January 1987

Export Controls on High Technology

Nancy K. Frank

Follow this and additional works at: http://digitalcommons.law.scu.edu/chtlj

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara High Technology Law Journal by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
I. INTRODUCTION

Pursuant to the Export Administration Act of 1979¹ (the "1979 Act") as amended by the Export Administration Amendments Act of 1985² (the "Amendments") (collectively referred to as the "Act"), all commodity and technical data exports from the United States of commodities and technical data are subject to a system of export controls. Every export must either be authorized under a general license or exported according to the terms of a validated license. The Export Administration Regulations (the "Regulations")³ which implement the Act are regularly revised to incorporate the changes in current United States foreign and domestic policy, as well as changing technical developments. Keeping up-to-date with the Regulations can be a challenge for even the most experienced exporter. This paper provides an overview of the Act and the Regulations, focusing on export controls as they apply to the high technology industry.

II. THE ADMINISTRATION OF EXPORT CONTROLS

The Act imposes two basic types of export controls, the export licensing requirements and the antiboycott restrictions. All exported items, including commodities and technical data, are subject to both the export licensing requirements and the antiboycott restrictions.

Section 3 of the Act states that the purpose of export controls is threefold. Controls are to be used: (1) to restrict the export of goods and technology which could make a significant contribution

---

³ Export Administration Regulations, 15 C.F.R. §§ 368.1-368.4.
to the military potential of any other country or combination of countries and could prove detrimental to the national security of the United States; (2) to restrict the export of goods and technology where necessary to significantly advance the foreign policy of the United States or to fulfill its declared international obligations; and (3) to restrict the export of goods, where necessary, to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.4

The federal government attempts to strike a balance between these goals and its desire to encourage free trade and improve the current trade deficit.5 The Act and the Regulations reflect the underlying tensions resulting from government efforts to reconcile these often conflicting goals under a system of export controls. One commentator points out that while the United States government has taken significant steps towards deregulating much of the American economy, it has not deregulated the international high technology industry.6 In fact, as the technology becomes more sophisticated, high technology exports are becoming more regulated and more strictly controlled. U.S. manufacturers and distributors of sophisticated high technology products find themselves caught in the political policy struggles among the advocates of free and unrestricted trade, the protectors of national security and the advocates of foreign policy controls. As commercial innovations lead to more sophisticated military applications, the tensions between trade and control will be exacerbated. The trend towards smaller, faster, more portable and highly capable business and personal computers makes the potential for military application of civilian technology both possible and probable. The Western countries are committed to preventing or, at least making more difficult, the diversion of vital technology to the Soviet Union and the East Bloc nations.7

There are five statutory bases for imposing the U.S. export controls. Commodities and technical data may be controlled for national security, foreign policy, short supply, nuclear non-proliferation or crime control reasons. For most exports, the Government imposes limited controls. However, exports of certain groups of commodities, involving specific levels of technologies, destined for particular countries, are strictly controlled and require

5. T. Murphy, Technology Transfer Problems and Prospects, a paper given at the Wilton Park Conference (British Foreign and Commonwealth Office) and European High-Tech. Industries (July 8, 1985).
6. Id.
7. Id.
authorization through validated licenses generally issued by the Department of Commerce, Office of Export Administration ("OEA"). Countries are divided into "Country Groups" to which the Government applies similar export restrictions. A copy of the Country Groups is attached as Appendix A.

The following five types of transactions are regulated: (1) direct exports of U.S. goods and technical data; (2) reexports of U.S. goods and technical data from one foreign country to another; (3) foreign use of U.S. goods as parts and components of foreign-made products and the disposition of those products; (4) disposition of foreign-made "direct products" of U.S. technical data; and (5) exports of purely foreign products by foreign companies controlled by U.S. persons.

The Act requires the Department of Commerce ("Commerce") to consult with other government agencies, primarily the Departments of State and Defense, in order to coordinate their export administration activities. Commerce must also consult with the Coordinating Committee ("COCOM"), a multilateral group of fifteen member countries. COCOM is charged with the responsibility of developing uniform control policies on the export of computer hardware, computer software, telecommunications switching equipment and related technology to prevent such products and technology from being directed to the Soviet Union and the other communist countries in the Eastern Bloc. COCOM review is required for certain commodities going to certain countries and must be obtained after the necessary United States agencies have approved a transaction.

III. OVERVIEW OF THE EXPORT ADMINISTRATION AMENDMENTS ACT OF 1985

On July 12, 1985, President Reagan signed into law the Export

---

8. Export controls may also be administered by other government departments, e.g., Department of State (export of arms, ammunition, implements of war and related technical data), Department of Defense (arms, ammunition), National Security Counsel (arms, ammunition), Treasury Department (antiboycott rules, enforcement); Department of Energy (special nuclear equipment and related materials); Department of Justice (narcotics); and the Maritime Administration (certain water-craft).

9. The COCOM countries are: Belgium, Canada, Denmark, France, The Federal Republic of Germany, Greece, Italy, Japan, Luxembourg, The Netherlands, Norway, Portugal, Turkey, the United Kingdom and the United States.

10. The OEA recently published final rules amending the processing times and procedures relating to license reviews by federal agencies and COCOM. See 15 C.F.R. Parts 370.15, 372 and 386 (1985).
Administrative Amendments Act of 1985 (the "Amendments")\(^1\) which reenacts and amends the 1979 Act.\(^2\) The Amendments represent one of the most significant revisions of United States export control legislation since its introduction following World War II.

Any discussion of export controls involves several contradictory political American policy goals.\(^3\) There is the goal of open international trade. Advocates of open trade, among them, exporters of high technology products, believe the well-being of the United States requires a strong export program. In their view, open markets and a favorable international balance of payments are paramount to America's strength. They believe increased commercial relationships with the traditional enemies of the United States will result in an amelioration of global tensions.\(^4\)

There is also the goal of safeguarding the national security. Advocates of that policy goal believe the most effective way to protect the national security of the United States is to control the diversion of any commodity or technology that could possibly help the Soviet Bloc. They believe that all technology, even low technology, could have some strategic application and that technology once considered solely "civilian technology" is easily adaptable to military use. The advocates of a strong national defense believe the


United States must make every effort to prevent any diversion of technology to its adversaries. These advocates lobby for even more stringent controls. They do not believe the other COCOM member states have as strong an interest in preventing diversion of goods and technology to the Soviet Bloc as does the United States. They would impose even tighter unilateral controls on a wider range of products.\(^\text{15}\)

There is another political goal, often complementing the strong security goal. That goal is the ability to influence political friends and enemies through United States' trade sanctions.\(^\text{16}\) Proponents of the use of sanctions through foreign policy export controls, believe that such controls can be instrumental in bringing about changes in the the policies of foreign governments. These advocates are the policy-makers who argued that the 1979 grain embargo and 1980 embargo on natural gas and petroleum equipment exports to the Soviet Union would be instrumental in forcing the Soviets to conform their conduct to norms of behavior approved by the United States or, at least would serve as a symbolic protest against the Soviet Union’s human rights violations.

