

DEPARTMENT OF COMMERCE**Bureau of Industry and Security****15 CFR Parts 730, 744 and 756**

[Docket No. 0612243150–8535–02]

RIN 0694–AD82

Authorization To Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States**AGENCY:** Bureau of Industry and Security, Commerce.**ACTION:** Final rule.

SUMMARY: The Entity List (Supplement No. 4 to Part 744 of the Export Administration Regulations (EAR)) provides notice to the public that certain exports and reexports to parties identified on the Entity List require a license from the Bureau of Industry and Security (BIS) and that availability of License Exceptions in such transactions is limited. This rule expands the scope of reasons for adding parties to the Entity List. This rule also amends the EAR to state explicitly that a party listed on the Entity List has a right to request that its listing be removed or modified and sets procedures for addressing such requests.

DATES: This rule is effective August 21, 2008.

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SUPPLEMENTARY INFORMATION:**Background**

The Entity List (Supplement No. 4 to Part 744 of the EAR) provides notice to the public of the identity of certain parties whose presence as a recipient of items subject to the EAR can result in the imposition of a license requirement in an export or reexport transaction.

BIS published a proposed rule (72 FR 31005, June 5, 2007) to authorize adding to the Entity List entities that BIS has reasonable cause to believe, based on specific and articulable facts, have been, are or pose a risk of being involved in activities that are contrary to the national security or foreign policy interests of the United States or those acting on behalf of such entities. This new authorization would not be used to add to the Entity List entities that are U.S. persons (as defined in § 772.1 of the EAR). The proposed rule also provided a procedure for entities listed

on the Entity List to request removal or modification of their entries. After review of the comments on the proposed rule, BIS is publishing this final rule.

Reasons for This Rule

This rule will allow BIS to focus its export control efforts more closely on problematic recipients of items that are subject to the EAR, where those recipients do not meet the criteria set forth in §§ 744.2, 744.3, 744.4, 744.6, 744.10, 744.17, 744.20 or 744.21 for addition to the Entity List. Pursuant to this rule, the U.S. government will be able to conduct prior review and make appropriate licensing decisions regarding proposed exports and reexports to such recipients to the degree necessary to protect United States national security or foreign policy interests. The government will be able to tailor license requirements and availability of license exceptions for exports and reexports to parties that have taken, are taking, or pose a significant risk of taking actions that are contrary to U.S. national security or foreign policy interests without imposing additional license requirements that apply broadly to entire destinations or items. BIS believes that such targeted application of license requirements provides the flexibility to prevent items subject to the EAR from being used in ways that are inimical to the interests of the United States, with minimal costs to and disruption of legitimate trade. As export controls continue to focus not just on countries, but also on individual customers or entities, BIS believes it is important to provide more information to the public about entities of concern. Implementation of this rule will provide additional information to enhance the ability of members of the public to screen potential recipients of items subject to the EAR.

In addition, this rule will simplify the EAR by reducing the need to issue general orders that impose license requirements on specific parties, thereby reducing the number of EAR provisions that the public would be required to review to determine license requirements under the EAR.

Summary of the Provisions of This Rule

This rule authorizes imposing foreign policy export and reexport license requirements, limiting the availability of license exceptions, and setting license application review policy for exports and reexports to entities under certain circumstances. Specifically, such steps may be taken where there is reasonable cause to believe, based on specific and

articulable facts, that an entity has been involved, is involved or poses a risk of being involved in activities that are contrary to the national security or foreign policy interests of the United States or is acting on behalf of such an entity. Under this rule, the activities at issue need not involve items or activities that are subject to the EAR in order for the entity to be placed on the Entity List. Pursuant to this rule, BIS will implement changes to the Entity List made by decision of an interagency committee called the End-User Review Committee (the “Committee”). The End-User Review Committee will consist of representatives of the Departments of Commerce, State, Defense, Energy and, if appropriate in a particular case, the Treasury. The grounds for changes to the Entity List established by this rule are in addition to the grounds provided in §§ 744.2, 744.3, 744.4, 744.6, 744.10, 744.17, 744.20 and 744.21 of the EAR.

This rule lists, as illustrative examples, five types of conduct that the End-User Review Committee could determine are contrary to U.S. national security or foreign policy interests. The five types of conduct are:

(i) Supporting persons engaged in acts of terror.

(ii) Actions that could enhance the military capability of, or the ability to support terrorism of governments that have been designated by the Secretary of State as having repeatedly provided support for acts of international terrorism.

(iii) Transferring, developing, servicing, repairing, or producing conventional weapons in a manner that is contrary to United States national security or foreign policy interests or enabling such transfer, development, service, repair or production by supplying parts, components, technology, or financing for such activity.

(iv) Preventing accomplishment of an end use check conducted by or on behalf of BIS or the Directorate of Defense Trade Controls of the Department of State by: precluding access to; refusing to provide information about; or providing false or misleading information about parties to the transaction or the item to be checked. The conduct in this example includes: expressly refusing to permit a check, providing false or misleading information, or engaging in dilatory or evasive conduct that effectively prevents the check from occurring or makes the check inaccurate or useless. A nexus between the conduct of the party to be listed and the failure to produce a complete, accurate and useful check is required, even though an

express refusal by the party to be listed is not required.

(v) Engaging in conduct that poses a risk of violating the EAR when such conduct raises sufficient concern that prior review of exports or reexports involving the party and the possible imposition of license conditions or license denial enhances BIS's ability to prevent violations of the EAR.

These examples are illustrative of conduct that could be contrary to the national security or foreign policy interests of the United States. An entity could be added to the Entity List if specific and articulable facts provided reasonable cause to believe that the entity is involved in, has been involved in, or poses a significant risk of being or becoming involved in conduct described by one or more of the five listed illustrative examples or other activities that are contrary to U.S. national security or foreign policy interests.

This rule also authorizes BIS to modify the license requirements, license exception availability or license application review policy that applies to any entity placed on the Entity List pursuant to this rule. As with decisions to place an entity on the Entity List, BIS will make such modifications in accordance with the decisions of the End-User Review Committee.

This rule does not authorize adding to the Entity List an entity to which exports or reexports require a license pursuant to §§ 744.12, 744.13, 744.14 or 744.18 of the EAR. Those sections impose license requirements because of the presence of certain parties on the List of Specially Designated Nationals and Blocked Persons published by the U.S. Department of the Treasury, Office of Foreign Assets Control. This rule does not authorize placing U.S. persons, as defined in § 772.1 of the EAR, on the Entity List.

All impositions of license requirements or statements of license application review policy or any modification thereof pursuant to this rule must be done by publishing an amendment to the Entity List found at Supplement No. 4 to part 744 of the EAR. License exceptions are not available for any entity added to the Entity List pursuant to this rule unless specifically authorized in the entry for the entity.

This rule permits a party listed on the Entity List to request that its listing be removed or modified. Such requests, including reasons therefor, must be made in writing, and BIS will provide a written response. Such requests will be reviewed by an End-User Review Committee composed of representatives

of the Departments of Commerce, State, Defense, and Energy and, if appropriate in a particular case, the Treasury. The End-User Review Committee will make a decision in accordance with the procedures set forth in Supplement No. 5 to part 744 of the EAR. The Deputy Assistant Secretary for Export Administration will convey the decision to the requesting party. This decision shall be the final agency action on such a request and may not be appealed to the Under Secretary for Industry and Security under part 756 of the EAR.

Summary of the Changes From the Proposed Rule

Changes to § 744.11

Section 744.11 of the proposed rule included an introductory paragraph, set forth criteria for listing a party on the Entity List and provided five illustrative examples of conduct that could meet the criteria. In response to the public comments, this final rule revises the introductory paragraph, paragraph (b), the criteria and two of those illustrative examples.

This final rule adds two sentences to the end of the introductory paragraph of § 744.11 in the proposed rule. This final rule also replaces the phrase "that BIS has reasonable cause to believe" in the criteria with the phrase "for which there is reasonable cause to believe." BIS is making these changes in the final rule in response to public comments stating that more information about the procedure for adding, removing and modifying Entity List listings pursuant to this rule should be disclosed. This addition and replacement are intended to make clear that decisions to add, remove or modify Entity List listings pursuant to § 744.11 are made by an interagency End-User Review Committee.

This final rule revises the first sentence of paragraph (b) to clarify the meaning of that sentence. This final rule also revises the fifth sentence in paragraph (b) to clarify that the list of examples is merely illustrative not exhaustive.

