

RECORD OF COMMENTS
Conforming Changes to Certain End-User/End-Use Based Controls in the EAR;
Clarification of the Term “Transfer” and Related Terms as Used in the EAR
(RIN 0694-AD59)

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Comments Due: June 17, 2008

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1	<u>AeA</u>	Ken Montgomery	06/17/08	3 pages

determined the internal failure of the magneto firewall connector resulted in both magneto "P" leads shorting to ground. A maintenance "safety" feature through a spring-loaded safety pin incorporated in the firewall connector on many DHC-2 aircraft ground out both magneto systems when the connector is disconnected. This connector type is readily identified when disconnected by the existence of three internal pins on the firewall and magneto harness side, one of which is shorted directly to ground.

These connectors are no longer in production.

Since no effective Instructions for Continued Airworthiness exist to ensure the safety feature of these connectors will operate correctly when disconnected, or will ensure the internal integrity of the connector while in service, this directive is revised to mandate replacement of connectors with a different design.

Viking Air Limited has developed SB V2/0001 to provide for the installation of a replacement connector, similar in design to magneto systems in service today. This modification incorporates a "straight through" type connector, ensuring magneto circuit integrity should the connection open.

Actions and Compliance

(f) Inspect the connector plugs on the fore side of the firewall for security and the connector plug lockwire to ensure it is intact and the holes in the plugs are not broken out or cracked. Initially inspect within the next 100 hours time-in-service (TIS) after December 6, 2004 (the compliance date retained from AD 2004-21-06). Repetitively inspect thereafter at intervals not to exceed 100 hours TIS until the modification required in paragraph (h) of this AD is done. Do the inspections following deHavilland Beaver Alert Service Bulletin Number A2/53, Revision B, dated May 28, 2004; and deHavilland Otter Alert Service Bulletin Number A3/53, Revision B, dated May 28, 2004, as applicable.

(g) During any inspection required in paragraph (f) of this AD, if the lockwire holes or the lockwire is found damaged, install Modification Kit Number C2VMK0001-1 or Modification Kit Number C3VMK0001-1, as applicable. Install the modification kit before further flight following the Accomplishment Instructions in Viking DHC-2 Beaver Service Bulletin Number V2/0001, dated June 27, 2007; and Viking DHC-3 Otter Service Bulletin Number V3/0001, dated June 27, 2007, as applicable. Installing the modification kit terminates the repetitive inspections required in paragraph (f) of this AD.

(h) Unless already done, replace the magneto firewall connector by installing Modification Kit Number C2VMK0001-1 or Modification Kit Number C3VMK0001-1, as applicable. Install the modification kit within the next 6 months after the effective date of this AD following the Accomplishment Instructions in Viking DHC-2 Beaver Service Bulletin Number V2/0001, dated June 27, 2007; and Viking DHC-3 Otter Service Bulletin Number V3/0001, dated June 27, 2007, as applicable. Installing the modification kit terminates the repetitive

inspections required in paragraph (f) of this AD.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: AD 2004-21-06 required incorporating repetitive inspections of the connector plugs and the connector plug lockwire on the fore side of the firewall into the maintenance program while the MCAI required incorporating Temporary Revision No. 14, dated August 24, 2001, into the applicable maintenance manual in order to incorporate the repetitive inspections into the maintenance program.

Other FAA AD Provisions

(i) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, New York Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Fabio Buttitta, Aerospace Engineer, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone: (516) 228-7303; fax: (516) 794-5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120-0056.

Related Information

(j) Refer to MCAI Transport Canada AD No. CF-2001-36R1, dated January 21, 2008; and AD No. CF-2001-37R, dated January 21, 2008; and Viking Air Limited DHC-2 Beaver Service Bulletin Number V2/0001, dated June 27, 2007; and Viking Air Limited DHC-3 Otter Service Bulletin Number V3/0001, dated June 27, 2007; for related information.

