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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 742, 743, 744, 748, 750 and 758

[Docket No. 061205125-7125-01]

RIN 0694-AD75

Revisions and Clarification of Export and Reexport Controls for the People's Republic of China (PRC); New Authorization Validated End-User; Revision of Import Certificate and PRC End-User Statement Requirements

AGENCY: Bureau of Industry and Security, Commerce

ACTION: Final rule

SUMMARY:

In this final rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) to revise and clarify U.S. licensing requirements and licensing policy on exports and reexports of items to the People's Republic of China (PRC). BIS published a revised policy and related amendments in proposed form in the Federal Register with a request for comments.

This final rule establishes a control, based on knowledge of a "military end-use," on exports and reexports to the PRC of certain items on the Commerce Control List (CCL) that otherwise do not require a license to the PRC. It also includes a revision to the license application review policy for items destined for the PRC that are controlled on the CCL for reasons of national security, and revises the license review policy for items controlled for reasons of chemical and biological weapons proliferation, nuclear nonproliferation, and missile technology for export to the PRC, requiring that applications involving such items be reviewed in conjunction with the revised national security licensing policy. This rule also creates a new authorization for "validated end-users" to which specified items may be exported or reexported without a license.

Validated end-users will be placed on a list in the EAR after review and approval by the United States Government. The process for such review is also set forth in this final rule. This rule also revises the circumstances in which End-User Statements, issued by the PRC Ministry of Commerce (MOFCOM), must be obtained, requiring them for transactions that both require a license to the PRC for any reason and (for most exports) exceed a total value of \$50,000. This final rule also includes other minor corrections and conforming amendments.

DATES: This rule is effective [INSERT DATE OF PUBLICATION]. Comments may be submitted at any time.

ADDRESSES: Although this is a final rule, BIS welcomes comments, which should be sent by fax to (202) 482-3355, e-mail to [publiccomments@bis.doc.gov](mailto:publiccomments@bis.doc.gov), or by mail to Sheila Quarterman, Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, P.O. Box 273, Washington, DC 20044. Please refer to regulatory identification number (RIN) 0694-[AD75 final] in all comments, and in the subject line of email comments. Comments on the collection of information should be sent to David Rostker, Office of Management and Budget (OMB) by email to [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov), or by fax to (202) 395-7285.

FOR FURTHER INFORMATION CONTACT: For technology related issues, contact Bernard Kritzer, Director, Office of National Security and Technology Transfer Controls, Bureau of Industry and Security, Department of Commerce, P.O. Box 273, Washington, DC 20044; by telephone (202) 482-0092; or by e-mail to [bkritzer@bis.doc.gov](mailto:bkritzer@bis.doc.gov).

For issues related to the Validated End-User authorization, contact Michael Rithmire, Export Administration Intelligence Liaison, Bureau of Industry and Security, Department of Commerce, P.O. Box 273, Washington, DC 20044; by telephone (202) 482-6105; or by e-mail to [mrithmir@bis.doc.gov](mailto:mrithmir@bis.doc.gov).

For general questions or a copy of the economic analysis, please contact Sheila Quarterman at the address listed in the ADDRESSES section.

## SUPPLEMENTARY INFORMATION

### **Background**

It is the policy of the United States Government to facilitate U.S. exports to legitimate civilian end-users in the People's Republic of China (PRC), while preventing exports that would enhance the military capability of the PRC. Consistent with this policy, the Bureau of Industry and Security (BIS) is amending the Export Administration Regulations (EAR) by revising and clarifying United States licensing requirements and licensing policy on exports and reexports of goods and technology to the PRC.

As the PRC has increased its participation in the global economy, bilateral trade has grown rapidly, and the PRC has emerged as a major market for U.S. exports and investment. This greatly expanded economic relationship is beneficial for both nations, and has increased the prosperity of both the American and Chinese people. The United States therefore seeks to encourage and facilitate exports to legitimate civil end-uses in the PRC. At the same time, the United States has a longstanding policy of not permitting exports that would make a direct and significant contribution to the PRC's military capability. Moreover, the United States has an interest in restricting exports of certain dual-use products and technologies that would not otherwise need an export license, if those items are destined for a "military end-use" in the PRC.

BIS is therefore amending the EAR to revise and clarify U.S. licensing requirements and licensing policy on exports and reexports of items to the PRC, and to establish a new authorization that is intended to facilitate exports to validated civilian end-users in the PRC. On July 6, 2006, BIS published a proposed rule and requested public comments (71 FR 38313). On October 19, 2006, the original comment period deadline of November 3, 2006 was extended until December 4, 2006 (71 FR 61692). The detailed rationale for the proposed rule's provisions is provided in the preamble to the proposed rule and is not repeated here. In general, however, this rule proposes certain revisions and clarifications to licensing requirements and policies with regard to the PRC to more precisely reflect U.S. foreign policy and national security interests.

*Revision of licensing review policy and license requirements*

To strengthen efforts to prevent U.S. exports to the PRC that would enhance the PRC's military capabilities, this rule revises the licensing review policy for items controlled on the Commerce Control List for reasons of national security. Specifically, this rule amends section 742.4(b)(7) to make clear that the overall policy of the United States for exports to the PRC of these items is to approve exports for civil end-uses but generally to deny exports that will make a direct and significant contribution to Chinese military capabilities. BIS makes further revisions to the EAR to clarify that it will review license applications to export or reexport to the PRC items controlled for chemical and biological weapons proliferation, nuclear nonproliferation, and missile technology under sections 742.2, 742.3 and 742.5, respectively, of the EAR, in accordance with the licensing policies in both paragraph (b) of the applicable section and with the revised licensing policy in paragraph 742.4(b)(7) of the EAR, which provides a presumption of denial for

license applications to export, reexport, or transfer items that would make a direct and significant contribution to the PRC's military capabilities such as, but not limited to, the major weapons systems described in new Supplement No. 7 to Part 742 of the EAR.

This rule also implements a new control on exports to the PRC of certain CCL items that otherwise do not require a license to the PRC when the exporter has knowledge, as defined in section 772.1 of the EAR, that such items are destined for "military end-use" in the PRC or is informed that such items are destined for such an end-use. The list of items subject to this "military end-use" restriction covers approximately 20 products and associated technologies, as described in the entries of 31 full or partial Export Control Classification Numbers (ECCNs). The list was based on a review of public comments and a careful interagency review of items listed on the CCL that currently do not require a license for export to the PRC but have the potential to advance the military capabilities of the PRC. Applications to export, reexport, or transfer items controlled pursuant to the "military end-use" control will be reviewed on a case-by-case basis to determine whether the export, reexport, or transfer will make a material contribution to the military capabilities of the PRC and would result in advancing the country's military activities contrary to the national security interests of the United States. Other end-use controls in part 744 of the EAR continue to apply.

*New Authorization Validated End-User (VEU)*

To facilitate legitimate exports to civilian end-users, BIS establishes in this rule a new authorization Validated End-User. The authorization will allow the export, reexport, and

transfer of eligible items to specified end-users in an eligible destination, initially the PRC. Validated end-users will be those entities that meet a number of criteria, including a demonstrated record of engaging only in civil end-use activities. This rule outlines clear procedures to request Validated End-User authorization, the procedures and timelines to be used by an interagency committee established to consider such requests, and the criteria for evaluating requests.

#### *Revision of End-User Statement requirements*

To strengthen implementation of the April 2004 end-use visit understanding between the Vice Minister of Commerce of the PRC and the U.S. Under Secretary of Commerce for Industry and Security, this rule requires exporters to obtain PRC End-User Statements from the Ministry of Commerce of the PRC for all exports of items on the CCL requiring a license to the PRC over a specific value, which for most exports will be a new, higher threshold of \$50,000. BIS anticipates that this change will facilitate BIS's ability to conduct end-use checks on exports or reexports of controlled goods and technologies to the PRC, consistent with the existing end-use visit understanding with the Government of the PRC, without resulting in an overall annual increase in the number of such statements required from U.S. exporters. The facilitation of end-use checks should, in turn, facilitate increased U.S. exports to the PRC.

#### **Comments and Responses**

BIS received 57 public comments, amounting to more than 1000 pages of comments on the proposed rule. Summaries of those comments and BIS responses appear below by topic. Similar comments are consolidated.

*Revised License Review Policy for Items Controlled for National Security Reasons to the PRC*

Comment 1: A number of commenters asserted that the “material contribution to military capability” standard used in the proposed rule with respect to BIS’s review of license applications involving items controlled for national security is too broad. In addition, certain commenters stated that the concept of “material contribution to military capability” is largely subjective, and best left to military experts in the Government. Moreover, they asserted that the proposed definition of “military end-use” goes far beyond even the broad scope of the “material contribution to military capability” standard used elsewhere in the proposed rule and that it is unlikely that this problem can be resolved by revising that definition.

Response: BIS has considered the public comments received regarding the appropriate license review standard to apply to license applications involving items controlled for national security (NS) reasons. BIS had proposed revising section 742.4(b)(7) of the EAR to establish a policy of reviewing applications involving items controlled for NS reasons to determine if the items would make a “material contribution” to the PRC’s military capabilities. This proposal would have changed the review standard in the EAR, in place since 1983, which provided that BIS would conduct an extended review or deny applications to export or reexport items that would make a “direct and significant

contribution” to a series of listed PRC military activities. Having reviewed public comments, BIS and its interagency partners have decided to maintain the “direct and significant” standard and not to adopt a new “material contribution” standard. BIS agreed with commenters that the “material contribution” standard was too broad for a review of NS-controlled items. Although the “direct and significant” standard is being retained, BIS has decided to apply it to PRC military capabilities as a whole, rather than a limited list of military activities. To update and better inform exporters of this license application review policy, and to add clarity to the term “military capabilities,” BIS is adding new Supplement No. 7 to Part 742 of the EAR, which provides an illustrative list of weapons systems that could constitute PRC military capabilities. BIS developed this illustrative list in conjunction with its interagency partners.

*Military End-Use license requirement for certain exports and reexports to the PRC*

Comment 2: Many commenters claimed that, due to widespread foreign availability, including production of such items in the PRC, the export, reexport, or transfer to the PRC of the listed items to which the proposed “military end-use” license requirement for the PRC would apply (set forth in Supplement No. 2 to Part 744) would not make an impact on the military capability of the PRC. Some of those commenters claimed that many of the items subject to the new “military end-use” license requirement have been exempted from most export restrictions and national security controls because they were deemed not useful for “military end-use” purposes.

Response: BIS reviewed each comment received regarding the list of ECCNs proposed for the new “military end-use” control. In response to these comments, BIS conducted a

thorough review and analysis of each proposed ECCN, considering the following factors: (1) the military applicability of each item; (2) the relative foreign availability of each item; and (3) the level of U.S. commercial exports of each item to the PRC. Each ECCN was evaluated individually against all three criteria, with no one criterion being solely determinative. Greatest weight was given to the military applicability of each item, based on an evaluation of the contribution the items covered by the ECCN could make to a military capability if used in a “military end-use,” as defined in this final rule. With regard to foreign availability, indigenous availability within the PRC was given greater weight than evidence of foreign availability from countries that cooperate with the United States in multilateral export control regimes, though all evidence of foreign availability was considered. When BIS found significant evidence of foreign availability and a high level of commercial exports, but limited military applicability, the ECCN was removed from the proposed list. When BIS found limited evidence of foreign availability and significant military applicability, the item remained on the proposed list, even if it was a major commercial export. As a result of this analysis, BIS determined that it was appropriate to reduce the number of ECCNs subject to the “military end-use” licensing requirement from 47 to 31 full and partial ECCNs. For certain items, the list in Supplement No. 2 to part 744 includes particular commodities, as well as the software and technology associated with such commodities. Thus, the resulting list of full and partial ECCNs covers approximately 20 distinct product areas, including items such as aircraft and aircraft engines, underwater systems, lasers, depleted uranium, certain composite materials, airborne communications systems and inertial navigation systems, and certain highly specialized telecommunications equipment useful for electronic

warfare, space communications, or air defense. The final list published with this rule clearly identifies those items that have the potential to contribute to the military end-uses that this final rule is intended to control, consistent with overall U.S. policy toward the PRC.