The second illustrative example addresses actions that benefit governments that have been designated by the Department of State as sponsors of terrorism. In this final rule that example has been revised to remove a reference to actions that are detrimental to the human rights of citizens of those governments. BIS believes that this revision makes the example clearer and more focused.

The fourth illustrative example addresses lack of cooperation with end use checks. As proposed, the example

read "Deliberately failing or refusing to comply with an end use check conducted by or on behalf of BIS or the Directorate of Defense Trade Controls of the Department of State, by denying access, by refusing to provide information about parties to a transaction, or by providing information about such parties that is false or that cannot be verified or authenticated." In response to requests that the example be more clearly distinguished from the criteria for placing an entity on a BIS publication entitled "The Unverified List," this final rule emphasizes that some conduct on the part of the party to be listed that makes conducting the check impossible or that renders its results inaccurate or useless would justify placing the entity on the Entity List although that conduct need not be an express refusal to permit the check. Accordingly, in this final rule, the example has been revised to read: "Preventing accomplishment of an end use check conducted by or on behalf of BIS or the Directorate of Defense Trade Controls of the Department of State by: precluding access to; refusing to provide information about; or providing false or misleading information about parties to the transaction or the item to be checked. The conduct in this example includes: expressly refusing to permit a check, providing false or misleading information, or engaging in dilatory or evasive conduct that effectively prevents the check from occurring or makes the check inaccurate or useless. A nexus between the conduct of the party to be listed and the failure to produce a complete, accurate and useful check is required, even though an express refusal by the party to be listed is not required."

This final rule also revises the fifth illustrative example, which, in the proposed rule, read: "Engaging in conduct that poses a risk of violating the EAR and raises sufficient concern that BIS believes that prior review of exports or reexports involving the party and the possible imposition of license conditions or license denial enhances BIS's ability to prevent violations of the EAR." In response to public comments recommending the example be modified to apply only to imminent and serious violations of the EAR, this final rule revises the example to read: "Engaging in conduct that poses a risk of violating the EAR when such conduct raises sufficient concern that the End-User Review Committee believes that prior review of exports or reexports involving the party and the possible imposition of license conditions or license denial enhances BIS's ability to prevent

violations of the EAR.” BIS believes that, given the varying consequences of violations based on the facts in individual cases, declaring certain violations to be *a priori* less serious than others would be unwise. BIS also notes that preventing an “imminent” violation is part of the standard for imposing a temporary denial order under part 766 of the EAR. However, BIS concludes that the proposed example would be more precise and useful if it more clearly and directly tied imposing license requirements, possibly restricting the availability of license exceptions and setting licensing policy, to the ability to prevent violations. In addition, this final rule replaces the phrase “that BIS believes” with the phrase “that the End-User Review Committee believes” because decisions to add, remove or modify an Entity List listing pursuant to § 744.11 of the EAR will be made by the End-User Review Committee.

Changes to § 744.16 of the EAR

Section 744.16 of the EAR sets forth the procedure by which listed parties may request modification or removal of their listing. In the proposed rule, that section included the following statement: “BIS will review such requests in conjunction with the Departments of Defense, State and Energy, and, if appropriate in a particular case, the Treasury.” The corresponding language in the final rule reads: “The End-User Review Committee will review such requests in accordance with the procedures set forth in Supplement No. 5 of this part” to make clear the role of the End-User Review Committee in these decisions.

This rule also revises § 744.16 of the EAR to provide that decisions on a listed entity’s request to have its listing modified or removed will be conveyed to the requester by the Deputy Assistant Secretary for Export Administration. The proposed rule provided that such decisions would be conveyed by the chairman of the End User Review Committee. BIS is making this change to make the procedure for delivering decisions pursuant to § 744.16 EAR consistent with the procedure for delivering “is informed” letters under §§ 744.2, 744.3, 744.4, 744.6, 744.17 and 744.21 of the EAR.

Addition of New Supplement to Part 744

In response to public comments requesting more information about the procedures by which the Entity List would be modified pursuant to this rule, this final rule adds a new supplement: Supplement No. 5 to Part 744—

Procedures for End-User Review Committee Entity List Decisions. This Committee is the body for all decisions to make changes to the Entity List pursuant to §§ 744.11 and 744.16 of the EAR.

Conforming and Technical Changes Made by This Rule

The proposed rule stated the decision on a party’s request to have its listing removed or modified would be the final agency action on the request. BIS intended that language to mean that no further administrative procedures for changing the decision are available. As a conforming change, this final rule adds language to § 756.1 excluding decisions made by the End-User Review Committee pursuant to § 744.16 of the EAR from the appeal procedure of part 756 of the EAR. Such express exclusion is not needed with respect to End-User Review Committee decisions pursuant to § 744.11 of the EAR because those decisions must, in all instances, be implemented through an amendment to the EAR and are excluded from § 756.1 by preexisting language.

In response to a suggestion in the public comments, this rule revises § 744.11 of the EAR to reference Supp. No. 4 to part 744 of the EAR. That reference was not in the proposed rule.

Summary of the Public Comments and BIS’s Responses to Those Comments

Comment on Rulemaking Requirements

1. One commenter stated that this proposed rule should be designated as a major rule because of its broad implications and the economic consequences that could arise for U.S. exporters if the rule results in a larger effort by foreign companies to design out U.S. products.

The Office of Management and Budget (OMB) has authority to designate rules as major under the Congressional Review Act. OMB has determined that this rule is not a major rule for purposes of that Act. The Department of Commerce does not have authority to designate a rule as major for purposes of the Congressional Review Act.

General Comments on the Proposed Rule

2. Three commenters expressed support in principle for the concept of targeted entity based license requirements. The reasons cited for support of the concept were that such controls are better suited to the global nature of national security and other threats than are broader, country based controls, that such controls have potential to employ more efficiently

enforcement and compliance resources by government and the private sector by focusing on entities of concern and that such controls would allow BIS to conduct more prior reviews of exports to risky users. However, all of the commenters, whether or not they expressed support for the concept in principle, expressed reservations or suggested changes to some aspect of the concept as noted in the following paragraphs.

3. One commenter stated that adding new entries to the Entity List creates minimal disruption to private sector screening programs and specifically contrasted that procedure to the recently promulgated “China rule.”

BIS believes that the targeted end-user controls set forth in this rule are valuable because they minimize disruption to business. However, the military end-use license requirements set forth in the “China rule” are also important instruments of United States policy. The reasons for those license requirements were set forth in the preamble to that rule (72 FR 33646, June 19, 2007) and need not be repeated here.

4. Two commenters suggested that all entries on the Entity List identify the EAR section on which that listing was based.

As set forth in the proposed rule and in this final rule, all of the entries to be added pursuant to § 744.11 as created by this rule will be identified as being added pursuant to § 744.11. The proposal to add section references to all of the existing entities on the Entity List that do not currently have such references is beyond the scope of this rule. At this time, BIS does not have plans to add such references to any pre-existing entries that do not already have such references. However, BIS plans to have the interagency End-User Review Committee conduct annual reviews of the Entity List. The Committee may consider the proposal in this comment as part of its review.

5. One commenter asserted that the proposed rule is seriously flawed and imprecise, offering a dubious process, which could be more effectively handled by existing mechanisms under the Export Administration Regulations.

BIS believes that the final rule is sufficiently precise. This rule will provide a mechanism for listing parties in the Code of Federal Regulations whose activities raise sufficient concern to justify imposing export and reexport license requirements on items to be sent to them. By doing so, all potential exporters and reexporters will have access to information about these parties of concern. BIS agrees that more public disclosure than was provided in the

proposed rule of the process by which entities will be added to the Entity List pursuant to this rule is warranted. Accordingly, this rule includes a new Supplement No. 5 to part 744, setting forth the process by which changes to the Entity List will be made.

BIS is publishing this rule precisely to make its license requirements more easily identifiable by the public and therefore more effective. License requirements based on country or item may be too broad to deal with problems that apply to particular recipients of EAR items. A denial of export privileges may be too rigid or unwarranted in a particular case. Adding a name to the Unverified List does not impose a license requirement and, therefore, does not allow BIS to scrutinize transactions in advance. This rule will reduce the need for ad hoc procedures such as use of general orders to impose license requirements on transactions involving problematic entities.

6. One commenter stated that foreign availability should be a key factor in all decisions, particularly with respect to items that may pose little or no national security or foreign policy concerns. If a foreign company presents such concerns that it must be listed, controls should be applied only to items that present a national security or foreign policy concern rather than across the board.

