

GAO

Report to the Chairman, Subcommittee
on International Economic Policy and
Trade, Committee on Foreign Affairs,
House of Representatives

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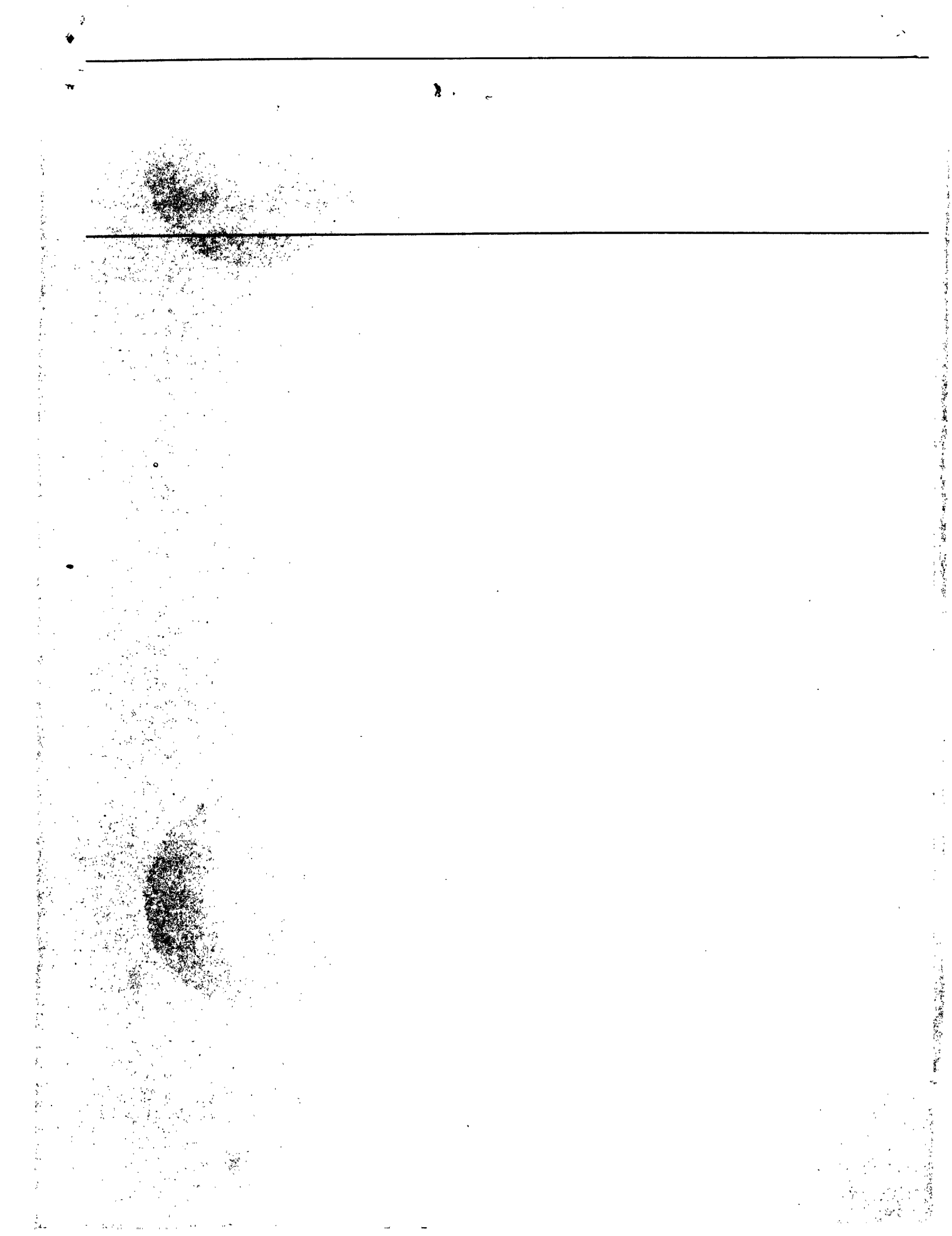
EXPORT CONTROLS

Advising U.S. Business of Policy Changes



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**National Security and
International Affairs Division**

B-239683

May 18, 1990

The Honorable Sam Gejdenson
Chairman, Subcommittee on International
Economic Policy and Trade
Committee on Foreign Affairs
House of Representatives

Dear Mr. Chairman:

As requested by your office, we are reporting on the U.S. government's dissemination of information regarding export control developments. More specifically, this report addresses (1) the timeliness of implementing changes to U.S. export controls agreed to with our major Western allies and (2) U.S. policies and practices regarding dissemination of information on developments in export controls, focusing primarily on actions to liberalize the list of controlled commodities. In addition, we have included a discussion of whether such practices created disparate treatment between American exporters and their foreign competitors.