Exporters find themselves caught between the substantive policy differences and the bureaucratic rivalries within both Congress and the Administration. The Congressional Hearings reveal that among exporters, there is a general consensus as to export policy. Most agree with the need for multilateral controls of goods and technology critical to the military. However, they strongly object to imposing unilateral controls, especially when such controls are imposed on products widely available from international sources. As a group, exporters vehemently object to retroactive controls which disrupt existing contracts and result in their being considered unreliable suppliers. Further, they oppose and object to extraterritorial controls imposed on their foreign subsidiaries, distributors or customers.\(^\text{17}\)

The exporting community is concerned with predictability. They must have predictability in the licensing process, predictabil-

\(^{15}\) See Senate Hearings on Reauthorization of the 1979 Act supra note 13, at 5 (statements of Senator Jake Garn; Richard Perle, Assistant Secretary for International and Security Policy, Department of Defense; William Schneider, Under Secretary for Security Assistance, Department of State); House Hearings on Technology Transfers, supra note 13, (statement of Richard Perle, Assistant Secretary for International Security Policy, Department of Defense); Senate Oversight Hearings on the Act (statement of Senator Sam Nunn).


\(^{17}\) Id.
ity in the determination of which commodities and technologies will
be controlled, and predictability in the enforcement of those
controls. The 1979 Act did not provide exporters with the predict-
ability required to establish and sustain international trading
relationships.

A 1983 case which appeared in the record of the Senate Sub-
committee on International Finance and Monetary Policy, illustrates the problems faced by exporters under the 1979 Act. It is the
case of Marco Industries, a shipbuilder, headquartered in Seattle.
Marco designs, builds, and supplies hydraulic deck machinery and
outfitting materials to commercial shipping vessels. It both con-
structs completed vessels and licenses the construction of vessels
abroad. Export trade is critical to Marco’s economic well-being.
Under the company licensing arrangements, Marco supplies every-
thing required for the construction of a vessel.

In 1971 there was a boom in the commercial shipbuilding in-
dustry. Marco was able to supply the majority of hydraulic deck
machinery and standard marine electronics equipment to foreign
shipbuilders. Until 1983, the Company had no problem exporting
its products under the 1979 Act; the individual components that
made up the shipments were all covered under general licenses.
Not only were the components of little strategic value, they were
widely available in the international market.

On January 27, 1983, Marco learned from its customs broker
that a shipment destined for Italy, worth $250,000, had been de-
tained under “Operation Exodus.” Marco was under a time con-
straint because its Italian customer’s letter of credit was to expire
January 31. The Customs Inspector at the border, unable to resolve
the matter, forwarded the problem to the Customs Control Center
in Washington D.C. On February 3, the customer’s letter of credit
expired and Marco was forced to request an extension from its cus-
tomer. On February 7, the Customs Control Center advised Marco
that four of forty-two items in the shipment were still in question
and that the Customs Service needed more information on all items
to complete its review. Marco sent specifications for each product
to Washington along with invoices identifying each item.

After not hearing from the Customs Service within a reason-

18. Senate Hearings on Reauthorization of the 1979 Act, Marco letter by Charles R.
Hart to Senator Gordon at 456.

19. Operation Exodus is a program initiated by the Customs Service in 1981 to prevent
illegal exports of technology by inspecting outbound shipments at U.S. borders and points-of-
entry.
able time, Marco contacted the Undersecretary of Trade at the International Trade Commission (the "ITC"). The ITC referred Marco to the Commerce Department in Washington, who referred the Company back to the District Enforcement Branch of Commerce in Los Angeles. The Los Angeles Office of Export Enforcement (the "OEE") advised Marco that now all forty-two items were suspect and that the OEE would need additional information from the company. Ten days later, hearing nothing, Marco called both the Washington headquarters of OEE and the Customs Service. Marco was advised by Commerce that a product which had been exportable under a general license, now required an individual validated license. Marco was also asked by OEE to send duplicate documentation because the documentation it had previously sent had been misplaced.

By February 23, 1983, the date of a Marco letter to Senator Slade Gordon of Washington regarding the matter, little had been resolved and the second letter of credit was expiring. Marco stated to Congress that it anticipated the customer would exercise its only option available and buy the equipment from other international sources so that it could complete its contract without incurring any delay penalties. Marco noted pessimistically that an identical shipment to the same customer was now in serious jeopardy.

A. Historical Abstract

The 1985 Amendments were intended to remedy problems like those faced by Marco. Debatably, no single piece of legislation in history gives more power to the President in controlling American commerce. Originally conceived after World War II to avert shortages of basic commodities, the export control program quickly became primarily directed towards restricting exports to communist nations.

By 1950, most exports to the Soviet Union and Eastern Europe had been placed under control. Because of concern with diversion of U.S. products for reexport to third parties, for example the communist nations, many product exports to other nations were controlled as well. These extensive East/West trade restrictions on a broad range of commodities were justified on national security grounds. The Eisenhower administration perceived Soviet dominance in Eastern Europe to be a threat to U.S. interests. American involvement in the Korean conflict led to an embargo on exports to

20. See generally, Berman and Garson, United States Export Controls — Past, Present and Future, 67 Colum. L. Rev. 791 (1967); Abbott, supra note 16.
North Korea and the People's Republic of China. President Ken-
edy embargoed exports to Cuba in 1962; President Johnson em-
bargoed exports to North Vietnam in 1964; and President Ford, to
Vietnam and Cambodia in 1975. The embargo was extended most
recently to Nicaragua and to Libya. With the exception of the Peo-
ple's Republic of China, an embargo on all exports to all these na-
tions has been and is now justified on foreign policy grounds, rather
than on the original national security grounds.

The national security rationale for strict export controls be-
came less compelling after Joseph Stalin's death. Western Europe
took advantage of the more relaxed political climate and expanded
its trade with the Soviet Union and the East European countries. The United States did not relax its controls during the 1960's.

Under President Nixon's policy of detente, U.S. trading with
the East expanded and Commerce began to dismantle American
unilateral controls. The dismantling accelerated during the 1970's
under the Export Administration Act of 1969 (the "1969 Act").21
The American controls now more closely corresponded with con-
trols imposed by other major Western nations. American controls
were primarily national security controls of dual use technology.
Foreign policy controls were not used extensively.

In fact until the late 1970's, foreign policy controls were lim-
ited to embargoes, controls to implement United Nation's actions,
controls restricting export nuclear items and controls aimed at pre-
serving international stability and fighting terrorism.22

By 1977 and 1978, United States-Soviet relations had improved
considerably and the world economy was changing. The United
States no longer claimed a monopoly on high technology. High
technology goods were being imported into the United States and
U.S. sellers had to look abroad to open new markets. Business
found that the export controls imposed under the 1969 Act were
cumbersome and unfairly and unevenly administered. They com-
plained that in some instances controls were unnecessary because
many of our trading partners were able to secure equivalent goods
and technology from foreign sources. The 1979 Act was intended
to be responsive to the concerns of the Defense Department, the
State Department and the business community.23

However, between 1979 and 1982 when Congress took up

reauthorization, the climate surrounding export policy had changed dramatically. President Reagan came into office with a strong anti-Communist bias. Casper Weinberger, the Secretary of Defense, dedicated himself to strengthening the U.S. armed forces and preventing the diversion of any technology which could be broadly defined as “strategic.” There was also evidence that the Soviets had engaged in an extensive military build-up and posed a greater threat to U.S. security than they had in 1979. Secretary Weinberger and Assistant Secretary Richard Perle insisted that there was a “hemorrhage” of United States technology and that this leakage had enabled the Soviet Union to accelerate its weapons build-up by at least ten years.24

Simultaneous with an American weapons build-up by Secretary Weinberger, a world-wide and domestic recession increased business’ need for a consistent export policy. Without a consistent policy, the exporters argued they could not develop new markets or maintain established trading relationships. President Carter’s grain embargo and President Reagan’s gas and petroleum pipeline embargo had done considerable damage to the reputations of American exporters. They were considered unreliable suppliers who were subject to licensing delays at best, and non-performance at worst.25

The 1979 Act had attempted to strike a compromise between the demands for increased protection of United States national security, the ability to use trade leverage in the conduct of foreign policy and predictability in the export licensing process. Clearly something more was needed.

