

FOREIGN POLICY EXPORT CONTROLS

1. Introduction

Export controls maintained for foreign policy purposes require annual extension according to Section 6 of the Export Administration Act of 1979, as amended (the Act). Section 6(f) of the Act requires the Secretary of Commerce, through authority delegated by the President, to submit a report to Congress to extend the controls. Sections 6(b) and 6(f) of the Act require the report to include certain considerations¹ and determinations² on the criteria established in that section. This report complies with all the requirements set out in the Act for extending, amending or imposing foreign policy controls.

The Department of Commerce is acting under the authority conferred by Executive Order No. 12924 of August 19, 1994, and continued by notices of August 15, 1995, August 14, 1996, and August 13, 1997. Therein, the President, by reason of the lapse of the Act, 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 Act. Under a policy of conforming actions under the Executive Order to those under the Act, the Department of Commerce, insofar as appropriate, is following the provisions of Section 6 of the Act with regard to extending foreign policy controls.

With this report, the United States is extending all foreign policy controls in effect on December 31, 1997. The Department of Commerce is taking this action at the recommendation of the Secretary of State. As further provided by the Act, foreign policy controls remain in effect for replacement parts and for parts contained in goods subject to such controls. The controls administered in accordance with procedures established pursuant to Section 309(c) of the Nuclear Non-Proliferation Act of 1978 likewise remain in effect.

Each chapter that follows describes a particular category of foreign policy controls and delineates modifications that have taken place over the past year.

Most of the statistical data presented in the report are based on fiscal year export licensing statistics, unless otherwise noted. Commerce generates that data from the computer automated system it uses to process and track export license activity. Due to the tabulating procedures used by the system in accounting for occasional license applications that list more than one country or destination, or are amendments to approved applications, the system has certain limitations as a means of gathering data. In addition, Commerce based the data in the report on values contained in export licenses it issued. Such values may not represent the values of actual shipments made against those licenses, because in some cases an exporter may ship only a portion of the value of an approved license.

Highlights of 1997

Embargoed Countries and Entities: Cuba. On March 3, 1997, Commerce published a rule in the *Federal Register* that implements changes in U.S. export control policy toward Cuba, announced by President Clinton in October 1995. These changes are based on the “Support for the Cuban People” section of the Cuban Democracy Act of 1992 and are consistent with the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996. This rule amends licensing policy to allow the approval, on a case-by-case basis, of certain exports to human rights organizations, news bureaus, and individuals and non-governmental organizations engaged in activities that promote democracy in Cuba. However, the ban on all U.S. direct flights to Cuba (announced by the President in February 1996) still applies. The Administration considers exceptions to the ban on a case-by-case basis.

Of particular note in the latter part of the year, the Bureau of Export Administration (BXA) and other agencies formed an interagency group to consider export requests made in conjunction with the awaited visit to Cuba of Pope John Paul II in January of 1998. Such license requests were considered on a case-by-case basis, consistent with existing regulations and the humanitarian needs of the Cuban people. Exceptions to the Presidential ban on direct flights from the United States to Cuba were also considered on a case-by-case basis if in conjunction with the Pope's visit.

Iran. On August 19, 1997, the President issued Executive Order 13059 to confirm that the embargo on Iran prohibits all trade and investment activities by United States persons, wherever located, and to consolidate in one Order the various prohibitions previously imposed to deal with the national emergency declared on March 15, 1995. Executive Order 12957 of March 5, 1995, prohibits U.S. persons from entering into contracts for the financing or the overall management or supervision of the development of petroleum resources located in Iran or over which Iran claims jurisdiction. Executive Order 12959 of May 6, 1995, imposed a comprehensive trade and investment embargo on Iran.

Sudan. On November 3, 1997, President Clinton signed Executive Order 13067, which imposed a trade and investment embargo on Sudan, effective November 4, 1997. This Executive Order expands existing prohibitions imposed as a result of the Secretary of State's designation of Sudan as a state sponsor of international terrorism. The new sanctions block Sudanese assets in the United States, and prohibit a wide range of transactions between the United States and Sudan, including, *inter alia*, the export to Sudan of any goods, technology, or services from the United States or by a U.S. person, and the facilitation by any U.S. person of the export of goods, technology or services to Sudan from any destination, or from Sudan to any destination.³ The Department of the Treasury's Office of Foreign Assets Control (OFAC) is implementing the Executive Order and exercises licensing responsibility for exports to Sudan.