Decisions to set the license requirements, license exception availability and licensing policy for any entity listed pursuant to § 744.11 will be made by the End-User Review Committee. Nothing in this rule either precludes or requires considering foreign availability in the Committee's deliberations. Because this rule is intended to focus license requirements on specific entities based on the conduct of those entities, BIS believes that decisions about the factors to consider and items to control should be decided on a case-by-case basis.

7. One commenter stated that the preamble to the proposed rule states that the reasons for which BIS may place an entity on the Entity List are stated in §§ 744.2, 744.3, 744.4, 744.6, 744.10 and 744.20. However, only §§ 744.10 and 744.20 referred to Supp. 4 of the EAR. The commenter recommended that BIS add a reference to Supp. 4 in §§ 744.2, 744.3, 744.4, and 744.6 and proposed § 744.11.

Although §§ 744.2, 744.3, 744.4 and 744.6 of the EAR do not explicitly mention Supp. No. 4 to part 744, they do provide for BIS to inform by amendment to the Export Administration Regulations that exports or reexports to certain parties require a license because those parties pose an

unacceptable risk of use in or diversion to the activities set forth in those sections. Such amendments take the form of amendments to Supp. No. 4 to part 744 of the EAR. BIS believes that adding a reference to Supp. No. 4 in these sections is unnecessary and beyond the scope of this rule. Section 744.11 of the EAR in the proposed rule referred to the Entity List, but did not explicitly identify the Entity List as Supp. No. 4 to part 744. BIS believes that such identification would be useful. Accordingly, this final rule revises the introductory text of § 744.11 of the EAR to make such identification.

8. The proposed rule provided that new § 744.11 could not be used to add to the Entity List parties for whom a license is required pursuant to §§ 744.12, 13, 14 or 18 of the EAR. Those sections apply a BIS license requirement to certain entities that appear on the List of Specially Designated Nationals and Blocked Persons that is published by the Office of Foreign Assets Control in the Department of the Treasury. Two commenters recommended that the same limitation apply to entities added to the Entity List pursuant to § 744.20 of the EAR. Section 744.20 provides for inclusion on the Entity List certain parties who are sanctioned under certain statutes by the Department of State. Both § 744.20 and the new § 744.11 established by this rule are foreign policy based export controls. One commenter expressed concern that not excluding entities listed pursuant to § 744.20 from listing pursuant to new § 744.11 could cause differences of opinion between the Departments of State and Commerce in the EAR as to which entities are listed because of the foreign policy concerns that underlie § 744.11 and those listed because of the concerns that underlie § 744.20. The other commenter expressed concern that not excluding entities listed pursuant to § 744.20 from listing pursuant to new § 744.11 could lead to duplicate listings on the Entity List based on the two sections.

BIS believes that the potential consequences cited by these two commenters are not likely to pose problems in practice and that no change to the rule is needed on this point. A single committee (the End-User Review Committee) will vote on all changes to the Entity List regardless of the section that authorizes placement of the entity on the Entity List. The Department of State will have a representative on that Committee. Therefore, conflicting interagency opinions regarding a proposed listing are likely to be resolved before that listing is published. If the

Committee were to conclude that more than one section supported placing an entity on the list, it could list all of the applicable sections with that entity's entry rather than have multiple listings.

9. One commenter recommended that BIS use the new § 744.11 to impose license requirements on entities that have been targeted for non-proliferation reasons by the United States government or by foreign governments where other provisions of part 744 do not authorize inclusion on the Entity List.

BIS believes that no change to the language of the proposed rule is needed because of the issues raised by this comment. Sections 744.2, 744.3, and 744.4 of the EAR provide a basis for listing entities on the Entity List because "there is an unacceptable risk of use in or diversion to" proliferation activities related to certain nuclear end-uses, certain rocket systems and unmanned air vehicles and certain chemical or biological weapons end-uses. Section 744.6 provides a basis for listing an entity on the Entity List because activities of U.S. persons in connection with that entity could involve certain nuclear activities, certain missile related activities or certain chemical or biological weapons activities. In addition, to the extent that an entity's proliferation related activities meet the criteria in new § 744.11, that section could serve as a basis for listing the entity. BIS believes that these sections provide sufficient basis for using the Entity List to promote non-proliferation interests and that the decisions to list an entity should be made on a case-by-case basis.

*Comments on Proposed § 744.11(b)
Criteria for Revising the Entity List—In
General*

10. One commenter stated that BIS should ensure that the criteria for making a decision to list an entity are well defined and clear, to avoid capturing entities that are in compliance with their countries' laws and regulations, particularly if those companies are located in countries that are allies or major trading partners of the United States.

Because the criteria set forth in the proposed rule are intended to protect U.S. national security and foreign policy interests, BIS believes that revising the criteria to preclude listing parties who are acting in accordance with their own countries' laws and regulations would undermine the purpose for imposing these license requirements. Nevertheless, BIS understands the need to act consistently with overall U.S. government interests, including the

interest in maintaining appropriate relationships with U.S. allies and major trading partners. BIS believes that the multi-agency composition of the End-User Review Committee will provide balanced consideration of relevant U.S. government national security and foreign policy interests including interests based on relationships with other governments.

11. One commenter stated that BIS should ensure that “behaviors” that can lead to placement on the List are at a comparable level in terms of failure to comply with U.S. government requirements.

An important role of the End-User Review Committee is to promote consistent practice with respect to the Entity List. The Committee’s procedures, including the right of escalation by any member agency, are intended to promote such consistency. However, the criteria for placing an entity on the Entity List do not require that the party’s conduct violate a U.S. law or regulation. Placement on the Entity List pursuant to new § 744.11 imposes a license requirement, sets licensing policy and sets the availability of license exceptions for the listed party. Failure to comply with government requirements would likely be a violation of law for which other actions, either instead of or in addition to placing an entity on the Entity List, would be appropriate.

12. One commenter stated that actions that would warrant placement on the list should be examined principally against international standards for business conduct and internationally agreed upon principles for addressing common threats to the world community, rather than on purely unilateral considerations.

BIS recognizes that international business, by its nature, must be conducted in accordance with the laws of more than one country. BIS also recognizes the value of international standards in influencing the laws and regulations of individual countries. In keeping with this recognition, the EAR include requirements drawn from multilateral export control regimes and United Nations arms embargoes. However, the EAR also include requirements that are based on U.S. interests that are not based on conclusions reached by a multinational body. BIS believes that multi agency participation (including the Department of State) on the End-User Review Committee will provide perspective (including an international perspective) in all decisions to modify the Entity List pursuant to § 744.11. However, as stated in both the proposed rule and in this

final rule, the underlying purpose of the rule is to protect U.S. national security and foreign policy interests. As such, BIS believes that it would be counterproductive to adopt a rule that would require decisions to modify the Entity List pursuant to § 744.11 to meet an internationally agreed upon standard.

Comments on the Illustrative Examples of Criteria for Placing an Entity on the Entity List § 744.11(b)—In General

13. One commenter stated that the five illustrative examples of conduct are stated very broadly, that they are only illustrative and that clearer and narrower limits are needed to prevent confusion. Two commenters specifically stated that more guidance on the type of conduct that would place an entity on the Entity List is needed.

BIS believes the criteria and the illustrative examples must be broadly stated to illustrate effectively the kinds of activities that are contrary to U.S. national security or foreign policy interests and that justify placing an entity on the list. BIS notes that the decision to place an entity on the list must be based on specific and articulable facts. In recent years, BIS has sought to tailor certain export license requirements to specific users and has been forced to resort to *ad hoc* solutions to do so. Section 744.20 of the EAR allows for placing an entity on the Entity List only if the party is first sanctioned by the Department of State pursuant to certain statutes. That section has been used only one time. General Order Number 3 (Supp No. 1 to part 736 of the EAR) has been used to impose license requirements on parties where there is no regulatory basis to list those parties on the Entity List. BIS believes that broadly stating its criteria for placing an entity on the list will reduce the need for such *ad hoc* procedures. Broad illustrative examples are needed to illustrate effectively the broad nature of the criteria.

BIS believes that the overall effect of this rule will be to reduce the possibility of confusion by consolidating names of parties whose presence in a transaction trigger an EAR license requirement onto a single list.

