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# Export Licensing of Computer Equipment and Technology - A Practitioner's Perspective

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# Export Licensing of Computer Equipment and Technology—A Practitioner’s Perspective

*Benjamin H. Flowe, Jr.\**

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\* Associate, Bowman Conner Touhey & Petrillo, P.C., Washington, D.C. B.A. 1978, Duke University; J.D. 1981, University of North Carolina at Chapel Hill.

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## I. Introduction

This article provides a practical overview of how to comply with the United States export licensing system in the computer field. It does not attempt to discuss every detail of the voluminous pages of ever-changing regulations. Neither does it fully discuss the significant policy issues in this area now being debated among various congressional, administrative, and private factions. These limits are particularly necessary because the exact policy and legal framework of export controls that will be in place at the time of publication is uncertain.

Two sets of fundamental competing policy interests lie at the heart of the debate on most of the policy issues in this area and ensure the continuation of debate over the appropriate level and method of export controls. On the one hand, free enterprise and free speech provide the foundation for unfettered exports of goods and technology. On the other hand, national security and foreign policy concerns call for certain restrictions on United States exports. The issue of the appropriate balance between the two sets of competing policies is the dilemma underlying the debates over a number of export control issues: which agency should have regulatory power—Commerce or Defense; which agency should have enforcement power—Commerce or Customs; whether existing contracts should be sanctified when new controls are imposed; to what extent, if any, should there be judicial review of export control decisions; and what kind of exports should be controlled to which countries.

Perhaps nowhere is the effect of this balancing dilemma more clearly realized than in the computer area. The result is a complex, rapidly changing set of regulations that requires interpretation by a combination of lawyers, engineers, and businesspersons. Thus, any definitive examination of the current technical and policy issues will be stale before it is published. Nevertheless, the competing policies also assure that much of the basic regulatory structure will continue to exist in some form or another. Therefore, this article explores the practical and legal aspects of United States export controls and provides suggestions for establishing export control compliance

programs.<sup>1</sup>

## II. Overview of the Export Control Framework

### A. All Exports Require a License

Often when a client has a new product or technology to export, the first question is "Does it need an export license?" This question is more correctly phrased as "Do I have to *apply* for a license," or "What kind of license do I need?" With a few minor exceptions,<sup>2</sup> all exports and re-exports of U.S. goods and technology require a license.

Certain licenses require prior application and approval by the appropriate U.S. agency ("Validated Licenses").<sup>3</sup> Others generally require only self-adherence to regulations ("General Licenses").<sup>4</sup> Both types of licenses, however, require adherence to other export control regulations, including documentation and recordkeeping requirements. Also, a product that may be exported under a General License to one destination may require a Validated License for export to another destination, for reasons not readily apparent. The perspective that all exports require an export license thus will assist in complying with export control requirements.

### B. Two Principal Sets of Export Controls for Computers

#### 1. Export Administration Regulations

The primary U.S. export licensing regulations for computers are the Export Administration Regulations (EAR).<sup>5</sup> They are administered principally by the Office of Export Administration (OEA) in the International Trade Administration of the Commerce Department. Unless an export is specifically governed solely by other licensing requirements, it is under the jurisdiction of the EAR.<sup>6</sup> This article

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<sup>1</sup> For a broader article on export controls, see Sloniewsky, *The Export Administration Regulations—Licensing Requirements*, in 2 THE COMMERCE DEPARTMENT SPEAKS ON IMPORT ADMINISTRATION AND EXPORT ADMINISTRATION 129 (P.L.I. Corp. L. & Prac. Handbook Ser. No. 456, 1984) [hereinafter cited as THE COMMERCE DEPARTMENT SPEAKS]. See generally Boyd & Whisman, *The U.S. Law of Export Controls: A Selected Bibliography*, 18 INT'L LAW. 483 (1984) (articles cited therein).

