



## Chapter 1: Export Control Policy and Regulations

### Mission

The Bureau of Industry and Security (BIS) is charged with the development, implementation, and interpretation of U.S. export control policy for dual-use commodities, software, and technology. Dual-use items subject to BIS regulatory jurisdiction have predominantly commercial uses, but also have military applications. One of BIS's principal objectives is to ensure that exports from the United States and reexports of U.S.-origin items from third countries are consistent with U.S. national security and foreign policy objectives, without imposing unnecessary regulatory burdens on U.S. exporters or impeding the flow of legitimate trade.

In order to accomplish this objective, BIS seeks to promulgate clear, concise, and timely regulations. Principal areas of focus include implementation of changes decided by the four multilateral export control regimes – the Nuclear Suppliers Group (NSG), the Missile Technology Control Regime (MTCR), the Australia Group (AG) (chemical and biological nonproliferation), and the Wassenaar Arrangement (WA) (conventional arms and dual-use goods and technologies).

BIS also seeks to promulgate regulations that further U.S. foreign policy objectives, including sanctions policies, rules that clarify which export licensing agency has jurisdictional authority for a given item, and the rights and obligations of U.S. exporters.

In the development of regulatory policy, BIS consults with industry through its Technical Advisory Committees (TACs). The TACs provide valuable input regarding industry perspectives on trends in technology as well as the practicality and likely impact of export controls. In addition, BIS often publishes significant rules in proposed form to give the exporting community an opportunity to comment before the regulations take effect.

### Accomplishments in Fiscal Year 2002

During Fiscal Year 2002, BIS made significant progress in modifying and updating export controls to ensure that U.S. firms compete for international sales on a fair and equal basis with foreign competition while protecting U.S. national security and foreign policy interests.

### Advancements in IT Sector

In three specific areas important to U.S. industry – high performance computers (HPCs), microprocessors, and encryption – BIS and its Wassenaar Arrangement partners



Under Secretary Kenneth I. Juster addresses the Bureau of Industry and Security's 7th Annual Symposium for International Export Control Officials, October 2, 2001.

adjusted control levels in Fiscal Year 2002 to reflect advances in technology, mass market availability, and/or foreign availability.

### ***High Performance Computers***

In Fiscal Year 2002, BIS made two adjustments to the control threshold for exports of high performance computers (HPCs). The first, announced in January 2002 and effective in March 2002, made HPCs capable of up to 190,000 millions of theoretical operations per second (MTOPS) eligible for export to Tier III countries (including China, Russia, and India) under License Exception CTP. As a result, HPCs with a composite theoretical performance of up to 190,000 MTOPS may be exported to most destinations under License Exception CTP without any advance notification to BIS. There is, however, a post-shipment reporting requirement for such exports. Prior to this change, the control threshold for HPC exports to Tier III countries under License Exception CTP was 28,000 MTOPS.

The second set of changes to HPC export controls in Fiscal Year 2002 was implemented as a result of multilateral agreements reached in the Wassenaar Arrangement in December 2000. In a rule published on March 8, 2002, BIS raised the national security control threshold for HPCs to 28,000 MTOPS from 6,500 MTOPS. Accordingly, exports of HPCs below 28,000 MTOPS may be made without a license to all destinations except Tier IV countries (designated terrorism-supporting countries) and sanctioned persons. Exports of HPCs up to 85,000 MTOPS also are now exempt from the reporting requirements set forth in License Exception CTP.

The Administration is continuing its overall review of HPC export policy, including the metric by which exports of HPCs are controlled. The purpose of this review is to maximize the effectiveness of the controls on HPCs while minimizing the adverse impact of such controls on U.S. economic interests.

### ***Microprocessors***

In March 2002, BIS published a regulation adjusting export controls on general purpose microprocessors by

raising the performance level of general purpose microprocessors eligible for export under license exception to 12,000 MTOPS from 6,500 MTOPS. Microprocessors with a CTP up to 12,000 MTOPS may be exported to civil end-users throughout the world, except to terrorism-supporting countries and sanctioned persons, under License Exception CIV.