Comment 3: A number of commenters asserted that imposing the "military end-use" control on 47 ECCNs would have a commercial impact that extended beyond these items. Several commenters noted that, as proposed, the "military end-use" control extended to items classified under ECCNs 5A992 and 5D992, items that have never been controlled for export or reexport to the PRC. At the same time, items with higher-level encryption functionality would be eligible for export to the PRC under License Exception ENC. The commenters asserted that this would create an incentive for exporters to add cryptography to their items in order to be exempt from the "military end-use" licensing requirement.

Response: As noted in response to Comment 2, this final rule has been amended such that ECCNs 5A992 and 5D992 are no longer subject to the "military end-use" control. As a result, any such incentive that might have been present is no longer present.

Comment 4: A number of commenters asserted that the "military end-use" license requirement will be unilateral because some European members of the Wassenaar Arrangement have stated that they do not plan to implement the Wassenaar Arrangement Statement of Understanding on Control of Non-Listed Dual-Use Items to the PRC.

Response: The United States is committed to maintaining and implementing trade controls decided on a multilateral basis with like minded countries, such as other member

countries of the Wassenaar Arrangement. To that end, this rule is consistent with U.S. commitments as a Participating State in the Wassenaar Arrangement. At the December 2003 Wassenaar Arrangement Plenary, Wassenaar Arrangement members agreed in a Statement of Understanding on Control of Non-Listed Dual-Use Items to adopt and implement measures controlling exports of dual-use items destined for “military end-use” in a country subject to a United Nations or relevant regional arms embargo. Commenters are correct that some Wassenaar Arrangement members have stated that they would not implement similar “military end-use” controls on dual-use exports to the PRC. However, other Wassenaar Arrangement members have said that they would consider such controls. The revisions made by this final rule are intended to align U.S. export controls with overall U.S. national security and foreign policy interests, consistent with our multilateral commitments but also recognizing the unique nature of U.S. military and security interests in the Asia-Pacific region.

Comment 5: Some commenters asserted that the “military end-use” license requirement will be burdensome to U.S. exporters and would be difficult to comply with, as proposed, because the definition of “military end-use” was overly broad and vague. They argued that the breadth of the definition would result in encompassing more items and transactions than those that potentially could enhance the military capabilities of the PRC. Some commenters argued that terms such as “deployment” and “support” were too vague to be readily understood by exporters screening their transactions, while other commenters noted that the definition of “military end-use” did not use well-understood terms from the EAR.

Response: To address the commenters' argument that the definition of "military end-use," as proposed, may have been insufficiently precise, BIS, in conjunction with its interagency partners, has revised the definition of "military end-use" in section 744.21(f) of the EAR to add additional clarity and specificity. The revised definition draws extensively on the definition of military end-use already contained in section 744.17 of the EAR, which restricts certain exports and reexports of general purpose microprocessors for "military end-use" and to "military end-users." Like the proposed rule, this final rule continues to define "military end-use" as including incorporation into a military item described on the U.S. Munitions List, International Munitions List, and items listed under ECCNs ending in "A018" on the CCL. However, it clarifies that "military end-use" also means for the "use", "development", or "production" (each as defined in part 772 of the EAR) of such items, and that it means for the "deployment" only of those items covered under ECCN 9A991 as described in Supplement No. 2 to Part 744. In addition, for purposes of this "military end-use" control, in a new note to section 744.21(f), BIS has provided definitions for "operation," "installation," "maintenance," and "deployment." These are terms not previously defined in the EAR, and BIS intends such definitions to clarify the scope of the military end-use control.

Comment 6: Some commenters asserted that the license application review standard related to the "military end-use" control also was overly broad and vague. They argued that this, too, would result in the rule encompassing more items and transactions than those that potentially could enhance the military capabilities of the PRC. They pointed out that the "military end-use" control would apply to items previously removed from

control by agreement of various multilateral regimes, and commented that the concept of “material contribution” was imprecise.

Response: In response to comments received, BIS reviewed the breadth and clarity of the license review standard set forth in proposed Section 744.21(e). This section provided that license applications involving the “military end-use” control would be reviewed on a case-by-case basis to determine whether they would make a “material contribution” to the military capabilities of the PRC and would result in advancing the country’s military activities contrary to U.S. national security interests. This final rule reflects BIS’s continued belief that this standard is the appropriate basis through which it will review such license applications. Items subject to the “military end-use” control were determined to be more sensitive when destined for a “military end-use” than when they are simply controlled for national security reasons, and therefore BIS determined that they are more appropriately subject to a different licensing review standard, consistent with U.S. foreign and related export control policies for the PRC. (BIS’s consideration of “material contribution” is also discussed in response to Comment 1.) In addition, in reviewing public comments, BIS determined that the license review standard set forth in the proposed rule did not specify how BIS would treat a license application if it were determined that the criteria set forth in the standard were satisfied. In this final rule, BIS is revising the proposed license review standard to specify that when it is determined that these criteria are met, the license application will be denied.

Comment 7: A number of commenters stated that U.S. exporters, especially those exporting to distributors, would experience an undue burden and an increase in liability

because they do not always have accurate information on the specific end-use of their products. Commenters further stated that it is difficult to know about customers' intentions with respect to resale, especially after reincorporation into a new product. They argued that the lack of clarity as to the expected degree of due diligence for complying with the "military end-use" control would exacerbate this problem, particularly because knowledge of a "military end-use" is determined using the existing standard of knowledge in the EAR instead of an actual and positive knowledge standard. In this context, some commenters also argued that the high costs of compliance U.S. exporters would experience would place them at a competitive disadvantage in the PRC market.

Response: BIS has reviewed the comments received regarding the knowledge standard set forth in the proposed "military end-use" control. Applying the EAR's existing knowledge standard provides exporters and reexporters with a familiar standard for screening or evaluating intended exports, reexports or transfers of items subject to the "military end-use" control. Under the EAR, exporters and reexporters already are responsible for ensuring that they do not, without a license, knowingly export or reexport any item subject to the EAR to an end-user or end-use that is restricted by part 744 of the EAR. The term "knowledge" used throughout part 744 (as defined in section 772.1 of the EAR) encompasses both actual knowledge and reason to know. Therefore, BIS believes that most exporters and reexporters already have screening procedures or internal controls in place to address the ramifications of having or gaining knowledge of an unauthorized end-use. The comments received did not provide evidence to support assertions that exporters will incur high costs of compliance related to the new "military

end-use” control, nor was evidence provided to demonstrate that compliance burdens would be any greater than those currently required by provisions in part 744 of the EAR, which require exporters to apply for licenses based on their “knowledge” of the intended end-user or end-use of an item. Moreover, because this final rule reduces the number of ECCNs subject to the “military end-use” licensing requirement and further clarifies the definition of “military end-use,” BIS believes that the overall scope of the control has narrowed in a way that will minimize any additional burden of complying with these requirements.

Comment 8: Some commenters recommended that a better approach to the “military end-use” control would be for BIS to publish a list, similar to the Unverified List or Entity List in the EAR, which would name specific prohibited military end-users in the PRC. Commenters argued that such a publication would shift the burden from the U.S. exporters to the U.S. Government.

Response: BIS agrees that the EAR should provide exporters with as much clarity as possible regarding specific end-users of concern and end-users that merit greater scrutiny, as well as end-users that have been validated as legitimate civilian customers. As a result of this rule, BIS anticipates publishing the names of validated end-users. Another proposed rule, published on June 5, 2007 (72 FR 31005), would expand the criteria by which BIS could place end-users on the Entity List to include military end-users, thereby alerting exporters to the need for licenses. Yet even as BIS takes steps to identify for exporters customers of concern as well as legitimate civilian customers, BIS believes it remains critical for exporters to know their customers and perform due diligence to

ensure that certain items destined for a “military end-use” in the PRC are reviewed by BIS. With regard to the suggestion that BIS publish a list of military end-users, it is important to recall that this rule controls certain items based on their *end-use*, not on the *end-user*. The control depends on the circumstances of how the item will be used, not necessarily by whom it will be used. Therefore, BIS does not believe that a special list of military end-users in the PRC is appropriate for this rule. BIS has other end-user controls and other lists to identify end-users of concern.

Comment 9: One commenter suggested that BIS clarify the relationship between existing License Exceptions available for the PRC and the proposed military end-use control.

Response: BIS has revised section 744.21(c) to state more clearly that certain provisions of License Exception GOV are available for items requiring a license as a result of the military end-use control. Absent such a license requirement or another relevant license requirement set forth elsewhere in the EAR (e.g., for a proliferation end-use restricted under part 744), items listed in Supplement No. 2 to Part 744 would be exported to the PRC without a license.

Comment 10: Some commenters stated that because the “military end-use” control will have a significant impact, it should have been determined to be a “major rule” for purposes related to requirements of the Congressional Review Act (CRA) and that BIS’s analysis of the projected impact of the rule should be made public.

Response: Under the CRA, the OMB determines whether a rule is a “major rule.” OMB has determined, without regard to whether the proposed rule may have been major, that

this final rule is not major because its annual effect on the economy is well below the \$100 million threshold provided in the CRA.

BIS's analysis for this final rule demonstrates that the changes to the EAR (End-User Statement (EUS) requirement; Validated End-User (VEU) authorization; and "military end-use" control) that have the potential to have an annual effect on the economy will actually have little overall effect.

The EUS requirement will result in little, if any additional cost to U.S. exporters. EUSs are now required for all license exports exceeding \$50,000 in value (except for computers subject to the provisions of section 748.10(b)(3) or to items classified under ECCN 6A003). While this changes the distribution of license applications requiring EUSs, the higher dollar threshold triggering the need for an EUS will keep the overall number of license applications that require EUSs about the same as it was before this revision.

The VEU authorization will actually reduce costs of U.S. exporters because it will eliminate the need for individual export licenses to specified customers in the PRC.

Eliminating export license applications could save U.S. exporters as much as several million dollars annually. While the rule does establish reporting requirements on U.S. companies that export without a license under the VEU authorization, these requirements are not appreciably more than existing recordkeeping requirements and should be far less than the cost of license applications avoided by the U.S. exporters.

Finally, the "military end-use" control established by this rule covers a small set of items. U.S. exporters should already be screening these exports, as well as all items subject to the EAR (items numbering in the thousands) for reasons of control that are set forth in part 744 of the EAR (including weapons of mass destruction end-uses and involvement

of persons denied export privileges). The most direct potential cost of the “military end-use” control would be export license applications now required when previously they were not. Based on existing data, this control could result in additional export licenses for approximately \$5,000,000 worth of goods annually, with a cost, using a very high estimate, of \$500,000. Commenters did not provide data to allow BIS to evaluate what increased compliance costs, if any, entities would incur with this additional screening requirement.

Thus, the overall annual effect on the economy of this rulemaking, using a very high estimate, will not be more than about several million dollars, which is well below the \$100 million threshold required for a major rule.

Comment 11: Two commenters asserted that BIS does not have the statutory authority to promulgate this regulation. In particular, one commenter asserted that BIS does not have authority to amend the EAR to impose unilateral national security controls on exports to China.