<sup>2</sup> For exports to Canada, the general policy is that neither a validated nor a general license is required. 15 C.F.R. § 385.6 (1984). Commodities transiting through Canada and intended for re-export to a third country and certain nuclear-related commodities and technical data exported to Canada, however, require a license. *Id.* §§ 379.4(c), (e), 378.4 (1984).

<sup>3</sup> See *infra* text accompanying notes 123-37.

<sup>4</sup> See *infra* text accompanying notes 112-22.

<sup>5</sup> 15 C.F.R. §§ 369-399 (1984) [hereinafter cited as EAR]. The EAR is published by OEA each fiscal year as a looseleaf set, and it is supplemented by periodic *Export Administration Bulletins* containing amendments to the EAR, as published in the *Federal Register*.

EAR § 369 contains the Commerce Department's "antiboycott regulations," which are not discussed in this article.

<sup>6</sup> See EAR § 370.10 (1984). Other export controls covering specific areas include the

thus focuses on the EAR.

The principal legislative authority for the EAR has been the Export Administration Act of 1979.<sup>7</sup> In the midst of protracted disagreements over the type of legislation that should be enacted to amend the Act, however, Congress allowed it to expire, and on March 30, 1984, the President invoked the International Emergency Economic Powers Act<sup>8</sup> to maintain the EAR in place.<sup>9</sup> Although in the past, presidents have extended the EAR when its enabling statute has lapsed, such lengthy administrative extension of a complex set of regulations under broad statutory authority raises issues that are beyond the scope of this article. It is worth noting, however, that at least one district court has held that judicial review of an export licensing decision was not precluded under administratively extended regulations, as it would have been under the Export Administration Act of 1979.<sup>10</sup> Other challenges to attempted denials of the protection of the Administrative Procedure Act<sup>11</sup> may be expected. A more fundamental question is the scope of administrative discretion if

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International Traffic in Arms Regulations, *see infra* text accompanying notes 12-18, and those export controls covering: nuclear reactor vessels and related commodities, 10 C.F.R. § 110 (1984) (administered by the Nuclear Regulatory Commission); commodities and technical data related to production of special nuclear material, 10 C.F.R. § 810 (1984) (administered by the Department of Energy); natural gas, electric power, and related facilities, 10 C.F.R. §§ 305, 320 (1984); 18 C.F.R. § 153.1 (1984) (Department of Energy); narcotics and dangerous drugs, 21 C.F.R. § 1321.21 (1984) (Drug Enforcement Agency, Department of Justice); certain U.S.-flag watercraft, 46 C.F.R. § 221 (1984) (U.S. Maritime Administration, Department of Transportation), *see also* EAR § 370.10(f) (1984) (export of watercraft) (OEA); endangered fish and wildlife, 50 C.F.R. §§ 17, 222 (1984) (Department of Interior, National Marine Fisheries Service); tobacco seed and certain tobacco plants, 7 C.F.R. § 34.3 (1984) (Department of Agriculture); technical data for filing patent applications, 37 C.F.R. § 5 (1984) (Patent and Trademark Office); EAR § 379.3(c) (1984) (patent applications under a General License GTDA).

Certain regulations administered by the Treasury Department should also be consulted regarding exports from non-U.S. countries to certain destinations by the U.S. citizens or affiliates of U.S. companies. *See* Foreign Assets Control Regulations, 31 C.F.R. § 500; Transaction Control Regulations, *id.* § 505, Cuban Assets Control Regulations, *id.* § 515, Iranian Assets Control Regulations, *id.* § 535.

<sup>7</sup> Pub. L. No. 96-72, 93 Stat. 503 (1979), amended by Export Administration Amendments Act of 1981, Pub. L. No. 97-145, 95 Stat. 1727 (1981) (formerly codified at 50 U.S.C. app. §§ 2401-2420 (1982)) (expired Mar. 30, 1984) [hereinafter cited as EAA of 1979].

For a review of legislation up to enactment of the Export Administration Act of 1979, *see* Note, *An Overview of Export Controls on Transfer of Technology to the U.S.S.R. in Light of Soviet Intervention in Afghanistan*, 5 N.C.J. INT'L L. & COM. REG. 555, 559-66 (1981).