In addition, after extensive discussions with the Departments of State and Defense and in consultation with the private sector, the U.S. Government agreed with the consensus position of the Wassenaar Arrangement members in Fiscal Year 2002 to remove export controls on general purpose microprocessors. At the same time, the U.S. will focus its controls on general purpose microprocessors destined for military end-users and end-uses. BIS expects that these changes will be fully implemented in the regulations in early 2003. These changes are necessary to ensure that U.S. industry can compete on a level playing field in the burgeoning commercial markets for microprocessors, while protecting vital U.S. national security interests.

### ***Encryption***

On June 6, 2002, BIS published a rule in the *Federal Register* updating U.S. encryption export control policy, following extensive industry consultation and inter-agency review. The updated U.S. encryption regulations reflect changes made to the Wassenaar Arrangement list of dual-use items, and ensure that effective multilateral encryption controls with key information technology trading partners, such as the European Union and Japan, are maintained.

These updated regulations allow “mass market” encryption products using symmetric encryption algorithms with key lengths exceeding 64 bits to be exported and reexported (except to designated terrorist countries or sanctioned persons) after a 30-day technical review by BIS and the Encryption Request Coordinator (National Security Agency). There will be no licensing or post-export reporting requirements related to the export or reexport of such “mass market” encryption products upon completion of this review.

As part of the policy review and update process, BIS worked closely with interagency and industry groups, such as the Regulations and Procedures Technical Advisory Committee (RPTAC), the Information Systems Technical Advisory Committee (ISTAC), the Alliance for Network Security (ANS), and the American Electronics Association (AEA).

representatives of BIS and Israel's Ministry of Defense met to discuss how to best ensure the relevancy and suitability of encryption export controls in the post-September 11 global environment. BIS also participated in the United States review of the Organization for Economic Cooperation and Development's information security guidelines.



Deputy Under Secretary Karan K. Bhatia addresses the Bureau of Industry and Security's 7th Annual Symposium for International Export Control Officials, October 2, 2001.

The new U.S. encryption export policy reflects the results of active consultations with other nations, such as members of the Wassenaar Arrangement and the European Union. The United States and its key trading and security partners recognize the importance of encryption controls in securing critical infrastructures, developing new technologies and standards, thwarting cybercrime, and promoting electronic commerce, and at the same time understand the need to restrict the flow of goods that could compromise our common security and foreign policy interests.

As a result, partners in the Wassenaar Arrangement and other multilateral entities, such as the European Union, continue to track the U.S. position and implement the multilateral agreements. In addition, the United States works closely with its partners on a bilateral and multilateral basis. For example, during Fiscal Year 2002,

### Interagency Jurisdiction Issues

#### *Night Vision Equipment*

BIS made progress in its ongoing efforts to resolve the issue of jurisdiction over the licensing of night vision equipment. BIS approved over 97 percent of the license applications for night vision cameras that were submitted during Fiscal Year 2002. Working with the interagency community and the industry TACs, BIS developed a better understanding of industry concerns regarding how certain license conditions impact their activities. During Fiscal Year 2003, BIS will continue to work with the interagency community to reach agreement on license conditions for night vision exports as well as export control jurisdiction for

certain of these items.

#### *"Space Qualified" Items*

Working with other agencies, BIS resolved longstanding jurisdictional uncertainty regarding controls on "space qualified" goods and technologies. BIS and the Department of State reached agreement on which space-qualified items were to remain under Commerce Department jurisdiction, and which would be transferred to the Department of State's U.S. Munitions List (USML). These changes took effect in regulations published on September 23, 2002. Those space qualified items remaining on the Commerce Control List will be subject to enhanced controls to ensure that important national security and foreign policy objectives are met.

