

## **Chapter 2. Strategic Trade and Foreign Policy Controls**

The Office of Strategic Trade and Foreign Policy Controls (STFPC) is composed of three divisions: Strategic Trade, Information Technology Controls, and Foreign Policy Controls. Each division plays an important role in implementing export controls and developing export control policy in light of foreign policy and national security concerns.

STFPC implements multilateral export controls for national security reasons pursuant to the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (Wassenaar Arrangement), which is a multilateral export control regime intended to control the export of conventional arms and certain dual-use items. In addition, STFPC is the primary office responsible for review of encryption export policy and implementation of related export controls.

STFPC also implements U.S. foreign policy controls for human rights, antiterrorism, and regional stability reasons. STFPC is responsible for all policy actions, export licenses, commodity classifications, and advisory opinions for items subject to the Wassenaar Arrangement or foreign policy controls. STFPC also represents the Department in international negotiations on export controls and control list development.

### **Strategic Trade Division**

#### *National Security Controls*

The United States maintains national security controls on the export and reexport of strategic items (i.e., goods and technology). Because many countries produce and export items of strategic value, unilateral controls by the United States alone would not be effective in preventing diversion of such strategic items to end-uses and end-users of concern. To achieve this objective, the United States works closely with its allies and participates in the 33-country Wassenaar Arrangement.

#### *Policy Toward Individual Countries*

Section 5(b) of the Export Administration Act of 1979, as amended (EAA), requires the President to establish a list of controlled countries for national security purposes. Executive Order 12214 (May 2, 1980) delegated this authority to the Secretary of Commerce. Initially, this list comprised those countries named in Section 620(f) of the Foreign Assistance Act of 1961 (FAA) at the time of the enactment of the EAA. The Secretary of Commerce, however, may add or remove countries from the list of controlled countries under criteria provided in the EAA. Since 1980, the Secretary has removed from the list of controlled countries the former Federal Republic of Yugoslavia (in 1985), Hungary (in

1992), and the Czech Republic, Poland, and the Slovak Republic (in 1994). Public Law 102-511 amended the FAA to delete the former Soviet Bloc countries and certain other nations from the list of Communist countries. Under the EAA, the United States, however, continues to control exports for national security reasons to some of the countries deleted from the list the FAA.

The countries to which exports are currently controlled for national security reasons under the EAA are: Albania, Bulgaria, Cuba, Estonia, Latvia, Lithuania, Mongolia, the independent states of the former Soviet Union, North Korea, the People's Republic of China, Romania, Tibet, and Vietnam. BXA, along with other agencies, provides technical export control development assistance to many of these countries with the ultimate objective of sufficiently improving their export control system so they can be removed from the list of controlled countries under Section 5(b) of the EAA.

### *Wassenaar Arrangement*

The Wassenaar Arrangement is a multilateral export control regime currently consisting of 33 member countries. It contributes to national and international security and stability by promoting transparency and advocating increased responsibility in transfers of conventional arms and dual-use items, thereby preventing destabilizing accumulations of these items. The Wassenaar Arrangement obligates member countries to exchange information on certain dual-use transfer approvals and denials to enhance international security and regional stability.

The Wassenaar Arrangement has a series of meetings each year, culminating in the Plenary meeting customarily held in December. Member states also submit export data to the Wassenaar Arrangement twice a year in April and October. BXA is responsible for compiling and submitting data on export of dual-use items on behalf of the United States.

BXA representatives participated in the sixth Plenary session in Bratislava, Slovakia, on November 30-December 1, 2000. For the United States, the most notable accomplishments at the Plenary included significantly liberalized controls on general purpose microprocessors and high performance computers, institution of export controls on Man Portable Air-Defense Systems, and a decontrol of mass market encryption products regardless of encryption-key length. The Plenary also agreed on non-binding best practices regarding effective enforcement of national export controls.

At the Plenary, member countries agreed to study a denial consultations proposal. If adopted, a member country would be required to consult on a proposed export that had previously been denied by another Wassenaar Arrangement member before approving a license for the transaction. Members also agreed to focus consideration on reforming on machine tools, microprocessors, and computers.