Congress debated the export controls legislation for two-and-a-half years. It heard testimony from the Defense, Commerce, and State Departments; the Customs Service; and from the business and the academic communities. As in 1979, Congress was faced with reconciling conflicting political goals and deep philosophical differences.26 While there was a near compromise in the 98th Congress, Congressional leaders failed to reach agreement on the extension by the end of the session. Jurisdictional, political and regulatory policy differences still divided both the House and the Senate. The Act expired, but its controls were extended under the International Emergency Economic Powers Act.27

25. See generally The Hearings, supra note 13.
The 99th Congress wanted to avoid repetition of the bitter battles of the 98th Congress and so the renewal bill embodied the compromise reached in 1984. The bill was accompanied by a full report and a Joint Explanatory Statement. It was signed into law by President Reagan on July 12, 1985.

After two-and-a-half years of debate, Congress finally had forged what it considered to be a reconciliation of the differing points of view. According to its authors, the goals of the Amendments are: (1) to reduce the number of goods and technologies subject to export controls; (2) to increase and improve the security of any foreign sale of our most sophisticated and militarily critical technology; (3) to improve the efficiency of the exporting process so as not to unduly handicap our exporters' ability to be competitive; and (4) to establish a set of criteria and procedural requirements to govern the use of foreign policy controls. The Conference Committee Report states that the Amendments attempt to meet these goals in four ways: (1) By strengthening national security controls; (2) by restricting the President's authority to impose foreign controls; (3) by streamlining the exporting process; (4) and by beefing up and improving the efficiency of enforcement efforts. The following discussion highlights the significant changes from the 1979 Act.

B. National Security Controls

The Amendments require the Secretaries of Defense and Commerce to consult each other on export policy and to integrate items on the List of Militarily Critical Technologies into the Control List (formally called the Commodities Control List). The Control List is to be reviewed annually and the annual reviews must include a review of at least one-third of the COCOM list. Commerce and Defense are advised to reduce the number of items on the list.

The foreign availability provisions of the National Security Controls represent a significant improvement to the 1979 Act. The amendments shift the burden of proof from the exporter to the Commerce Department and require Commerce to prove a product is not available internationally. They also require the Secretary to

---

48215; the second extension was promulgated on March 30, 1984 by Executive Order No. 12470, 49 Fed. Reg. 13099.
29. See supra note 2.
establish an Office of Foreign Availability and to negotiate with foreign governments to eliminate foreign availability of controlled commodities.33

In the near future it is unlikely that the foreign availability provisions will afford much relief to U.S. exporters. The test of foreign availability is whether a commodity is available-in-fact in a controlled country in both comparable quality and comparable quantities so as to make unilateral U.S. expert controls meaningless.34 Foreign availability procedures do not apply to West/East transactions. That is, a U.S. exporter cannot look to a Western country such as the United Kingdom or Japan to show a comparable controlled product is available internationally. Presumably, that controlled product is not "available" because it is controlled by COCOM. The comparable product in comparable quantities must be available in a non-Western country.35

The penalties for violations of national security export controls were made more severe. Under the Act, it is a criminal offense to intentionally evade the national security controls. If convicted, a panoply of criminal sanctions may be imposed against the violator. Those sanctions include the following:

1. A business can be liable for five times the value of the export or one million dollars, whichever is greater;
2. An individual can be liable for criminal fines of up to $250,000 or ten years imprisonment or both;
3. Both the business and the exporter can be denied export privileges;
4. They can each be liable for a civil penalty of up to $100,000; and
5. The illegally exported goods will probably be seized.36

The Amendments also add import restrictions against foreign violators of U.S. export controls. A foreign company, not subject to U.S. jurisdiction, which willfully violates the national security export controls can be barred from importing its goods into the United States.37

At the same time, the Amendment tries to reconcile academic freedom and national security. It states that in traditional academic

---

34. 15 C.F.R. Part 391 (1986).
35. A non-Western country means a country other than a COCOM country or a country with a bilateral control agreement with the United States.
scientific activities, those involving universities engaged in scientific research, scholars should be free from restriction with respect to their exchanges in the open classroom and conferences unless a scientific question is subject to security classification.\textsuperscript{38}

C. Foreign Policy Controls\textsuperscript{39}

In order to promote foreign policy objectives, the Act gives the President the power to impose controls on the export of goods and technology to certain target countries which are not otherwise subject to export controls because of national security reasons. The Amendments make significant changes to the President's ability to impose such foreign policy controls.

As discussed above, the reputations of American exporters has been severely damaged by previous embargoes. One of the most hotly contested issues in the debate over the extension of the 1979 Act was whether the President's authority extended far enough to require the breaking of existing contracts and licenses. Many in Congress wanted to avoid any retroactive application of foreign policy export controls on American companies.\textsuperscript{40} The Amendments add a "contract sanctity" provision which removes the President's authority to terminate existing contracts for foreign policy reasons unless the President certifies to Congress that a breach of the peace poses a serious and direct threat to the strategic interests of the United States. He must also certify that the curtailment of existing contracts will be instrumental in remedying the situation, and the United States can enforce the controls. Such foreign policy controls can remain in effect only so long as the direct threat continues to exist.\textsuperscript{41}

The Amendments significantly tighten the criteria the President must meet in order to impose foreign policy controls. Sanctions can only be used after all other channels of diplomacy have been tried and the President has conducted an analysis of the probable costs and benefits involved in imposing controls. Six months after the date the foreign policy controls are imposed, the Secretary of Commerce must determine whether there is foreign availability of any controlled product. If the Secretary determines that any

\begin{itemize}
\item \textsuperscript{39} 50 U.S.C. § 2405 (1985).
\item \textsuperscript{40} See generally, Senate Hearings on Reauthorization of 1979 Act; Senate Foreign Relations Hearings; Joint Explanatory Statement, supra note 13.
\item \textsuperscript{41} 50 U.S.C. app. § 2405(b) (1985).
\end{itemize}
commodity or technology is available internationally, he must remove the commodity or technology from the Control List.\textsuperscript{42}

One important foreign policy control involves doing business with or in South Africa. The Amendments reimposed certain prior export controls on South Africa for a renewable one year period.\textsuperscript{43} On November 18, 1985, the Department of Commerce issued final rules regarding trade and other transactions with South Africa.\textsuperscript{44} These rules require a validated export license for all exports to South African military and police entities even though the export could be made under a general license to other parties in South Africa.

\textbf{D. Streamlining the Exporting Process}

The Amendments mandate that the export application review process be streamlined. They do this by decontrolling products which were restricted solely because they contained microprocessors.\textsuperscript{45} In this way, Congress estimated that it eliminated the need for some forty percent of the volume of export licenses required prior to the Act.\textsuperscript{46}

The Amendments mandate a fifteen-day license processing time for certain relatively low technology exports destined to COCOM countries.\textsuperscript{47} It gives these privileges to non-COCOM countries who agree to control commodities and technologies in the same manner as COCOM.\textsuperscript{48}

The Amendments also reduce application review processing times by as much as one-third.\textsuperscript{49} Unfortunately for exporters, no additional funds were allocated to expand the Office of Export Administration staff and, in light of budgetary constraints, it is highly unlikely the OEA and the other reviewing agencies will be able to meet the time constraints. Neither OEA nor Defense is currently meeting their respective deadlines.