North Korea. In FY 1997 BXA approved, with the support of the Departments of State and Defense, 45 licenses for humanitarian aid to famine victims in North Korea. These licenses

allowed for the export of \$38 million in food supplies donated by the U.S. Government via private voluntary organizations and a large part of the \$52 million in food assistance donated by the U.S. government during the year.

UNITA. On December 12, 1997, President Clinton signed Executive Order 13069, which imposed additional sanctions (effective December 15, 1997) against the National Union for the Total Independence of Angola (UNITA), an armed movement in Angola which has not complied fully with the provisions of the Lusaka Peace Accords, which it signed with the Angolan government in 1994. This Executive Order implements the economic elements of the sanctions included in the 1997 United Nations Security Council Resolution 1127, by closing all UNITA offices in the United States and prohibiting the provision of aircraft, aircraft components and aircraft services to UNITA and the territory it controls inside Angola. Aircraft services, including, *inter alia*, maintenance, certificates of airworthiness, payment of insurance on new claims and the writing of new insurance contracts, are also prohibited to any aircraft known to have entered Angola through any unauthorized airport subsequent to the effective date of this Executive Order. Treasury is responsible for implementing the sanctions against UNITA and will consider exemptions for flights for humanitarian aid and diplomatic purposes on a case-by-case basis. The sanctions originally imposed against UNITA on September 26, 1993, prohibiting the sale or provision of weapons, military materiel and petroleum products, remain in effect. No general or limited embargo exists against the country or government of Angola.

Multilateral Efforts: The United States ratified the Chemical Weapons Convention (CWC) on April 25, 1997, and the CWC entered into force on April 29, 1997. The CWC imposes a global ban on the development, production, stockpiling, retention and use of chemical weapons and prohibits the direct or indirect transfers of chemical weapons. In negotiating the CWC, the Administration worked closely with industry, and sought to negotiate positions which minimize burdens and maximize protections to U.S. industry. Both houses of Congress have passed CWC implementing legislation, and a law is expected to be enacted in early 1998. Implementation of the CWC will require Commerce to revise the Export Administration Regulations (EAR) accordingly.

Non-Proliferation Initiatives: At the recommendation of the Trade Promotion Coordinating Committee, BXA published an "Entity List" identifying specific end-users who pose an unacceptable risk of diversion to proliferation activities. BXA first published this list on February 3, 1997, advising that shipments of computers with a composite theoretical performance between 2,000 and 7,000 million theoretical operations per second (MTOPS) require a license when exported to Ben Gurion University, Israel. Bharat Electronics Limited, India, was added to the Entity List on May 16, 1997, imposing a license requirement for exports or reexports of all items subject to the EAR to that entity. Several additions to the list were made on June 30 that included entities located in Russia, China, India, Pakistan and Israel for the export of all items subject to the EAR. On October 1, the Bharat Electronics entry on the Entity List was revised by listing the specific Bharat Electronics facilities affected, and narrowing the scope of the items subject to the end-user license requirement. (See Appendix III for the complete Entity List.)

Encryption: On December 30, 1996, BXA issued a regulation implementing the Clinton Administration's encryption policy that was announced by the Vice President on October 1, 1996. A Presidential Memorandum and Executive Order dated November 15, 1996, fully outlined the Administration's policy. The Administration is implementing its policy in several parts, including maintaining export controls, developing standards, and promoting international cooperation. The encryption policy aims to promote the growth of electronic commerce and secure communications worldwide while protecting the public safety and national security.

Beginning on January 1, 1997, nonrecoverable 56-bit DES or equivalent strength encryption products are exportable under a special license exception, which a company can renew every six months during a two-year transition period. The transition period began on January 1, 1997, and will end on December 31, 1998. This special license exception requires a one-time review of the product and submission of a satisfactory business and marketing plan to build and market recoverable encryption products. Renewal of the license exception requires the exporter to submit a report to Commerce, showing that the company has made progress on the recovery product.

On April 24, 1997, the Secretary of Commerce established the President's Export Council Subcommittee on Encryption, comprising forty members from the exporting community, manufacturers and law enforcement officials interested in encryption policy. The Subcommittee will advise the President, through the President's Export Council, and the Secretary on matters pertinent to implementing an encryption policy that will support the growth of electronic commerce while protecting the public safety and national security.