Issued in Kansas City, Missouri, on April 11, 2008.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8-8365 Filed 4-17-08; 8:45 am]

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 736, 740, 742, 744, 748, 752, 760, and 772

[Docket No. 080220216-8518-01]

RIN 0694-AD59

Conforming Changes to Certain End-User/End-Use Based Controls in the EAR; Clarification of the Term "Transfer" and Related Terms as Used in the EAR

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: The Bureau of Industry and Security (BIS) proposes to amend the Export Administration Regulations (EAR) by making conforming changes in certain end-user/end-use controls in the EAR to ensure that the terminology used to describe each type of end-user/end-use control is consistent, to the fullest extent possible, with the terminology in other such controls in the EAR. The proposed amendments would clarify that a party cannot proceed with an export, reexport, or transfer (in-country) that is in transit at the time the party is informed by BIS that a license is required (in accordance with certain end-user/end-use controls in the EAR), unless that party first obtains a license from BIS authorizing the completion of the transaction. These proposed changes to part 744 are intended to enhance the ability of BIS to stop items subject to the EAR, including items not on the Commerce Control List, from being exported, reexported or transferred (in-country) when there is an unacceptable risk that such items will be used in, or diverted to, any of the proliferation activities specified in §§ 744.2, 744.3, 744.4 and 744.6 of the EAR. This rule also proposes to amend the EAR by revising the definition of the term "transfer" and certain related terms, to provide greater clarity regarding these provisions.

DATES: Comments must be received by June 17, 2008.

ADDRESSES: Written comments on this rule may be sent to the **Federal Register** eRulemaking Portal: <http://www.regulations.gov>, or by e-mail to publiccomments@bis.doc.gov. Include RIN 0694-AD59 in the subject line of the message. Comments may be submitted by mail or hand delivery to Timothy Mooney, Office of Exporter Services, Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, 14th St. &

Pennsylvania Avenue, NW., Room H2705, Washington, DC 20230, ATTN: RIN 0694-AD59; or by fax to (202) 482-3355.

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

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

SUPPLEMENTARY INFORMATION:

Background

Conforming Changes to Certain End-User/End-Use Based Controls in the EAR

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

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

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

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

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

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

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

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

This rule makes the following specific revisions to the EAR:

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

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

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

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

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

5. In § 744.5 (Restrictions on Certain Maritime Nuclear Propulsion End-Uses), this rule proposes to amend paragraph (a) (General Prohibition) by clarifying that this prohibition in § 744.5 also applies to transfers (in-country). With this proposed rule, this paragraph (a)

would prohibit the exports, reexports, and transfers (in-country) of items subject to the EAR to defined nuclear maritime end-uses in § 744.5.

Revisions to Definitions of Transfer and Related Terms

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

This rule also proposes to correct several places in the EAR where the term “transfer” is used, but the intended meaning is “transfer (in-country)” or “in-country transfer”. Specifically, references to the term “transfer” in § 736.2, General Order No. 2 to Supp. No. 1 to part 736, §§ 740.5, 740.7, 740.9, 740.11, 740.17, 742.15, 744.3, 744.4, 744.6, Supp. No. 2 to part 748, §§ 752.5, 752.8, 752.16, and Supplement No. 3 to part 752 are proposed to be clarified with this rule. This rule also proposes to clarify that the term “retransfer” means “in-country transfer” by replacing the term “retransfer” with the term “transfer (in-country)” in §§ 740.11, 740.17, 742.15, 752.5, and Supp. No. 3 to part 752. This rule also proposes to clarify that the terms “transferred” and “transfer”, in the context of §§ 760.1 and 760.3, mean “assigned to” and “assignment”, respectively.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as extended by the Notice of August 15, 2007, 72 FR 46137

(August 16, 2007), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act.

Rulemaking Requirements

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

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

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

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. However, in order to obtain the benefit of a variety of viewpoints before publishing any final rule, BIS is issuing this proposed rule with request for comments. Comments must be received by BIS no later than

June 17, 2008. In developing a final rule, BIS will consider all comments received on or before that date. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. BIS will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. BIS will return such comments and materials to the persons submitting the comments and will not consider them in the development of the final rule. All public comments on this proposed rule must be in writing (including fax or e-mail) and will be a matter of public record, available for public inspection and copying at the Federal eRulemaking Portal at <http://www.regulations.gov> and on the BIS Freedom of Information Act (FOIA) Web site at <http://www.bis.doc.gov/foia>. BIS does not maintain a separate public inspection facility. If you have technical difficulties accessing this Web site, please call BIS's Office of Administration at (202) 482-0500 for assistance.

