

### **Export Control Program Description And Licensing Policy**

The United States maintains export controls over certain chemicals, equipment, materials, software, technology and whole plants to further U.S. foreign policy opposing the proliferation and use of chemical weapons.<sup>1</sup> The United States implements these controls in coordination with the Australia Group (AG), an informal forum of 30 nations cooperating to halt the proliferation of chemical and biological weapons. (See table in Appendix II for complete list of members.) The Department of Commerce has primary responsibility for overseeing the compliance of industry with the Chemical Weapons Convention (CWC), which bans the development, production, stockpiling, and retention of chemical weapons, and provides for an extensive verification regime.<sup>2</sup> Chemical warfare agents deemed to have direct military application are controlled by the State Department under the International Traffic in Arms Regulations.

Pursuant to passage of the CWC Implementation Act (CWCIA) on October 21, 1998, Commerce expects to be responsible for industry compliance with the Convention and will promulgate two regulations in the near future: (1) amendment to the EAR addressing new export controls and end-use requirements; and (2) Chemical Weapons Convention Regulations (CWCR) addressing data declaration and inspection requirements. After publication of the final CWCR, Commerce will collect industry declarations regarding production, processing, consumption, import, and export of toxic chemicals for purposes not prohibited by the Convention (e.g., industrial, agricultural, and other peaceful purposes) and will forward the information to the Organization for the Prohibition of Chemical Weapons (OPCW). Commerce will also escort inspections of certain U.S. chemical production facilities by the OPCW.

The licensing requirements for chemicals, equipment, materials, software, technology and whole plants are as follows:

A. Commerce requires a license for the export to all destinations, except AG member countries, of precursor and intermediate chemicals used in the production of toxic chemical warfare agents; relevant process control software; technology for their use, production and/or disposal; and facilities designed to produce them.

Commerce requires a license for the export to specified destinations of certain chemical manufacturing facilities and equipment, toxic gas monitoring systems and detectors that can be used in the production of chemical warfare agents, and technology for the use of such items. The countries to which these licensing requirements apply are indicated in Column CB:3 of the Commerce Country Chart, Export Administration Regulations (EAR)

, Part 738, Supplement No. 1, as well as the embargoed destinations identified in EAR Part 746.<sup>3</sup>

A license is also required for the export of any commodity, technology, or software when the exporter knows that it will be used in the design, development, production, stockpiling, or use of chemical weapons in, or by, specified countries. (Country Group D:3, EAR, Part 740, Supplement No. 1.<sup>4</sup>) Commerce may inform the exporter or reexporter that a license is required due to an unacceptable risk that the items will be used in, or diverted to, chemical weapons activities anywhere in the world.

No U.S. person may export, reexport or transfer any item without a license, when that person knows that the item will be used in the design, development, production, stockpiling or use of chemical weapons in, or by, a country listed in Country Group D:3. No U.S. person may knowingly support such an export, reexport or transfer without a license. Support means any action, including financing, transportation, or freight forwarding, that facilitates the export, reexport or transfer.

No U.S. person may, without a license, perform any contract, service or employment knowing that it will directly assist in the design, development, production, stockpiling or use of chemical weapons in, or by, a country listed in Country Group D:3.

B. Commerce will consider applications for licenses on a case-by-case basis to determine whether the export would make a material contribution to the design, development, production, stockpiling, or use of chemical weapons. If Commerce determines that an export will make such a contribution, Commerce will deny the export.

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

### A. The Purpose of the Control

These controls are to prevent a U.S. contribution to, and to support multilaterally coordinated efforts to control, the proliferation and use of chemical weapons. They also provide regulatory authority to control the export of any item from the United States when there is a significant risk that it will be used for chemical weapon purposes. These controls implement certain measures specified in Executive Order 12735 of November 16, 1990, and its successor, Executive Order 12938 of November 14, 1994, and the Enhanced Proliferation Control Initiative (EPCI) announced by President Bush on December 13, 1990 (and endorsed by President Clinton).

These controls advance U.S. implementation of multilateral export control commitments made by members of the AG to further non-proliferation objectives. The AG works to accomplish this objective through the harmonization of export controls, the exchange of

information, and other diplomatic means. In addition, these controls assist the United States in implementing its obligation under the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction (the Chemical Weapons Convention, or CWC) not to assist anyone, in any way, in chemical weapons activities. The controls also support the goals of the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, which prohibits the use of chemical or biological weapons.