In May 1997, the Department of Commerce announced that it would allow the export of the strongest available data encryption products to support electronic commerce around the world. These products include direct home banking software of any key length offered by banks to their customers worldwide. The Clinton Administration took this step as part of its overall initiative to promote the development of a secure and trusted environment for electronic commerce. The products and institutions that will together make up a robust security infrastructure will permit users from homes and businesses to perform all types of commercial data transactions, ranging from managing investment transactions to purchasing goods and services. That infrastructure will manage encryption to provide privacy, message integrity, user authentication, and recovery services. The policy will not require key recovery for certain financial-specific products since banks and other financial institutions are subject to explicit legal requirements and have shown a consistent ability to provide appropriate access to transaction information in response to authorized law enforcement requests.

Commerce Control List: The Department of Commerce made a major change to the Commerce Control List (CCL) in 1997, which reduces the licensing requirements for exporters. On August 6, 1997, Commerce liberalized export controls on oscilloscopes. The rule created new Export Control Classification Numbers (ECCNs) for oscilloscopes and related technology (3A292 and 3E292), which are controlled only to countries that pose nuclear proliferation concerns and designated terrorism-supporting countries.

In 1997, the Departments of Commerce, State and Defense decided to elaborate further those U.S. Munitions List (USML) items that may be included in a commercial communications satellite licensed by the Department of Commerce by including satellite fuel, ground support equipment and other specified USML items. This change is accomplished by amending the EAR and the International Traffic in Arms Regulations (under the jurisdiction of the Department of State), with formal notification of Congress. On September 29, 1997, Commerce published its corresponding regulation for the EAR by amending the Commerce Control List entry for ECCN 9A004.

Legislative Events: Congress added provisions to the FY 1998 National Defense Authorization Act to require exporters to notify BXA of their intent to export and reexport high performance computers (HPCs) with a performance capability between 2,000 and 7,000 MTOPS to end-users in specified countries (known in the EAR as Tier 3 countries). Under the new law, pursuant to specific objections within ten days by the Secretary of Commerce, Defense, Energy or State, or the Director of the Arms Control and Disarmament Agency, Commerce would require the exporter to apply for a license. The provisions will take effect when the Department of Commerce revises the EAR accordingly in 1998. Current regulations allow exports of HPCs up to 7,000 MTOPS without a license to civil end-users in Tier 3 countries. The legislation also requires the Department of Commerce to perform post-shipment verifications on exports of HPCs over 2,000 MTOPS to Tier 3 countries, whether or not Commerce required a license for the export.

China: In October 1997, the Secretary and BXA representatives met their Chinese counterparts in Beijing for the eleventh annual meeting of the Joint Commission on Commerce and Trade. The two countries agreed to begin holding bilateral export control seminars, with the first one in early 1998. These seminars will provide opportunities to discuss issues of concern, promote mutual understanding of the respective export control systems, and enhance future cooperation.

Hong Kong: In October 1997, the United States and Hong Kong signed an agreement establishing regular discussions on export controls, and scheduled the first meeting for January 1998. This was the first meeting on export controls since Hong Kong's return to Chinese sovereignty, and the United States reaffirmed its commitment to maintain its export control policy for Hong Kong. Hong Kong authorities have committed to continue adhering to various multilateral export control regimes and to maintain an effective export control system.

Export Control Program Description and Licensing Policy

This part defines the export controls maintained for a particular foreign policy purpose that are imposed or extended for the year 1998. The licensing requirements and policy applicable to a particular control are described in this section.

Analysis of Control as Required by Section 6(f) of the Act

This part outlines the considerations or determinations, as required by Section 6(f)(2) of the Act, on the purpose of the control, criteria, alternative means, consultation efforts, and foreign availability. For each control program, the Department's conclusions are based on the following required criteria:

A. The Purpose of the Control

This section provides the foreign policy purpose and rationale for each particular control.

B. Considerations and/or Determinations of the Secretary of Commerce

1. **Probability of Achieving the Intended Foreign Policy Purpose.** This section considers or determines whether such controls are likely to achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology subject to control, and whether the foreign policy purpose can not be achieved through negotiations or other alternative means.
2. **Compatibility with Foreign Policy Objectives.** This section considers or determines whether the controls are compatible with foreign policy objectives of the United States and with overall U.S. policy toward the country or the proscribed end-use subject to the controls.
3. **Reaction of Other Countries.** This section considers or determines whether the reaction of other countries to the extension of such export controls by the United States is likely to render the controls ineffective in achieving the intended foreign policy purpose or to be counterproductive to other U.S. foreign policy interests.
4. **Economic Impact on United States Industry.** This section considers or determines if the effect of the controls on the export performance of the United States, its competitive position in the international economy, the international reputation of the United States as a reliable supplier of goods and technology, or the economic well-being of individual U.S. companies and their employees and communities exceeds the benefit to U.S. foreign policy objectives.⁴
5. **Enforcement of Control.** This section considers or determines the ability of the United States to enforce the controls. Some enforcement problems are common to all foreign policy controls.⁵ Others are associated with only one or a few controls. Each individual control has been assessed to determine if it has presented, or is expected to present, an uncharacteristic enforcement problem.