List of Subjects

15 CFR Part 736 and 772

Exports.

15 CFR Part 740, 748, and 752

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

15 CFR Part 742

Exports, Terrorism.

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

15 CFR Part 760

Boycotts, Exports, Reporting and recordkeeping requirements.

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

PART 736—[AMENDED]

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

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 2151 (note), Pub. L. 108-175; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp. p. 219; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, May 13, 2004; Notice of August 3, 2006, 71 FR 44551 (August 7, 2006); Notice of October 27,

2006, 71 FR 64109 (October 31, 2006); Notice of August 15, 2007, 72 FR 46137 (August 16, 2007).

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

§ 736.2 General prohibitions and determination of applicability.

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

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

Supplement No. 1 to Part 736—General Orders

* * * * *

General Order No. 2

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

* * * * *

PART 740—[AMENDED]

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

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; Sec. 901-911, Pub. L. 106-387; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 3, 2006, 71 FR 44551 (August 7, 2006); Notice of August 15, 2007, 72 FR 46137 (August 16, 2007).

5. Section 740.5 is amended by revising paragraph (b)(1) to read as follows:

§ 740.5 Civil end-users (CIV).

(b) *Restrictions.*—(1) *Restricted end-users and end-uses.* You may not use CIV if you “know” the item will be or is intended to be exported, reexported, or transferred (in-country) to military uses or military end-users. Such exports, reexports, and transfers (in-

country) will continue to require a license. In addition to conventional military activities, military uses include any proliferation activities described and prohibited by part 744 of the EAR.

* * * * *

6. Section 740.7 is amended:

a. By revising the first sentence of paragraph (b)(3); and

b. By revising paragraph (b)(5) to read as follows:

§ 740.7 Computers (APP).

* * * * *

(b) * * *

(3) Computers and software eligible for License Exception APP may not be reexported or transferred (in-country) without prior authorization from BIS, *i.e.*, a license, a permissive reexport, another License Exception, or “No License Required”. * * *

(4) * * *

(5) License Exception APP does not authorize exports, reexports and transfers (in-country) for nuclear, chemical, biological, or missile end-users and end-uses subject to license requirements under § 744.2, § 744.3, § 744.4, and § 744.5 of the EAR. Such exports, reexports and transfers (in-country) will continue to require a license and will be considered on a case-by-case basis. Reexports and transfers (in-country) to these end-users and end-uses in eligible countries are strictly prohibited without prior authorization.

* * * * *

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

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

* * * * *

(a) * * *

(2) * * *

(ix) *Temporary exports to a U.S. subsidiary, affiliate or facility in Country Group B.*

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

* * * * *

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

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

* * * * *

(c) * * *

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

* * * * *

9. Section 740.17 is amended by revising the second sentence of the introductory text of paragraph (a)(1) to read as follows:

§ 740.17 Encryption commodities and software (ENC).

* * * * *

(a) * * *

(1) * * * Any encryption item produced or developed with an item exported or reexported under this paragraph (a)(1) is subject to the EAR and requires review and authorization before any sale or transfer outside of the private sector end-user that developed it.

* * * * *

PART 742—[AMENDED]

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

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; Sec. 901–911, Pub. L. 106–387; Sec. 221, Pub. L. 107–56; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of August 3, 2006, 71 FR 44551 (August 7, 2006); Notice of October 27, 2006, 71 FR 64109 (October 31, 2006); Notice of August 15, 2007, 72 FR 46137 (August 16, 2007).

11. Section 742.15 is amended by revising the second sentence of paragraph (b)(3)(i) to read as follows:

§ 742.15 Encryption items.

* * * * *

(b) * * *

(3) * * *

(i) * * *

All items produced or developed by U.S. subsidiaries with encryption commodities, software and technology

exported under this paragraph are subject to the EAR and require review and authorization before any sale or transfer outside of the U.S. company.