In FY 2001, approximately 60 proposals were submitted by member states and discussed in the Wassenaar Arrangement expert group meetings in February and early April 2001. The traditional September meeting was postponed until early November as a result of the terrorist attacks of September 11, 2001. In addition to these export group meetings, BXA also attended various working group meetings throughout the year, addressing such issues as strengthening information exchanges,

implementing “catch-all” controls, and sharing national licensing and enforcement procedures.

In June and August 2001, BXA participated in bilateral consultations between the U.S. and United Kingdom governments on a wide range of Wassenaar issues, such as the dual-use denial consultation procedure and the establishment of a “catch-all” provision. The U.S. and Swiss governments also held bilateral consultations regarding machine tool controls in August and September 2001.

### *Jurisdictional Review of “Space Qualified” Items Completed*

During the past year, a National Security Council (NSC)-chaired interagency group consisting of representatives of the Departments of Commerce, Defense, and State completed its review of 16 categories of items on the Commerce Control List (CCL) that contain “space qualified” items (i.e., items built or designed to satisfy requirements for use in space). The review was to determine whether the export licensing jurisdiction of any of these items should be transferred from the Department of Commerce to the Department of State. In August 2001, the group decided to move five categories of items to State Department jurisdiction (i.e., to the U.S. Munitions List (USML)), to subdivide five categories between the CCL and the USML, and to keep six categories on the CCL. The United States will propose that the Wassenaar Arrangement control lists similarly be changed.

## **Information Technology Controls Division**

### *Encryption*

On October 3, 2000, BXA participated in the U.S. delegation to the Organization for Economic Cooperation and Development (OECD), which met in Paris, France. The BXA representative provided an update on U.S. encryption policy. BXA also participated in an OECD workshop on “Information Security in a Networked World” in Tokyo, Japan, in September 2001.

In October 2000, BXA amended its encryption regulations. The most significant change allows U.S. companies to export encryption items under License Exception Encryption, immediately upon notifying BXA of the intent to export to any end-user in the 15 nations of the European Union, Australia, Czech Republic, Hungary, Japan, New Zealand, Norway, Poland, and Switzerland. Under the October 2000 rule:

- U.S. companies can export certain encryption items such as source code, general purpose toolkits, and high-end routers and switches under new procedures.
- Companies may immediately export products that enable U.S. and non-U.S. origin products to operate together to facilitate the development of next-generation products and to allow greater market flexibility.
- Licenses are required only for “cryptanalytic items,” a specialized class of tools not normally used in commercial environments.

- Export controls were streamlined for beta test software compiled from “open” sources and products that implement short-range wireless encryption technologies, such as HomeRF and Bluetooth.
- Post-export reporting for encryption exports was streamlined.

The U.S. Government has crafted a new encryption policy in part in response to its consultations with other countries, most notably the member states of the Wassenaar Arrangement. Past Wassenaar Arrangement agreements on encryption include:

- In December 1998, members countries agreed to downgrade the export control sensitivity for encryption items from the Sensitive List to the Basic List and replaced the General Software Note with a new cryptography note, implemented in U.S. regulations in January 2000, evaluating encryption items covered by the Wassenaar Arrangement control list. This action led to the easing of export control requirements for encryption products.
- In December 2000, member countries agreed to delete the 64-bit key length restriction in the cryptography note. Based on this agreement, member nations are decontrolling all mass market encryption products, regardless of key length.

The President’s Export Council Subcommittee on Encryption (PECSENC) met throughout FY 2001 to advise the President and the Secretary of Commerce on matters pertaining to the implementation of encryption policy. Since its inception in 1997, PECSENC has worked to support the growth of electronic commerce while protecting public safety and promoting foreign policy and national security interests. PECSENC met twice in FY 2001 to review the national security and business implications of U.S. semi-annual post-export reporting requirements, and to provide BXA with recommendations for changes and updates to the U.S. encryption export regulations. PECSENC disbanded upon the expiration of its charter on September 30, 2001.

U.S. encryption policy and regulations also reflect consultations with the Regulations and Procedures Technical Advisory Committee, Alliance for Network Security, Americans for Computer Privacy, and the Computer Systems Policy Project.