The Amendments encourage the use of special licenses authorizing multiple exports for "reliable" exporters and their customers. Also added is a new special license, the Comprehensive Operations

\begin{itemize}
\item \textsuperscript{42} 50 U.S.C. app. § 2405(h) (1985).
\item \textsuperscript{43} 50 U.S.C. app. § 2405(a) (1985).
\item \textsuperscript{44} 15 C.F.R. Parts 371, 373, 379, 385, 386, and 399 (1985).
\item \textsuperscript{45} 50 U.S.C. app. § 2405(m) (1985).
\item \textsuperscript{46} Joint Explanatory Statement, supra note 13.
\item \textsuperscript{47} 50 U.S.C. app. § 2409(o) (1985).
\item \textsuperscript{48} 50 U.S.C. app. § 2404(k) (1985).
\item \textsuperscript{49} 50 U.S.C. app. § 2409 (1985).
\end{itemize}
License. This license is intended to better regulate technology exchanges and to facilitate cooperative innovation and the transfer of know-how among affiliated companies including subcontractors and suppliers of the international operations of U.S. exporters and joint venturers.

E. Enforcement

The Amendments expand the enforcement provisions of the Act and impose tougher penalties on those violators of the national security and foreign policy controls. They add enforcement powers and clarify the responsibilities of the Customs Service and the Department of Commerce. (See the discussion of Enforcement in Section IX, infra at p.132.) The question is whether Customs and Commerce can truly work together in their enforcement efforts.

IV. EXPORT CONTROLS ON COMPUTERS AND COMPUTER SOFTWARE

Pursuant to Section 5(i) of the Act (National Security Controls), the United States entered into certain agreements with COCOM members to establish a uniform policy on export control. The Amendments require further cooperation with COCOM to more effectively deter diversions of controlled items. The OEA is charged with the responsibility of implementing the international agreements. On December 31, 1984, without public comment, OEA published its final rules implementing certain COCOM agreements (the “December Amendments”). These December Amendments: (1) decontrolled certain low-level computers, certain “embedded” or “incorporated” computers and certain low-level peripheral equipment; (2) raised the level of controls on more powerful commercial computers and imposed stricter controls on compact, “ruggedized” computers, super minicomputers and other more sophisticated computer-related products; (3) imposed significantly more controls on all categories of software; and (4) established definitions to assist exporters in interpreting and applying

54. See 15 C.F.R. § 399.1 (1985). These computer and computer-related controls are listed in CL Number ECCN 1565A. See also, 51 Fed. Reg. 1493 (1986) conforming 15 C.F.R. § 376.10 to ECCN 1565A.
55. “Ruggedized” computers are computers built for military combat situations.
the export control rules as those rules relate to computers.\textsuperscript{56}

The December Amendments also established a separate control category for stored program controlled communication switching equipment and related software.\textsuperscript{57}

The December Amendments were met with such stormy protest from industry that on April 26, 1985, the OEA published new rules (the "April Amendments").\textsuperscript{58} The April Amendments completely revised the December Amendments as those rules related to computer software and clarified the scope of the rules relating to controls on "embedded" computers and related peripherals.\textsuperscript{59} Under the April Amendments, most unbundled software does not need a validated license but may be exported to Country Groups T and V under a General License GTDR, while certain other software requires a validated license. Certain software which can be exported under a General License GTDR requires "written assurances" from the consignee that the software will not be reexported to a controlled destination without a validated license. (See the discussion on Technical Data and Software in Section V.A.2., infra at p. 122.)

V. EXPORT LICENSING

To enforce its controls, the Act mandates an export licensing system. All exports from the United States of any commodity or technical data must be authorized under either a general license or a validated license issued by the Department of Commerce or another government agency.

A general license comes into being by operation law.\textsuperscript{60} It is a certification given by an exporter clearly identifying on the Shipper's Export Declaration that the export falls within one of the general license categories and that a validated license is not required.\textsuperscript{61} No application is required and the OEA does not issue a document.\textsuperscript{62}

\textsuperscript{56} See supra note 54.
\textsuperscript{57} See 15 C.F.R. § 399.1 (1985). Stored program controlled communication switching equipment and related software listed in CL Number ECCN 1567A.
\textsuperscript{58} 15 C.F.R. §§ 379.4, Supplement 3 to Parts 379 and 399 (1985).
\textsuperscript{59} For an excellent discussion of the December Amendments and the April Amendments, respectively, see, McKenzie, Changes in Export Controls on Computers and Software, 2 THE COMPUTER LAWYER 1, 28 (January 1985); and McKenzie, Recent Developments in Contracts [sic] on Software Exports, 2 THE COMPUTER LAWYER 5 (May 1985).
\textsuperscript{60} 15 C.F.R. § 371.1 (1986).
\textsuperscript{61} 15 C.F.R. § 371.2 (1986).
\textsuperscript{62} 15 C.F.R. § 371.1 (1986).
A validated export license is a formal authorization issued by
the OEA. It permits the exporter to ship a specific amount of a
particular commodity to a specific consignee in a country for a des-
ignated use.

A. General License

There are a number of different general licenses. Following is a
discussion of some of the more widely used general licenses.

1. Commodities

   a. General License G-DEST\textsuperscript{63}

      The majority of exports are shipped under a General License
      G-DEST (General Destination). A General License G-DEST au-
      thorizes shipments of any commodity listed on the Control List to
      any destination for which a validated license is not required.

   b. General License GLV\textsuperscript{64}

      A General License GLV (Shipments of Limited Value) autho-
      rizes the export of a single order of a controlled commodity when
      the commodity is normally shipped pursuant to a validated license
      but the total order amount is valued within the GLV dollar value
      limit specified on the CL. The value of the order, not the shipment
      value, determines the authorization. Shippers may not split an or-
      der to create shipments which would fall within the GLV dollar
      limit.

   c. General License GLR\textsuperscript{65}

      General License GLR (Return or Replacement of Certain
      Commodities) covers the return or replacement of certain commod-
      ities from countries which imported them. A General License GLR
      is limited to four types of return situations: (1) it enables exporters
      to export commodities sent to the United States for servicing which
      consists of inspection, testing, calibration, repair, including over-
      haul and reconditioning; (2) it allows an exporter to return un-
      wanted foreign origin commodities as long as those commodities
      were not enhanced while in the United States (however, goods may
      not be returned to Country Groups S or Z); (3) it allows shipments

\textsuperscript{63} 15 C.F.R. § 371.3 (1986).
\textsuperscript{64} 15 C.F.R. § 371.5 (1986).
\textsuperscript{65} 15 C.F.R. § 371.17 (1986).
of commodities refused entry into the United States to be returned to any country except Country Group S and Z, and (4) it allows an exporter to replace defective or unacceptable U.S.-origin controlled parts or equipment to a country in all Country Groups except Group S and Z. This last category is intended to cover products which are under warranty. A General License GLR may not be used to replace controlled parts or equipment which are worn through normal use and service.67

**d. General License GTE**68

General license GTE (Temporary Exports) authorizes the temporary shipment of commodities for a period of up to one year. This General License is particularly important to sales representatives, distributors and others who want to exhibit U.S.-origin products abroad. Unlike the other general licenses, General License GTE requires the exporter to request a written registration from OEA.69

The following types of shipments may be exported under the General License GTE: (1) the usual and reasonable kinds and quantities of commodities for use by the exporter or his representative in an enterprise or undertaking of the exporter approved by the OEA; (2) commodities for exhibition or demonstration in Country Group T or V providing the United States exporter retains title; (3) commodities to be inspected, tested, calibrated or repaired abroad; (4) certain containers; (5) video tapes; and (6) commodities to be exported to Mexico and returned to the United States under U.S. Customs offshore manufacturing program.70