Background

The United States maintains its strategic export control program in cooperation with its major Western allies through the Coordinating Committee On Multilateral Export Controls (COCOM). Organized in 1949, COCOM is an informal, non-treaty organization of 17 countries¹ that voluntarily participate to restrict exports of sophisticated goods and technologies to the Soviet Union and other proscribed destinations. Although agreements on strategic trade controls must be reached unanimously within COCOM, each member country retains the right to act independently, based on its own legal, administrative, and policy situations. Each member is responsible for incorporating agreements into its export control system.

COCOM administers its controls through three lists of embargoed items: the International Atomic Energy List, the International Munitions List, and the International List. The International List, which covers items having both commercial and military uses, is the basis for much of the U.S. Commodity Control List. COCOM reviews and revises the International List periodically to reflect technological developments and changing uses for the controlled technologies. Once changes are agreed to in

¹COCOM is comprised of the following member countries: Australia, Belgium, Canada, Denmark, the Federal Republic of Germany, France, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States.

COCOM, they are incorporated into each member's control list, including the U.S. Commodity Control List. In the United States, the Department of Commerce is responsible for administering the Commodity Control List and incorporating any agreed-upon changes.

Results in Brief

The United States has improved its ability to implement changes to its export control list, but has not been able to consistently meet the effective dates agreed upon by COCOM. The United States lags behind other major COCOM countries in both implementing changes and disseminating information to its business community on impending changes resulting from the COCOM list review process.

In addition, the United States does not publish or otherwise disseminate to the business community information pertaining to exceptions COCOM grants to export controlled commodities and precedent-setting U.S. licensing decisions, primarily because of confidentiality concerns. Promptly communicating information on such developments can be an important element in ensuring equitable treatment for all U.S. exporters.

To the extent that U.S. businesses are not privy to the same information on impending liberalization measures at the same time as their foreign competitors, they may be at a competitive disadvantage and unable to position themselves to establish footholds in emerging international markets. This is particularly important at this time because the liberalization of export controls to Eastern Europe and the Soviet Union is now being discussed at COCOM.

The United States Is Slow to Implement COCOM Changes and Disseminate Information on Impending Changes

COCOM reviews the International List over a 4-year period on a segmented basis. Such reviews can result in decisions to remove goods and technologies from the control list altogether or to raise the performance level at which goods and technologies will continue to be controlled. During 1988 and 1989, for example, the COCOM review process resulted in changes to about 135 commodity entries in the U.S. Commodity Control List.

In the United States, COCOM changes become effective when they are published in the Federal Register. Commerce is responsible for drafting the regulatory language to reflect the change. The proposed regulation is reviewed concurrently by several internal Commerce components before

it is subjected to an interagency review process which includes, at a minimum, the Departments of Defense and State and the Office of Management and Budget. Section 15(b) of the Export Administration Act requires that export control-related regulations be issued only after they are submitted for review to the Departments of Defense and State and other departments or agencies the Secretary of Commerce deems appropriate. A Commerce policy official stated that the entire process, from initial draft to final publication, can take anywhere from a few weeks to several months, depending upon the commodity involved and level of concerns that may be raised, particularly during the interagency review.

Commerce officials have indicated that the United States' ability to formally publish COCOM changes to the Commodity Control List by the agreed-upon effective date has improved significantly over the last few years. Nevertheless, delays still occur. During 1989, for example, 5 sets of revisions were made to the U.S. Commodity Control List, based on COCOM review of the International List; these revisions affected 62 commodity classifications. In one case, revisions affecting controls on 28 commodities were published in the Federal Register 2 months after the effective COCOM date. In another instance, revisions which affected three commodities were published 7 months after the COCOM effective date. Of the three remaining sets of revisions made in 1989, one, involving 1 commodity, was published within 2 weeks after the effective date; one, involving 29 commodities, was published within 4 days; and one, involving 1 commodity, was published on the effective date.