As noted in the discussion above of the changes from the proposed rule, BIS has modified two of the illustrative criteria to describe more precisely the conduct that could justify placing an entity on the Entity List.

Comments on the Term “Specific and Articulable Facts” in § 744.11(b)

14. One commenter asked whether intelligence reporting would be used in

the process and if so, would the intelligence be no more than two years old and actionable? The commenter went on to recommend that only intelligence that has been certified by the Director of National Intelligence should be used in this process. In support of these recommendations, the commenter offered several assertions.

This commenter asserted that, based on experience as a government employee in employment related to license application review, much intelligence information is of poor quality or outdated. This commenter also asserted that, in recent years, the focus of intelligence gathering has been closely tied to proliferation of weapons of mass destruction. Finally, this commenter asserted that a unit of the Department of Defense has, at times, stepped in to provide intelligence of poor quality.

BIS intends that the End-User Review Committee utilize reliable information that is relevant to the case at hand in making its decisions. BIS believes that the Committee will be in a position to evaluate the reliability of information on a case-by-case basis. Adding a provision to this final rule prohibiting the use of information because of its age, source, whether it is “actionable” or whether it has been certified by a particular official would arbitrarily restrict the Committee and might preclude the use of reliable information in some cases. BIS believes that a former employee’s opinions regarding the quality or focus of intelligence reporting available during that former employee’s government tenure should not be a basis for limiting by regulation the information that the End-User Review Committee may consider. Therefore, BIS is making no change to the rule based on this comment.

15. One commenter stated that the proposed rule could present problems for exporters in terms of compliance and ability to remain competitive in the international arena. This commenter asked for additional information about the standards that “specific and articulable facts” would have to meet, specifically what universe of conduct would lead to imposing a license requirement.

BIS believes that compliance with the license requirements imposed by this rule will impose a minimal additional burden on exporters. Most exporters will meet the definition of U.S. Person in § 772.1 of the EAR and thus may not be placed on the Entity List pursuant to this rule. By expanding the grounds for placing a name on the Entity List, BIS will be reducing the need to issue general orders that impose license

requirements, thereby reducing the number of provisions of the EAR that must be reviewed to identify potential recipients whose presence triggers a license requirement. BIS believes that describing in advance every sort of action that could be contrary to U.S. national security and foreign policy interests would be impossible and that attempting to do so would be counterproductive. Rather, the examples are intended to illustrate, in a general way, the nature of conduct that could be a basis for listing.

Comments Relating to the First Illustrative Example—Supporting Persons Engaged in Acts of Terror § 744.11(b)(1)

16. One commenter asked that BIS state the meaning of “Supporting persons engaged in acts of terror.” That same commenter asserted that there is no internationally agreed definition of terrorism and asked what the term “acts of terror” means.

BIS believes that the meaning of terror and terrorism are sufficiently understood in common parlance that defining these terms is not necessary for public understanding of this rule. However, as examples and not as limitations, the acts set forth in 18 U.S.C. 2331(1), 18 U.S.C. 2331(5) and the acts described in the preamble to the General Order Concerning Mayrow General Trading and Related Entities (71 FR 32272, June 5, 2006) would be considered supporting persons engaged in acts of terror for purpose of § 744.11 of the EAR.

This rule is intended to protect U.S. national security and foreign policy. Accordingly, obtaining international agreement as to the meaning of a term in the rule is unnecessary.

17. One commenter asked what types of exports or reexports these restrictions are intended to cover.

The license requirements imposed by adding a name to the Entity List could apply to any item subject to the Export Administration Regulations. The Committee could tailor the requirements based on the risks imposed by the party to be listed. The conduct that provides the reason for listing a party need not be an export or reexport of any type.

Comments Relating to the Second Illustrative Example—Actions That Could Enhance the Military Capability of, or the Ability To Support Terrorism of Governments That Have Been Designated by the Secretary of State as Having Repeatedly Provided Support for Acts of International Terrorism § 744.11(b)(2)

18. One commenter stated that it is not clear whether the illustrative example applies only to governments that the Department of State has designated as supporters of terrorism.

BIS's intent is that any party taking the action described in this illustrative example could be placed on the Entity List. The action would have to enhance the military capability or the ability to support terrorism of a government that has been designated by the Secretary of State as having repeatedly provided support for acts of international terrorism. However, the action itself need not be taken by such a government. BIS does not believe that any change to the text of the rule is needed to make this point clear.

19. One commenter asked whether the first clause addresses actions described in § 744.21 of the EAR as part of the China rule.

Read as a whole, this illustrative example does not address actions described in § 744.21 of the EAR. Attempting to ascribe a meaning to the first clause of this illustrative example without reference to the final clause could be misleading. Section 744.21 of the EAR imposes a license requirement for certain exports and reexports for military end-uses in China where the exporter or reexporter knows that the item at issue in the specific transaction will be employed in a military end-use. This illustrative example deals with imposing license requirements on exports and reexports to certain parties by listing those parties and the license requirements on the Entity List because those parties have taken actions to enhance certain capabilities (including military capabilities) of governments that have been designated by the Secretary of State as having repeatedly provided support for acts of international terrorism. China has never been so designated.

20. One commenter asserted that this section should be more clearly written to have the Department of State specify the government in question and tie the conduct that enhances the military capability of that government designated as supporting international terrorism. This, according to the commenter, would avoid confusion in the exporting community, avoid

capricious interagency behavior and prevent commercial mischief.

The Department of State determines that certain countries have repeatedly provided support for acts of international terrorism and so designates those countries pursuant to its statutory authority. This rule makes no change to that procedure. BIS believes that there are several provisions in this rule that provide reasonable safeguards against capricious interagency behavior: the requirement that the decisions to place an entity on the Entity List be supported by specific and articulable facts, the multi-agency composition of the End-User Review Committee that makes decisions to place an entity on the Entity List, and the right of agencies to escalate as provided in Supplement No. 5 to part 744 of this final rule. The fact that identifying information about the entities will be published will serve to reduce opportunities for confusion among any segment of the public that is engaged in exporting or reexporting items that are subject to the EAR.

Comments Relating to the Third Illustrative Example—Transferring, Developing, Servicing, Repairing or Producing Conventional Weapons in a Manner That Is Contrary to United States National Security or Foreign Policy Interests or Enabling Such Transfer, Service, Repair, Development, or Production by Supplying Parts, Components, Technology, or Financing for Such Activity—744.11(b)(3)

21. One commenter stated that the language of this illustrative example “should not be a back door maneuver seeking to penalize parties for certain conduct” that was in the proposed version of the recently published China rule but that was removed from the final version of that rule.

BIS believes that this comment is inapposite. The proposed modification to § 744.6 of the EAR to which the commenter alludes would have applied a license requirement to certain support activities if done with knowledge that the underlying export or reexport transaction was occurring without a required license (See 72 FR 33817, July 6, 2006). This illustrative example describes a type of conduct, including support activities related to that conduct, that, when done contrary to United States national security or foreign policy interests, could justify imposing a license requirement for shipments to the party who engaged in that conduct and for notifying the public of the existence of that license requirement through publication on the Entity List.

22. Two commenters suggested that the conduct in this illustrative example could cover situations in which foreign companies are complying with the laws and regulations of their own countries and that these situations are best dealt with through government to government negotiations rather than by imposing a license requirement on the party involved. One of these commenters noted that other governments may have bilateral arms arrangements and defense cooperation agreements and that BIS should not drive foreign policy by penalizing entities engaged in trade that is in compliance with their own domestic laws and regulations. The other commenter asked specifically in what “manner” the entity would have to be involved in such activities to be placed on the list.

BIS is aware that not all other countries share the views of the U.S. government and that those countries may enter into arrangements and agreements consistent with their own interests. Nevertheless, an important part of BIS’s role is to regulate exports in a manner that is consistent with U.S. foreign policy interests. The participation of the Department of State on the End-User Review Committee provides an opportunity for foreign policy input so that the Committee’s actions are consistent with overall U.S. foreign policy interests. Moreover, the placement of an entity on the Entity List pursuant to this rule would not preclude the Department of State from engaging with another government regarding that government’s policies and practices.

The use of the word “manner” in this illustrative example is intended to make clear that any of the activities in this illustrative example must be contrary to U.S. national security or foreign policy interests to serve as a basis for placing a name on the Entity List.