As stated above, exports made under the General License GTE must be returned to the U.S. within one year of the date of export. In the event the export is exported under General License GTE with the intent to sell or otherwise dispose of the commodity abroad and it is not practical to return the item to the U.S., the exporter may retain the commodity abroad and apply for a validated license.71

66. 15 C.F.R. § 371.17(d) (1986).
68. 15 C.F.R. § 371.22 (1986).
69. 15 C.F.R. § 371.22(b) (1986).
70. 15 C.F.R. § 371.22(e) (1986).
71. 15 C.F.R. § 371.22(e) (1986).
e. General License G-COM\textsuperscript{72}

The Amendments authorize a new General License G-COM (COCOM). The regulations, published September 23, 1985, authorize the export of certain eligible controlled commodities to and between COCOM countries without a validated license. The commodities permitted to be exported under General License G-COM are listed in the CL under the paragraph "Special Licenses Available". Eligibility for G-COM is based on the destination (COCOM Country) and the technical performance characteristics of a given commodity, not its intended end-use.

f. Proposed General License G-CEU\textsuperscript{73}

On June 23, 1986, OEA proposed a new general license which would permit pre-certified foreign parties ("Certified End-Users") to receive exports of certain restricted commodities which would, under other circumstances, require a validated license. The Department has solicited comments.

2. Technical Data and Software

All "technical data," defined as information, know-how, assistance or service, specifications and training, that can be used, or adapted for use in the designing, production, manufacture, utilization, or reconstruction of articles or materials, is controlled. The data may take a tangible form such as a model, prototype, blueprint or operating manual; or they may take an intangible form such as technical service.\textsuperscript{74} All software is technical data.\textsuperscript{75}

An "export of technical data" means (1) an actual shipment or transmission of technical data outside the United States; (2) any release of technical data in the United States with the knowledge or intent that the data will be exported; and (3) any release of U.S.-origin technical data in a foreign country.\textsuperscript{76}

Technical data may be released in a number of ways. For example, the training of foreign nationals is an export, as is the visual inspection of U.S. origin plants, equipment and facilities in foreign nations. Technical data may be released by oral exchanges either in the United States or abroad, or by providing technical knowledge or

\textsuperscript{72} 15 C.F.R. Parts 371, 374, 386, and 399 (1985).
\textsuperscript{73} 51 Fed. Reg. 22826 (1986).
\textsuperscript{74} 15 C.F.R. § 379.1 (1986).
\textsuperscript{75} Software is controlled pursuant to 15 C.F.R. Parts 379 and 399. The media may be controlled by ECCN 1572A of 15 C.F.R. § 399.1.
\textsuperscript{76} 15 C.F.R. § 379.1 (1986).
experience abroad, which has been acquired in the United States. Reexports of technical data are also controlled. A reexport of technical data occurs when technical data is "released" in a foreign country with the knowledge or intent that the data will be exported to another foreign country. Under this definition, inspection of a U.S. facility, plant or equipment in a foreign country is considered a reexport.

On May 16, 1986, OEA published proposed rules relating to the transfer of technical data. Among other things, the proposed regulations would amend the rules relating to the release of controlled technical data to resident foreign nationals employed by American companies or universities. The proposed rules would allow technical data otherwise exportable only under an individual validated license to be released under a general license to a qualifying foreign national employee.

Part 379 of the Regulations establishes two General Licenses for technical data and identifies the technical data for which a validated license is required.

a. General License GTDA

A General License GTDA (Data Generally Available) is a general license which authorizes shipment of qualifying technical data to all destinations. Authorized technical data under General License GTDA is data that is generally available. For example, data released at conferences, lectures, trade shows and other media open to the public, as well as publications that may be purchased at nominal cost or are readily available at public libraries. Also, scientific or education data not directly and significantly related to the design, production or utilization in industrial processes, and data


78. The proposed conditions are:

(i) The foreign person is a bona fide and full-time regular employee, or appropriate action has been initiated under the Immigration and Naturalization Act that is intended to result in the foreign person becoming a full-time regular employee;
(ii) The employee resides throughout the period of employment in the United States;
(iii) The employee is not a national of a country listed in country groups Q, S, W, Y, Z, Afghanistan or the Peoples Republic of China;
(iv) The technical data are not restricted by either § 379.4(c) or (e); and
(v) The employer has been assured by the employee in writing that the technical data will not be transferred to other foreign persons, without the written consent of the OEA.

79. 15 C.F.R. § 379.3 (1986).
from patent applications, may be exported to any destination under a General License GTDA.

Current General License GTDA regulations provide for three categories of eligible technical data: (1) data generally available to the public; (2) scientific or educational data; and (3) information contained in patent applications.\(^8\) The OEA has had difficulty over the years applying these three categories. "Data generally available" included publications available at nominal cost. While the "nominal cost" test did often indicate general availability, it was a difficult and arbitrary test and OEA's licensing determinations were often unduly restrictive. The transfer of data in a scientific conference is presently permitted under General License GTDA if the conference is "open." However, OEA has had difficulty determining precisely how to define the criteria for research which qualified as scientific or educational data.

The proposed regulations redefine the categories. To qualify for General License GTDA, technical data must either be: (1) publicly available; (2) fundamental research; (3) educational information; or (4) a patent.\(^1\) The May 16 rules propose to define "publicly available" and "fundamental research." Publicly available information is information available to a community of persons such as persons who share a scientific or engineering discipline. Under the proposed Regulations, most mass marketing software would be considered publicly available and could be exported under a General License GTDA. Fundamental research is defined in terms of degree of control imposed of the dissemination of the data and the entity performing the research. Research conducted at a university which is research neither contractually controlled nor classified, would be deemed fundamental research, while proprietary research conducted by a business would be fundamental, only if the information could be freely disclosed.

b. General License GTDR\(^2\)

The General License GTDR (General License under Restriction) authorizes the export of most proprietary technical data to free world destinations. There are special restrictions on exports under General License GTDR to Country Groups Q, W, Y, S and Z as well as to the People's Republic of China, Afghanistan, the

\(^8\) Id.
\(^1\) See supra note 77.
Republic of South Africa and Namibia.83

There are other restrictions and those restrictions relate to certain commodities which may only be exported under a validated license. Primarily, commodities involved in the design, production or testing of nuclear weapons and civil aircraft, and related aircraft and instruments related to similar aircraft.84 There are also special limitations on the use of General License GTDR for technical data on crime control and detection instruments and equipment.85 In addition, technical data may not be shipped General License GTDR if such technical data is specifically related to or listed as an entry on the CL.86

(i) Written Assurances Requirements

Part 379.4(f) of the Regulations requires that before an exporter may ship certain data, services, materials or software under General License GTDR, he must receive written assurances from the importer that neither the technical data nor the direct product87 is intended to be shipped, either directly or indirectly, to Country Group Q, S, W, Y or Z or Afghanistan, or the People’s Republic of China without a validated license. The written assurances from the prospective importer of the technical data may be either in the form of a letter or in a clause of a license agreement or other contract.88 The assurances must commit the importer, in writing, to restrict the disposition of the technical data and or the direct product of the data. A sample “written assurances clause” is attached as Appendix B. In the event the exporter does not receive the written assurances prior to shipment, the exporter will require a validated license.89

(ii) Software as Technical Data

The April Amendments, supra, established a hierarchy of controls on software exports.90 A validated license is required for exports of all software covered by Parts 379.4(c) and 379.4(d) of the