Response: Although the EAA has been in lapse since August 21, 2001, BIS amends the EAR under the authority conferred by Executive Order 13222 of August 17, 2001, as extended most recently by the Notice of August 3, 2006 (71 FR 44551 (Aug. 7, 2006)). Therein, the President, by reason of the expiration of the EAA, invoked his authority, including authority under the International Emergency Economic Powers Act, to continue in effect the system of controls that had been maintained under the EAA. In addition, as noted in response to Comment 4, BIS is imposing this “military end-use” control consistent with U.S. commitments as a Participating State in the Wassenaar Arrangement,

under the Arrangement's policy of national discretion in implementation. Moreover, other Participating States are considering their own measures to implement those commitments.

Comment 12: Two commenters asserted that, in drafting the final version of this rule, BIS should include a provision for contract sanctity in order to avoid adverse effects on existing business contracts. In particular, one commenter stated that BIS should allow exports under open, unshipped orders or contracts and allow companies to continue to satisfy warranty obligations for spare parts, service and maintenance, as well as non-warranty obligations for machines that are already installed.

Response: BIS recognizes that exporters and reexporters may have ongoing contractual obligations to service items previously shipped to the PRC. This is the case whenever BIS issues a rule that imposes a new license requirement. Accordingly, BIS has a practice of including contract sanctity language in the Saving Clause section of such rules, and has included such language in this rule. This language provides that there is a thirty-day delay between publication of this rule and the rule's effective date.

#### *Expansion of End-User Statement requirement for the PRC*

Comment 13: Many commenters stated that an expansion of the End-User Certificate (EUC) requirement to encompass items that require a license for any reason to the PRC and exceed \$5,000 would pose a substantial burden for exporters and reexporters because it would increase the number of EUCs required for exports of items to the PRC. Currently, they argued, U.S. exporters experience delays in obtaining EUCs from the

PRC's Ministry of Commerce (MOFCOM). They further argued that having to obtain additional EUCs from MOFCOM would protract these delays because MOFCOM does not have sufficient resources to accommodate such an increase in requests. In this context, some commenters also asserted that BIS should not implement the expanded EUC requirement until the government of the PRC agrees to provide the certificates in a timely manner.

Response: As an initial matter, BIS notes that to conform with nomenclature that is recognized by MOFCOM, BIS is amending the EAR to label documents previously described as PRC End-User Certificates as End-User Statements (EUSs). This change was implemented in response to commenters' requests that BIS increase its coordination and cooperation with MOFCOM regarding EUSs. In this rule, this amendment to the EAR is being made in sections 748.9, 748.10 and 748.12.

Like the proposed rule, this final rule continues to provide in section 748.10(a) that it applies to transactions involving items controlled for reasons of national security that are destined for any country identified in section 748.9(b)(2) of the EAR and that, in the case of the PRC, it applies to transactions involving all items that require a license to the PRC for any reason. Based on public comments, however, BIS has reassessed the value threshold at which an EUS will be required for the PRC. As compared to the proposed rule, this final rule, in section 748.10(b)(4), increases the threshold at which an EUS will be required for most items from \$5,000 to \$50,000. In recent years, exporters and reexporters to the PRC have obtained between 500 and 600 EUSs each year. BIS selected the \$50,000 threshold so that the number of EUSs obtained would remain approximately the same, thereby addressing commenters' concerns regarding the burden

of obtaining an increased number of EUSs and the burden on MOFCOM of processing an increased number of requests for EUSs. While some exporters (those that export items controlled for reasons other than national security, especially in the chemical sector) will face a new requirement to obtain EUSs, other exporters (those exporting items controlled for reasons of national security valued under \$50,000) will have a reduced burden.

In raising this threshold, BIS has acted to provide some relief from burdens commenters state that exporters experience with paperwork and the EUS requirement for applicable transactions above \$5,000. The new \$50,000 threshold will not apply to items classified under ECCN 6A003 (cameras) or to exports to the PRC of computers subject to section 748.10(b)(3). BIS's analysis of licensing data revealed that nearly all transactions for items controlled under ECCN 6A003 are valued at below \$50,000. Because BIS believes there is a continued national security need to require EUSs to conduct end-use checks on the sensitive commodities covered by ECCN 6A003, BIS left the \$5,000 threshold in place for these commodities. Items classified under ECCN 6A003 are controlled for national security reasons; as a result, this action does not result in imposing a new requirement but simply maintains an existing one. Excluding computers subject to section 748.10(b)(3) from the \$50,000 threshold also maintains an existing requirement. As to any delay in the PRC's implementation of this new EUS requirement, as noted above, the U.S. Government and the Government of the PRC continue a dialogue to address obstacles that may impede the timely processing of requests for EUSs.

Comment 14: Some commenters argued that the \$5,000 threshold for the EUC requirement is too low.

Response: As noted in response to Comment 13, above, BIS is raising the EUC threshold for most items to \$50,000. The response to Comment 13 provides BIS's rationale for raising this threshold.

Comment 15: Commenters also argued that the expansion of the EUC requirement would protract delays in export licensing because of the lack of sufficient U.S. Government personnel in the PRC to conduct end-use visits and because the Department of Commerce would use the expanded EUC requirement as a basis to increase the number of end-use visits in the PRC.

Response: As noted in the response to Comment 13, BIS does not expect this final rule to result in any significant increase in the number of EUSs required per year. The application of the EUS requirement to items other than those controlled for NS reasons is intended to broaden the variety of situations in which end-use visits may be performed (to include end-use visits concerning items controlled for chemical or biological weapons proliferation reasons, for example). The increased dollar threshold is intended to substantially minimize any increase in the overall number of such visits.

Comment 16: Some commenters stated that the issuance of EUCs depends on the cooperation of senior officials of the government of the PRC. These commenters contend that expanding this requirement would harm the bilateral economic relationship, as well as significant political, military, and foreign policy relationships, between the United States and the PRC, thereby disrupting the necessary cooperation.

Response: As noted in the response to Comment 13, this final rule will require EUSs in circumstances where they were not previously required, but because of the higher dollar threshold this amendment to the EAR is not expected to result in an overall increase in the number of EUSs required. The fact that the Governments of the United States and the PRC are currently engaged in productive dialogue to facilitate end-use visits counters the notion that the changes to the EUS requirement would harm the bilateral relationship.

Comment 17: Some commenters stated that the consequence of the expanded EUC requirement would be a decrease in the volume of U.S. exports to the PRC because customers in the PRC would look to non-U.S. suppliers that do not maintain a similar requirement. They argue that this outcome would be contrary to the purpose of facilitating end-use visits and increased U.S. exports to the PRC, which was explained in the proposed rule.

Response: As explained in the response to Comment 13, the effect of the change to the EUS requirement is not expected to result in a great impact either in terms of costs to the exporter or reexporter or in terms of compliance burden. As a result, BIS does not anticipate that this amendment to the EAR would cause customers in the PRC to turn to non-U.S. suppliers.

Comment 18: Some commenters argued that BIS should exempt companies that are granted Validated End-User status from the EUC requirement.

Response: Section 748.10 of the EAR requires that EUSs be obtained in situations in which a license is required. As Validated End-User authorization eliminates a license

requirement, eligible items exported, reexported or transferred under that authorization will not need EUSs.

Comment 19: One commenter stated that the proposed rule should be clarified to indicate whether the expanded EUC requirement covered exports of technology.

Response: Section 748.9(a)(7) provides that exports and reexports of software and technology are exempt from support documentation requirements; BIS proposed no change to this exemption and has made none in this final rule.

Comment 20: One commenter asserted that the EUC requirement constitutes a non-tariff barrier to trade with the PRC. Another commenter asserted that, given the difficulty of obtaining EUCs and the inconsistent information and lack of transparency of MOFCOM in issuing EUCs, U.S. exporters may be required to increase their Foreign Corrupt Practices Act (FCPA) compliance costs to ensure that no prohibited payments are made.

Response: The need for an EUS has been a long standing requirement in the Export Administration Regulations. As noted in response to Comment 13, this final rule merely widens the scope of circumstances in which an EUS is required without increasing the number of EUSs that must be obtained. In addition, BIS notes that the requirement for U.S. exporters to obtain an EUS stems from the Chinese determination that EUSs are required for end-use checks. BIS does not agree that EUSs pose a non-tariff barrier to trade, and without concrete information has no basis to assess possible FCPA-compliance issues raised by this commenter.

Comment 21: Some commenters asserted that the expansion of the EUS requirement implicates requirements of the Paperwork Reduction Act of 1955 (44 U.S.C. 3501 *et seq*) (PRA).

Response: The impact of the revision of the EUS requirement has been addressed above in the response to Comment 13. BIS prepared a PRA package in connection with the EUS element of this rule.

*Authorization Validated End-User (VEU)*

Comment 22: Several commenters claimed that the VEU authorization may benefit exporters that have a small customer base, but would not benefit exporters that sell to a large number of customers in the PRC that will in turn act as resellers, distributors, or retailers of those products in the Chinese market to a wide variety of customers.

Response: VEU authorization is intended to facilitate exports by removing the requirement for an individual license for end-users that meet the criteria for VEU authorization. BIS has set no limit on how many customers may apply to receive exports under VEU authorization, and has not precluded resellers from receiving VEU status.

Comment 23: Some commenters asserted that the VEU authorization presents an additional administrative burden because of the associated VEU certification, recordkeeping and reporting requirements, which are similar to the requirements associated with Special Comprehensive Licenses (SCLs).

Response: Authorization VEU is voluntary and therefore does not present an additional administrative burden for any entity that does not choose to avail itself of the

authorization. Exporters or customers who believe the VEU requirements are too burdensome may continue to apply for individual licenses if they so choose. Nevertheless, following our review of comments, in this final rule, BIS has established procedures for applying for VEU status that were designed to be as straightforward and present as little burden as possible, consistent with the requirements of national security. VEU status would provide significant benefits for end-users, as well as entities that export or reexport to validated end-users. In addition, BIS believes that the requirements for recordkeeping and reporting associated with VEU status are less burdensome than those currently in effect for other authorizations such as special licenses that are available under the EAR to companies that meet specified criteria.

Comment 24: Several commenters claimed that the VEU authorization would be burdensome because it would require a complex internal control commitment from Chinese customers or end-users. Those end-users would require assistance from exporters or reexporters in order to request the authorization.

Response: End-users will wish to evaluate the benefit of holding a VEU authorization, and exporters, similarly, will want to consider for themselves the benefits of working with their customers to apply for such authorization. As noted in response to Comment 23, VEU authorization is entirely voluntary, but those that meet its criteria will be afforded the significant benefit of receiving certain items without the need for an individual license for each transaction. Also as noted in response to Comment 23, BIS has established procedures for applying for VEU status that were designed to be as straightforward and present as little burden as possible, consistent with the requirements

of national security. BIS offers assistance for exporters and end-users in complying with the EAR, and anticipates conducting additional outreach to clarify the procedures and benefits of the VEU authorization.

Comment 25: Several commenters questioned whether the VEU authorization offers a benefit. They asserted that U.S. exporters would go through an administratively burdensome and costly process of preparing and submitting a request for VEU authorization only to have their Chinese customers made public on the BIS website. This would result in the exporters losing competitive advantage as their competitors would have access to their customers.

Response: See responses to Comments 23 and 24. In developing the VEU authorization, BIS reviewed an extensive amount of licensing data, which indicated that many Chinese end-users are served by multiple U.S. exporters, all of whom would benefit if the end-user were to be granted VEU status. BIS believes that identifying Chinese customers as validated end-users will help to expand high-technology trade and U.S. exports by making clear to all potential U.S. exporters that there is a universe of end-users in the PRC that may receive certain items on the CCL without the administrative burden of receiving an individual license.

Comment 26: Several commenters stated that BIS should ensure that no violations of Section 12(c) of the Export Administration Act of 1979, as amended (EAA) occur when BIS publishes information related to the VEU authorization or information about end-users who are granted VEU authorization.