Regarding the 2-month late publication, Commerce cited the interagency review process as being the primary source of delay. At that time, the Office of Management and Budget had just recently been given review responsibility and was still establishing its scope of authority in the review process and becoming familiar with the technical and policy nuances of export controls in general. According to a Commerce official, although the actual effective date was delayed, Commerce licensing officers were made aware of the impending changes and were able to expedite the licensing process for shipments affected by this liberalization. This does not, however, address the concern that some U.S. firms, unaware of the impending change, would not seek sales that were now permissible.

Regarding the 7-month delay, a Commerce official explained that the changes did not involve highly visible or actively traded commodities. These revisions were given low priority because other more significant decontrol actions were being handled at the time.

Some Other COCOM Countries Publish Changes Faster Than the United States

Some other COCOM member countries regularly meet agreed-upon effective dates. According to representatives of the British, Japanese, Dutch, and Federal Republic of Germany embassies in the United States, implementing export control changes in their respective countries is a routine and simple process that is done soon after COCOM agreement is reached. In the United Kingdom, for example, the Department of Trade and Industry, the agency responsible for export controls, simply drafts and publishes the change without external review. In addition to the Department of Trade and Industry, other British departments having a direct interest in export controls participate in developing the country's negotiating position and, to some degree, in the COCOM list review process. According to a British embassy official, the United Kingdom does not have a subsequent interagency review of draft changes because it is perceived to be too time-consuming and somewhat duplicative of interagency involvement during the initial negotiating process.

Regarding the Federal Republic of Germany, an embassy official said that the Ministry for Economic Affairs is responsible for drafting proposed changes, obtaining routine approval from its executive body, which meets on a weekly basis, and publishing the final amendments. He estimated that incorporating changes can take only 1 to 3 weeks, but stated that final publication of revisions is not usually made until the agreed-upon effective date.

Japanese and Dutch embassy officials similarly advised us that they are able to meet agreed-upon effective dates without any difficulty. Implementation of changes in Japan was said to take approximately 1 to 4 weeks, while in the Netherlands the turnaround time is only 1 to 2 weeks.

Informing U.S. Firms of Impending COCOM Changes

U.S. industry representatives have expressed concern that their foreign competitors appear to know about impending control liberalization much earlier than U.S. firms. Basically, they believe this gives foreign competitors increased opportunities in targeting marketing activities in trade show presentations, negotiating sales with potential foreign customers, and consummating sales agreements pending the effective date of decontrol. Foreign competitors can, in essence, be in a position to ship on the effective date of the change, while U.S. firms are simply in a position to start seeking sales. Also, as one industry representative observed, foreign competitors are able to establish market footholds in the emerging markets, which can be difficult for U.S. exporters to overcome.

The COCOM review process is complex and lengthy. A review period usually includes two rounds of discussions. During the first round, member governments present their proposals, discuss the various positions, and decide how to handle each item. During the second round, member governments reaffirm their position on all items agreed to in the first round and seek agreement on positions on all proposals not disposed of during the first round.

Agreed-upon changes are submitted to a drafting group that examines the amendments from an editorial standpoint. All member governments then are to receive a copy of the draft, which is automatically approved if no objections are raised within 30 days of its distribution.² The revised International List will become effective 15 days after the draft document has been approved.

According to a Department of State official, list changes are fairly well established after the second round of COCOM discussions. Although these changes are subject to a routine edit and final review by member governments, the proposed changes tend to stay substantively intact. Thus, advance notice to businesses regarding fairly certain pending changes can occur much sooner than the effective date of the change. For example, the changes for about 29 commodity entries were effective on October 1, 1989, although round two discussions were completed between April through July 1989, 60 to 150 days before the effective date.

In the United States, COCOM information is generally not designated as "classified" for national security reasons, but categorized as "COCOM restricted" in keeping with informal COCOM policy. According to a Department of State official responsible for COCOM matters, there is no formal definition for or guidance regarding the treatment of information identified as "COCOM restricted." His office has consequently requested a legal opinion on the status of restricted material from State's legal adviser.

In the absence of a formal policy in this regard, all agreements, information, and documents generated during COCOM list review meetings are treated as restricted information in the United States. According to a Commerce official, U.S. negotiators, Technical Advisory Committee members, and other representatives involved in the process are prohibited from disseminating information regarding COCOM list reviews until formal notice of changes has been published in the Federal Register. As

²In 1989, the final consideration period was 45 days.

a matter of policy, U.S. companies are not given advance notice of impending changes to the Commodity Control List resulting from COCOM reviews.