C. Consultation with Industry

This section discusses the results of consultations with industry leading up to the extension or imposition of controls. It also includes comments provided to BXA by the Technical Advisory Committees (TACs); such comments are attributed to the TAC unless otherwise indicated.

D. Consultation with Other Countries

This section reflects consultations on the controls with countries that cooperate with the United States on multilateral controls, as well as with other countries as appropriate.

E. Alternative Means

This section specifies the nature and results of any alternative means attempted to accomplish the foreign policy purpose, or the reasons for extending the controls without attempting any such alternative means.

F. Foreign Availability

This section considers the availability from other countries of goods or technology comparable to those subject to the proposed export control. It also describes the nature and results of the efforts made pursuant to Section 6(h) of the Act to secure the cooperation of foreign governments in controlling the foreign availability of such comparable goods or technology. In accordance with the Act, foreign availability considerations do not apply to export controls in effect prior to June 12, 1985, to controls maintained for human rights and anti-terrorism reasons, or to controls in support of the international obligations of the United States.

General Comments from Industry

The Department of Commerce published a notice in the *Federal Register* on October 8, 1997, requesting public comments on its foreign policy-based export controls. BXA received three responses from industry to this request. Appendix I of this report summarizes them in further detail. The responses varied in nature, yet all called for the revision or elimination of certain licensing requirements specific to their industries. Specifically, the Regulations and Procedures Technical Advisory Committee commented on what it sees as an expansion of unilateral foreign policy controls; one computer manufacturer called for further analysis of the efficacy of the “Catch-All” provisions of the Enhanced Proliferation Control Initiative, and for revisions to the controls on high-performance computers and encryption items; another manufacturer called for BXA to liberalize controls on a particular titanium alloy.

In 1997, two Executive Branch advisory groups and several industry and think-tank organizations published reports on the effects of U.S. unilateral sanctions in response to the perceived recent rise in their use by Congress and the Administration as a foreign policy tool. Appendix I includes summaries of the recommendations of these studies. In general, these reports catalogued existing sanctions, estimated their economic effects on the U.S. economy, and

evaluated their success in effecting the desired foreign policy outcomes. Almost unanimously, the studies recommended establishing guidelines for implementing sanctions and employing multilateral rather than unilateral measures whenever possible.

Sanctions reform legislation was introduced in both houses of Congress in October 1997, which sought to establish a framework for the consideration of legislative and executive branch proposals to impose unilateral economic sanctions. The measures were referred to the relevant Committees, but have yet to come to a vote in either house.

ENDNOTES

1. *Section 6(b)(2) requires the Department to consider the criteria set forth in Section 6(b)(1) when extending controls in effect prior to July 12, 1985. In addition, the report must include the elements set forth in Sections 6(f)(2)(A) (purpose of the controls); 6(f)(2)(C) (consultation with industry and other countries); 6(f)(2)(D) (alternative means attempted); and 6(f)(2)(E) (foreign availability).*
2. *Section 6(b)(1) requires the Department to make determinations regarding the criteria set forth therein when extending controls in effect after July 12, 1985. The report must also contain the additional information required in Section 6(f)(2)(A), (C)-(E) (as set forth in endnote 1, supra.)*
3. *The scope of the embargo as pertains to reexports to Sudan has not been determined as of the submission of this report.*
4. *Limitations exist when assessing the economic impact of certain controls because of the unavailability of data or because of the prevalence of other factors, e.g., currency values, foreign economic activity, or foreign political regimes, which may restrict imports of U.S. products more stringently than the United States restricts exports.*
5. *When controls are implemented without the imposition of corresponding restrictions by other countries, it is difficult to guard against reexports from third countries to the target country, to secure third country cooperation in enforcement efforts, and to detect violations abroad and initiate proper enforcement action. The relative ease or difficulty of identifying the movement of controlled goods or technical data is also a factor. Controls on items that are small, inexpensive, easy to transport or conceal, or that have many producers and end-users, are harder to enforce.*