

International Trade Alert

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BIS Proposes First Rewrite of Routed Export Rules in Over a Decade

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On February 6, 2014, the Commerce Department's Bureau of Industry and Security (BIS) published a Proposed Rule announcing its intent to clarify the responsibilities of parties involved in "routed exports." Delegation of License Requirements Determination and Licensing Responsibility to a Foreign Principal Party, **79 Fed. Reg. 7,105 (Feb. 6, 2014) (Proposed Rule)**.

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

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

While many of the proposed changes amount to administrative housekeeping (such as replacing terms and elaborating on responsibilities already stated in the EAR), it is anticipated that the Proposed Rule will likely revive an old debate spearheaded by the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA). That is, it again brings to a head the practical conflict between the written authorizations required by the EAR and service agreements between FPPIs and forwarders.

BIS will accept comments on the Proposed Rule until April 7, 2014.

Foreign Principal Party Controlled Export Transaction

As noted, the Proposed Rule would insert the term "Foreign Principal Party Controlled Export Transaction" for transactions currently described by EAR § 758.3(b) as "routed export transactions." BIS proposes changing the term throughout the EAR to alleviate confusion stemming from Census' definition of "routed export transactions" in the FTR, used to determine which party is responsible for filing electronic export information (EEI) via the Automated Export System (AES). Going forward, "routed export transaction" will be an FTR term of reference, while "foreign principal party controlled export transaction" will be a separately defined term for EAR purposes.

Clarification of Parties' Responsibilities

The Proposed Rule would also amend multiple EAR sections to clarify responsibilities of USPPIs, FPPIs, and FPPIs' US agents in Foreign Principal Party Controlled Export Transactions. Section 758.3 of the EAR currently describes the responsibilities of the parties to an export transaction and states the requirements when certain of those responsibilities are delegated to other parties to the transaction or to agents.

The Proposed Rule provides that *unless authorized by EAR § 758.3*, the USPPI is the exporter of record and the party responsible for applying to BIS for an export license, when required, even if the FPPI is responsible for the export of items out of the United States. However, when an FPPI's designated US agent has written authorization from the FPPI, the US agent may apply for the export license. This change is motivated by the fact that some exporters, freight forwarders, and foreign parties have misunderstood the current language that requires a USPPI to allow an FPPI to assume responsibility for determining licensing requirements and obtaining licensing authority in all routed export transactions, as defined by the Census Bureau.

Refined Procedures for FPPI Controlled Export Transactions

While the Proposed Rule does *not* propose to alter the general responsibilities of the parties, it does

propose changes to the requirements for delegating the responsibility for licensing determination and obtaining license authorization to FPPIs.

First, through an amendment to § 758.3(b)(1), the Proposed Rule would require that a USPPI agree to the delegation through a written authorization (such as a contract, letter, facsimile, or email), and that the FPPI must likewise assume this responsibility and identify in writing a US agent authorized to act as the exporter. These explicit writings would create a valid Foreign Principal Party Controlled Export Transaction. A single writing may still be used to cover multiple transactions between the same principals.

Second, the Proposed Rule would add a new § 758.3(b)(2), which would require the FPPI to designate an agent in the US to represent the FPPI, prior to assuming responsibility from a USPPI. The FPPI would also be required to provide a power of attorney or other written authorization to its US agent to authorize the agent to act on its behalf, before the agent could represent the FPPI or apply for a license on the FPPI's behalf. New Section 758.3(b)(2) would require FPPIs to provide USPPIs with a copy of a power of attorney or other written authorization prior to the FPPIs' assuming responsibility from the USPPIs for determining licensing requirements and obtaining license authority.

Last, § 758.3(b)(3) adds two sub-paragraphs that require:

- (i) A USPPI to provide the FPPI and its US agent with the correct ECCN or "sufficient technical information to determine a classification," upon request of the FPPI or its US agent and, as noted, any information the USPPI "knows may affect the determination of license requirements or export authorization;" and
- (ii) An FPPI to: (1) authorize the USPPI to obtain from the FPPI's US agent certain information related to the transaction, specifically including: (a) date of export; (b) port of export; (c) country of ultimate destination and destination port; (d) method of transportation and specific carrier identification; and (e) export authorization, e.g., license number; and (2) direct the US agent to provide such information to the USPPI upon request.

This information sharing requirement will allow USPPIs to determine whether exports have been properly authorized.

The NCBFAA previously provided comments to the Regulations and Procedures Technical Advisory Committee (RPTAC) on June 11, 2013, after BIS issued its Notice of Inquiry with respect to the Proposed Rule.

Generally, the NCBFAA's position is that the Proposed Rule fails to consider a recurring commercial reality; namely, the fact FPPIs and freight forwarders, serving as the FPPIs' US agents, often enter into service agreements that conflict with the requirements of the EAR. According to the NCBFAA, FPPIs rarely understand the extent of their assumption of obligation and rarely notify their freight forwarders of such delegation. In fact, some FPPI-forwarder agreements explicitly conflict with such delegation by stating that the forwarders will *not* act as US agent for US export control purposes.

In its comments to RPTAC, the NCBFAA recommended that the Proposed Rule include a requirement that FPPIs' US agents, *i.e.* forwarders, confirm in writing their understanding and acceptance of the responsibilities associated with USPPIs' delegation. This recommendation was not incorporated into the Proposed Rule.

Recommendations

If the Proposed Rule is implemented, companies that routinely act as USPPI, FPPI, or US agent for a FPPI in Foreign Principal Party Controlled Export Transactions will need to update their policies and procedures to reflect the new EAR terminology and refine their business practices accordingly. It will also be critical to train personnel responsible for executing written authorizations and powers of attorney on the new obligations imposed by the Proposed Rule.

Interested parties should develop and submit their comments prior to the April 7, 2014 deadline. Anonymous comments can be submitted online via www.regulations.gov.

Please contact Venable's **International Trade Group** for assistance in submitting comments on the Proposed Rule.