Comments Relating to the Fourth Proposed Illustrative Example—Deliberately Failing or Refusing to Comply With an End Use Check Conducted by or on Behalf of BIS or DTC by Denying Access, by Refusing to Provide Information About Parties to a Transaction, or by Providing Information About Such Parties That is False or That Cannot be Verified or Authenticated—§ 744.11(b)(4)

23. One commenter stated that “some parties have not been notified that they have been deemed to fail end use checks—either because they hadn’t failed such checks or because the checks never even had been attempted.” The rule “as applied [should] include steps to ensure that such parties are not added

to the Entity List in these circumstances.”

All proposed additions to the Entity List pursuant to § 744.11 will be reviewed by the multi-agency End-User Review Committee. The Committee will be in a position to inquire into the details and circumstances of the end use check before making a decision. In addition, the Committee’s procedures allow any participating agency to escalate the decision to a higher level. Finally, this rule contains a provision for the listed entity to seek to have its listing removed or modified and to present information supporting its request to the Committee. BIS believes that these procedures are sufficient to provide reasonable assurances against errors of the types described in the comment. BIS has modified the language of this illustrative example to emphasize that some conduct on the part of the party to be listed that makes conducting the check impossible or that renders its results inaccurate or useless must be present for the terms of this example to be met.

24. Two commenters compared this illustrative example with the existing Unverified List published by BIS. One commenter stated that this illustrative example conflicted with the Unverified List because the Unverified List stated that it did not create a license requirement. The other commenter stated that the existing mechanism under the EAR for addressing entities in countries where BIS has been unable to conduct pre-license checks or post shipment verifications is more than adequate because it requires enhanced due diligence. This commenter asserted that establishing new license requirements on U.S. companies for actions that could be seen by other countries as their sovereign right could have consequences for U.S. manufacturers as those companies could decide to “design out” their [the U.S. manufacturers] products.

BIS believes that conduct described in this illustrative example is sufficiently distinct from the conduct that would form a basis for placing a party on BIS’s Unverified List that conflicting decisions are unlikely. Moreover, the existing Unverified List is not adequate to address the situations covered by this rule. BIS may place entities on the Unverified List because BIS is unable to perform an end use check or where BIS is unable to verify the existence or authenticity of the end user, intermediate consignee, ultimate consignee or other party to an export transaction for reasons outside the control of the U.S. government (*See* 67 FR 40910, June 14, 2002 and 69 FR

42652, July 16, 2004). This illustrative example requires a deliberate refusal or a pattern of conduct by the party to be listed that makes the check impossible to conduct or that makes the results of the check inaccurate or useless. To emphasize this point, BIS has revised the language published in the proposed rule. BIS believes that conduct of the type described in this illustrative example can warrant imposing a license requirement on transactions with the parties who engage in the conduct because a license requirement will result in more comprehensive scrutiny of transactions than would identifying the party’s presence as a red flag thereby requiring additional scrutiny by a private sector party. Although nothing in the EAR expressly precludes an entity from being listed simultaneously on the Unverified List and on the Entity List, BIS expects that such an event is unlikely given the differences in criteria underlying the two lists.

Although some risk exists that manufacturers will attempt to design out U.S. origin components because of any U.S. export control regulation, BIS believes that judicious review by the End-User Review Committee will provide reasonable assurance that the Committee will list only entities whose conduct truly merits placement on the Entity List.

Comments Relating to the Proposed Fifth Illustrative Example—Engaging in Conduct That Poses a Risk of Violating the EAR and Raises Sufficient Concern That BIS Believes That Prior Review of Exports or Reexports Involving the Party and the Possible Imposition of License Conditions or License Denial Enhances BIS’s Ability To Prevent Violations of the EAR.—§ 744.11(b)(5)

25. One commenter stated that more information is needed for the fifth illustrative example. The commenter stated that the example should be replaced with more specific illustrations of conduct that is of concern to BIS. The commenter stated that some violations are minor and that BIS should spell out in detail those types of violation risks that cause it concern. The commenter suggested that if this illustrative example is to be maintained, some form of materiality standard should be added and suggested “engaging in conduct that poses a substantial risk of imminent and serious violation of the EAR” as a possible materiality standard.

Although many acts could pose a risk of violating the EAR, the acts that would meet the terms of this example are limited to those where the End-User Review Committee believes that imposing license requirements through

the Entity List enhances BIS's ability to prevent violations of the EAR. In this final rule, BIS has modified the language of this illustrative example to emphasize that connection. BIS believes that replacing this illustrative example with several more specific examples, which inevitably would be more narrow in scope, could mislead readers into focusing on the specific conduct in the examples themselves rather than on the nexus between the conduct that poses a risk of violating the EAR and enhanced ability to prevent violations that would result from an Entity List listing.

BIS believes that it would not be prudent to designate some EAR violations as, *a priori*, more serious than others. The seriousness of a violation may vary according to the facts of a particular case. This illustrative example, as clarified in this final rule, is designed to illustrate that there must be a nexus between the conduct of the party to be placed on the Entity List and the enhanced ability of BIS to prevent violations through imposing a license requirement. BIS believes that further illustrations are not needed to explain this point.

"[P]revent[ing] an imminent violation" is the standard for imposing temporary denial orders pursuant to § 766.24 of the EAR. BIS believes that, in some instances, a license requirement may prevent a violation even in the absence of an imminent threat and that § 744.11 of the EAR could be used in such instances.

26. One commenter stated that it would be better for BIS to engage in a partnership with U.S. industry in order to find ways to prevent potential violations rather than impose additional licensing requirements on a U.S. company.

BIS is open to suggestion from any member of the public as to ways to prevent violations and welcomes all such recommendations. However, members of the public vary in their willingness and ability to detect and deter violations. This rule recognizes that in some instances, a license requirement, which enables the government to review the proposed transaction, impose license conditions, or, if necessary, deny the license application, is needed to prevent violations. This final rule revises this illustrative example to tie more explicitly the conduct of the party to be added to the Entity List to the risk of a violation and to the End-User Review Committee's belief that imposing the review associated with license applications will aid BIS in preventing violations.

Comments Relating to the Listing Process—§ 744.11 of the EAR

27. One commenter stated that more information should be provided about the process for listing entities on the Entity List pursuant to this rule. Specifically, the commenter wanted more information on the process that will be employed to determine whether non-EAR related activities would provide a basis for listing, who would determine the national security interests of the United States, the levels at which interagency consultations will take place, who will make listing determinations with respect to non-EAR activities and, the checks that will be in place to prevent lower level officials from applying their own notions of national security and foreign policy.

BIS agrees that this rule should disclose more information on the process by which Entity List decisions will be made pursuant to §§ 744.11 and 744.16 than the proposed rule disclosed. Accordingly, this final rule includes, as a supplement to part 744, the procedures to be used by the End-User Review Committee in making such decisions. Those procedures provide that the Committee will include representatives from the Departments of State, Defense, Energy and Commerce, and the Treasury as appropriate. Decisions to make changes to the Entity List will be made by majority vote of the Committee. Any participating agency that disagrees with the outcome may escalate the matter according to the same procedures that are used to escalate interagency disputes regarding export license applications. BIS believes that these procedures provide reasonable assurances that low level officials will not impose any personal notions of national security or foreign policy that are inconsistent with actual U.S. national security or foreign policy interests.

Under this rule, the activity that forms a basis for listing an entity need not be an activity that is a violation of the EAR or even be an activity that is regulated pursuant to the EAR. BIS believes that the multi-agency composition of the End-User Review Committee and its procedures as set forth in new Supplement No. 5 to part 744 of the EAR will provide reasonable assurance that any activity forming the basis for listing an entity will be consistent with the criteria set forth in § 744.11.

28. Two commenters proposed that any entity under consideration for placement on the Entity List should be notified and afforded an opportunity to state its position, provide information

and present arguments against the listing before any action is taken.

BIS is not adopting this proposal because other provisions of the EAR provide adequate provision for listed parties to be heard. This rule provides a procedure in new § 744.16 that allows a listed entity to present information to the End-User Review Committee. In addition, placement on the Entity List results in the imposition of a license requirement, the establishment of licensing policy, and the establishment of limits on use of License Exceptions for that entity. If any license application to send an item that is subject to the EAR to a listed entity subsequently is denied, that entity, as a person directly and adversely affected by the denial, would have a right to appeal under part 756 of the EAR.

29. Two commenters stated that certain members of the public (particularly U.S. exporters) who could be affected by new Entity List listings should have an opportunity to present information before a final decision is made to place an entity on the Entity List.