* * * * *

PART 744—[AMENDED]

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

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; Sec. 901–911, Pub. L. 106–387; Sec. 221, Pub. L. 107–56; 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 August 3, 2006, 71 FR 44551 (August 7, 2006); Notice of October 27, 2006, 71 FR 64109 (October 31, 2006); Notice of August 15, 2007, 72 FR 46137 (August 16, 2007).

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

§ 744.1 General provisions.

(a)(1) *Introduction.* In this part, references to the EAR are references to 15 CFR chapter VII, subchapter C. This part contains prohibitions against exports, reexports, and selected transfers to certain end-users and end-uses as introduced under General Prohibition Five (End-use/End-users) and Nine (Orders, Terms, and Conditions), unless authorized by BIS. Sections 744.2, 744.3, 744.4 prohibit exports, reexports and transfers (in-country) of items subject to the EAR to defined nuclear, missile, and chemical and biological proliferation activities. Section 744.5 prohibits exports, reexports and transfers (in-country) of items subject to the EAR to defined nuclear maritime end-uses. Section 744.6 prohibits certain activities by U.S. persons in support of certain nuclear, missile, chemical, or biological end-uses. Section 744.7 prohibits exports and reexports of certain items for certain aircraft and vessels. Section 744.9 prohibits U.S. persons from providing technical assistance to certain foreign persons seeking to develop or manufacture certain encryption commodities or software. Section 744.10 prohibits exports and reexports of any item subject to the EAR to Russian entities, included in Supplement No. 4 of this part. Sections 744.12, 744.13 and 744.14 prohibit exports and reexports of any item subject to the EAR to persons designated as Specially Designated

Global Terrorists, Specially Designated Terrorists, or Foreign Terrorist Organizations, respectively. Section 744.19 sets forth BIS's licensing policy for applications for exports or reexports when a party to the transaction is an entity that has been sanctioned pursuant to any of three specified statutes that require certain license applications to be denied. Section 744.20 requires a license, to the extent specified in Supplement No. 4 to this part, for exports and reexports of items subject to the EAR destined to certain sanctioned entities listed in Supplement No. 4 to this part. Section 744.15 describes restrictions on exports and reexports to persons named in general orders. In addition, these sections include license review standards for export license applications submitted as required by these sections. It should also be noted that part 764 of the EAR prohibits exports, reexports and certain transfers of items subject to the EAR to denied parties.

* * * * *

(b) * * *

(2) *Determine applicability.* Second, determine whether any of the end-use and end-user prohibitions described in this part are applicable to your planned export, reexport, transfer (in-country) or other activity. See Supplement No. 1 to part 732 for guidance. For exports, reexports or transfers (in-country) that are in transit at the time you are informed by BIS that a license is required in accordance with §§ 744.2(b), 744.3(b), 744.4(b) or 744.6(b) of the EAR, you may not proceed any further with the transaction unless you first obtain a license from BIS (see part 748 of the EAR for instructions on how to apply for a license). The provisions of § 748.4(d)(2) shall not apply to license applications submitted pursuant to a notification from BIS that occurs while an export, reexport, or transfer (in-country) is in transit.

* * * * *

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

§ 744.2 Restrictions on certain nuclear end-uses.

(a) *General prohibition.* In addition to the license requirements for items specified on the CCL, you may not export, reexport, or transfer (in-country) to any destination, other than countries in Supplement No. 3 to this part, an item subject to the EAR without a license if, at the time of export, reexport, or transfer (in-country) you know¹ that

¹ Part 772 of the EAR defines "knowledge" for all of the EAR except part 760, Restrictive Trade

the item will be used directly or indirectly in any one or more of the following activities described in paragraphs (a)(1), (a)(2), and (a)(3) of this section:

* * * * *

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

* * * * *

15. Section 744.3 is amended:

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

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

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

* * * * *

(b) *Additional prohibition on persons informed by BIS.* BIS may inform persons, either individually by specific notice or through amendment to the EAR, that a license is required for a specific export, reexport or transfer (in-country) or for the export, reexport, or