83. 15 C.F.R. § 379.4 (1986).
84. See 15 C.F.R. § 379.4(c), (d) (1986).
86. For example, for software, such entries would include ECCN Numbers 1091A, 1354A, 1355A, 1527A, 1532A, 1567A, listed in 15 C.F.R. § 399.1 (1986).
87. “Direct product” means the immediate product (including processing and services) produced directly by use of the technical data. 15 C.F.R. § 379.4(f) n.1 (1986).
88. 15 C.F.R. § 379.4(f) (1986).
89. Id.
Regulations and all software controlled under a CL entry. Software that COCOM has agreed to control is at the next level of control. This software is listed in Supplement 3 to Part 379 and requires written assurances from the consignee. Finally, all other proprietary software may be exported under a General License GTDR.91

B. Validated Licenses

A validated license, issued by OEA, is based on an Application for Export License (Form IT-622P). It authorizes the export of a specific commodity to a specific destination or destinations at a specific dollar amount of shipment. Approval of the application is based on the following considerations: (1) the reason for the control (i.e. national security, foreign policy, short supply); (2) the type of commodity; (3) the ultimate destination; (4) the dollar value; (5) the intended use; (6) whether the commodity has other potential uses and what those uses are; (7) whether the circumstances suggest the possibility of a diversion to an unauthorized destination; and (8) whether the goods or technical data are available from other countries.92 It is important to note that the OEA will not accept an application without evidence that the exporter has a valid order for the goods and93 technical data.

There are currently six types of validated licenses:

1. Individual Licenses

   a. Individual Validated Licenses94

The most widely used validated license is the individual validated license. It authorizes the export of technical data for a specified quantity of a specified commodity to a designated consignee in a designated country for a specified period of time (usually one year). The license is renewable and must be returned to the OEA if it is revoked, suspended, revised or unused.

91. Id.
92. Under the foreign availability provisions of the Amendments, the OEA is required to give more favorable consideration to exports of items that can be obtained from foreign sources in comparable quantities and comparable quality as United States denial of export privileges would be ineffective in achieving its intended result.
94. 15 C.F.R. § 373.2 (1986).
2. Special Multiple Licenses

   a. *A Project License*\(^95\)

   A Project License authorizes the export of commodities (and technical data where specifically authorized) required for a specified activity for a period of approximately one year from the issuance of the license. An extension of a Project License may be valid up to two years. This license is used in connection with a substantial project, construction or expansion of a facility or the supply of material for maintenance, repair or operation or production of other commodities and is approved when there is a reasonable expectation that if granted, the Project License will replace at least twenty-five individual validated licenses.

   b. *Distribution License*\(^96\)

   On May 24, 1985, the OEA issued final rules substantially changing the procedures relating to Distribution Licenses. The Distribution License authorizes the export of certain commodities to approved distributors and end-users under an international marketing program to Country Groups T and V, except the People's Republic of China, Iran and Afghanistan. The Distribution License is valid for two years and may be extended once by amendment for a two year period. Thereafter, a new application may be approved for a four-year period.

   OEA has been seeking ways to improve the monitoring and control of the Distribution License program without creating unnecessary roadblocks for the United States exporters. The new rules establish more stringent eligibility requirements for licensed applicants by imposing additional internal controls over consignee and license-holder activities, including the screening of customers. The rules require that top management of firms with Distribution Licenses be responsible for assuring compliance and maintaining the quality of the control program. The OEA intends to hold top management accountable for compliance by requiring the Distribution License holder to be responsible for advising consignees of the regulatory restrictions of the Distribution License procedure.\(^97\) License holders and their consignees must know their customers as well as the Regulations. The new procedures also impose new re-

---

\(^{95}\) 15 C.F.R. § 373.3 (1986).

\(^{96}\) Id.

\(^{97}\) 50 U.S.C. app. § 2403(a)(2)(B) (1985). As of the date of this writing, OEA has not published implementing regulations.
quirements for controls on drop shipments, in transit shipments and sales to authorize reexport territories.

The OEA has stated that the Distribution License is a special privilege that provides companies with significant flexibility to make shipments without obtaining individual validated licenses. In turn, the OEA requires strict compliance by license holders and their approved consignees.

c. **Comprehensive Operations License**

The Amendments establish a new Comprehensive Operations License which authorizes exports and reexports of controlled goods and technology from the United States to and among foreign subsidiaries, affiliates, joint venturers and licensees that have (1) long-term, contractually defined relations with the exporter, (2) are located in countries other than controlled countries and (3) have been approved by the OEA. The OEA may grant the license to manufacturing, laboratory or related operations on the basis of the exporter's internal compliance program, including proprietary controls, applicable to the technology and related goods to be exported.

d. **Service Supply Procedure**

A Service Supply Procedure ("SL") is established to enable U.S. companies and persons to provide prompt service for equipment exported from the United States. Under a SL, the U.S. exporter or manufacturer may export spare and replacement parts to Country Group T or V (and, in more limited degree only replacement parts to Country Groups Q, W and Y, Afghanistan and the People's Republic of China) subject to certain restrictions. Three types of export and reexport authorizations are obtainable: (a) exports from the United States; (b) reexports by a foreign-based service facility in Country Groups T and V (except Afghanistan and the People's Republic of China), to any other destination in Country Group T or V (except Afghanistan and the People's Republic of China), to service U.S. equipment unless the consignee is listed in the Table of Denials Orders. Under certain circumstances, a service facility located in

---

98. 15 C.F.R. § 373.7 (1986).
99. The Table of Denial Orders is a list published by the OEA on those persons and firms denied export privileges. See 15 C.F.R. Part 388 (Supp. 1 1982).
100. 15 C.F.R. § 373.7 (1986).
Country Group T or V (except Afghanistan), that is under the effective control of the U.S. exporter may be authorized to reexport, upon specific instructions of the U.S. exporter, replacement parts for the immediate repair of U.S. equipment in Country Group Q, W and Y, Afghanistan or the People's Republic of China; and (c) reexports by foreign manufacturers in Country Group T or V (except Afghanistan), who incorporated U.S.-origin parts into their products for reexport of spare or replacement parts to consignees in Country Group T or V (except Afghanistan), as long as such consignees are not listed in the Table of Denial Orders. 101

3. Determining Licenseability

As stated above, a validated license is required for the export of all products listed on the CL. To determine whether or not a particular commodity requires a validated license, the exporter locates the commodity description, then locates the export control number ("ECCN"). This is a four-digit number followed by a code letter. A code "A" means the commodity is subject to multilateral control (COCOM review) to all destinations. A code "B" means it is subject only to United States' unilateral control.

Below the commodity description and the ECCN are the controls. They include:

(a) Unit — Indicates how to describe units in the license application.

(b) Validated License Required — Indicates by Country Group the destinations which require a validated license. If the intended destination is not listed, the commodity is not controlled and the transaction cannot qualify for another general license, the commodity may go to General License G-DEST.

(c) GLV Value Limit: Indicates the dollar limit for making shipments of controlled commodities under General License GLV. The GLV limit applies to the value of the order, not the shipment; shipments may not be split.

(d) Processing Code — This is a two letter code that designates the OEA licensing office that will process the application. While different ECCN numbers may be placed on the same license application, processing codes must not be mixed on an application.

(e) Reasons for Control — This designates the reason for control, i.e. national security, short supply, foreign policy, nuclear non-proliferation, or crime control

(f) Special Licenses Available — This highlights any limitations on the use of multiple licenses.