BIS believes that it is not necessary to notify the public at large of impending Entity List changes. Placement of an entity on the Entity List results in the imposition of a license requirement, the establishment of licensing policy, and the establishment of limits on use of license exceptions for that entity. If any license application to send an item that is subject to the EAR to a listed entity subsequently is denied, the license applicant, as a person directly and adversely affected by the denial, would have a right to appeal under part 756 of the EAR.

30. One commenter stated that BIS failed to provide a transparent and rational process, raising serious issues under the national treatment provisions of the WTO treaty.

BIS does not know what this commenter means by "serious issues." BIS is not aware of any treaty provision that this rule would contravene.

Comments Concerning § 744.16—Procedure for Requesting Removal or Modification of an Entity List Entry

31. One commenter asserted that the need for more information about the process would be vital for persons seeking removal from the list and that given the broad and far reaching nature of criteria for listing an entity, senior level officials should have a greater role in the removal process.

BIS agrees that this rule should disclose more information on the process by which Entity List decisions will be made than the proposed rule

disclosed. Decisions made pursuant to § 744.16 (requests for removal or modification) will be made by the same End-User Review Committee that makes decisions to add an entity pursuant to § 744.11. Accordingly, this final rule includes, as a supplement to part 744, the procedures that the End-User Review Committee will use in making such decisions. That procedure provides that a member agency that disagrees with a decision has the right to escalate the matter to more senior officials.

32. One commenter stated that persons whose requests for removal are denied by the interagency review committee should have an express right of appeal.

BIS believes that a right of appeal for listing decisions on the Entity List is not necessary as the EAR already contains a mechanism for appeals of decisions to reject license applications. A rejection of a party's request to be removed from the Entity List retains existing license requirements, licensing policy and restrictions on availability of license exceptions. In the event that a license application on which the listed entity is shown as a party is denied, the listed entity as a party directly and adversely affected by that denial would have a right to appeal under part 756 of the EAR.

33. One commenter stated that there should be a transparent and rational process that allows the listed party and interested parties to request removal. This commenter asserted that failure to provide a transparent and rational process raises serious issues under the national treatment provisions of the WTO treaty.

BIS agrees that more disclosure than was contained in the proposed rule of the process by which Entity List decisions will be made pursuant to § 744.11 and 744.16 is appropriate. Accordingly, this final rule includes, as a supplement to part 744, the procedures of the End-User Review Committee that will make such decisions. BIS does not know what this commenter means by "serious issues." BIS is not aware of any treaty provision that this rule would contravene. Comments are not related to specific proposals in the proposed rule.

34. One commenter suggested that BIS consider replacing the broader based controls as in the recent China rule with targeted entity based controls.

Although BIS believes that targeted end-user controls are valuable, BIS also believes that they cannot at this replace end-use license requirements imposed by the recent China rule. The reasons for those license requirements were set forth in the preamble to that rule (72 FR

33646, June 19, 2007) and need not be repeated here.

35. One commenter stated that BIS should take steps to coordinate any expanded Entity List with the Validated End User process, for example, make the VEU process available to all entities not included on the Entity List or by creating a presumption that a party not included on the list should be eligible, in the absence of other specific and articulable facts, for VEU status.

BIS believes that neither of these suggestions is practical. The Validated End User (VEU) authorization (§ 748.15 of the EAR) allows exports and reexports without a specific license of certain items to end users who have been approved by the End-User Review Committee. Section 744.11 as set forth in this rule imposes license requirements on exports and reexports to certain identified parties even if such exports and reexports would not require a license in the absence of the Entity List listing. Between these two categories of potential recipients are many potential recipients for whom neither Entity List listing nor Validated End User status is likely to be appropriate.

36. Two commenters recommended that the rule include a "contract sanctity" provision. One stated that parties should be able to complete transactions that were entered into before the date that BIS determined that specific and articulable facts justified listing of a party on the Entity List. The other stated that such a provision was needed to avoid unnecessary disruption to collaborative efforts that may have been in place for a long time.

This rule provides the authorization for adding parties to the Entity List, but does not add any parties to the list. BIS believes that establishing a contract sanctity provision that would apply to all Entity List additions regardless of circumstances and consequences would be unwise. BIS notes that this rule does not preclude the use of a contract sanctity provision in an individual action to add a party to the Entity List nor does it preclude consideration of a preexisting contract in evaluating any license application for an export or reexport to a party added to the Entity List pursuant to this rule. However, BIS believes that foreseeing at this time all of the possible circumstances that would justify either including or precluding a "contract sanctity" provision in a particular Entity List decision is not possible. Accordingly, BIS is making no changes to the rule based on this comment.

37. Two commenters recommended changes for improving the quality of

information on the Entity List. Their recommendations included identifying the locations of listed entities, supplying known aliases and contact information and systematic review to correct or remove outdated entries or entries that have changed names or affiliations.

BIS agrees that more systematic review and updating of the Entity List is desirable and would make the List more useful to the public. Therefore BIS intends to have the End-User Review Committee conduct a systematic review of the Entity List for the purpose of identifying and implementing any needed corrections and updates at least annually. The End-User Review Committee procedures published in Supplement No. 5 to part 744 as part of this rule reference that annual review. BIS expects that the first review will be completed no later than August 21, 2009.

38. One commenter noted that BIS has stated that it cannot supply the Chinese names of entities on the Entity List because the **Federal Register** cannot accommodate their publication. BIS should overcome this technical limitation by publishing on its Web site an augmented version of the Entity List including names of listed entities in original alphabets.

BIS recognizes that making the Entity List as widely understood as possible would be beneficial to users of the list and to BIS's interest in promoting voluntary compliance. However, given other priorities and BIS's limited resources, implementing a recommendation such as this in the foreseeable future is unlikely.

39. One commenter stated that BIS should provide clear guidance on how to deal with entities related to those on the list. BIS should explicitly state the extent to which the license restrictions on listed entities apply to related entities and should list all of the related entities to which restrictions apply.

BIS intends to publish guidance in the near future on dealing with entities related to those on the Entity List. In addition, the new Supplement No. 5 to Part 744, which sets forth the End-User Review Committee's procedures, provides for annual review of the Entity List. That annual review is to include an assessment of whether affiliates should be added to or removed from the Entity List.

40. One commenter stated that the rule should make clear that only listed entities—not, for example, unlisted affiliates, subsidiaries or sister entities—are covered.

BIS intends to publish guidance on dealing with entities related to those on the Entity List in the near future.

41. One commenter stated that the Entity List should avoid capturing parent companies and subsidiaries, and ensure that a decision to do so takes into consideration all potential consequences for legitimate business of the parent or subsidiary, particularly if they could negatively impact additional companies far removed from the behavior that may cause the listing.

BIS believes that decisions to list or refrain from listing a subordinate or affiliated entity should be made on a case by case basis by the End-User Review Committee after consideration of the facts relevant to that decision.

42. One commenter suggested that BIS include information about the reason for an entity's listing in order to inform exporters more about diversion risk. The commenter noted that the section that forms the basis for a listing indirectly suggests the reason, but that the broad scope of § 744.11 as proposed would obscure the underlying reason. The commenter suggested that a "warning list" published by the Japanese Ministry of Economy, Trade and Industry provides a useful model.

Although informing the public about the nature of diversion risks may be useful, the Entity List serves to inform the public about license requirements based on diversion risks or other factors that meet the criteria for Entity List listing. Accordingly, BIS is not changing the structure of the Entity List at this time.

43. One commenter recommended that BIS should consider more systematic use of § 744.20 of the EAR, which allows adding to the Entity List parties sanctioned by the State Department. The commenter noted that such sanctions are applied to various parties for proliferation related activities. The commenter stated that all of these "inherently risky" end-users should be added and retained on the list even after the State sanction expires unless the End-User Review Committee determines that they are no longer a risk.

The recommendation to increase use of § 744.20 of the EAR to place more entities that have been sanctioned by the Department of State on the Entity List is beyond the scope of this rule. However, BIS notes that, the conduct for which the Department of State imposed sanctions might, in a particular case, also meet the standards for placing the party on the Entity List pursuant to new § 744.11 and the End-User Review Committee might decide to list such an entity.