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

1. **Probability of Achieving the Intended Foreign Policy Purpose.** These export controls demonstrate U.S. commitment to curtail the spread of chemical weapons and to uphold multilateral agreements to cooperate in this effort. However, many of the items covered by these controls are available in chemical producing nations that are not members of the AG. These controls, however, continue to be a significant part of the United States' overall strategy to prevent the proliferation of weapons of mass destruction. Accordingly, the Secretary has determined that these controls are likely to achieve the intended foreign policy purpose.

2. **Compatibility with Foreign Policy Objectives.** In extending these controls, the Secretary has determined that the controls are compatible with the foreign policy objectives of the United States. The United States has a strong interest in remaining in the forefront of international efforts to stem the proliferation of chemical weapons. These controls are compatible with the multilateral export controls for chemicals and related equipment and technology agreed to by the AG. Moreover, the United States has a binding international commitment under the CWC to the complete prohibition and elimination of all chemical weapons and of assistance to chemical weapons programs.

3. **Reaction of Other Countries.** The Secretary has determined that the reaction of other countries to these controls by the United States is not likely to render the controls ineffective in achieving the intended foreign policy purpose or to be counterproductive to U.S. foreign policy interests. Some non-aligned countries, that are parties to the CWC and the Biological Weapons Convention (BWC), have voiced opposition to the export controls of the AG and have called for its elimination claiming that it discriminates against developing economies. They falsely imply that the AG's export controls deprive non-proliferating States of economic and technological development in the chemical field. They state that the CWC should be looked to as the governing legal instrument for the elimination of chemical weapons, and therefore, incorrectly claim that AG export controls are obsolete. The United States in coordination with its AG partners has sought to dispel this perception in international fora by clarifying the purpose of the controls.

**4. Economic Impact on United States Industry.** The Secretary has determined that the potential impact of these export controls on the U.S. position is minimal. In FY 1998, Commerce received 824 license applications, valued at \$1 billion, for the export or reexport of controlled chemical precursors and equipment. Of these, the Commerce approved 742 applications, denied two and RWA'd (returned without action) 83 applications. In addition, the actual trade in these controlled commodities is significantly greater than the value of the license applications because exporters may export many of these commodities to selected countries without a license.

**5. Enforcement of Control.** The vast size, dispersion, diversity, and specialized nature of the dual-use chemical industry make detecting and investigating potential violations difficult for enforcement personnel. Challenges include distinguishing commercial procurement from chemical weapons-related transactions; establishing appropriate commodity thresholds for targeting; and tracking exports and re-exports for verification of end-use and end-users. In addition, enforcement officers may be exposed to personal safety risks when seizing and inspecting chemical materials.

To meet the challenge of effective enforcement of these controls, Commerce has directed resources toward preventive enforcement. (This is in addition to continued efforts to aggressively pursuing all leads provided by intelligence, industry, and other sources on activity of concern.) Analysis of Shipper's Export Declarations helps ensure that the products labeled ANo License Required® (NLR) are in fact eligible. Also, use of its extensive outreach program to educate companies about export controls related to chemical products helps prevent the illegal export of dual-use products which can be used to make chemical weapons.

Finally, Commerce is preparing for new enforcement responsibilities as required by implementation of the Chemical Weapons Convention by enhancing agent training. Special courses to include proper inspection procedures, conduct during mock inspections and so forth is currently underway and should raise general awareness of enforcement requirements related to control of chemical precursors and related technology.

### **C. Consultation with Industry**

On October 13, 1998, the Department of Commerce, via the *Federal Register*, solicited comments from industry on the effectiveness of export policy. In general, the comments indicated that industry does not feel that unilateral sanctions are effective. A more detailed review of the comments is available in Appendix I.

The Department maintains ongoing interaction with the chemical industry in terms of individual companies seeking export licenses, Commerce chartered Technical Advisory Committees and trade associations. Commerce consults regularly with exporting firms on proposed export transactions and marketing plans to facilitate thorough, yet prompt,

review of export license applications. Through the Technical Advisory Committees, Commerce keeps industry representatives abreast of proposals for items on the control list and gives them the opportunity to provide technical input.