Following this information is a description of the characteristics of those products which may be licensed (e.g., make and model number, parts and accessories, etc.), as well as the exceptions. The listing also contains "Advisory Notes" which are OEA policy statements.

Part 376 of the Regulations addresses special commodity policies and provisions and Part 385 addresses special country policies and provisions. Each should be consulted prior to exporting because they may impose additional restrictions on the planned export.

In the event a validated license is required, the exporter must fill out the proper application form and supporting documentation. Even if a validated license is not required, in most cases the exporter will be required to prepare a Shipper's Export Declaration prior to shipping.

VI. REEXPORTS

Pursuant to Part 370.2, a "reexport" includes the reexport, transshipment of diversion of commodities and technical data from one foreign destination to another. Under this definition, if the end-use or end-user changes, there will be a reexport. Thus, a reexport can include a transfer of goods or technical data between countries or within the same country. Reexports of controlled commodities or technical data are themselves controlled.

An exporter who plans to reexport the commodity prior to shipping, can request reexport authorization on the validated license application. If, after delivery, the ultimate consignee decides to reexport the commodity to a new consignee, the consignee must obtain OEA reexport approval. Certain types of reexports are considered "permissive reexports" and may be made without obtaining prior OEA approval. For example, a commodity may be reexported to a destination to which direct shipment is authorized under an unused outstanding validated license.

Special rules apply to reexports of commodities made under a General License GLR (General License Repair) for the replacement of defective or unacceptable U.S.-origin product. To reexport

---

103. Id.
replacement products under a General License GLR to Country Groups Q, W or Y, the exporter must ensure and so certify that the replaced product will be destroyed or replaced.

Reexports to and from COCOM countries and Canada receive special consideration.

A reexport of technical data, is subject to the same controls imposed upon its export from the United States. That is, its reexport is controlled unless it falls within the "permissive reexport" classification of Part 379.8(b). Three types of permissive reexports of technical data: (1) technical data which at the time of export could have been shipped directly from the United States to the new destination under a General License GTDA or General License GTDR; (2) technical data such as manuals, blueprints, etc., reexported to Country Groups Q, W, Y, or Afghanistan, where the exporter has a validated license and the reexport is made as part of the same transaction, and (3) the reexport has specific COCOM authorization.

VII. SPARE PARTS, COMPONENTS AND MATERIALS IN FOREIGN-MADE END PRODUCTS

Parts, components, materials or other commodities exported from the United States and used abroad to manufacture or produce a foreign-made end product are subject to the export control laws.\textsuperscript{106} In order to determine whether a validated license is required for the export from a foreign country of foreign-made end product containing U.S. origin parts or components, the Regulations set up a three-part test.\textsuperscript{107}

VIII. RESTRICTIVE TRADE PRACTICES AND ANTIBOYCOTT PROVISIONS

In the early 1970's the Arab countries put increasing pressure on its suppliers and customers to boycott Israel. The Arab league recommended that companies and persons making a "material contribution" to Israel be blacklisted and boycotted. Firms were further pressured not to use goods or services produced by Israel or other blacklisted persons or firms. Congress responded to the increasing Arab pressure by prohibiting American companies from participating in the boycott.\textsuperscript{108} Section 2407 of the Act and the im-

\textsuperscript{106} 15 C.F.R. § 376.12 note.
Implementing Regulations set out the rules regarding the prohibitions and the rigorous reporting requirements. The following are prohibited under the Act:

(a) Refusing or requiring any person to refuse to do business with or in the boycotted country or with any business organized under the laws of the boycotted country or with any national or resident of the boycotted country or with any other person pursuant to an agreement with, or requirement or request from, or on behalf of, the boycotting country.
(b) Refusing or requiring any other person to refuse to employ or otherwise discriminate against any United States person on the basis of race, religion, sex or national origin.
(c) Furnishing information with respect to the race, religion, sex or national origin of any United States person.
(d) Furnishing information about business relationships with boycotted countries or blacklisted persons.
(e) Furnishing any information about any person's associations with charitable or fraternal organizations which support the boycotted country.
(f) Paying, honoring, confirming or implementing a letter of credit which contains a condition or requirement compliance of which is prohibited by the Regulations.

The Regulations provide for seven basic exceptions.

(a) Compliance with the import requirements of the boycotting country;
(b) Compliance with the shipping requirements of a boycotting country;
(c) Compliance with the import and shipping document requirements of a boycotting country;
(d) Compliance with the unilateral or specific selection requirements of a boycotting country;
(e) Compliance with the export requirements of a boycotting country relating to transshipments of exports to a boycotted country;
(f) Compliance with immigration, passport or employment requirements of a boycotting country; and
(g) Compliance with local law with respect to activities exclusively within the boycotting country.

The antiboycoting prohibitions apply to all United States persons and all transactions in United States commerce. The penalties

for violation are severe. Violations of the antiboycott regulations, including failure to report boycott requests pursuant to Part 369.6 of the Regulations could result in a civil penalty of $10,000 for each violation. As with other violations of the Act, willful violations can result in imprisonment, criminal fines, and denial of export privileges.

IX. ENFORCEMENT

As stated above, the Amendments mandate a number of changes relating to the enforcement of the export control laws. Congress attempted to balance the nation's need to improve export performance with the need to more effectively control the diversion of strategic technology to potential adversaries. On December 30, 1985, the OEA published revised Regulations governing violations of the Act. These Regulations incorporate the statutory changes and revised procedures for imposing administrative sanctions for violations of any Regulation relating to both the export controls and the antiboycott provisions.

Violations of the Act and the Regulations fall into two general categories: exporting without a license and exporting in a manner contrary to the terms of the license. Typical violations of the law and the Regulations include diversion from a designated country of destination to an unauthorized country, making false or misleading statements, and exporting to a person listed in the Table of Denial Orders. The Amendments establish as separate offenses: violating, conspiring to violate and attempting to violate the Act or the Regulations. Other offenses include failing to report that a controlled commodity is being used in a controlled country for military or intelligence-gathering purposes contrary to the conditions under which a license is issued, possessing goods or technology in violation of an export control imposed under the Act or any Regulation and taking any action to evade the provisions of the Act.

Criminal violations are referred to the U.S. attorney for prosecution in the federal district court. Civil violations are handled administratively by the Department of Commerce.

The civil and criminal penalties for violations of the Act are considerable. Civil penalties may be imposed for each violation of the Act or any Regulation, either in addition to, or instead of, any other liability or penalty. The civil penalty may not exceed $10,000.

for each violation except that civil penalties for each violation involving national security controls may not exceed $100,000. In addition, a violator can have his export privileges suspended, revoked or denied and, in some cases, be denied import privileges. Any person who violates any law, regulation or order can also be barred from practice before the International Trade Commission.

A knowing violation of the Act or the Regulations is punishable by a fine of the greater of $50,000 or five times the value of the export, imprisonment for not more than five years, or both. A willful violation by a company of the national security or foreign policy controls is punishable by the greater of a fine of no more than $1,000,000 or five times the value of the export. A willful violation by an individual is punishable by a fine of not more than $250,000 or imprisonment a period not to exceed 10 years, or both.

Any false or misleading statement or concealment of material facts, whether in connection with the license application, boycott reports, export declarations, investigating or compliance proceedings are punishable by fine of not more than $10,000 or by imprisonment for not more than five years or both, for each violation. In addition, commodities or technical data which have been, are being or are intended to be exported or shipped from the United States in violation of the Act or any Regulation, are subject to seizure and forfeiture.