Response: BIS agrees that it is critical to protect information covered by Section 12(c) of the EAA. BIS conscientiously protects all proprietary information, and will continue to ensure that the requirements of Section 12(c) are met in its administration of VEU authorization.

Comment 27: Some commenters asserted that VEU authorization would present problems for companies in the PRC unwilling to submit to U.S. legal jurisdiction because of possible penalties under the laws of the PRC. They argued that the Government of the PRC might discourage companies from applying for VEU authorization, and further claimed that MOFCOM would refuse to allow end-use checks to be conducted on such companies.

Response: BIS designed the VEU authorization program to correspond to existing requirements of the EAR and to impose as little additional burden as possible on exporters, reexporters and Chinese end-users that currently use individual licenses or SCLs. BIS notes that Chinese end-users currently receiving items under individual licenses or SCLs are already (and have long been) required by the EAR to maintain certain records and to comply with certain license conditions. These activities are similar to the activities required of validated end-users in section 748.15 of the EAR. Hence, the VEU program will not substantially add compliance responsibilities for companies in China whose activities are subject to the EAR. BIS will continue to explain the VEU authorization to the Government of the PRC, and to encourage that Government's cooperation with the program. However, it is important to note that decisions regarding

export licenses and export authorizations for items subject to the EAR are made solely by the United States Government.

Comment 28: Some commenters asserted that the potential benefit or usefulness of VEU authorization is reduced because vetted end-users would not be allowed to receive all products and technology under all ECCNs under the EAR.

Response: Authorization VEU is not intended to eliminate the requirement that exporters or others comply with applicable provisions of law or the EAR. By statute, BIS must require a license for items controlled for missile technology or crime control reasons that will be exported or reexported to the PRC. While BIS recognizes that entities designated as validated end-users would like to be exempt from all EAR licensing requirements, BIS has designed the VEU authorization to ensure that exports under VEU are relevant to the validated end-user's business. It would not be appropriate, for example, to permit exports under authorization VEU of semiconductor manufacturing equipment to a chemical factory, or of aircraft parts to a plant producing computers. For that reason, BIS will require applicants for VEU authorization to identify those ECCNs that they wish to receive under the authorization, and will decide whether those items are appropriate based on the circumstances of the case.

Comment 29: Many commenters asserted that there would be negative consequences for companies who apply for and do not receive VEU authorization, implicitly creating a "black list," thus posing a risk of application that most U.S. exporters would be unwilling to take. Commenters further stated that BIS should make clear that applying for and not

obtaining VEU authorization would not be considered a “red flag” for a transaction. In addition, one commenter stated that BIS should delete language regarding possible “other actions,” in addition to removal from the VEU list, as a penalty for non-compliance with VEU requirements.

Response: Based on these comments, BIS has specifically noted in the chapeau to section 748.15 that if an application for VEU authorization for a particular end-user is not granted, no new license requirement is triggered and the end-user is not rendered ineligible for license approvals from BIS. Moreover, VEU status is pertinent only to transactions in which licenses would otherwise be required. Accordingly, lack of approval of a VEU request would neither add to nor take away from the licensing requirements applicable to exports or reexports to an end-user that is not validated. Actions taken in the context of VEU authorization, including non-compliance with VEU requirements, that violate the EAA, the EAR, or any order, license, or authorization issued thereunder may form the basis for enforcement action.

Comment 30: Many commenters claimed that the selection process for granting VEU authorization is unclear and the evaluation factors are too extensive and ill-defined. The commenters further stated that providing illustrative examples of evaluation factors, such as an example of the factor “party’s relationships with U.S. and foreign companies,” might increase exporters’ understanding of the VEU process. Several commenters further asserted that a published model VEU request would provide U.S. exporters and potential VEU guidance on BIS’s expectations.

Response: BIS agrees that it is important to be explicit about the type of criteria that BIS and its interagency partners will consider in evaluating VEU candidates, as well as the process that BIS and its interagency partners will use in making such determinations. As a result, in this final rule, BIS has attempted to explain in great detail how VEU authorizations will be administered by the U.S. Government. Section 748.15(a)(1) provides that BIS will accept applications from exporters, reexporters, or end-users and identifies the address to which such applications must be submitted. Section 748.15(a)(2) of this rule specifies that, in determining which end-users will be approved for VEU status, BIS will consider a range of information, including such factors as: the entity's record of exclusive engagement in civil end-use activities; the entity's compliance with U.S. export controls; the need for an on-site review prior to approval; the entity's capability of complying with the requirements of authorization VEU; the entity's agreement to on-site reviews to ensure adherence to the conditions of the VEU authorization by representatives of the U. S. Government; and the entity's relationships with United States and foreign companies. Section 748.15(a)(2) also specifies that when evaluating the eligibility of an end-user, agencies will consider the status of export controls and the support and adherence to multilateral export control regimes of the government of the eligible destination. In addition, new Supplement No. 8 to Part 748 provides details as to the specific information that must be submitted to BIS in a VEU authorization request. Finally, new Supplement No. 9 to Part 748 provides details as to the decision-making process of the End-User Review Committee (ERC), including timeframes for decision-making. The ERC is composed of representatives of the Departments State, Defense, Energy, and Commerce and other agencies, as appropriate.

All of these changes are intended to address public comments encouraging BIS to explain the VEU authorization process in as much detail as possible. In addition, BIS plans to conduct extensive outreach to explain to exporters and potential VEU candidates the procedures and requirements for applying for this authorization, and will consider sample or model requests as part of this outreach and education.

Comment 31: Some commenters stated that BIS should identify a time limit for approving or rejecting VEU requests.

Response: BIS agrees that it is important to establish specific time deadlines for approving or rejecting VEU applications. Supplement No. 9 to Part 748, paragraph 4, provides that the ERC will make determinations whether to grant VEU authorization to each VEU candidate no later than 30 calendar days after the candidate's complete application is circulated to all ERC agencies. Prior to or during its review of an application, BIS or the Committee may determine that it is appropriate to request additional information from the applicant or potential validated end-user. When BIS or the ERC requests such information, the 30-day clock is put on hold while the ERC is waiting for additional information.

Comment 32: One commenter stated that BIS should: expressly limit audits associated with VEU authorization to activities that occur under the authorization; not extend such audits to other areas of compliance; identify which U.S. Government agency would conduct VEU visits; and specify how frequently such visits will occur. In this context,

the commenter stated that visits should occur no more than three times per year, and that advance notice should be provided – preferably 14 days in advance of the visit.

Response: In this rule, based on public comments, BIS clarifies that reviews for purposes of administering and enforcing the provisions of authorization VEU are not financial audits, as the term may have been interpreted. As BIS implements the VEU authorization, BIS will continue to consider the recommendation that reviews should occur no more than three times per year and with 14 days advance notice. Visits will be conducted and led by personnel of the Commerce Department, in coordination with the U.S. Embassy, and may include representatives of other U.S. Government agencies, as appropriate.

Comment 33: Some commenters stated that BIS should clarify whether BIS’s reference to “items” in the VEU authorization includes technology and hardware.

Response: As stated in section 772.1 of the EAR, “item” means “commodities, software, and technology.” As such, commodities, software, and technology are eligible items under authorization VEU.

Comment 34: Some commenters stated that BIS should clarify whether the knowledge standard set forth in the EAR applies to exporters’ actions under the VEU authorization.

Response: As provided in section 764.2(e) of the EAR, no person may take certain actions with respect to any item subject to the EAR with knowledge that a violation of the EAA, EAR, or any order, license or authorization issued thereunder, has occurred, is about to occur, or is intended to occur in connection with the item. The term

“knowledge” is defined in section 772.1. Authorization VEU is an authorization covered by section 764.2(e), and the knowledge standard set forth in section 772.1 applies to actions under the VEU authorization.

Comment 35: Some commenters recommended that BIS extend the VEU authorization program to other destinations such as India and Taiwan.

Response: The United States Government believes that authorization VEU could be a valuable tool to facilitate exports to civilian end-users in other destinations, and is actively considering making additional destinations eligible for authorization VEU.

Comment 36: Some commenters advised that the VEU authorization should apply to subsidiaries, subcontractors, and multiple facilities of the same end-user.

Response: BIS agrees that it may be appropriate for VEU authorization to cover multiple facilities of the same end-user. Such entities are free to request authorization for multiple locations or facilities. If so, pursuant to the requirements of Supplement No. 9 to Part 748, paragraph 1, they must provide with their applications the physical addresses of each location in the eligible destination. BIS will consider requests to cover multiple facilities according to the criteria and procedures listed in new Supplements 8 and 9 to Part 748. In particular, as described in Supplement No. 8 to Part 748, BIS requires that VEU applications provide an overview of the structure, ownership and business of the prospective validated end-user, which should include subsidiaries and joint-venture projects. Applicants must also provide the physical address(es) of the location(s) where

the item(s) will be used, if this address is different from the address of the prospective validated end-user.

Comment 37: Some commenters requested that BIS allow a more permissive VEU certification process for subsidiaries of U.S. companies.

Response: BIS believes that it is important to maintain the same procedure for all applicants for VEU authorization. Subsidiaries of U.S. companies are certainly eligible to apply for VEU authorization; their applications will be reviewed against the criteria listed in section 748.15(a)(2).

Comment 38: One commenter suggested that the U.S. Government, on its own, identify companies to be granted VEU status.

Response: BIS agrees that it is important for the U.S. Government to be able to identify possible VEU candidates. As such, Supplement No. 9 to Part 748, paragraph 3, specifies that the ERC will consider candidates for VEU authorization that are identified by the U.S. Government.

Comment 39: Some commenters suggested that end-users under the Special Comprehensive License (SCL) program should be given special consideration in obtaining VEU authorization and that the SCL approval process for end-users should warrant “de facto” authorization for VEU status.

Response: BIS will consider all applicants for VEU status, and status as an SCL consignee or end-user will be taken into account if such consignees or end-users are VEU

candidates. The SCL approval process will not, however, be “de facto” VEU authorization because SCL status and VEU authorization are materially different from one another, and consequently the criteria BIS uses to evaluate applicants for SCL status (set forth in Part 752 of the EAR) and VEU authorization (set forth in section 748.15 of the EAR and in Supplement No. 8 to Part 748) are different. Because these differing sets of criteria are tailored toward the distinct and differing features of SCL and VEU status, respectively, BIS has made the decision not to grant special consideration to VEU applications from SCL end-users or consignees. Such applications will be evaluated on the basis of the criteria set forth in section 748.15 and Supplement No. 8 to Part 748 of the EAR.

Comment 40: One commenter argued that there is a significant disconnect between the VEU authorization and BIS’s deemed exports licensing policy. This commenter urged that BIS allow authorization VEU to cover exports of technology to foreign national employees of authorized companies normally employed inside the United States, if the employees are nationals of a country eligible for VEU status. Similarly, another commenter argued that BIS should confirm in this final rule that authorization VEU will allow the release of technology to PRC nationals in the United States if the PRC national is a full-time employee of an entity with approved VEU status.

Response: If a validated end-user is approved to receive specific eligible technology, part of that VEU authorization is the authorization for Chinese employees of that validated end-user to receive the same technology, including through a transfer inside the United States.

Comment 41: One commenter argued that BIS should clarify the impact of this rule on deemed exports. In particular, this commenter stated that this rule should not apply to technical information that flows between affiliated entities, particularly with respect to Chinese subsidiaries of U.S. parent corporations.

Response: Under the new “military end-use” control, a license is now required for any deemed export covered by section 744.21 of the EAR. In addition, the revised licensing policy for items controlled for national security reasons will apply to license applications involving deemed exports. The intersection between the VEU authorization and transfers of technology inside the United States is discussed above in response to Comment 39.