In contrast to the United States, the Netherlands maintains a much more liberal and open approach. According to a Dutch embassy official, the Dutch government assumes an aggressive role in keeping its enterprises informed of trade and export control developments and will often notify businesses directly by telephone about important impending changes. The government works closely with the business community, knows which firms are active in terms of their level of exports, is aware of their business concerns, and maintains direct contact with its key firms, particularly in the computer, telecommunications, and machine tool industries. In addition, the government also publishes a weekly newsletter on pertinent export control developments and has regular monthly meetings with the Central Board for Foreign Economic Relations, an umbrella organization which represents the Dutch private sector. Both forums regularly provide information on the status of proposed changes, the final decisions reached during COCOM list reviews, and other specific topics.

Other COCOM countries also seem to treat COCOM information in a less guarded manner. According to embassy officials, government officials in Japan and Germany readily respond to business inquiries regarding the outcome of COCOM discussions. They do not feel prohibited from sharing information and believe it is important to maintain an open dialogue with their businesses to help enhance their competitiveness and allow them the opportunity to benefit from opening markets. Businesses are made aware of which products are being reviewed during scheduled COCOM meetings and are free to call government officials to determine the outcome of the list review process.

A British embassy official told us that in the United Kingdom, advance notice is provided as a practical matter to all parties that may be affected by a change in the export control list. This allows the lead time needed for (1) industry to become familiar with the change in rules and to position itself to take advantage of any new marketing opportunities and (2) government customs officials to learn about the new exporting policies and make corresponding changes in their enforcement practices.

According to a U.S. industry official, U.S. companies are losing opportunities to seek sales because they do not know about impending policy changes as quickly as their foreign competitors. In some instances, they

are not able to get export licenses to demonstrate equipment about to be decontrolled. In one instance, for example, both British and Dutch manufacturers started marketing oscilloscopes in certain proscribed countries in July 1989, after second round discussions were completed, on the basis of decontrol that was to take effect in October 1989. A U.S. manufacturer of the same type of product was informed by its European subsidiary that this was occurring and it also attempted to engage in marketing efforts. However, its efforts were hampered by the U.S. government when its applications for temporary demonstration licenses were initially denied. In this particular instance, the foreign companies had a significant 2-month marketing advantage over U.S. manufacturers of similar products. Moreover, not all U.S. companies have an overseas network and therefore are not privy to the same level of information.

Commerce Can Provide More Information on Export Control Developments

COCOM regularly grants exceptions to its restrictions on the export of certain high technology commodities to proscribed countries that may represent a precedent and consequently a change from past policy. The United States also makes certain licensing decisions not requiring COCOM review that may also represent a change in U.S. policy. Neither COCOM nor U.S. licensing decisions are disseminated to the exporting community at large. As a result, exporters are not routinely made aware of important business information that may affect their marketing and export activities. In some cases, this may result in an unfair advantage to some exporters having knowledge of important business information regarding liberalized export policies.

COCOM Licensing Decisions Involving Other Countries

Currently, the United States does not publish any information pertaining to exceptions granted by COCOM. For example, in cases where COCOM approves the export of a high technology product from a European COCOM member to an East European country, the U.S. government would not normally inform exporters. In the meantime, the European company that applied for the license and possibly other European manufacturers of similar products know about a significant change in export controls and can have an important competitive edge in making further sales.

According to a Commerce official, specific COCOM exception cases are not published for public dissemination, but are informally communicated to the appropriate Commerce officials so that similar U.S. license applications can be processed in light of these cases. If the export issue surfaced by a COCOM licensing decision is important enough, Commerce drafts and circulates a formal management report to ensure that its

licensing process appropriately reflects any new insights into or developments in export control policy. In the meantime, the business community is not routinely informed of these policy changes and so is not in a position to seek sales.

According to a State official, there is no COCOM policy against the publication of COCOM exception cases, assuming that proprietary business data are adequately protected. Commerce, nevertheless, has been hesitant to publish COCOM exception cases, citing concerns that some proprietary information might be published. In May 1990, the House Committee on Foreign Affairs approved a bill which, among other things, requires publication of COCOM decisions.