<sup>8</sup> Pub. L. No. 95-223, 91 Stat. 1626 (codified at 50 U.S.C. §§ 1701-1706 (1982)).

<sup>9</sup> Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984), *continued* by 50 Fed. Reg. 12,513 (Mar. 29, 1985).

<sup>10</sup> *Nuclear Pac., Inc. v. Department of Commerce*, No. C84-49R (W.D. Wash. June 8, 1984) (order denying defendant's motion to dismiss for lack of jurisdiction and failure to exhaust administrative remedies), *reprinted* in THE COMMERCE DEPARTMENT SPEAKS, *supra* note 1, at 373.

<sup>11</sup> 5 U.S.C. §§ 551-559, 701, 706, 3105, 3344, 5362, 7521. Section 13(a) of the now expired Export Administration Act of 1979 exempted functions exercised thereunder from most APA provisions relating to procedure and judicial review.

such complex and burdensome regulatory requirements may be imposed without specific authorizing legislation.

## 2. *International Traffic in Arms Regulations*

The International Traffic in Arms Regulations (ITAR)<sup>12</sup> implement the Arms Export Control Act of 1976.<sup>13</sup> The regulations cover exports of defense services and defense articles identified by the U.S. "Munitions List."<sup>14</sup> The Office of Munitions Control of the State Department administers the ITAR, with input from the Defense Department.

The ITAR lacks specificity as to what types of computer equipment and technology fall within its jurisdiction. Cryptographic devices, privacy devices, software (encoding and decoding), and related components<sup>15</sup> are the only such products specifically listed in the Munitions List, in Category XIII. Two general guidelines, however, govern whether specific computer equipment or technology fall under Category XI or XXI:<sup>16</sup> (1) if the product is designed to military specifications or pursuant to a military contract; (2) if it is specifically designed, modified, or configured for military application.

Because much of the computer equipment and software that may fall within ITAR coverage is also sold for commercial use, the lack of definition can be troublesome. The EAR governs the vast majority of "dual-use" computer equipment and technology, but where the jurisdictional line should be drawn in specific cases often is not clear from the regulations alone.<sup>17</sup> Even more troublesome is

<sup>12</sup> 49 Fed. Reg. 47,682-712 (1984) (to be codified at 22 C.F.R. §§ 121-130 (1985)) (effective Jan. 1, 1985) [hereinafter citations will be to 22 C.F.R.].

<sup>13</sup> Pub. L. No. 94-329, 90 Stat. 729, *amended by* International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat. 1519 (codified at 22 U.S.C. §§ 2751-2796(c) (1982)).

<sup>14</sup> 22 C.F.R. §§ 120.2, 121.1 (1985).

<sup>15</sup> *Id.* § 121.1(b) Cat. XIII(b) (1985).

<sup>16</sup> *Id.* Cats. XI, XXI (1985). Category XI-Military and Space Electronics includes "[e]lectronic equipment not included in Category XII of the Munitions List which is assigned a military designation or is specifically designed, modified or configured for military application. This includes but is not limited to certain . . ." specified equipment:

Category XXI-Miscellaneous Articles.

Any article not specifically enumerated in the other categories of the U.S. Munitions List which has substantial military applicability and which has been specifically designed for military purposes. The decision on whether any article may be included in this category shall be made by the Director of the Office of Munitions Control.

*See also* 22 C.F.R. § 120.3 (1985) (policy on designating defense articles and services).

<sup>17</sup> Despite the burden put on the exporter to determine whether its product falls within such vague regulations, in a recent case the district court dismissed an indictment of conspiracy to violate the Arms Export Control Act and regulations as invalid because the terms "counter measures, counter-counter measures" specified in the regulations did not constitute "items" that Congress had required to be made part of the Munitions List, and the indictment based on exporting radar jamming devices failed to state a crime. *United States v. Zheng*, 590 F. Supp. 274 (D.N.J. 1984).