Under the current regulations, the deemed export rule does not regulate the flow of information between exporters in the U.S. and affiliated entities overseas that the commenter describes as a deemed export transaction. The deemed export rule regulates the transfer of controlled technology to foreign nationals working in the United States. Under the EAR, unless a License Exception applies, an export license is required if technology that requires a license is to be released to an affiliated entity overseas.

Comment 42: Some commenters stated that BIS should publish in Chinese the names of entities that receive VEU authorization. These commenters also recommended that the Entity List and Unverified Parties List be published in Chinese.

Response: BIS agrees that it is important to provide as much information as possible to exporters and reexporters regarding U.S. export controls. However, the Federal Register, which officially publishes all U.S. Government regulations, only publishes documents in

the English language. In addition, BIS's limited resources do not allow such information to be published on the BIS website at this time. BIS will continue to consider this recommendation as part of its outreach effort to educate exporters and customers in the United States and the PRC.

Comment 43: One commenter argued that instead of the VEU authorization, BIS should consider a "gold card" license for certain exporters that would allow those exporters to export a pre-identified range of products to any qualified customer in the PRC.

Response: The VEU accomplishes the same goal as that proposed by the commenter. It allows U.S. exporters to export a pre-identified range of products to qualified customers. For national security reasons, however, the U.S. Government must retain the ability to determine who is a "qualified customer" for controlled items exported by any exporter, no matter how "gold." The VEU program facilitates civilian high-technology trade, in a way that will be neither overly burdensome nor intrusive. The VEU program creates positive, market-based incentives and rewards for companies that act responsibly with sensitive products. Firms with established civilian credentials and a good record of handling such products will enjoy better access to controlled technology than their competitors, and U.S. exporters will be able to sell more efficiently to their best civilian customers.

Comment 44: Some commenters argued that instead of the VEU authorization, companies in the PRC should be allowed to provide certificates to BIS in which they agree to end-use checks.

Response: A VEU authorization will take the place of individual licenses.

Consequently, there are a number of factors to be considered, in addition to willingness to host on-site reviews, in determining whether a customer in the PRC will be approved as a VEU. As set forth in section 748.15, these factors include the entity's record of exclusive engagement in civil end-use activities, the entity's compliance with U.S. export controls, the need for an on-site review prior to approval, and the entity's capability of complying with the requirements of authorization VEU, as well as an agreement to accept on-site reviews. Moreover, on-site reviews by U.S. Government officials are to verify the end-user's compliance with the conditions of the VEU authorization. Thus, VEU on-site reviews are separate and distinct from End-Use Visits as defined in the End-Use Visit Understanding established between the Governments of the U.S. and the PRC.

Comment 45: Some commenters argued that BIS should provide another opportunity for industry to comment on the VEU authorization before it becomes effective.

Response: BIS has considered the 57 public comments received, many of which included statements regarding the VEU authorization. Having thoroughly reviewed these comments, BIS believes it has a basis to move forward with the VEU authorization program. However, BIS accepts comments on an ongoing basis, as noted in the ADDRESSES section of this Action. BIS is always considering how to improve the EAR, and will consider any such comments received as it goes forward with the VEU program.

### **Changes from the Proposed Rule**

After considering the public comments and consulting with its interagency partners, BIS is implementing the proposed rule, with the modifications described below.

*1. Amendments to license review policy and license requirements with respect to the PRC*

With respect to the license review policy for items controlled for national security reasons destined for the PRC, the proposed rule provided that there would be a presumption of denial for items that would make a “material contribution” to the military capabilities of the PRC. This amendment would have modified Section 742.4(b)(7) of the EAR, which previously provided that applications involving items destined for the PRC that are controlled for national security reasons received extended review or denial if they would make a “direct and significant contribution” to certain specified aspects of PRC military development. BIS is retaining its “direct and significant contribution” standard in this final rule, but has amended the list of PRC military capabilities. An illustrative list of PRC military capabilities is presented in new Supplement No. 7 to Part 742 of the EAR (Description of Major Weapons Systems).

BIS also is implementing the “military end-use” control set forth in the proposed rule. BIS has reviewed the proposed list of items covered by this new control, which are set forth in Supplement No. 2 to Part 744 of the EAR, and determined that rather than the 47 ECCNs identified in the proposed rule, this final rule will apply the “military end-use” control to items covered under 31 ECCNs, entirely or in part, covering commodities, software, and technology for approximately 20 distinct product groups. All of the 31 full or partial ECCNs included in this final rule were also included in the proposed rule.

With respect to the “military end-use” control, BIS is also changing the definition of “military end-use” that was set forth in Section 744.21(f) of the proposed rule. In this final rule “military end-use” means: incorporation into a military item described on the U.S. Munitions List (USML) (22 CFR part 121, International Traffic in Arms Regulations); incorporation into a military item described on the International Munitions List (IML) (as set out on the Wassenaar Arrangement website at <http://www.wassenaar.org>); incorporation into items listed under ECCNs ending in “A018” on the CCL in Supplement No. 1 to part 774 of the EAR; or for the “use”, “development”, “production”, or deployment of military items described on the USML or the IML, or items listed under ECCNs ending in “A018” on the CCL. For purposes of section 744.21, deployment applies only to commodities covered under ECCN 9A991 as described in Supplement No. 2 to Part 744 of the EAR. In connection with the definition of “military end-use,” BIS is also amending the EAR to include a note to section 744.21(f) that defines, for purposes of the “military end-use” control, the terms, “operation,” “installation,” “maintenance,” and “deployment.”

## *2. Revision of End-User Statement requirements*

BIS is amending the EAR to provide that what were previously described as “End-User Certificates” are now properly termed “End-User Statements” (EUSs) with respect to the PRC. This amendment affects sections 748.9, 748.10 and 748.12. In the proposed rule, BIS originally stated that it planned to expand the requirement for EUSs to items that require a license for any reason to the PRC and exceed a total value of \$5,000. In this final rule, BIS has raised the threshold dollar amount for required EUSs for the PRC in

section 748.10 of the EAR to \$50,000 for most items. The raised threshold will not apply to items classified under ECCN 6A003 (cameras) and exports to the PRC of computers subject to section 748.10(b)(3). The threshold amount for items classified under ECCN 6A003 remains \$5,000, as set forth in the proposed rule. Also in this final rule, BIS has raised the threshold dollar amount for required Import Certificates for items controlled for national security reasons to any destination listed in section 748.9(b)(2) from the \$5,000 specified in the proposed rule to \$50,000. Finally, BIS is amending Supplement No. 4 to Part 748 to provide the correct name of the branch of the Government of the PRC that issues EUSs.

### *3. Authorization Validated End-User (VEU)*

BIS is adding Authorization Validated End-User (VEU) to the EAR, in new section 748.15. With this final rule, BIS amends the EAR to provide detailed information to the exporting community regarding the VEU authorization. Information required to be submitted with VEU authorization applications is set forth in new Supplement No. 8 to Part 748 of the EAR (Information Required for Requests for Validated End-User Authorization). In addition, section 748.15 establishes the End-User Review Committee, which is responsible for making determinations on VEU candidates. New Supplement No. 9 to Part 748 sets forth the membership of the Committee and the procedures that the Committee will follow.

In connection with these amendments to the EAR regarding VEU authorization, BIS is also making conforming changes. BIS is adding new paragraph (3) to section 743.1

(Wassenaar Arrangement), which informs exporters of the Wassenaar Arrangement of reporting requirements related to VEU authorization; new paragraph (b) to section 750.2 (Processing of Classification Requests and Advisory Opinions), which informs exporters of the timeframe in which VEU applications will be considered; and new paragraph (b)(5) to section 758.1 (The Shipper's Export Declaration (SED) or Automated Export System (AES) record), which informs exporters that shipping documentation must be filed with the U.S. Government for all exports under VEU authorization.

#### *Saving Clause*

Shipments of items removed from eligibility for a License Exception or for export or reexport without a license (NLR) as a result of this regulatory action that were on dock for loading, on lighter, laden aboard an exporting or reexporting carrier, or en route aboard a carrier to a port of export or reexport on [INSERT DATE OF PUBLICATION], pursuant to actual orders for export or reexport to a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export or reexport without a license (NLR) so long as they are exported or reexported before [INSERT DATE 30 DAYS AFTER PUBLICATION]. Any such items not actually exported or reexported before midnight on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION] require a license in accordance with this rule.

#### **Rulemaking Requirements**

1. This final rule has been determined to be significant for purposes of Executive Order 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 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 contains collections of information subject to the requirements of the PRA. These collections have been approved by OMB under Control Numbers 0694-0088 (Multi-Purpose Application), which carries a burden hour estimate of 58 minutes to prepare and submit form BIS-748, and 0694-0093, “Import Certificates and End-User Certificates (End-User Statements when referring to the PRC),” which carries a burden of 15 minutes per submission. This rule also contains a revision to the existing collection under Control Number 0694-0088 for recordkeeping, reporting and review requirements, which would be required in connection with authorization Validated End-User and would carry an estimated burden of 30 minutes per submission. An amendment to the existing collection under Control Number 0694-0088 reflecting this revision has been submitted to OMB for approval. This rule is not expected to result in a significant increase in license applications or other documentation submitted to BIS. Send comments regarding this burden estimate or any other aspect of this collection 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, Department of Commerce, 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 Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking and the opportunity for public participation are inapplicable because this regulation involves a military or 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 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. This regulation is issued in final form. Although the formal comment period closed on December 4, 2006, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to Sheila Quarterman, Office of Exporter Services, Bureau of Industry and Security, Department of Commerce, P.O. Box 273, Washington, DC 20044.

#### List of Subjects

##### 15 CFR Part 742

Exports, Terrorism.

##### 15 CFR Part 743

Administrative practice and procedure, Reporting and recordkeeping requirements

##### 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

15 CFR Parts 748, 750 and 758

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements

Accordingly, parts 742, 743, 744, 748, 750 and 758 of the Export Administration Regulations (15 CFR Parts 730-774) are amended as follows:

**PART 742 - [AMENDED]**

1. 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.*; 18 U.S.C. 2510 *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 25, 2005, 71 FR 64109 (October 31, 2006).

2. Amend §742.2 by adding paragraph (b)(4) to read as follows:

**§742.2 Proliferation of chemical and biological weapons.**

\* \* \* \* \*

(b) \* \* \*

(4) License applications for items described in paragraph (a) of this section, when destined for the People's Republic of China, will be reviewed in accordance with the licensing policies in both paragraph (b) of this section and §742.4(b)(7).

\* \* \* \* \*

3. Amend §742.3 by adding paragraph (b)(4) to read as follows:

**§742.3 Nuclear nonproliferation.**

\* \* \* \* \*

(b) \* \* \*

(4) License applications for items described in paragraph (a) of this section, when destined to the People's Republic of China, will be reviewed in accordance with the licensing policies in both paragraph (b) of this section and §742.4(b)(7).

\* \* \* \* \*

4. Amend §742.4 by revising paragraph (b)(7) to read as follows:

**§742.4 National security.**

\* \* \* \* \*

(b) \* \* \*

(7) For the People's Republic of China (PRC), there is a general policy of approval for license applications to export, reexport, or transfer items to civil end-uses. There is a presumption of denial for license applications to export, reexport, or transfer

items that would make a direct and significant contribution to the PRC's military capabilities such as, but not limited to, the major weapons systems described in Supplement No. 7 to Part 742 of the EAR.

\* \* \* \*

5. Amend §742.5 by adding paragraph (b)(4) to read as follows:

**§742.5 Missile technology.**

\* \* \* \*

(b) \* \* \*

(4) License applications for items described in paragraph (a) of this section, when destined for the People's Republic of China, will be reviewed in accordance with the licensing policies in both paragraph (b) of this section and §742.4(b)(7).