Practices and Boycotts. The definition, which includes variants such as “know” and “reason to know”, encompasses more than positive knowledge. Thus, the use of “know” in this section in place of the former wording “know or have reason to know” does not lessen or otherwise change the responsibilities of persons subject to the EAR.

transfer (in-country) of specified items to a certain end-user, because there is an unacceptable risk of use in, or diversion to, the activities specified in paragraphs (a)(1) or (a)(2) of this section. Specific notice is to be given only by, or at the direction of, the Deputy Assistant Secretary for Export Administration. When such notice is provided orally, it will be followed by a written notice within two working days signed by the Deputy Assistant Secretary for Export Administration. However, the absence of any such notification does not excuse persons from compliance with the license requirements of paragraphs (a)(1), (a)(2), or (a)(3) of this section.

* * * * *

(d) *License review standards.*

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

* * * * *

16. Section 744.4 is amended:

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

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

(a) *General prohibition.*

In addition to the license requirements for items specified on the CCL, you may not export, reexport, or transfer (in-country) an item subject to the EAR without a license if, at the time of export, reexport, or transfer (in-country) you know that the item will be used in the design, development, production, stockpiling, or use of chemical or biological weapons in or by any country or destination, worldwide.

* * * * *

(d) *License review standards.*

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

* * * * *

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

§ 744.5 Restrictions on certain maritime nuclear end-uses.

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

* * *

* * * * *

18. Section 744.6 is amended:

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

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

(a) * * *

(1) * * *

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

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

(2) * * *

(3) Whole plant requirement. No U.S. person shall, without a license from BIS, participate in the design, construction, export, reexport, or transfer (in-country) of a whole plant to make chemical weapons precursors identified in ECCN 1C350, in countries other than those listed in Country Group A:3 (Australia Group) (See Supplement No. 1 to part 740 of the EAR).

(b) Additional prohibitions on U.S. persons informed by BIS. BIS may inform U.S. persons, either individually by specific notice or through amendment to the EAR, that a license is required because an activity could involve the types of participation and support described in paragraph (a) of this section. Specific notice is to be given only by, or at the direction of, the Deputy Assistant Secretary for Export Administration. When such notice is provided orally, it will be followed by a written notice within two working days signed by the Deputy Assistant

Secretary for Export Administration. However, the absence of any such notification does not excuse the U.S. person from compliance with the license requirements of paragraph (a) of this section.

* * * * *

PART 748—[AMENDED]

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

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 3, 2006, 71 FR 44551 (August 7, 2006); Notice of August 15, 2007, 72 FR 46137 (August 16, 2007).

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

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

* * * * *

(c) * * *

(2) Security Safeguard Plan requirement. The United States requires security safeguards for exports, reexports, and transfers (in-country) of High Performance Computers (HPCs) to ensure that they are used for peaceful purposes. If you are submitting a license application for an export, reexport, or in-country transfer of a high performance computer to or within a destination in Computer Tier 3 (see § 740.7(c)(1) of the EAR) or to Cuba, Iran, North Korea, Sudan, or Syria you must include with your license application a security safeguard plan signed by the end-user, who may also be the ultimate consignee. This requirement also applies to exports, reexports, and transfers (in-country) of components or electronic assemblies to upgrade existing “computer” installations in those countries. A sample security safeguard plan is posted on BIS’s Web page at <http://www.bis.doc.gov/hpcs/SecuritySafeguardPlans.html>.

* * * * *

PART 752—[AMENDED]

21. The authority citation for 15 CFR part 752 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13020, 61 FR 54079, 3 CFR, 1996 Comp., p. 219; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 3, 2006, 71 FR 44551 (August 7, 2006); Notice of August 15, 2007, 72 FR 46137 (August 16, 2007).

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

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

* * * * *

(c) * * *

(8) * * *

(ii) * * *

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

* * * * *

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

§ 752.8 SCL application review process.

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

* * * * *

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

§ 752.16 Administrative actions.

(a)(1) * * *

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

* * * * *

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

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

* * * * *

Block 8: Disposition or Use of Items.