The *Zheng* case provides useful language for arguments in many vague areas of export

the fact that clearly commercial products being exported to military end users may be detained by Customs Service officials for investigation, even if they are exported pursuant to a Validated License under the EAR.

Therefore, in cases in which it is unclear which set of controls applies—the EAR or the ITAR—it is useful to obtain a written determination from the Office of Munitions Control under its “commodity jurisdiction procedure.”<sup>18</sup> Such a commodity jurisdiction determination may provide assurance of legal compliance and also assist in obtaining speedy release of mistaken detentions.

### C. *Reasons for EAR Controls/Principal Agency*

The EAR contains four<sup>19</sup> reasons for controlling exports: national security, foreign policy, nuclear nonproliferation, and short supply.<sup>20</sup> The first three reasons apply to exports of computer equipment and technology.<sup>21</sup>

#### 1. *National Security*

The Export Administration Act authorized controls “to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which prove detrimental to the national security of the United States.”<sup>22</sup> The Defense Department is the principal agency in charge of defining national security concerns applicable to export licenses. In coordination with the Commerce Secretary, the Defense Secretary is authorized to identify particular goods and technology for inclusion in the “Commodity Control List”<sup>23</sup> and to review export license applications and recommend disapproval of those believed detrimental to U.S. national security.<sup>24</sup> Interagency disagreements are to be resolved by the President. In effect, the Defense Department has taken the lead in this area. OEA refers to the Defense Department export license applications that are subject to national security controls, unless the Defense Department has

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licensing regulations. It is significant, however, that the case was a criminal action, because it might not apply to the vast majority of cases in this area, which are civil.

<sup>18</sup> 22 C.F.R. § 120.5 (1985). It may be useful to consult the Military Critical Technologies List (MCTL), an unclassified version of which has recently been made public. Department of Defense, *The Military Critical Technologies List* (Oct. 1984).

<sup>19</sup> The EAR actually lists a fifth reason, crime control, but this is a part of the foreign policy controls. See EAR § 399.1(i); EAA of 1979, § 6(j).

<sup>20</sup> *Id.*

<sup>21</sup> See EAR § 399.1, Export Control Commodity No. 1565A (electronic computers and related equipment) [hereinafter cited as ECCN 1565A].

<sup>22</sup> EAA of 1979, § 3(2)(A).

<sup>23</sup> *Id.* § 5(c).

<sup>24</sup> *Id.* § 10(g); EAR § 370.13(d).

agreed that no such referral is necessary.<sup>25</sup>

The Defense Department's role in export licensing recently has been strengthened by the President, who, in a classified memorandum signed by the National Security Affairs Advisor, has authorized Defense to review certain license applications for export to fifteen Free World destinations.<sup>26</sup> Previously, Defense had reviewed only East Bloc cases and has sought to increase its authority because of its concerns over diversion of high technology exports to the Soviet Union and its allies.<sup>27</sup> The Commerce and Defense Departments have been engaged in a turf battle, and the recent Presidential directive replaces a Memorandum of Understanding, which was drafted in early 1984,<sup>28</sup> but never signed. Because of the Defense Department's conservative perspective on export licensing issues, its review is expected to result in increased denials of some Free World licenses and processing delays on many others.

To a great extent, national security controls are coordinated among U.S. allies through the multilateral group known as the Consultative Group Coordinating Committee (COCOM).<sup>29</sup> COCOM members consist of the NATO countries, less Iceland and Spain, plus Japan. The group is not a treaty organization, but purportedly holds its status with the United States pursuant to a classified executive agreement. The United States also imposes controls unilaterally when its COCOM allies do not agree with U.S. national security concerns on particular exports. In the past, this has been particularly true with respect to computer sales to East Bloc countries.<sup>30</sup>

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<sup>25</sup> It is the author's understanding that a classified, internal working memorandum exists whereby the Defense Department has delegated to OEA authority to review applications for commodities falling below specified parameters.