Precedent-Setting U.S. Licensing Decisions

Commerce, in administering the U.S. export control system, makes decisions on whether to permit exports of controlled commodities to all destinations except Canada. It annually reviews tens of thousands of export license applications. These decisions, as a matter of Commerce policy, are not communicated beyond the applicant. According to Commerce officials, in some cases these licensing decisions may be "precedent-setting" in that they represent a more liberal interpretation of the regulations or a decision to permit exports that had been previously denied. For example, Commerce's first approval to export a limited number of a 386-based personal computer (a computer that utilizes the currently controlled 386 computer chip) to the Soviet Union was a precedent-setting decision.

Commerce's export licensing decisions are currently not being published in the United States. Thus, only the export applicant has knowledge of the change in policy or regulatory interpretation that may be the basis of a precedent-setting licensing decision. A senior Commerce export licensing official acknowledged the value of communicating precedent-setting cases to the public from an equity standpoint, but emphasized the difficulty of publishing such information without violating the confidentiality provisions of section 12(c) of the Export Administration Act.³

Although publishing licensing decisions has practical difficulties, a Commerce senior counsel on export control matters stated that it is legally possible to provide information on export control decisions. Information

³Section 12(c)(1) of the Export Administration Act provides in part that information obtained concerning export license applications shall be withheld from public disclosure unless the Secretary of Commerce determines that the release of such information is in the national interest.

disclosed must be limited to general product category and country destination; individual parties to the transaction and specific product information such as model number cannot be identified.

One problem involved in publishing information on licensing decisions is the difficulty of removing proprietary information from the case while retaining enough specificity to still be useful to the business community. According to Commerce officials, some commodities can be described in considerable detail without divulging proprietary information, while others cannot be described with sufficient specificity to be useful. For example, one licensing official said that if only a small number of manufacturers produce a certain product (e.g., supercomputers), it is difficult, if at all possible, to maintain the anonymity of the firm and not divulge proprietary marketing information to its competitors.

Scope and Methodology

To identify and assess procedures for implementing agreed-upon COCOM changes to the control list and for disseminating information regarding these changes, we reviewed documents detailing the COCOM list review process and discussed the process with knowledgeable Departments of State and Commerce officials. We also discussed with them the process for incorporating these changes into the Commodity Control List and the policies for when and how these changes are made known to American exporters. To assess how quickly Commerce incorporates COCOM changes into the Commodity Control List, we examined documentation detailing dates of agreement on changes made to the control list in 1988 and 1989 and compared them to the dates when these changes were published in the Federal Register.

We interviewed officials of the embassies of Japan, the Netherlands, the United Kingdom, and the Federal Republic of Germany located in Washington, D.C., to compare U.S. practices for disseminating information with those of other COCOM countries. These officials were identified to us as being knowledgeable about their country's export control practices by a senior Department of State official involved in export controls. We did not, however, independently assess their dissemination practices. We also discussed the impact of differing dissemination practices on U.S. competitiveness with several U.S. exporters.

To identify and assess U.S. practices on advising exporters of precedent-setting licensing decisions, we spoke with Commerce licensing officials and State officials involved with COCOM matters.

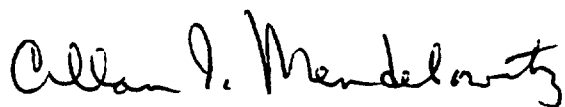
Because section 12(c) of the Export Administration Act prohibits the disclosure of information relating to individual parties, we interviewed Commerce's Office of Chief Counsel to determine whether there are any legal impediments to disclosing information on licensing decisions, excluding references to specific parties. In addition, we examined an earlier effort made by Commerce to disseminate licensing information in a document called the Daily Licensing List.

We conducted our review between January and May 1990 in accordance with generally accepted government auditing standards. We informally discussed the contents of this report with Departments of State and Commerce officials and have incorporated their comments where appropriate.

As agreed with your office, unless you announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will provide copies to other appropriate congressional committees; the Secretaries of Commerce and State; and the Director, Office of Management and Budget. We will make copies available to other interested parties upon request.

Please contact me on (202) 275-4812 if you or your staff have any questions concerning the report. Major contributors to this report are listed in appendix I.

Sincerely yours,



Allan I. Mendelowitz, Director
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