44. One commenter asserted that the recently promulgated China rule goes beyond the Wassenaar Statement of Understanding on the Control of non-Listed Dual-use Items and that the United States has no overarching China trade policy, but seeks to cobble together a trade policy directed to China, creating unpredictability for U.S. exporters in terms of compliance and ability to remain competitive. This same commenter also stated that the United States government should change its position on the development of an International Arms Trade Treaty. The commenter stated that seeking to penalize those involved in conventional weapons activities while not using its influence to work towards a meaningful arms trade treaty within the United Nations framework is dysfunctional and hypocritical.

All of these ideas are outside the scope of the proposed rule and BIS is making no changes to the rule in response to them. BIS's rationale for publishing the recently published China rule is set forth in the preamble to that rule (72 FR 33646, June 19, 2007) and need not be repeated here. Without expressing an opinion on the commenter's assessment of the United States government's trade policy towards China, BIS notes that the composition of the End-User Review Committee and the right of agencies to escalate disputed decisions are intended to provide a balanced approach that considers all relevant U.S. policy interests. BIS does not determine the position that the U.S. government takes on proposed treaties or represent the United States at the United Nations.

45. One commenter asserted that repeated on-site visits to known consignees, increasing pressure from Congress and elsewhere and limited staff to conduct these visits result in delays and backlogs of pending license applications. The commenter stated that a better approach would be for BIS to work with the technical advisory committees to develop a risk transaction matrix that would identify specific criteria that call for such on-site visits.

This comment addresses criteria by which transactions are selected for on-site visits, an issue that is beyond the scope of this rule.

46. One commenter recommended that BIS consider the potential effect of listing decisions on imports from listed companies and resulting consequences for U.S. companies.

This rule reflects BIS's statutory mission to utilize export controls to protect United States national security and foreign policy interests (by listing problematic entities) without unduly

burdening legitimate export activities (avoiding imposing license requirements to entire destinations or items when doing so is not necessary). If a nexus between the potential effect of a listing decision on imports and protecting U.S. national security or foreign policy interests exists in a particular case, the impact of the listing decision on imports properly may be considered in that case. BIS believes that determining whether such a nexus exists must be done on a case-by-case basis and that a rule requiring such consideration in all cases would not be appropriate.

47. One commenter stated that BIS should conduct more training overseas on U.S. export control requirements to ensure that foreign companies and governments fully understand the extraterritorial nature of U.S. export controls.

This comment is outside the scope of the proposed rule. BIS conducts a number of training sessions both in the United States and abroad and expects to do so in the future.

Rulemaking Requirements

1. This rule has been determined to be a significant rule pursuant to Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule involves two collections of information that have been approved by OMB. Control number 0694-0088 "Multi-Purpose Application" carries a burden hour estimate of 58 minutes to prepare and submit form BIS-748. Miscellaneous and recordkeeping activities account for 12 minutes per submission. Control number 0694-0134, Procedure for Parties on the Entity List to Request Removal or Modification of their Listing carries a burden hour estimate of three hours per submission and an estimate of five submissions per year.

Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to David Rostker, OMB Desk Officer, by e-mail at david_rostker@omb.eop.gov or by fax to (202) 395-7285; and to the Regulatory Policy Division, Bureau of Industry and

Security, Department of Commerce, Room 2705, Washington, DC 20044.

3. This rule does not contain policies with Federalism implications as this term is defined in Executive Order 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 or foreign affairs function of the United States (see 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 rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., are not applicable. However, to obtain the benefit of a variety of viewpoints before issuing this final rule, BIS issued this rule in proposed form with a request for comments.

5. The license requirements imposed by this rule are an expansion of foreign

policy export controls and require a report to Congress in accordance with section 6 of the Export Administration Act. The report was delivered to Congress on August 12, 2008.

List of Subjects

15 CFR Part 730

Administrative practice and procedure, Advisory committees, Exports, Reporting and, recordkeeping requirements, Strategic and critical materials.

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

15 CFR Part 756

Administrative practice and procedure, Exports, Penalties.

■ Accordingly, parts 730, 744 and 756 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 730—[AMENDED]

■ 1. The authority citation for part 730 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; 10 U.S.C. 7420; 10 U.S.C.

7430(e); 22 U.S.C. 287c; 22 U.S.C. 2151 note; 22 U.S.C. 3201 et seq.; 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; 22 U.S.C. 7201 et seq.; 22 U.S.C. 7210; E.O. 11912, 41 FR 15825, 3 CFR, 1976 Comp., p. 114; E.O. 12002, 42 FR 35623, 3 CFR, 1977 Comp., p. 133; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12214, 45 FR 29783, 3 CFR, 1980 Comp., p. 256; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 179; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; 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. 12981, 60 FR 62981, 3 CFR, 1995 Comp., p. 419; 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. 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; 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. Amend Supplement No. 1 to part 730 by adding an entry to the table immediately following the entry for collection number 0694–0132 that reads as follows:

0694–0134	Procedure for parties on the Entity List to Request Removal or Modification of their Listing	§ 744.16
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PART 744—[AMENDED]

■ 3. The authority citation for part 744 is revised to read as follows:

Authority: 50 U.S.C. app. 2401; 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).

■ 4. In § 744.1(a)(1), a new sentence immediately following the current seventh sentence and a new sentence immediately following the current eighth sentence are added, to read as follows:

§ 744.1 General provisions.

(a)(1) * * *

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.

* * *

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.

* * * * *

■ 5. Section § 744.11 is added to read as follows:

§ 744.11 License requirements that apply to entities acting contrary to the national security or foreign policy interests of the United States.

BIS may impose foreign policy export and reexport license requirements, limitations on availability of license exceptions, and set license application review policy based on the criteria in this section. Such requirements, limitations and policy are in addition to those set forth elsewhere in the EAR. License requirements, limitations on use of license exceptions and license application review policy will be imposed under this section by adding an entity to the Entity List (Supp. No. 4 to this part) with a reference to this section and by stating on the Entity List the license requirements and license

application review policy that apply to that entity. BIS may remove an entity from the Entity List if it is no longer engaged in the activities described in paragraph (b) of this section and is unlikely to engage in such activities in the future. BIS may modify the license exception limitations and license application review policy that applies to a particular entity to implement the policies of this section. BIS will implement the provisions of this section in accordance with the decisions of the End-User Review Committee or, if appropriate in a particular case, in accordance with the decisions of the body to which the End-User Review Committee decision is escalated. The End-User Review Committee will follow the procedures set forth in Supplement No. 5 to this part.

(a) *License requirement, availability of license exceptions, and license application review policy.* A license is required, to the extent specified on the Entity List, to export or reexport any item subject to the EAR to an entity that is listed on the Entity List in an entry that contains a reference to this section. License exceptions may not be used unless authorized in that entry. Applications for licenses required by

this section will be evaluated as stated in that entry in addition to any other applicable review policy stated elsewhere in the EAR.

(b) *Criteria for revising the Entity List.* Entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entity has been involved, is involved, or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States and those acting on behalf of such entities may be added to the Entity List pursuant to this section. This section may not be used to place on the Entity List any party to which exports or reexports require a license pursuant to §§ 744.12, 744.13, 744.14 or 744.18 of this part. This section may not be used to place on the Entity List any party if exports or reexports to that party of items that are subject to the EAR are prohibited by or require a license from another U.S. government agency. This section may not be used to place any U.S. person, as defined in § 772.1 of the EAR, on the Entity List. Examples (1) through (5) of this paragraph provide an illustrative list of activities that could be contrary to the national security or foreign policy interests of the United States.

(1) Supporting persons engaged in acts of terror.

(2) Actions that could enhance the military capability of, or the ability to support terrorism of governments that have been designated by the Secretary of State as having repeatedly provided support for acts of international terrorism.

(3) Transferring, developing, servicing, repairing or producing conventional weapons in a manner that is contrary to United States national security or foreign policy interests or enabling such transfer, service, repair, development, or production by supplying parts, components, technology, or financing for such activity.

(4) Preventing accomplishment of an end use check conducted by or on behalf of BIS or the Directorate of Defense Trade Controls of the Department of State by: precluding access to; refusing to provide information about; or providing false or misleading information about parties to the transaction or the item to be checked. The conduct in this example includes: expressly refusing to permit a check, providing false or misleading information, or engaging in dilatory or evasive conduct that effectively prevents the check from occurring or makes the check inaccurate or useless. A nexus between the conduct of the

party to be listed and the failure to produce a complete, accurate and useful check is required, even though an express refusal by the party to be listed is not required.

(5) Engaging in conduct that poses a risk of violating the EAR when such conduct raises sufficient concern that the End-User Review committee believes that prior review of exports or reexports involving the party and the possible imposition of license conditions or license denial enhances BIS's ability to prevent violations of the EAR.