\* \* \* \*

6. Supplement No. 7 to Part 742 is added to read as follows:

**SUPPLEMENT NO. 7 TO PART 742 – DESCRIPTION OF MAJOR WEAPONS SYSTEMS**

(1) Battle Tanks: Tracked or wheeled self-propelled armored fighting vehicles with high cross-country mobility and a high-level of self protection, weighing at least 16.5 metric tons unladen weight, with a high muzzle velocity direct fire main gun of at least 75 millimeters caliber.

(2) Armored Combat Vehicles: Tracked, semi-tracked, or wheeled self-propelled vehicles, with armored protection and cross-country capability, either designed and equipped to transport a squad of four or more infantrymen, or armed with an integral or organic weapon of a least 12.5 millimeters caliber or a missile launcher.

(3) Large-Caliber Artillery Systems: Guns, howitzers, artillery pieces combining the characteristics of a gun or a howitzer, mortars or multiple-launch rocket systems, capable of engaging surface targets by delivering primarily indirect fire, with a caliber of 75 millimeters and above.

(4) Combat Aircraft: Fixed-wing or variable-geometry wing aircraft designed, equipped, or modified to engage targets by employing guided missiles, unguided rockets, bombs, guns, cannons, or other weapons of destruction, including versions of these aircraft which perform specialized electronic warfare, suppression of air defense or reconnaissance missions. The term “combat aircraft” does not include primary trainer aircraft, unless designed, equipped, or modified as described above.

(5) Attack Helicopters: Rotary-wing aircraft designed, equipped or modified to engage targets by employing guided or unguided anti-armor, air-to-surface, air-to-subsurface, or air-to-air weapons and equipped with an integrated fire control and aiming system for these weapons, including versions of these aircraft that perform specialized reconnaissance or electronic warfare missions.

(6) Warships: Vessels or submarines armed and equipped for military use with a standard displacement of 750 metric tons or above, and those with a standard displacement of less than 750 metric tons that are equipped for launching missiles with a range of at least 25 kilometers or torpedoes with a similar range.

(7) Missiles and Missile Launchers:

(a) Guided or unguided rockets, or ballistic, or cruise missiles capable of delivering a warhead or weapon of destruction to a range of at least 25 kilometers, and those items that are designed or modified specifically for launching such missiles or rockets, if not covered by systems identified in paragraphs (1) through (6) of this Supplement. For purposes of this rule, systems in this paragraph include remotely piloted vehicles with the characteristics for missiles as defined in this paragraph but do not include ground-to-air missiles,;

(b) Man-Portable Air-Defense Systems (MANPADS); or

(c) Unmanned Aerial Vehicles (UAVs) of any type, including sensors for guidance and control of these systems.

(8) Offensive Space Weapons: Systems or capabilities that can deny freedom of action in space for the United States and its allies or hinder the United States and its allies from

denying an adversary the ability to take action in space. This includes systems such as anti-satellite missiles, or other systems designed to defeat or destroy assets in space.

(9) Command, Control, Communications, Computer, Intelligence, Surveillance, and Reconnaissance (C4ISR): Systems that support military commanders in the exercise of authority and direction over assigned forces across the range of military operations; collect, process, integrate, analyze, evaluate, or interpret information concerning foreign countries or areas; systematically observe aerospace, surface or subsurface areas, places, persons, or things by visual, aural, electronic, photographic, or other means; and obtain, by visual observation or other detection methods, information about the activities and resources of an enemy or potential enemy, or secure data concerning the meteorological, hydrographic, or geographic characteristics of a particular area, including Undersea communications. Also includes sensor technologies.

(10) Precision Guided Munitions (PGMs), including “smart bombs”: Weapons used in precision bombing missions such as specially designed weapons, or bombs fitted with kits to allow them to be guided to their target.

(11) Night vision equipment: Any electro-optical device that is used to detect visible and infrared energy and to provide an image. This includes night vision goggles, forward-looking infrared systems, thermal sights, and low-light level systems that are night vision devices, as well as infrared focal plane array detectors and cameras specifically designed, developed, modified, or configured for military use; image intensification and other night

sighting equipment or systems specifically designed, modified or configured for military use; second generation and above military image intensification tubes specifically designed, developed, modified, or configured for military use, and infrared, visible and ultraviolet devices specifically designed, developed, modified, or configured for military application.

**PART 743 – [AMENDED]**

7. The authority citation for 15 CFR Part 743 continues to read as follows:

**Authority:** 50 U.S.C. app. 2401 *et seq.*; Pub.L. 106-508; 50 U.S.C. 1701 *et seq.*; Notice of August 3, 2006, 71 FR 44551 (August 7, 2006).

8. Paragraph (b)(3) is added to §743.1 to read as follows:

**§743.1 Wassenaar Arrangement.**

\* \* \* \* \*

(b) \* \* \*

(3) Exports, reexports and transfers authorized under the Validated End-User authorization (see §748.15 of the EAR).

\* \* \* \* \*

**PART 744 - [AMENDED]**

9. 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).

10. Section 744.21 is added to read as follows:

**§744.21 Restrictions on certain military end-uses in the People’s Republic of China (PRC).**

(a) *General prohibition.* In addition to the license requirements for items specified on the Commerce Control List (CCL), you may not export, reexport, or transfer any item listed in Supplement No. 2 to Part 744 to the PRC without a license if, at the time of the export, reexport, or transfer, you know, meaning either:

- (1) You have knowledge, as defined in §772.1 of the EAR, that the item is intended, entirely or in part, for a "military end-use," as defined in paragraph (f) of this section, in the PRC; or
- (2) You have been informed by BIS, as described in paragraph (b) of this section, that the item is or may be intended, entirely or in part, for a "military end-use" in the PRC.

(b) *Additional prohibition on those informed by BIS.* BIS may inform you either individually by specific notice, through amendment to the EAR published in the Federal Register, or through a separate notice published in the Federal Register, that a license is required for specific exports, reexports, or transfers of any item because there is an unacceptable risk of use in or diversion to “military end-use” activities in the PRC. Specific notice will 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 written notice within two working days signed by the Deputy Assistant Secretary for Export Administration or the Deputy Assistant Secretary’s designee. The absence of BIS notification does not excuse the exporter from compliance with the license requirements of paragraph (a) of this section.

(c) *License exception.* Despite the prohibitions described in paragraphs (a) and (b) of this section, you may export items subject to the EAR under the provisions of License Exception GOV set forth in §§740.11(b)(2)(i) and (ii) of the EAR.

(d) *License application procedure.* When submitting a license application pursuant to this section, you must state in the "additional information" section of the BIS-748P "Multipurpose Application" or its electronic equivalent that "this application is submitted because of the license requirement in §744.21 of the EAR (Restrictions on Certain Military End-uses in the People’s Republic of China)." In addition, either in the additional information section of the application or in an attachment to the application, you must include all known information concerning the military end-use of the item(s).

If you submit an attachment with your license application, you must reference the attachment in the “additional information” section of the application.

(e) *License review standards.* (1) Applications to export, reexport, or transfer items described in paragraph (a) of this section will be reviewed on a case-by-case basis to determine whether the export, reexport, or transfer would make a material contribution to the military capabilities of the PRC and would result in advancing the country’s military activities contrary to the national security interests of the United States. When it is determined that an export, reexport, or transfer would make such a contribution, the license will be denied.

(2) Applications may be reviewed under chemical and biological weapons, nuclear nonproliferation, or missile technology review policies, as set forth in §§742.2(b)(4), 742.3(b)(4) and 742.5(b)(4) of the EAR, if the end-use may involve certain proliferation activities.

(3) Applications for items requiring a license for other reasons that are destined to the PRC for a military end-use also will be subject to the review policy stated in paragraph (e)(1) of this section.

(f) In this section, “military end-use” means: incorporation into a military item described on the U.S. Munitions List (USML) (22 CFR part 121, International Traffic in Arms Regulations); incorporation into a military item described on the International Munitions List (IML) (as set out on the Wassenaar Arrangement website at <http://www.wassenaar.org>); incorporation into items listed under ECCNs ending in

“A018” on the CCL in Supplement No. 1 to part 774 of the EAR; or for the “use”, “development”, or “production” of military items described on the USML or the IML, or items listed under ECCNs ending in “A018” on the CCL. “Military end-use” also means “deployment” of items classified under ECCN 9A991 as set forth in Supplement No. 2 to Part 744.

**Note to paragraph (f) of this section:** As defined in Part 772 of the EAR, “*use*” means operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing; “*development*” is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts; and “*production*” means all production stages, such as: product engineering, manufacture, integration, assembly (mounting), inspection, testing, quality assurance.

For purposes of this section, *operation* means to cause to function as intended; *installation* means to make ready for use, and includes connecting, integrating, incorporating, loading software, and testing; *maintenance* means performing work to bring an item to its original or designed capacity and efficiency for its intended purpose, and includes testing, measuring, adjusting, inspecting, replacing parts, restoring, calibrating, overhauling; and *deployment* means placing in battle formation or appropriate strategic position.

11. Supplement No. 2 to Part 744 is added to read as follows:

**SUPPLEMENT NO. 2 TO PART 744 – LIST OF ITEMS SUBJECT TO THE  
MILITARY END-USE LICENSE REQUIREMENT OF §744.21**

The following items, as described, are subject to the military end-use license requirement in §744.21.

**(1) Category 1 – Materials, Chemicals, Microorganisms, and Toxins**

- (i) 1A290 Depleted uranium (any uranium containing less than 0.711% of the isotope U-235) in shipments of more than 1,000 kilograms in the form of shielding contained in X-ray units, radiographic exposure or teletherapy devices, radioactive thermoelectric generators, or packaging for the transportation of radioactive materials.
- (ii) 1C990 Limited to fibrous and filamentary materials other than glass, aramid or polyethylene not controlled by 1C010 or 1C210, for use in "composite" structures and with a specific modulus of  $3.18 \times 10^6$  m or greater and a specific tensile strength of  $7.62 \times 10^4$  m or greater.
- (iii) 1C996 Hydraulic fluids containing synthetic hydrocarbon oils, having all the characteristics in the List of Items Controlled.
- (iv) 1D993 "Software" specially designed for the "development", "production", or "use" of equipment or materials controlled by 1C210.b, or 1C990.
- (v) 1D999 Limited to specific software controlled by 1D999.b for equipment controlled by 1B999.e that is specially designed for the production of prepregs controlled in Category 1, n.e.s.
- (vi) 1E994 Limited to "technology" for the "development", "production", or "use" of fibrous and filamentary materials other than glass, aramid or polyethylene controlled by 1C990.

**(2) Category 2 – Materials Processing**

- (i) 2A991 Limited to bearings and bearing systems not controlled by 2A001 and with operating temperatures above 573 K (300 °C).

(ii) 2B991 Limited to “numerically-controlled” machine tools having “positioning accuracies”, with all compensations available, less (better) than 9  $\mu\text{m}$  along any linear axis; and machine tools controlled under 2B991.d.1.a.

(iii) 2B992 Non-“numerically controlled” machine tools for generating optical quality surfaces, and specially designed components therefor.

(iv) 2B996 Limited to dimensional inspection or measuring systems or equipment not controlled by 2B006 with measurement uncertainty equal to or less (better) than  $(1.7 + L/1000)$  micrometers in any axes (L measured Length in mm).

### **(3) Category 3 – Electronics Design, Development and Production**

(i) 3A292.d Limited to digital oscilloscopes and transient recorders, using analog-to-digital conversion techniques, capable of storing transients by sequentially sampling single-shot inputs at greater than 2.5 giga-samples per second.

(iii) 3A999.c All flash x-ray machines, and components of pulsed power systems designed thereof, including Marx generators, high power pulse shaping networks, high voltage capacitors, and triggers.

(ii) 3E292 Limited to “technology” according to the General Technology Note for the “development”, “production”, or “use” of -digital oscilloscopes and transient recorders with sampling rates greater than 2.5 giga-samples per second, which are controlled by 3A292.d.