### *High Performance Computers*

Determining appropriate levels of export controls for high performance computers (HPCs) continues to be a priority as improvements in technology significantly enhance system performance levels. Currently, export control levels are based on Composite Theoretical Performance (CTP), which is expressed in millions of theoretical operations per second (MTOPS). The Administration currently is studying alternatives to CTP as a control metric to avoid continuous review cycles, while still maintaining export controls on computers to protect national security.

In October 2000, BXA published a rule expanding the License Exception CTP eligibility level to 45,000 MTOPS for the export of HPCs to Computer Tier 2 countries. The License Exception CTP level for exports to Computer Tier 3 countries also was raised to 28,000 MTOPS. The rule also removed the distinction between civil and military end-users and end-uses in determining eligibility for export to Computer Tier 3 countries under license exception CTP. The October 2000 rule also provided that, effective February 2001, HPCs with a CTP less than or equal to 28,000 MTOPS did not require advance notification before export or reexport. Additionally, the rule reflected the move of Argentina and Lithuania from Computer Tier 2 to Computer Tier 1. Estonia was moved from Computer Tier 3 to Computer Tier 2.

In January 2001, the Administration made additional adjustments to U.S. policy on HPC export controls, and BXA issued a rule to reflect these adjustments. All countries in Computer Tier 2 were moved to Computer Tier 1, and Computer Tier 2 was eliminated. The Administration made this change because it was determined that those countries formerly in Computer Tier 2 did not pose proliferation or security threats to the United States. Additionally, all HPCs are eligible for export to Computer Tier 1 countries under License Exception CTP.

Pursuant to the adjustments in January 2001, BXA also expanded License Exception CTP eligibility for HPC exports and reexports to Computer Tier 3 countries from 28,000 to 85,000 MTOPS. Finally, the January 2001 rule raised the advance notification requirement level for HPC exports to Computer Tier 3 countries to 85,000 MTOPS, effective March 2001. Therefore, advance notifications were no longer required for HPCs eligible for export or reexport to Computer Tier 3 countries under License Exception CTP. Although post-shipment reports are no longer required for exports of HPCs eligible for License Exception CTP, as of the end of FY 2001 reports still had to be submitted for exports of HPCs above the 85,000 MTOPS level.

## **Foreign Policy Controls Division**

### *Foreign Policy Controls*

#### Trade Sanctions Reform and Export Enhancement Act of 2000

On October 28, 2000, the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) (Title IX of Public Law 106-387) was signed into law. With certain exceptions, TSRA prohibits the imposition of new unilateral sanctions on exports of agricultural and medical exports to foreign countries or foreign entities without the approval of the Congress and also requires the lifting of any unilateral sanctions on agricultural and medical exports to such countries and entities that existed on the date of enactment. TSRA also restricts the export of agricultural and medical exports to designated terrorist-supporting countries. On July 12, 2001, BXA and the Department of the Treasury's Office of Foreign Assets Control (OFAC) published rules implementing provisions of TSRA that affect exports of agricultural and medical items to Cuba, Iran, Sudan, and Libya. These rules became effective on July 26, 2001.

On September 6, 2001, BXA and OFAC, in coordination with the State Department and the National Security Council, submitted to the Congress a set of proposed technical amendments to the TSRA; these amendments were subsequently enacted into law early in FY 2002.

### BXA Participation in Interagency Sanctions Reform Discussions

BXA has participated in interagency working groups led by the National Security Council that were established to consider sanction reform, review proposed legislation, and develop proposals to rationalize the sanctions process. The ultimate goal is a sanctions policy that is carefully targeted, truly advances U.S. foreign policy goals, and avoids unduly harming U.S. economic interests.

### **Country-Specific Activities**

#### *China*

BXA and China's Ministry of Foreign Trade and Economic Cooperation co-hosted a government/industry seminar in Shanghai on October 26-27, 2000. This was the first export control cooperation between the U.S. and Chinese governments since May 1999.