<sup>26</sup> See *Pentagon Wins on Export Review*, Washington Post, Jan. 12, 1985, at A1, col. 4. Although the affected destinations have not been revealed, they are believed to include Austria, Finland, Hong Kong, India, Lichtenstein, Singapore, South Africa, South Korea, Sweden, Switzerland, Taiwan, and Pakistan. The United States and India have been working on a bilateral agreement to prevent diversion and thereby ease controls on exports to India. See Washington Post, Nov. 27, 1984, at D1, col. 3.

<sup>27</sup> In one of the most celebrated of such cases, Digital Equipment Corp. agreed to a consent decree imposing a \$1.5 million fine (\$400,000 of which is suspended as long as no further violations occur for three years). This is the largest fine assessed under the Export Administration Act to date, and it was the result of alleged dealings with Richard Mueller, a West German believed to be a smuggler of computers and other high technology equipment to the East Bloc. See Washington Post, Sept. 5, 1984, at F1, col. 4. See also L. MELVERN, D. HEBDITCH, & N. ANNING, *TECHNO-BANDITS* (1984), abridged version reprinted in *COMPUTERWORLD*, Sept. 24, 1984, at ID/1, col. 1; Wall St. J., July 24, 1984, at 10, col. 6 (discussion of Western frustration at attempt to keep high technology out of Soviet hands).

<sup>28</sup> See, e.g., *COMPUTERWORLD*, Apr. 2, 1984, at 14; Washington Post, Mar. 24, 1984, at 1A, col. 5.

<sup>29</sup> See EAA of 1979, § 5(i).

<sup>30</sup> See, e.g., *U.S. Allies Restrict Technological Exports to Eastern Bloc*, *COMPUTERWORLD*, July 30, 1984, at 16 (discussing U.S. persuasion of other COCOM members to place restrictions on exports of superminis, software distribution packages, high-performance personal computers, and telecommunications switching systems in return for decontrol of certain low-end computer equipment); Washington Post, July 17, 1984, at A1, col. 2.



The principal rationale for imposing national security controls on exports of computers and similar goods is their potential for contributing to the military capabilities of East Bloc countries and others that pose a security threat. Although deficient in military manpower and perhaps even firepower, the NATO countries have maintained a technological advantage over Warsaw Pact countries. Therefore, defense experts wish to assure that the technological lead time is maintained, by restricting such exports and re-exports of the most advanced technology and goods from which the technology can be gleaned or which themselves can be used militarily as well as commercially ("dual use").<sup>31</sup> Hence, determining which exports are likely to jeopardize national security is a subject on which reasonable persons can differ.

## 2. Foreign Policy Controls

The Export Administration Act authorized controls "to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations."<sup>32</sup> The Commerce Department administers foreign policy controls in consultation with the State Department, principally through its Office of East-West Trade. Other agencies also are consulted when appropriate. Although the State Department does not have the effective veto power over Commerce that Defense has in the national security area, in practice, OEA generally defers to State Department views on foreign policy issues.

Foreign policy controls periodically are imposed for a variety of reasons: crime control/human rights; antiterrorism; nonsupport of South African apartheid; regional stability (quasi-military items not on the Munitions List); embargoes against North Korea, Vietnam, Kampuchea, and Cuba;<sup>33</sup> nonassistance to Libya; oil and gas equipment for the U.S.S.R. and Afghanistan; and truck manufacturing equipment for the Soviet Kama River and ZIL truck plants.<sup>34</sup>

Although any of these reasons may apply to particular exports of computer equipment and technology, computers have been singled out for certain South Africa and Namibia controls:

A validated license is required for export of computers, as de-

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<sup>31</sup> See, e.g., Note, *supra* note 7, at 566-69.

<sup>32</sup> EAA of 1979, § 3(2)(B). See also *id.* § 6(a).