### ***U.S. Munitions List Review***

During Fiscal Year 2002, BIS played a critical role in the ongoing interagency efforts to review the scope and contents of the U.S. Munitions List (USML) in light of technological developments and changed market trends. Items that continue to have predominately military uses are on the USML, while those with predominantly civil uses are identified on the Commerce Control List and subject to BIS jurisdiction. Areas of focus for the USML review included propellants and explosives, as well as nuclear and chemical-related commodities and technology.

BIS anticipates that the results of this portion of the USML review will be published in the *Federal Register* by the end of 2002. Specific jurisdictional clarifications will be beneficial to the exporting community as well as to all of the agencies involved in the export control review process.

### ***Export Authorizations for Cuba***

BIS continued to implement the U.S. Government's export sanctions against Cuba and reviewed requests for proposed exports of items that may be licensed under current law.

In July 2001, BIS created a hybrid license exception to permit the expedited processing of proposed exports of agricultural commodities to Cuba, in compliance with the requirements of the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) (Title IX of Pub. L. 106-387), as amended. Under new License Exception AGR, applicants submit notifications to BIS for proposed exports. Notifications are reviewed by the interagency community and, if there are no objections, BIS authorizes the applicant to use License Exception AGR.

There was significant interest in exporting agricultural commodities to Cuba during Fiscal Year 2002, largely driven by two events: Hurricane Michelle, which caused extensive damage to Cuban crops and grain stores in November 2001, and a U.S. food exposition that was held in Havana on September 26-30, 2002, and was the largest U.S. trade show in Cuba since the imposition of the Cuban embargo more than 40 years ago.

Based on the creation of the new expedited procedures for agricultural exports and these two events, the number of applications and notifications submitted to BIS rose significantly during Fiscal Year 2002, almost tripling the number of cases processed during Fiscal Year 2001. Because of the complexities of trade with Cuba – the nation most stringently embargoed by the United States – and the TSRA changes implemented last year, BIS also had a significant increase in queries regarding such trade.

### **Policy Toward Individual Countries**

During Fiscal Year 2002, geopolitical and security considerations had a major impact on BIS's export control policies. Concerns regarding the proliferation of weapons of mass destruction, the transfer of critical enabling technologies for advanced conventional weapons, and the need to develop international cooperation in the war against terrorism, have played a major role in focusing BIS's policies toward individual countries. The principal highlights are set forth below.

#### ***India/Pakistan Sanctions***

As a result of the May 1998 nuclear tests conducted separately by both India and Pakistan, the U.S. imposed export control sanctions that greatly restricted the flow of trade between the United States and these two countries. In light of the changing world situation and the focus on the war on terrorism, President Bush waived certain sanctions against India and Pakistan on September 22, 2001. On October 1, 2001, BIS published a rule that implemented the waiver of sanctions against India and Pakistan by lifting the policy of denial for the export of all nuclear and missile technology-controlled items (replacing it with a case-by-case review) and further reducing the number of entities on the Entity List. The current Entity List is focused on end-users with direct involvement in weapons of mass destruction and missile development and testing programs. The waiver of sanctions and the reduction of the Entity List, combined with the recognition of India's and Pakistan's role in the war against terrorism, has led to a more favorable exporting environment with these two countries. Overall, the United States is seeking to expand trade relations with these countries within the context of our non-proliferation policy.

### *People's Republic China*

China remains a country with great promise for expanded bilateral trade, but is a country that also poses certain concerns related to U.S. national security objectives.

During Fiscal Year 2002, BIS vigorously engaged China on bilateral export control issues, including the issue of end-use checks. In June 2002, BIS notified exporters,

### *Russia*

BIS seeks to develop an increasingly cooperative relationship with Russia, particularly in connection with efforts to ensure that Russia's prodigious technological and military capabilities are not transferred to countries of concern or to terrorist entities. During Fiscal Year 2002, BIS engaged Russia on efforts to strengthen controls on dual-use exports under the Wassenaar Arrangement.