#### *Cuba*

BXA implemented the requirements of TSRA for exports of agricultural commodities to Cuba and created a License Exception Agricultural Commodities (AGR) to permit exports to Cuba of agricultural commodities that are classified EAR99 (i.e., not specifically identified on the Commerce Control List). To utilize License Exception AGR, the exporter must first submit to BXA a notification of the proposed export. If the reviewing agencies do not object to the proposed export, BXA will notify the exporter that he/she may ship using License Exception AGR. Except for shipments of commercial samples or donations, all other exports under License Exception AGR must be made pursuant to a written contract and must take place within one year of signing the contract. This new provision for Cuba was not utilized very frequently in FY 2001.

Exports and reexports of medicines and medical devices to Cuba are not eligible for License Exception AGR because TSRA did not supersede the specific licensing requirements for medicines and medical devices set forth in the Cuban Democracy Act of 1992. However, these medical commodities remain eligible for export under existing license application procedures, and licenses granted are valid for two years.

#### *Federal Republic of Yugoslavia (Serbia and Montenegro)*

On May 4, 1999, BXA imposed comprehensive sanctions on Serbia because of the conflict in Kosovo. The ousting of Slobodan Milosevic and the democratic elections in October 2000 paved the way for the easing of U.S. sanctions on Serbia. BXA published a rule on March 1, 2001, generally restoring Serbia to the export control status it held prior to May 4, 1999. Under this March 2001 rule, U.S.

persons now may export and reexport many items to Serbia without a license. However, BXA maintains certain special restrictions on designated persons. U.S. persons may not export or reexport any item subject to the EAR to any person designated pursuant to Executive Order 13088, as amended by Executive Order 13192 of January 17, 2001. These persons include Slobodan Milosevic, designated family members and close associates, and persons indicted by the International Criminal Tribunal for the Former Yugoslavia.

In 1998, BXA implemented an embargo on the export to the Federal Republic of Yugoslavia (FRY) of arms and related materiel subject to the EAR, consistent with United Nations Security Council Resolution 1160. In September 2000, the U.N. Security Council terminated the arms embargo imposed under Resolution 1160. BXA is working to amend the EAR to remove the denial policy that applies to the export of arms and related materiel to the FRY.

### *Hong Kong*

Under the Hong Kong Policy Act of 1992, Hong Kong receives the same export licensing treatment that was in effect before China regained control of Hong Kong, provided Hong Kong maintains an effective and autonomous export control system. BXA continuously monitors the status of Hong Kong's post-reversion export control system to ensure it continues to be effective and autonomous from that of the People's Republic of China.

Under an Agreed Minute on Strategic Commodities Trade Controls (Agreed Minute) signed in October 1997, BXA and its Hong Kong counterpart agency hold semi-annual meetings to exchange information and enhance cooperation. BXA officials hosted interagency consultations with Hong Kong representatives in Washington in May 2001, the sixth round of talks held since the signing of the Agreed Minute. U.S. officials briefed their Hong Kong counterparts on developments in the multilateral control regimes, and the movement of Hong Kong – along with other formerly Computer Tier 2 countries – into Computer Tier 1 for purposes of exports of HPCs. Both sides provided updates on licensing and enforcement issues in their respective systems. The Hong Kong representatives agreed to share data on the disposition of HPCs with a CTP greater than 85,000 MTOPS exported to and reexported from Hong Kong. Officials from the Departments of State and Defense also participated in the consultations.

### *India/Pakistan*

In 1998, in response to the detonation of nuclear devices by India and Pakistan, the United States imposed a policy of denial for the export or reexport of United States-origin items controlled for nuclear proliferation and missile technology reasons to all end-users in India and Pakistan. These sanctions were imposed pursuant to Section 102 of the Arms Export Control Act (AECA). Section 102 was added to the AECA by Section 826 of the 1996 Foreign Relations Authorization Act (the "Glenn Amendment"). Prior to the sanctions, the United States reviewed applications for these items

on a case-by-case basis with a presumption of approval to appropriate end-users.

During FY 2001, the State Department led interagency discussions on possible changes to U.S. foreign policy in Southeast Asia, including export controls. On September 22, 2001, the President announced his decision to waive the application of sanctions placed on India and Pakistan in May 1998.