### **(4) Category 4 - Computers**

(i) 4A994 Limited to computers not controlled by 4A001 or 4A003, with an Adjusted Peak Performance (“APP”) exceeding 0.5 Weighted TeraFLOPS (WT).

(ii) 4D993 “Program” proof and validation “software”, “software” allowing the automatic generation of “source codes”, and operating system “software” not controlled by 4D003 that are specially designed for real time processing equipment.

(iii) 4D994 Limited to “software” specially designed or modified for the “development”, “production”, or “use” of equipment controlled by 4A101.

### **(5) Category 5 – (Part 1) Telecommunications**

(i) 5A991 Limited to telecommunications equipment designed to operate outside the temperature range from 219K (-54 °C) to 397K (124 °C), which is controlled by 5A991.a., radio equipment using Quadrature-amplitude-modulation (QAM) techniques, which is controlled by 5A991.b.7., and phased array antennae, operating above 10.5 Ghz, except landing systems meeting ICAO standards (MLS), which are controlled by 5A991.f.

(ii) 5D991 Limited to “software” specially designed or modified for the “development”, “production, or “use” of equipment controlled by 5A991.a., 5A991.b.7., and 5A991.f., or of “software” specially designed or modified for the “development”, “production”, or “use” of equipment controlled by 5A991.a., 5A991.b.7., and 5A991.f.

(v) 5E991 Limited to “technology” for the “development”, “production” or “use” of equipment controlled by 5A991.a., 5A991.b.7., or 5A991.f., or of “software” specially designed or modified for the “development”, “production”, or “use” of equipment controlled by 5A991.a., 5A991.b.7., and 5A991.f.

#### **(6) Category 6 – Sensors and Lasers**

(i) 6A995 “Lasers”, not controlled by 6A005 or 6A205.

(ii) 6C992 Optical sensing fibers not controlled by 6A002.d.3 which are modified structurally to have a “beat length” of less than 500 mm (high birefringence) or optical sensor materials not described in 6C002.b and having a zinc content of equal to or more than 6% by “mole fraction.”

#### **(7) Category 7 – Navigation and Avionics**

(i) 7A994 Other navigation direction finding equipment, airborne communication equipment, all aircraft inertial navigation systems not controlled under 7A003 or 7A103, and other avionic equipment, including parts and components, n.e.s.

(ii) 7B994 Other equipment for the test, inspection, or “production” of navigation and avionics equipment.

(iii) 7D994 “Software”, n.e.s., for the “development”, “production”, or “use” of navigation, airborne communication and other avionics.

(iv) 7E994 “Technology”, n.e.s., for the “development”, “production”, or “use” of navigation, airborne communication, and other avionics equipment.

**(8) Category 8 - Marine**

- (i) 8A992 Limited to underwater systems or equipment, not controlled by 8A001, 8A002, or 8A018, and specially designed parts therefor.
- (ii) 8D992 “Software” specially designed or modified for the “development”, “production” or “use” of equipment controlled by 8A992.
- (iii) 8E992 “Technology” for the “development”, “production” or “use” of equipment controlled by 8A992.

**(9) Category 9 – Propulsion Systems, Space Vehicles and Related Equipment**

- (i) 9A991 Limited to “aircraft”, n.e.s., and gas turbine engines not controlled by 9A001 or 9A101.
- (ii) 9D991 “Software”, for the “development” or “production” of equipment controlled by 9A991 or 9B991.
- (iii) 9E991 “Technology”, for the “development”, “production” or “use” of equipment controlled by 9A991 or 9B991.

**PART 748 – [AMENDED]**

12. 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).

13. Section 748.3 is amended by adding paragraph (c)(3) to read as follows:

**§748.3 Classification requests, advisory opinions, and encryption review requests.**

\* \* \* \* \*

(c) \* \* \*

(3) Requests for Validated End-User authorization should be submitted in accordance with the provisions set forth in §748.15 and Supplement Nos. 8 and 9 to this part.

\* \* \* \* \*

14. Section 748.9 is amended:

a. By revising paragraph (b)(1) introductory text;

b. By revising paragraph (b)(2) introductory text before the list of countries;

c. By revising paragraph (b)(2)(i);

d. By revising paragraph (c) introductory text; and

e. By revising paragraph (c)(1).

The revisions read as follows:

**§748.9 Support documents for license applications.**

\* \* \* \* \*

(b) \* \* \*

(1) Does your transaction involve items controlled for national security reasons?

Does your transaction involve items destined for the People's Republic of China (PRC)?

\* \* \* \* \*

(2) Does your transaction involve items controlled for national security reasons destined for one of the following countries? (This applies only to those overseas

destinations specifically listed.) If your item is destined for the PRC, does your transaction involve items that require a license to the PRC for any reason?

\* \* \* \* \*

(i) If *yes*, your transaction may require an Import Certificate or End-User Statement. If your transaction involves items destined for the PRC that are controlled to the PRC for any reason, your transaction may require a PRC End-User Statement. Note that if the destination is the PRC, a Statement of Ultimate Consignee and Purchaser may be substituted for a PRC End-User Statement when the item to be exported (i.e., replacement parts and sub-assemblies) is for servicing previously exported items and is valued at \$75,000 or less.

\* \* \* \* \*

(c) *License applications requiring support documents.* License applications requiring support by either a Statement by the Ultimate Consignee and Purchaser or an Import Certificate or End-User Statement must indicate the type of support document obtained in Block 6 or 7 on your application with an “X” in the appropriate box. If the support document is an Import Certificate or End User Statement, you must also identify the originating country and number of the Certificate or Statement in Block 13 on your application. If a license application is submitted without either the correct Block or Box marked on the application or the required support document, the license application will be immediately returned without action unless the satisfactory reasons for failing to obtain the document are supplied in Block 24 or in an attachment to your license application.

(1) *License applications supported by an Import Certificate or End-User*

*Statement.* You may submit your license application upon receipt of a facsimile or other legible copy of the Import Certificate or End-User Statement, provided that no shipment is made against any license issued based upon the Import Certificate or End-User Statement prior to receipt and retention of the original statement by the applicant.

\* \* \* \* \*

15. Section 748.10 is amended:

- a. By revising the section heading;
- b. By revising paragraph (a);
- c. By revising the heading and introductory text for paragraph (b);
- d. By revising paragraph (b)(4);
- e. By revising the heading and text for paragraph (c); and
- f. By revising the heading and text for paragraph (g).

The revisions read as follows:

**§748.10 Import Certificates and End-User Statements.**

(a) *Scope.* There are a variety of Import Certificates and End-User Statements currently in use by various governments. The control exercised by the government issuing the Import Certificate or End-User Statement is in addition to the conditions and restrictions placed on the transaction by BIS. The laws and regulations of the United States are in no way modified, changed, or superseded by the issuance of an Import

Certificate or End-User Statement. This section describes exceptions and relationships true for both Import Certificates and End-User Statements, and applies only to transactions involving national security controlled items destined for one of the countries identified in §748.9(b)(2) of this part. In the case of the PRC, this section applies to transactions involving all items that require a license to the PRC for any reason.

(b) *Import Certificate or End-User Statement.* An Import Certificate or End-User Statement must be obtained, unless your transaction meets one of the exemptions stated in §748.9(a) of this part, if:

\* \* \* \* \*

(4) Your license application involves the export of commodities and software classified in a single entry on the CCL, and your ultimate consignee is in any destination listed in §748.9(b)(2), and the total value of your transaction exceeds \$50,000. Note that this \$50,000 threshold does not apply to exports to the PRC of computers subject to the provisions of §748.10(b)(3) or to items classified under ECCN 6A003.

(i) Your license application may list several separate CCL entries. If *any* individual entry including an item that is controlled for national security reasons exceeds \$50,000, then an Import Certificate must be obtained covering all items controlled for national security reasons on your license application. If the total value of entries on a license application that require a license to the PRC for *any* reason listed on the CCL exceeds \$50,000, then a PRC End-User Statement covering all such controlled items that require a license to the PRC on your license application must be obtained;

(ii) If your license application involves a lesser transaction that is part of a larger order for items controlled for national security reasons (or, for the PRC, for any reason) in a single ECCN exceeding \$50,000, an Import Certificate, or a PRC End-User Statement, as appropriate, must be obtained.

(iii) You may be specifically requested by BIS to obtain an Import Certificate for a transaction valued under \$50,000. You also may be specifically requested by BIS to obtain an End-User Statement for a transaction valued under \$50,000 or for a transaction that requires a license to the PRC for reasons in the EAR other than those listed on the CCL.

(c) *How to obtain an Import Certificate or End-User Statement.* (1) Applicants must request that the importer (e.g., ultimate consignee or purchaser) obtain the Import Certificate and that it be issued covering only those items that are controlled for national security reasons. Exporters should not request that importers obtain Import Certificates for items that are controlled for reasons other than national security. Note that in the case of the PRC, applicants must request that the importer obtain an End-User Statement for all items on a license application that require a license to the PRC for any reason listed on the CCL. Applicants must obtain original Import Certificate or End-User Statements from importers.

(2) The applicant's name must appear on the Import Certificate or End-User Statement submitted to BIS as either the applicant, supplier, or order party. The Import Certificate may be made out to either the ultimate consignee or the purchaser, even though they are different parties, as long as both are located in the same country.

(3) If your transaction requires the support of a PRC End-User Statement, you must ensure that the following information is included on the PRC End-User Statement signed by an official of the Department of Mechanic, Electronic and High Technology Industries, Export Control Division I, of the PRC Ministry of Commerce (MOFCOM), with MOFCOM's seal affixed to it:

- (i) Title of contract and contract number (optional);
- (ii) Names of importer and exporter;
- (iii) End-User and end-use;
- (iv) Description of the item, quantity and dollar value; and
- (v) Signature of the importer and date.

**Note to paragraph (c) of this section:** You should furnish the consignee with the item description contained in the CCL to be used in applying for the Import or End-User Statement. It is also advisable to furnish a manufacturer's catalog, brochure, or technical specifications if the item is new.

\* \* \* \* \*

(g) *Submission of Import Certificates and End-User Statements.* Certificates and Statements must be retained on file by the applicant in accordance with the recordkeeping provisions of part 762 of the EAR, and should not be submitted with the license application. For more information on what Import Certificate and End-User Statement information must be included in license applications, refer to §748.9(c) of the EAR. In addition, as set forth in §748.12(e), to assist in license reviews, BIS will require

applicants, on a random basis, to submit specific original Import Certificate and End-User Statements.

\* \* \* \* \*

**§748.12 [Amended]**

16. Section 748.12 is amended by removing and reserving paragraph (a).

17. Supplement No. 4 to Part 748, is amended by revising the heading and the entry for “China, People’s Republic of”, to read as follows:

**Supplement No. 4 to Part 748 - Authorities Administering Import Certificate/Delivery Verification (IC/DV) and End-User Statement Systems in Foreign Countries.**

<u>Country</u>	<u>IC/DV Authorities</u>	<u>System Administered</u>
* * * * *		
China, People’s Republic of	Export Control Division I Department of M, E & HT I No. 2 Dong Chang An Street Beijing Phone: 8610-6519-7366 Fax: 8610-6519-7926	PRC End-User Statement
* * * * *		

18. Section 748.15 is added to read as follows:

**§748.15 AUTHORIZATION VALIDATED END-USER (VEU).**

Authorization Validated End-User (VEU) permits the export, reexport, and transfer to validated end-users of any eligible items that will be used in a specific eligible

destination. Validated end-users are those who have been approved in advance pursuant to the requirements of this section. To be eligible for authorization VEU, exporters, reexporters, and potential validated end-users must adhere to the conditions and restrictions set forth in paragraphs (a) through (f) of this section. If a request for VEU authorization for a particular end-user is not granted, no new license requirement is triggered. In addition, such a result does not render the end-user ineligible for license approvals from BIS.