■ 6. Section 744.16 is added to read as follows:

§ 744.16 Procedure for requesting removal or modification of an Entity List Entity.

Any entity listed on the Entity List may request that its listing be removed or modified.

(a) All such requests, including reasons therefor, must be in writing and sent to: Chair, End-User Review Committee, Bureau of Industry and Security, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Room 3886, Washington, DC 20230.

(b) The End-User Review Committee will review such requests in accordance with the procedures set forth in Supplement No. 5 to this part.

(c) The Deputy Assistant Secretary for Export Administration will convey the decision on the request to the requester in writing. That decision will be the final agency action on the request.

■ 7. Add a new Supplement No. 5 to part 744 to read as follows:

**Supplement No. 5 to Part 744—
Procedures for End-User Review
Committee Entity List Decisions**

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce, State, Defense, Energy and, where appropriate, the Treasury, will make all decisions to make additions to, removals from or changes to the Entity List. The ERC will be chaired by the Department of Commerce and will make all decisions to add an entry to the Entity List by majority vote and all decisions to remove or modify an entry by unanimous vote.

When determining to add an entity to the Entity List or to modify an existing entry, the ERC will also specify the section or sections of the EAR that provide the basis for that determination. In addition, if the section or sections that form the basis for an addition or modification do not specify the license requirements, the license application review policy or the availability of license exceptions, the ERC will specify the license requirements, the license application review policy and which license exceptions (if any) will be available for shipments to that entity.

Any agency that participates in the ERC may make a proposal for an addition to, modification of or removal of an entry from the Entity List by submitting that proposal to the chairman.

The ERC will vote on each proposal no later than 30 days after the chairman first circulates it to all member agencies unless the ERC unanimously agrees to postpone the vote. If a member agency is not satisfied with the outcome of the vote of the ERC that agency may escalate the matter to the Advisory Committee on Export Policy (ACEP). A member agency that is not satisfied with the decision of the ACEP may escalate the matter to the Export Administration Review Board (EARB). An agency that is not satisfied with the decision of the EARB may escalate the matter to the President.

The composition of the ACEP and EARB as well as the procedures and time frames shall be the same as those specified in Executive Order 12981 as amended by Executive Orders 13020, 13026 and 13117 for license applications. If at any stage, a decision by majority vote is not obtained by the prescribed deadline the matter shall be raised to the next level.

A final decision by the ERC (or the ACEP or EARB or the President, as may be applicable in a particular case) to make an addition to, modification of, or removal of an entry from the Entity List shall operate as clearance by all member agencies to publish the addition, modification or removal as an amendment to the Entity List even if, in the case of a decision by the ERC to add an entry or any decision by the ACEP or EARB, such decision is not unanimous. Such amendments will not be further reviewed through the regular Export Administration Regulations interagency review process.

A proposal by the ERC to make any change to the EAR other than an addition to, modification of, or removal of an entry from the Entity List shall operate as a recommendation and shall not be treated as interagency clearance of an EAR amendment. The chairman of the ERC will be responsible for circulating to all member agencies proposals submitted to him by any member agency. The chairman will be responsible for serving as secretary to the ACEP and EARB for all review of ERC matters. The chairman will communicate all final decisions that require Entity List amendments or individual "is informed" letters, to the Bureau of Industry and Security which shall be responsible for drafting the necessary changes to the Entity List. If the ERC decides in a particular case that a party should be informed individually instead of by EAR amendment the chairman will be responsible for preparing the "is informed" letter for the signature of the Deputy Assistant Secretary for Export Administration.

A listed entity may present a request to remove or modify its Entity List entry along with supporting information to the chairman at Room 3886, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230. The chairman shall refer all such requests and supporting information to all member agencies. The member agencies will review

and vote on all such requests. The time frames, procedures and right of escalation by a member agency that is dissatisfied with the results that apply to proposals made by a member agency shall apply to these requests. The decision of the ERC (or the ACEP or EARB or the President, as may be applicable in a particular case) shall be the final agency decision on the request and shall not be appealable under part 756 of the EAR. The chairman will prepare the response to the party who made the request. The response will state the decision on the request and the fact that the response is the final agency decision on the request. The response will be signed by the Deputy Assistant Secretary for Export Administration.

The End-User Review Committee will conduct a review of the entire Entity List at least once per year for the purpose of determining whether any listed entities should be removed or modified. The review will include analysis of whether the criteria for listing the entity are still applicable and research to determine whether the name(s) and address(es) of each entity are accurate and complete and whether any affiliates of each listed entity should be added or removed.

PART 756—[AMENDED]

■ 8. The authority citation for part 756 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).

■ 9. In § 756.1, add a new paragraph (a)(3) to read as follows:

§ 756.1 Introduction.

(a) * * *

(3) A decision on a request to remove or modify an Entity List entry made pursuant to § 744.16 of the EAR.

* * * * *

Dated: August 7, 2008.

Christopher R. Wall,

Assistant Secretary for Export Administration.

[FR Doc. E8-19102 Filed 8-20-08; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 740, 742, 744, 748, 750, 754, 764 and 772

[Docket No. 0612242559-8545-02]

RIN 0694-AD94

Mandatory Electronic Filing of Export and Reexport License Applications, Classification Requests, Encryption Review Requests, and License Exception AGR Notifications

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule requires that export and reexport license applications, classification requests, encryption review requests, License Exception AGR notifications and related documents be submitted to the Bureau of Industry and Security (BIS) via its Simplified Network Application Process (SNAP-R) system. This requirement does not apply to applications for Special Comprehensive Licenses or in certain situations in which BIS authorizes paper submissions.

DATES: Effective date October 20, 2008.

FOR FURTHER INFORMATION CONTACT: For information about this rule contact William Arvin, e-mail warvin@bis.doc.gov or tel. 202-482-2440. For information about registering for or using the SNAP-R system contact Lisa Williams at 202-482-2148.

SUPPLEMENTARY INFORMATION:

Background

BIS administers a system of export and reexport controls in accordance with the Export Administration Regulations (EAR). In doing so, BIS requires that parties wishing to engage in certain transactions apply for licenses, submit encryption review requests, or submit certain notifications to BIS. BIS also reviews, upon request, specifications of various items and determines their proper classification under the EAR. Currently, members of the public submit these applications, requests and notifications to BIS in one of three ways: via SNAP-R, via BIS's Electronic License Application Information Network (ELAIN), or via the paper BIS Multipurpose Application Form BIS 748-P and its two appendices, the BIS 748-P A (item appendix) and the BIS 748-P B (end user appendix). In many instances, BIS needs additional documents to act on the submission. For documents that relate to paper submissions, the documents can be

mailed or delivered to BIS with the BIS 748-P form. For submissions made electronically via ELAIN, the documents must be sent to BIS separately and matched up with the applications when they arrive.

In 2006, BIS replaced its then existing Simplified Network Application Processing system (SNAP) with an improved system referred to as "SNAP Redesign (SNAP-R)". The improvements include the ability to include documents related to a submission in the form of PDF (portable document format) files as "attachments" to the submission. Other improvements include a feature that allows BIS personnel to securely request additional information from the submitting party and for the party to submit that information in a manner that ties the chain of communication to the submission.

BIS believes that use of SNAP-R will reduce processing times and simplify compliance with and administration of export controls. SNAP-R provides not only improved efficiency in submission and processing, but improved end-user security through rights management and an updated application and security infrastructure.

Therefore, beginning October 20, 2008 all export and reexport license applications (other than Special Comprehensive License and Special Iraq Reconstruction License applications), classification requests, encryption review requests, License Exception AGR notifications, and "attached" related documents must be submitted to BIS via its Simplified Network Application Process Redesign (SNAP-R) system unless BIS authorizes paper submissions. This rule also sets forth the criteria under which BIS authorizes paper submissions.

Changes Made by This Rule

The changes that this rule makes center on part 748 of the EAR, which sets forth the principal procedures governing the submission of the applications, review requests and notifications affected by this rule. The changes are in § 748.1 "General provisions," § 748.3 "Classification requests, advisory opinions, and encryption review requests," and in § 748.6 "General instructions for license applications." The rule also makes conforming changes to a number of EAR provisions that currently employ language related to the paper forms.

Substantive Changes

Section 748.1 is revised to emphasize electronic filing over paper and to set forth the basic requirement that license