Commerce is working with chemical industry associations, including the Chemical Manufacturers Association and the Synthetic Organic Chemical Manufacturers Association, and other agencies, such as the Federal Bureau of Investigation and the Defense Threat Reduction Agency, to gain valuable input regarding Chemical Weapons Convention (CWC) implementation and meet its CWC responsibilities. (See CWC under Section E, "Alternative Means".)

#### **D. Consultation with Other Countries**

These U.S. controls are consistent with the multilateral export control criteria of the 30 member-nation AG, which includes many of the world's major chemical producers and traders. In addition, a number of non-AG countries--including Bulgaria, Russia, and Ukraine--have taken steps to adopt AG-type controls. An important element of the AG's efforts to curb the proliferation of chemical weapons is contacting non-members to encourage them to observe like-minded export controls. The United States continues to encourage harmonization of export control provisions among AG participants to ensure a level playing field for U.S. exporters.

#### **E. Alternative Means**

The United States continues to address the problem of the proliferation of chemical weapons on a number of fronts. Direct negotiations with countries intent on acquiring chemical weapons are not likely to prevent the use of U.S.-origin materials in such activities, nor are such negotiations likely to affect the behavior of these countries.

Alternative means to curtail the acquisition and development of chemical warfare capabilities, such as diplomatic negotiations, do not obviate the need for controls. The following are some examples of additional means that the United States has used and will continue to use in an attempt to curb the use and spread of chemical weapons:

- o **U.S. legislation:** The Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (Title III, Pub. L. 102-182) provides for the imposition of sanctions on foreign entities and countries for certain kinds of chemical and biological weapons related activity. The United States has imposed sanctions on certain entities for chemical weapons-related activities;

- o The Chemical Weapons Convention: As another tool for stemming the proliferation of chemical weapons, the Convention imposes a global ban on the development, production, stockpiling, retention and use of chemical weapons (CW). The Convention also prohibits the direct or indirect transfers of CW as well as restricting trade in chemicals to non-Parties, and creates an international organization to monitor the destruction of CW and the production of toxic chemicals for industrial, agricultural, medical and other peaceful purposes in countries party to the Convention.**

**The Department has participated in international fora to negotiate positions which minimize burdens and maximize protections to industry.**

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## **F. Foreign Availability**

Past reviews conducted by Commerce revealed that there was availability from non-AG countries for a wide range of AG chemical precursors and production equipment. Non-AG suppliers of precursors and/or related production equipment include Brazil, Chile, Colombia, India, Mexico, China (PRC), South Africa, the countries of the former Soviet Union, Taiwan, Thailand, and Turkey. However, most of these countries are parties to the CWC and will take steps under this treaty to prevent CW proliferation.

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### ***ENDNOTES***

1. *Anti-terrorism controls also apply to exports of these items to countries designated as state sponsors of terrorism by the Secretary of State.*
2. *The CWC was ratified by the United States on April 25, 1997 and entered into force on April 29, 1997. As of September 30, 1997, 100 nations were States Parties to the treaty.*
3. *As of the date of submission of this report, the countries in the Commerce Country Chart CB column 3 included Afghanistan, Armenia, Azerbaijan, Bahrain, Belarus, Bulgaria, Burma, China (PRC), Egypt, Georgia, India, Israel, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Moldova, Mongolia, Oman, Pakistan, Qatar, Russia, St. Kitts & Nevis, Saudi Arabia, Syria, Taiwan, Tajikistan, Turkmenistan, the Ukraine, the United Arab Emirates, Uzbekistan, Vietnam, and Yemen.*
4. *As of the date of submission of this report, the countries in Country Group D:3 included Afghanistan, Armenia, Azerbaijan, Bahrain, Belarus, Bulgaria, Burma, China (PRC), Cuba, Egypt, Georgia, India, Iran, Iraq, Israel, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Moldova, Mongolia, North Korea, Oman, Pakistan, Qatar, Russia, Saudi Arabia, Syria, Taiwan, Tajikistan, Turkmenistan, the Ukraine, the United Arab Emirates, Uzbekistan, Vietnam, and Yemen.*