In November 2000, the U.S. Government imposed sanctions on Pakistan as a result of Pakistan's purchase of Chinese missile technology. This new action created a policy of denial for items that require a license to the Pakistan Ministry of Defense and the Space and Upper Atmosphere Research Commission, including all sub-units, for a period of two years.

### *Israel*

During FY 2001, the U.S. and Israeli governments continued consultations on a number of export control issues. In November 2000, an Israeli government official reviewed BXA's electronic license submission system to assist the Israeli government's plans to adopt a similar electronic system. Officials from these two countries met again in December 2000, for discussions on pending license applications for exports to the Israeli government and future relations between the two governments.

In April 2001, BXA hosted a delegation from Israel to discuss encryption controls. BXA briefed the delegation on its ongoing work in encryption and the proposed changes in U.S. regulations based on the December 2000 Wassenaar Arrangement agreement to decontrol mass market encryption products regardless of key length. The Israeli delegation explained their encryption controls, which regulate the export, import, and domestic use of encryption products. The delegation participated in the open session of a meeting of the President's Export Council Subcommittee on Encryption. The next bilateral discussions between the United States and Israel are scheduled for early FY 2002.

### *North Korea*

In late October 2000, BXA and the American Chamber of Commerce of Korea co-sponsored an export control seminar in Seoul, Republic of Korea. BXA representatives reviewed U.S. export control policy for North and South Korea, and explained that the June 2000 liberalization of U.S. export controls on exports to North Korea involved removing a license requirement for the export and reexport of items subject to the EAR that are classified as EAR99 (e.g., not specifically identified on the Commerce Control List). Items on the Commerce Control List continue to require a license to export to North Korea. BXA received very few license applications for North Korea during FY 2001.

### **Transshipment Initiatives**

During FY 2001, BXA participated in a number of consultations and programs with the governments of major transshipment nations to emphasize the importance of export controls. The following meetings took place:



- In November 2000, officials from Singapore participated in Export Enforcement's multinational Transshipment Conference in San Diego, California. Throughout 2001, BXA officials met with officials from Singapore to clarify U.S. export control requirements for HPCs and encryption products.
- In January 2001, BXA representatives visited Malaysia and the United Arab Emirates (UAE) for bilateral export control consultations. These countries expressed interest in a continued dialogue.
- In January 2001, a BXA representative participated in a U.S. Government delegation that visited Malta and Cyprus to discuss export control issues with a focus on export enforcement.

### **Multilateral Cooperation**

In November 2000, BXA and other U.S. government officials led an export control discussion in Tokyo, Japan, as part of a month-long seminar sponsored by the government of Japan for licensing officials from Asian countries. BXA also participated in an international export control conference in Taipei, Taiwan.

In February 2001, BXA officials attended the Eighth Annual Asian Export Control Seminar in Tokyo, sponsored by the governments of Japan, the United States, the United Kingdom, and Australia. Fourteen Asian governments and two autonomous regions (Hong Kong and Macau) attended the seminar that was designed to provide information on export controls to Asian governments. Some of the governments in attendance have just begun to develop comprehensive export control systems. BXA officials made presentations on industry-government relations and post-licensing enforcement, and chaired a small-group discussion on transshipment issues. In addition to attending the seminar, the U.S. delegation, which included representatives from the Department of State as well as officials from the U.S. Embassy in Tokyo, held bilateral discussions on export control cooperation issues with delegations from Japan, China, and Malaysia.

In May 2001, BXA representatives participated in meetings with U.K. and Danish government officials in Copenhagen, Denmark, to plan the agenda for the third Conference on Export Controls held in September 2001 in the United Kingdom. The United States and the United Kingdom cohosted the conference. Thirty countries participated in the conference and considered the status of the global export control system, assessed efforts to assist the nations of the former Soviet Union and Central Europe to establish and strengthen national export control programs, and developed recommendations for strengthening the global export control system. Attendees were interested in a number of issues, particularly provisions relating to the transfer of intangible technology and "catch-all" provisions designed to prevent the export of commodities not identified on control lists to proliferation end-users and end-uses that raise proliferation concerns.