* * * * *

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

* * * * *

PART 760—[AMENDED]

26. The authority citation for 15 CFR part 760 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 3, 2006, 71 FR 44551 (August 7, 2006); Notice of August 15, 2007, 72 FR 46137 (August 16, 2007).

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

§ 760.1 Definitions.

* * * * *

(b) * * *

(4) * * *

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

* * * * *

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

§ 760.3 Exceptions to prohibitions.

* * * * *

(f) * * *

(4) * * *

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

* * * * *

PART 772—[AMENDED]

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

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 3, 2006, 71 FR 44551 (August 7, 2006); Notice of August 15, 2007, 72 FR 46137 (August 16, 2007).

30. Section 772.1 is amended by revising the definition of “transfer.”

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

* * * * *

Transfer. A shipment, transmission, or release to any person of items subject to the EAR either within the United States or outside the United States.

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

(b) Reserved.

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

violation of the EAR. See §§ 750.7(c) and 764.2(e).

* * * * *

Dated: April 9, 2008.

Matthew S. Borman,
Acting Assistant Secretary for Export
Administration.

[FR Doc. E8-8197 Filed 4-17-08; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF JUSTICE

28 CFR Part 28

[OAG 119; AG Order No. 2957-2008]

RIN 1105-AB24

DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006

AGENCY: Department of Justice.

ACTION: Proposed rule.

SUMMARY: The Department of Justice is publishing this proposed rule to implement amendments made by section 1004 of the DNA Fingerprint Act of 2005 and section 155 of the Adam Walsh Child Protection and Safety Act of 2006 to section 3 of the DNA Analysis Backlog Elimination Act of 2000. This rule directs agencies of the United States that arrest or detain individuals, or that supervise individuals facing charges, to collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. Unless otherwise directed by the Attorney General, the collection of DNA samples may be limited to individuals from whom an agency collects fingerprints. The Attorney General also may approve other limitations or exceptions. Agencies collecting DNA samples are directed to furnish the samples to the Federal Bureau of Investigation, or to other agencies or entities as authorized by the Attorney General, for purposes of analysis and entry into the Combined DNA Index System.

DATES: Written comments must be submitted on or before May 19, 2008.

ADDRESSES: Comments may be mailed to David J. Karp, Senior Counsel, Office of Legal Policy, Room 4509, Main Justice Building, 950 Pennsylvania Avenue, NW., Washington, DC 20530. To ensure proper handling, please reference OAG Docket No. 119 on your correspondence. You may submit comments electronically or view an electronic

version of this proposed rule at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: David J. Karp, Senior Counsel, Office of Legal Policy. Telephone: (202) 514-3273.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. If you wish to submit a comment, the public posting will include voluntarily submitted personal identifying information (such as your name, address, etc.).

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You also must identify prominently any confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be redacted effectively, all or part of that comment might not be posted on <http://www.regulations.gov>.

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

Background

All 50 States authorize the collection and analysis of DNA samples from convicted state offenders, and enter resulting DNA profiles into the Combined DNA Index System ("CODIS"), which the Federal Bureau of Investigation ("FBI") has established pursuant to 42 U.S.C. 14132. In addition to collecting DNA samples from convicted state offenders, several states

authorize the collection of DNA samples from individuals they arrest.

Until recently, federal DNA-sample collection was more limited. The DNA Analysis Backlog Elimination Act of 2000 (the "Act") authorized DNA-sample collection by federal agencies only from persons convicted of certain "qualifying" federal, military, and District of Columbia offenses. Public Law 106-546 (2000). The Act also addressed the responsibility of the Federal Bureau of Prisons ("BOP") and federal probation offices to collect DNA samples from convicted offenders in their custody or under their supervision, and the responsibility of the FBI to analyze and index DNA samples. On June 28, 2001, the Department of Justice published an interim rule to implement these provisions. 66 FR 34363. The rule, in part, specified the qualifying federal offenses for which DNA samples could be collected and addressed responsibilities of BOP and the FBI under the Act.