Assistant Secretary for Export Administration James J. Jochum addresses the Bureau of Industry and Security's 7th Annual Symposium for International Export Control Officials, October 2, 2001.

through the publication of an Unverified List, of the names of nine Chinese entities for which BIS had been unable to conduct pre-license checks or post-shipment verifications. Exports to entities on the Unverified List automatically raise "red flags" for exporters and require exporters to exercise greater due diligence to ensure compliance with the Export Administration Regulations.

The export to China of any item controlled for missile technology reasons, other than those for safety of flight, requires specific review and certification by the President, as mandated by Section 1512 of the National Defense Authorization Act. No certifications were made in Fiscal Year 2002, and thus no exports of missile technology-controlled items (other than those for safety of flight purposes) to China were authorized.

In addition, in conjunction with the Department of Energy's National Nuclear Security Administration, BIS plays an active role in the Nuclear Cities Initiative (NCI). The NCI is an effort to employ nuclear weapons scientists and technical personnel from the former Soviet Union in civilian endeavors. One such endeavor is the redevelopment activity of the Russian Federal Nuclear Center in Sarov, Russia. Development of a commercial building products manufacturing capability and the establishment of production lines for medical technologies are two initiatives planned for the Sarov Techno-

park known as Avangard. The objective is to help scientists in nuclear weapons enterprises find employment in the private sector.

BIS also facilitates the export of items needed to ensure the safety and security of Russian nuclear materials and weapons through Special Comprehensive Licenses.

### *Nonproliferation and Export Control Cooperation*

BIS's Nonproliferation and Export Control (NEC) Cooperation program is designed to assist key countries to develop and strengthen their national export control systems.

During Fiscal Year 2002, NEC, with assistance from other parts of BIS, organized or coordinated 53 bilateral technical exchange workshops and multilateral conferences. The exchange activities undertaken during Fiscal Year 2002 included cooperative bilateral workshops with Armenia, Azerbaijan, Bulgaria, the Czech Republic, Georgia, Hungary, India, Kazakhstan, the Kyrgyz Republic, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, Turkey, Ukraine, and Uzbekistan. Chapter 5 of this report includes detailed information on these activities.

### *Anti-Terrorism Efforts*

In concert with the overall U.S. response to the threat of terrorism, BIS has sought to broaden the focus of the multilateral export control regimes. Heretofore, these regimes focused primarily on the need to control exports to state-sponsored military and weapons of mass destruction programs. The growing terrorist threat argues for an expansion of the regimes' focuses to include items that could be useful for more limited terrorist applications. In this regard, BIS has taken a leadership role in advocating greater international consensus on common implementation procedures and a broader list of items subject to control (e.g., "catch-all" controls). Specific initiatives in each of the four regions are set forth in Chapter 5 of this report.

### *Export Administration Act*

BIS, working with other agencies and congressional staff, spent considerable time in Fiscal Year 2002 in support of the passage of a new Export Administration Act (EAA). Though EAA legislation was not enacted in 2002, BIS is looking forward to enactment of an EAA in 2003 that reflects post-cold war export control realities, provides appropriate penalties, and ensures the protection of confidential information submitted to BIS by U.S. companies. The continued protection of such information is currently the subject of litigation in the U.S. Court of Appeals for the District of Columbia Circuit.

## **Goals for Fiscal Year 2003**

In Fiscal Year 2003, BIS intends to work closely with Congress in seeking to pass a new EAA. In addition, BIS will continue to work with the Departments of State, Defense, and Energy on strengthening the effectiveness of and expanding adherence to the four major multilateral export control regimes. BIS also will continue to work to improve the effectiveness, efficiency, and transparency of the license application review process and procedures. In particular, BIS will seek to clarify and expedite the review process for commodities – such as night vision equipment – that currently undergo extensive interagency review. Finally, BIS will work to shorten the time needed to publish revisions to the EAR and process commodity classifications.