The Department of Commerce and the Customs Service are responsible for administering the enforcement functions. The Commerce Department has primary responsibility for administering the export control and antiboycott provisions of the Act and imposing civil penalties, administrative sanctions and temporary denial orders. Customs is responsible for enforcing suspected violations of the Act at borders and ports-of-entry to and from the United States. Within the United States, Commerce and Customs may conduct investigations either independently or jointly.

Enforcement proceedings are often settled informally. Formal proceedings commence with a charging letter by the OEA and are

116. Id.
119. Id.
120. Id.
121. Id.
heard by an administrative law judge.\textsuperscript{122}

While the Regulations provide that records must only be re-
strained for two years (except antiboycott requirements which must
be retained for three years), the statute of limitations for criminal
and for administrative compliance proceedings is five years and
records should be retained for the full five year period.\textsuperscript{123}

X. CONCLUSION

It is too early to know whether the 1985 Amendments will be
able to reconcile the conflicting philosophical, political, and jurisdic-
tional interests in the area of technology exports. It is also too
early to know whether the “streamlining” measures will speed li-
cense reviews. We shall have to wait to see whether the government
will be successful in deterring illegal diversions of technology, a
crime recently coined “Technotheft”. There is, however, no doubt
that enforcement of export controls are a high Government priority
and will remain so in the foreseeable future.

What is the role of a lawyer who counsels exporters? A lawyer
must be able to update exporters on the Regulations which change
daily. He can educate management as to the seriousness of the con-
trols and the importance of compliance. A lawyer can also work
directly with OEA or the Customs Service to help resolve the
problems faced by the exporter who finds a license application is
bogged down or a product shipment has been erroneously detained
by the Services Operation Exodus.

More importantly, a lawyer can work with his exporting cli-
ents to develop export internal compliance programs for Distribu-
tion Licenses.\textsuperscript{124} In September 1985, the Commerce Department
published \textit{Export Management Internal Control Guidelines for U.S.
Exporters and Foreign Consignees}. These guidelines were developed
to assist Distribution License applicants in understanding and es-
ablishing the required Internal Control Program. The guidelines
begin with a glossary of terms and abbreviations and they explain
the Distribution License Regulations, outline the steps involved in
developing an Internal Control Program, describe the elements re-
quired in such a program, and answer frequently asked questions.
These guidelines may be obtained from either the local OEA Field

\textsuperscript{122} 15 C.F.R. Part 388 (1986).
\textsuperscript{123} 15 C.F.R. § 387.13 (1986).
\textsuperscript{124} 15 C.F.R. § 373.3(e) (1986).
Offices or OEA Headquarters in Washington, D.C.\textsuperscript{125} Finally, the lawyer can assist the exporter as he prepares for a compliance audit. Regular compliance audits are a recent change in the operating procedures of the OEA. Until 1984, Commerce has conducted only one Distribution License audit in 1977.

Under the new Act the future will improve for exporters. The Amendments incorporate those changes for which the business community fought most ardently. Policy-makers appear to understand business’ concerns and appear to be more willing to work with the business community.

\textsuperscript{125} For more information regarding Distribution Licenses, call OEA, Multiple Licensing Branch, at (202) 377-3287 or (202) 377-4196.
APPENDIX A

COUNTRY GROUPS

For export control purposes, foreign countries are separated into seven country groups designated by the symbols “Q”, “S”, “T”, “V”, “Y”, and “Z”. Listed below are the countries included in each country group. Canada is not included in any country group and is referred to by name throughout the Export Administration Regulations.

Country Group Q
Romania

Country Group S
Libya

Country Group T
North America
Northern Area:
  Greenland
  Miquelon and St. Pierre Islands
Southern Area:
  Mexico (including Cozumel and Revilla Gigedo Islands)

Central America:
  Belize
  Costa Rica
  El Salvador
  Guatemala
  Honduras (including Bahia and Swan Islands)
  Panama

Bermuda and Caribbean Area:
  Bahamas
  Barbados
  Bermuda
  Dominican Republic
  French West Indies
  Haiti (including Gonave and Tortuga Islands)
  Jamaica
  Leeward and windward Islands
  Netherlands Antilles
  Trinidad and Tobago

South America
Northern Area:
  Columbia
French Guiana (including Inini)
Guyana
Surinam
Venezuela

Western Area:
Bolivia
Chile
Equador (including the Galapagos Islands)
Peru

Eastern Area:
Argentina
Brazil
Falkland Islands (Islas Malvinas)
Paraguay
Uruguay

Country Group V

Southern Rhodesia

All countries not included in any other group (except Canada).

Country Group W

Hungary
Poland

Country Group Y

Albania
Bulgaria
Czechoslovakia
Estonia
German Democratic Republic (including East Berlin)
Laos
Latvia
Lithuania
Outer Mongolia
Union of Soviet Socialist Republics

Country Group Z

Cuba
Kampuchea
Nicaragua
North Korea
Vietnam
APPENDIX B

Sample “Written Assurances” Clause in a Distributor Agreement

United States Export Control

(a) DISTRIBUTOR acknowledges that exportation of the Product may be subject to compliance with the United States Export Administration Act of 1979 and the Export Administration Act of 1985, as those Acts are amended from time to time, and the rules and regulations promulgated from time to time thereunder (collectively, the “Act”), which restricts the export and reexport of software media, technical data and direct products of technical data. (b) DISTRIBUTOR agrees to obtain written assurances of exportation of technical data substantially in the form of this Subparagraph and hereby certifies that no technical data or direct products therefore will be made available or re-exported, directly or indirectly, to the People’s Republic of China, Romania, Libya, Hungary, Poland, Albania, Bulgaria, Czechoslovakia, Estonia, German Democratic Republic (including East Berlin), Laos, Latvia, Nicaragua, Lithuania, Mongolian People’s Republic, Union of Soviet Socialist Republics, South Africa, Cuba, Kampuchea, North Korea, Vietnam or Afghanistan, unless prior authorization, if required, is obtained by DISTRIBUTOR from the office of Export Administration of the U.S. Department of Commerce, International Trade Administration in accordance with the Export Administration Regulations (15 C.F.R. Sections 368 et seq.) issued by the Department of Commerce of the United States in the administration of the Act. SELLER agrees to assist DISTRIBUTOR in obtaining any license required under the Act. The provisions of this clause may extend to other countries or exclude one or more of the above countries upon notice by SELLER to DISTRIBUTOR that such countries are required by United States law or regulation to be added or deleted.

(c) In addition, DISTRIBUTOR also agrees that with respect to compliance with the United States Export Regulations:

(i) DISTRIBUTOR will comply with all the U.S. Export Regulations including but not limited to the Anti-boycott Laws and Regulations as such laws and regulations relate to the Product;

(ii) DISTRIBUTOR will retain all export control documents for a period of five (5) years and will permit audits or reviews by SELLER covering export activity related to the Product;
(iii) DISTRIBUTOR understands that SELLER reserves the right to refuse performance of its obligations under this Agreement in cases of non-compliance by DISTRIBUTOR of the U.S. Export Regulations; and

(iv) DISTRIBUTOR will not engage in any transaction or activity with any party, firm or company notified by the U.S. Department of Commerce Office of Export Administration to be unsuitable or listed on the Table of Denial Orders.

(d) DISTRIBUTOR agrees to indemnify SELLER against any claim, demand, action, proceeding, investigation, loss, liability, cost or expense suffered or incurred by SELLER and arising out of or related to any violation (whether intentional or unintentional) by DISTRIBUTOR or its customers of any of the warranties or covenants in this Paragraph.