After publication of the interim rule, Congress enacted the USA PATRIOT Act, Public Law 107-56. Section 503 of the USA PATRIOT Act added three additional categories of qualifying federal offenses for purposes of DNA-sample collection: (1) Any offense listed in section 2332b(g)(5)(B) of title 18, United States Code; (2) any crime of violence (as defined in section 16 of title 18, United States Code); and (3) any attempt or conspiracy to commit any of the above offenses. The Department of Justice published a proposed rule in the **Federal Register** on March 11, 2003, to implement this expanded DNA-sample collection authority. 68 FR 11481. On December 29, 2003, the Department published a final rule implementing this authority. 68 FR 74855.

After publication of that final rule, the DNA-sample collection categories again were expanded by Congress pursuant to section 203(b) of the Justice for All Act of 2004, Public Law 108-405. The Justice for All Act expanded the definition of qualifying federal offenses to include any felony, thereby permitting the collection of DNA samples from all convicted federal felons. The Department published an interim final rule implementing this reform on January 31, 2005. 70 FR 4763.

More recently, section 1004 of the DNA Fingerprint Act of 2005 ("DNA Fingerprint Act"), Public Law 109-162, broadened the categories of persons subject to DNA-sample collection to authorize such collection from "individuals who are arrested or from non-United States persons who are detained under the authority of the United States." Before publication of a



June 17, 2008

Mr. Timothy Mooney
Regulatory Policy Division
Bureau of Industry and Security
US Department of Commerce
Washington, D.C. 20005

Re: Comments on RIN 0694-AD59 - Conforming Changes to Certain End-User/End-Use Controls in the EAR; Clarification to the Term Transfer and Related Terms as Used in the EAR

Dear Mr. Mooney,

On behalf of the 2500 high technology member companies of AeA, we are writing to comment on the proposed rule that would make conforming changes to end-user/end-use controls in Part 744 of the Export Administration Regulations ("EAR"), and related changes to other parts of the EAR. (73 Fed. Reg. 21076 (Apr. 18, 2008).) Perhaps the most important change would amend EAR 744.2 (Restrictions on Certain Nuclear End-Uses) to state that the 744.2 prohibition also applies to in-country transfers, not just exports and reexports. The draft regulation proposes to add the term "transfer (in country)" to the scope of the prohibitions set forth in EAR Part 744.2 to ensure language in that section conforms with language in Parts 744.3, 744.4, and 744.6. The desired consistency between Part 744.2 on the one hand and Parts 744.3 and 744.4 on the other could far more reasonably be achieved by deleting "transfer (in country)" from the latter provisions, given that the latter end-use controls were originally added to the EAR in 1990 to be consistent with 744.2.

The addition of the term "transfer (in country)" to Parts 744.3 and 744.4 was accomplished as a part of final rules in late 2004 and early 2005, with little attention by industry. (In retrospect, we should have been more vociferous in our opposition.) We oppose inclusion of that term in Part 744.2 and the conforming change to Part 744.1. Instead, we propose that "transfer (in country)" be removed from Parts 744.3 and 744.4.

As a reasonable restraint, at worst, in-country transfer restrictions in Part 744 and elsewhere in the EAR should apply only to "U.S. persons", as defined in EAR Part 772. Accordingly, we propose the only appropriate place to include Part 744 "transfer (in country)" related restrictions would be in Part 744.6. We further recommend that "transfer (in country)" restrictions found elsewhere in the EAR be amended to clarify that the term applies only to the activities of U.S. persons.

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

We submit these recommendations because for the United States to assert export controls on in-country-transfers within another country's borders is the height of extraterritorial application of U.S. law, offensive to our allies, unenforceable, and thus an undercutting of respect for extraterritorial reexport controls that are respected around the world. We note that in-country-transfer restrictions deviate from longstanding U.S. policy that has obtained since the rescission by the Reagan Administration of U.S. unilateral sanctions that applied extraterritorially to foreign subsidiaries of U.S. companies. That policy has since been upheld by three subsequent Administrations. That policy is an outgrowth of past experience:

- * Following several Cold War era developments including the earlier Soviet invasion of Afghanistan and the declaration of martial law in Poland, on July 2, 1982, the U.S. banned participation in the Siberian pipeline project by European subsidiaries of U.S. companies and other re-exports.
- * In response to the U.S. sanctions on the pipeline project, the U.K., France, the Netherlands, and other countries applied blocking-statutes (some previously adopted in opposition to U.S. extraterritorial antitrust laws), requiring the subsidiaries of U.S. companies and other companies affected to honor existing contracts-and disobey the U.S. sanctions. As a result, affected companies outside the U.S. found themselves in the impossible position of not being able to obey both U.S. and applicable foreign law at the same time.
- * As a result of the overreaching of extraterritorial U.S. export controls, U.S. companies' reputation as reliable suppliers was sullied. Further, this withdrawal ceded market share to non-U.S. competitors, in some industries for several decades. Perhaps more important, because they were discouraged from complying with U.S. re-export controls in this case, the effectiveness of U.S. re-export controls generally (which otherwise are often respected) was severely undercut.
- * On November 7, 1982, the Reagan Administration withdrew the extraterritorial measures to avert adverse rulings in multiple pending legal cases in both U.S. and overseas courts and to ease tensions with our major trading partners. Beginning with the regulations implementing sanctions on Libya in 1986, the U.S. has repeatedly limited investment and trade prohibitions to U.S. based companies, applied a de minimis rule, and applied other limitations on what otherwise might be viewed as excessive application of unilateral U.S. re-export controls (not applicable to EAR99 products to Sudan or Iran, for example) so as to better persuade our allies to support those controls that are most important rather than insisting on those that are merely symbolic.

Extraterritorial measures such as the "in-country-transfer" regulation irritates relations with the very nations the U.S. must secure cooperation from to promote multilateral strategies to fight terrorism and to address other areas of mutual concern. Non-U.S.

governments view U.S. efforts to dictate their foreign and commercial policy as violations of sovereignty, often leading them to adopt retaliatory measures more at odds with U.S. goals. We need to remember our mistakes rather than repeat them.

Extraterritorial application of U.S. export controls has long been an irritant to U.S. allies. European and Japanese companies have recently told BIS and other U.S. officials that they spend 80% of their time addressing U.S. re-export controls, and 20% on their own controls, and that this level of U.S. domination is intolerable. That concern is just based on re-export controls across borders. It is a much greater affront to a country's sovereignty to attempt to apply U.S. controls on activities that occur wholly within another country's borders. These controls, rather than be consistent with U.N.S.C. 1540, undercut it. No other ally applies their export controls extraterritorially, and all would strenuously object to U.S. assertion of jurisdiction over activities that occur solely within their borders.

Moreover, to attempt to do so would be ineffective as well as counterproductive. BIS officials have admitted in public meetings that the current in country transfer restrictions applicable to Iraq, which are stricter than export and re-export controls to Iraq, are not enforceable and they do not really expect persons there to refuse to provide a product eligible for License Exception export and re-export to another person in Iraq despite the fact that the EAR prohibits this. The same will be true of a company in, say, Israel that believes it cannot provide products to another company in Israel because of U.S. law. Faced with violating U.S. or Israeli law, the Israeli company really has no choice. That is true for other countries as well.

If we enact changes in the EAR that we do not really expect to be able to enforce, and in truth expect companies outside the U.S. to ignore, we undercut those U.S. export controls that can be effective and that really matter. By reasonably limiting our application of extraterritorial export controls to what is most important to us, we preserve respect for them from those we need to comply and maintain U.S. leadership for when it is truly important. If we apply them based simply on logic, without remembering history or respecting our allies, we do ourselves and our controls a disservice.

If non-U.S. countries attempted to impose their domestic laws on activities wholly within the United States, the U.S. would undoubtedly be similarly opposed to an infringement on its authority.

AeA respectfully requests that BIS act consistently with longstanding U.S. policy and use this regulation to a) delete all in-country-transfer restrictions, or b) clarify that in-country-transfer restrictions apply only to "U.S. persons".

Sincerely,



Ken Montgomery
Director, International Trade Regulation