(a) *Eligible end-users.* The only end-users to whom eligible items may be exported, reexported, or transferred under VEU are those validated end-users identified in Supplement No. 7 to Part 748, according to the provisions in this section and those set forth in Supplement Nos. 8 and 9 to this part that have been granted VEU status by the End-User Review Committee (ERC) according to the process set forth in Supplement No. 9 to this part.

(1) Requests for authorization must be submitted in the form of an advisory opinion request, as described in §748.3(c)(2), and should include a list of items (items for purposes of authorization VEU include commodities, software and technology, except as excluded by paragraph (c) of this section), identified by ECCN, that exporters or reexporters intend to export, reexport or transfer to an eligible end-user, once approved. To ensure a thorough review, requests for VEU authorization must include the information described in Supplement No. 8 to this part. Requests for authorization will be accepted from exporters, reexporters or end-users. Submit the request to:

The Office of Exporter Services, Bureau of Industry and Security

U.S. Department of Commerce  
14<sup>th</sup> Street and Pennsylvania Avenue, NW, Room 2705,  
Washington, DC 20230; or to

The Office of Exporter Services, Bureau of Industry and Security  
U.S. Department of Commerce  
P.O. Box 273,  
Washington, DC 20044.

Mark the package sent to either address “Request for Authorization Validated End-User.”

(2) In evaluating an end-user for eligibility under authorization VEU, the ERC will consider a range of information, including such factors as: the entity’s record of exclusive engagement in civil end-use activities; the entity’s compliance with U.S. export controls; the need for an on-site review prior to approval; the entity’s capability of complying with the requirements of authorization VEU; the entity’s agreement to on-site reviews to ensure adherence to the conditions of the VEU authorization by representatives of the U. S. Government; and the entity’s relationships with U.S. and foreign companies. In addition, when evaluating the eligibility of an end-user, the ERC will consider the status of export controls and the support and adherence to multilateral export control regimes of the government of the eligible destination.

(3) The VEU authorization is subject to revision, suspension or revocation entirely or in part.

(4) Information submitted in a VEU request is deemed to constitute continuing representations of existing facts or circumstances. Any material or substantive change relating to the authorization must be promptly reported to BIS, whether VEU authorization has been granted or is still under consideration.

(b) *Eligible destinations.* Authorization VEU may be used for the following destinations:

(1) The People's Republic of China.

(2) [Reserved]

(c) *Item restrictions.* (1) Items controlled under the EAR for missile technology (MT) and crime control (CC) reasons may not be exported or reexported under this authorization.

(d) *End-use restrictions.* Items obtained under authorization VEU may be used only for civil end-uses and may not be used for any activities described in part 744 of the EAR. Exports, reexports, or transfers made under authorization VEU may only be made to an end-user listed in Supplement No. 7 to this part if the items will be consigned to and for use by the validated end-user. Eligible end-users who obtain items under VEU may only:

(1) Use such items at the end-user's own facility located in an eligible destination or at a facility located in an eligible destination over which the end-user demonstrates effective control;

(2) Consume such items during use; or

(3) Transfer or reexport such items only as authorized by BIS.

**Note to paragraph (d):** Authorizations set forth in Supplement No. 7 to this part are country-specific. Authorization as a validated end-user for one country specified in paragraph (b) of this section does not constitute authorization as a validated end-user for any other country specified in that paragraph.

(e) *Certification and recordkeeping.* Prior to an initial export or reexport to a validated end-user under authorization VEU, exporters or reexporters must obtain certifications from the validated end-user regarding end-use and compliance with VEU requirements. Such certifications must include the contents set forth in Supplement No. 8 to this part. Certifications and all records relating to VEU must be retained by exporters or reexporters in accordance with the recordkeeping requirements set forth in part 762 of the EAR.

(f) *Reporting and review requirements.*

(1)(i) *Reports.* Exporters and reexporters who make use of authorization VEU are required to submit annual reports to BIS. These reports must include, for each validated

end-user to whom the exporter or reexporter exported or reexported eligible items:

(A) The name and address of each validated end-user to whom eligible items were exported or reexported;

(B) The eligible destination to which the items were exported or reexported;

(C) The quantity of such items;

(D) The value of such items; and

(E) The ECCN(s) of such items.

(ii) Reports are due by February 15 of each year, and must cover the period of January 1 through December 31 of the prior year. Reports must be sent to:

Office of Exporter Services , Bureau of Industry and Security,

U.S. Department of Commerce,

14<sup>th</sup> Street and Constitution Avenue, NW, Room 2705

Washington, DC 20230.

Mark the package “Authorization Validated End-User Reports”

(2) *Reviews.* Records related to activities covered by authorization VEU that are maintained by exporters, reexporters, and validated end-users who make use of authorization VEU will be reviewed on a periodic basis. Upon request by BIS, exporters, reexporters, and validated end-users must allow review of records, including on-site reviews covering the information set forth in paragraphs (e) and (f)(1) of this section.

19. Supplement No. 7 to Part 748 is added to read as follows:

**SUPPLEMENT NO.7 TO PART 748 –AUTHORIZATION VALIDATED END-  
USER (VEU): LIST OF VALIDATED END-USERS, RESPECTIVE  
ELIGIBLE ITEMS AND ELIGIBLE DESTINATIONS**

**Validated End-Users, Respective Eligible Items and Eligible Destinations for  
Exports and Reexports Under Authorization VEU:**

<b><u>Validated End-User</u></b>	<b><u>Eligible Items</u></b>	<b><u>Eligible Destination</u></b>
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20. Supplement No. 8 to Part 748 is added to read as follows:

**SUPPLEMENT NO. 8 TO PART 748 – INFORMATION REQUIRED IN  
REQUESTS FOR VALIDATED END-USER (VEU) AUTHORIZATION**

VEU authorization applicants must provide to BIS certain information about the prospective validated end-user. This information must be included in requests for authorization submitted by prospective validated end-users, or exporters or reexporters who seek to have certain entities approved as validated end-users. BIS may, in the course of its evaluation, request additional information.

*Required Information for Validated End-User Authorization Requests*

- (1) Name of proposed VEU candidates, including all names under which the candidate conducts business; complete company physical address (simply listing a post

office box is insufficient); telephone number; fax number; e-mail address; company Web site (if available); and name of individual who should be contacted if BIS has any questions. If the entity submitting the application is different from the prospective validated end-user identified in the application, this information must be submitted for both entities. If the candidate has multiple locations, all physical addresses located in the eligible destination must be listed.

(2) Provide an overview of the structure, ownership and business of the prospective validated end-user. Include a description of the entity, including type of business activity, ownership, subsidiaries, and joint-venture projects, as well as an overview of any business activity or corporate relationship that the entity has with either government or military organizations.

(3) List the items proposed for VEU authorization approval and their intended end-uses. Include a description of the items; the ECCN for all items, classified to the subparagraph level, as appropriate; technical parameters for the items including performance specifications; and end-use description for the items. If BIS has previously classified the item, the Commodity Classification Automated Tracking System (CCATS) number may be provided in lieu of the information listed in the foregoing provisions of this paragraph.

(4) Provide the physical address(es) of the location(s) where the item(s) will be used, if this address is different from the address of the prospective validated end-user provided in (a).

(5) If the prospective validated end-user plans to reexport or transfer the item, specify the destination to which the items will be reexported or transferred.

(6) Specify how the prospective validated end-user's record keeping system will allow compliance with the recordkeeping requirements set forth in §748.15(e) of the EAR. Describe the system that is in place to ensure compliance with VEU requirements.

(7) Include an original statement on letterhead of the prospective validated end-user, signed and dated by a person who has authority to legally bind the prospective validated end-user, certifying that the end-user will comply with all VEU requirements. This statement must include acknowledgement that the prospective end-user:

(i) Has been informed of and understands that the item(s) it may receive as a validated end-user will have been exported in accordance with the EAR and that use or diversion of such items contrary to the EAR is prohibited;

(ii) Understands and will abide by all authorization VEU end-use restrictions, including the requirement that items received under authorization VEU will only be used

for civil end-uses and may not be used for any activities described in part 744 of the EAR;

(iii) Will comply with VEU recordkeeping requirements; and

(iv) Agrees to allow on-site reviews by U.S. Government officials to verify the end-user's compliance with the conditions of the VEU authorization.

21. Supplement No. 9 to Part 748 is added to read as follows:

**SUPPLEMENT NO. 9 TO PART 748 – END-USER REVIEW COMMITTEE PROCEDURES**

(1) The End-User Review Committee (ERC), composed of representatives of the Departments of State, Defense, Energy, and Commerce, and other agencies, as appropriate, is responsible for determining whether to add to, to remove from, or otherwise amend the list of validated end-users and associated eligible items set forth in Supplement No. 7 to this part. The Department of Commerce chairs the ERC.

(2) Unanimous vote of the Committee is required to authorize VEU status for a candidate or to add any eligible items to a pre-existing authorization. Majority vote of the Committee is required to remove VEU authorization or to remove eligible items from a pre-existing authorization.

(3) In addition to requests submitted pursuant to §748.15, the ERC will also consider candidates for VEU authorization that are identified by the U.S. Government. When the U.S. Government identifies a candidate for VEU authorization, relevant parties (i.e., end-users and exporters or reexporters, when they can be identified) will be notified, before the ERC determines whether VEU authorization is appropriate, as to which end-users have been identified as potential VEU authorization candidates. End-users are not obligated to accept the Government's nomination.

(4) The ERC will make determinations whether to grant VEU authorization to each VEU candidate no later than 30 calendar days after the candidate's complete application is circulated to all ERC agencies. The Committee may request additional information from an applicant or potential validated end-user related to a particular VEU candidate's application. The period during which the ERC is waiting for additional information from an applicant or potential validated end-user is not included in calculating the 30 calendar day deadline for the ERC's determination.

(5) If an ERC agency is not satisfied with the decision of the ERC, that agency may escalate the matter to the Advisory Committee on Export Policy (ACEP). The procedures and time frame for escalating any such matters are the same as those specified for license applications in Executive Order 12981, as amended by Executive Orders 13020, 13026 and 13117 and referenced in §750.4 of the EAR.

(6) A final determination at the appropriate decision-making level to amend the VEU authorization list set forth in Supplement No. 7 to this part operates as clearance by all member agencies to publish the amendment in the Federal Register.

(7) The Deputy Assistant Secretary of Commerce for Export Administration will communicate the determination on each VEU request to the requesting party and the end-user.

#### **PART 750 [AMENDED]**

22. The authority citation for 15 CFR Part 750 continues to read as follows:

**Authority:** 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; Sec 1503, Pub.L. 108-11,117 Stat. 559; 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).

23. Paragraph (b) of section 750.2 is revised to read as follows:

#### **§750.2 Processing of Classification Requests and Advisory Opinions**

(a) \* \* \*

(b) Advisory Opinion requests. All advisory opinions submitted in accordance with procedures described in §748.3(a) and (c) of the EAR will be answered within 30

calendar days after receipt. Requests to obtain Validated End-User authorization will be resolved within 30 calendar days as described in Supplement No. 9 to Part 748 of the EAR.

**PART 758 [AMENDED]**

24. The authority citation for 15 CFR to Part 758 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).

25. Section 758.1(b) is amended

a. By removing the conjunction “or” from the end of paragraph (3) and placing “or” and a semicolon at the end of paragraph (4); and

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

**§758.1 The Shipper’s Export Declaration (SED) or Automated Export System (AES) record.**

\* \* \* \* \*

(b) \* \* \*

(5) For all items exported under authorization Validated End-User (VEU).

DATED:

Christopher A. Padilla  
Assistant Secretary for  
Export Administration