIN 0694-AF67**

Comments of

**Pacific Coast Council of Customs Brokers and Freight Forwarders Assoc, Inc.**

The Pacific Coast Council of Customs Brokers and Freight Forwarders Associations Inc. (“Pacific Coast Council” or “PCC”) hereby submits these comments in response to the Department of Commerce Bureau of Industry and Security (“BIS”) Notice of Proposed Rulemaking (“NPRM”) regarding the delegation of license requirements and the determination of licensing responsibility to a Foreign Principal Party published in the Federal Register in this docket on February 6, 2014.

The Pacific Coast Council represents the customs brokers and freight forwarders along the national largest international trade gateway – the Pacific Coast, including the seaports and airports from the Mexican border to the Canadian border, as well as the border crossings at Otay Mesa and others in the San Diego Customs Port, and Blaine, WA. Many of the members of the local PCC Associations (San Diego, Los Angeles, Northern California, Columbia River and the Washington State Association) are freight forwarders who handle large volumes of exceeding diverse imports and exports globally, and, due to geographic location, with Asia in particular.

The PCC has carefully reviewed and fully endorses the comments submitted by the National Association of Customs Brokers and Freight Forwarders Associations Inc. In addition, the Pacific Coast Council wishes to emphasize the following points.

1. The reality is that FPPI’s generally don’t understand what responsibilities they are assuming (even under the current regulatory language). Assigning responsibility to them is unrealistic, and practically speaking, unenforceable. Even if they accept the responsibility they don’t know what it means. To assume otherwise creates, from the outset, a weak and questionable foundation for the entire Proposed Rule.
2. The Forwarder is not automatically the U.S. Agent under the EAR. Many forwarders have explicit policies against this. The fact that the FPPI authorized them to move the cargo and file the EEI does **not** automatically make them their US Agent.

The FPPI (if they understood what responsibilities accompany a US party accepting/assuming the responsibility), can hire another agent in the US (such as consultants or attorneys) to act in the capacity of a US Agent. We emphasize the point made by the NCBFAA: **this Rule can only make commercial and enforcement sense if there are two separate definitions: one for Forwarding Agent, and a separate one for U.S. Agent.**

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3. We recommend that whoever the U.S. Agent is, their acceptance of the role should be part of the authorization process. Practically speaking, forwarders many times find out that their consignee customer accepted the responsibility and just assumed that the authorization to file EEI covered it. The forwarder might not learn about this assumption until the USPPI refuses to provide the license determination. So we believe as does the NCBFAA, that:
  - a. The USPPI can ask the FPPI to take on the responsibilities envisioned in the Proposed Rule, and
  - b. Should the FPPI accept these responsibilities, it would name a U.S. agent, and show that the U.S. Agent agreed (in writing) that it is qualified to perform the services required. It is essential that the US Agent has in fact, actually accept the role. It is important that the forwarder is made aware that the FPPI wants to designate it, and then has opportunity to refuse to do it.

The Pacific Coast Council appreciates the opportunity to submit comments the current NPRM to the Bureau of Industry and Security, to support the comments of the NCBFAA, and to emphasize certain points of vital interest to and impact on the freight forwarders and customs brokers along the Pacific Coast. We hope that our very practical assessment of the commercial and enforcement realities will assist BIS in clarifying the responsibilities of the various participants in these Routed Export Transactions.

Sincerely,

Victoria Lane  
President,  
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Thank you for your proposal to clarify and distinguish concepts between the EAR and the FTR. The “routed” concept has created significant confusion among exporters for years. I like the fact that the US party retains the “exporter” status unless it chooses to give it away under the EAR. Census should take BIS’s lead on this and also amend the FTR such that the USPPI retains AES filing unless it affirmatively chooses to give it away.

I also like the required data elements that the US agent will be required to provide the USPPI. This will go a long way to aiding US exporters’ compliance programs. We will now at least be entitled to information that proves the goods were exported, and to what country.

Comments on the proposal:

I believe the proposal still leaves a gap, and that is, the US agent’s “acceptance” of its responsibilities. They are a party to a Foreign Principal Party Controlled Export, and should therefore have to sign something as well. Many of the big name forwarders put right in their terms & conditions that they will not assume licensing determination. What BIS is proposing is still primarily between the USPPI and FPPI. Yes the FPPI would have to issue a POA to the US agent, but they do that for other reasons too. In other words, and FPPI simply issuing a POA to a US agent does not: 1) mean the transaction is a FPPCE (example: the FPPI may simply be issuing a POA in the context of the FTR, to allow the US agent to perform AES filing) 2) mean the US agent ACCEPTS the license determination responsibility being authorized/requested by the FPPI.

Another point to consider may be some sort of requirement for the US party to communicate to the agent at the shipment level whether it is a FPPCE. A lot of the large US forwarding agents handle business for a single FPPI that may source from many US exporters. Some exports from certain vendors could be standard exports and some FPPCE, destined to the same FPPI. I’ve seen practical confusion on this point in some case.