<sup>33</sup> These embargoes also are administered under the Trading with the Enemy Act, ch. 106, §§ 101(b), (c), 207, 40 Stat. 415 (1917) (codified as amended at 50 U.S.C. app. § 5(b), (c) (1982)).

<sup>34</sup> See, e.g., *Request for Comments on Effects of Foreign Policy Export Controls*, 49 Fed. Reg. 47,047 (1984); *Extension of Foreign Policy Export Controls*, 49 Fed. Reg. 3061 (1984). Pursuant to EAA of 1979, § 6, the Secretary of Commerce, in consultation with the Secretary of State, annually requests public comments on the extant foreign policy controls, reviews the controls in accordance with specified criteria, revises and extends such controls as deemed necessary, and reports his findings to Congress.

fined in CCL entry 1565A, to the Department of Cooperation and Development, the Department of Internal Affairs, the Department of Community Development, the Department of Justice, the Department of Manpower Utilization, and administrative bodies of the "Homelands" that carry out similar functions. Applications for validated licenses will generally be considered favorably on a case-by-case basis for exports of computers that would not be used to enforce the South African policy of apartheid.<sup>35</sup>

These controls are designed in part "to distance the United States from the practice of apartheid."<sup>36</sup> According to State Department officials, controlling exports of computers to be used by certain South African Government agencies is seen as a highly visible means of demonstrating United States antipathy toward apartheid because those agencies purportedly make significant use of computers in administering the apartheid policy. While perhaps having a laudable purpose, the effect of these controls is largely symbolic because non-U.S. suppliers readily meet the needs that go unfulfilled by U.S. companies that are denied export licenses. Nevertheless, the controls demonstrate how computers are singled out for export control purposes.

### 3. Nuclear Nonproliferation

Pursuant to policies on national security and foreign policy in sections 3(2)(A) and (B) of the Export Administration Act of 1979, and section 309(c) of the Nuclear Non-Proliferation Act of 1978,<sup>37</sup> the EAR controls export transactions related to nuclear weapons or explosive devices and the U.S. maritime nuclear propulsion policy for the following reasons:

- (1) To exercise the necessary vigilance from the standpoint of their significance to the national security of the United States;
- (2) To further significantly the foreign policy of the United States or to fulfill its international responsibilities; and
- (3) To maintain controls over items because of their potential significance for nuclear explosive purposes.<sup>38</sup>

The Commerce Department reviews export license applications in this area in consultation with the Department of Energy.<sup>39</sup>

Although this article does not extensively discuss computer exports directly related to nuclear weapons, nuclear power, nuclear propulsion, or nuclear research,<sup>40</sup> it describes controls placed on

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<sup>35</sup> EAR § 385.4(a)(9). See also ECCN 1565A, *supra* note 21.

<sup>36</sup> See Letters from Sec. of Commerce Lawrence J. Brady to President of the Senate and Speaker of the House, Encl. 2, at 4 (transmitting reasons for extending foreign policy controls).

<sup>37</sup> 42 U.S.C. § 2139a(c) (1982).

<sup>38</sup> EAR § 378.1(a). See EAR § 378.2 (Nuclear Referral List).

<sup>39</sup> See EAR § 378, Supp. No. 1 (discussing full procedures for nuclear controls, including interagency review by the Subgroup on Nuclear Export Coordination and higher levels).

<sup>40</sup> See generally EAR § 378.

general purpose computers because of their capability for use in nuclear weapons or energy research and development. For two types of computer exports, Validated Licenses are required, and the Distribution License procedure<sup>41</sup> may not be used. The first set relates to the intended end user, and the second to the power of the computer.

First, exports of electronic computers intended for end users engaged, directly or indirectly, in designing, developing, researching, training, or similar activities related to nuclear weapons or nuclear energy require individual Validated Licenses.<sup>42</sup> Export license applications for such end users are referred to the Energy Department for review, based on reliability of the end user and capabilities and intended use of the equipment. Exports to nuclear facilities that do not allow inspections to determine compliance with international safeguards will be strictly scrutinized, and licenses may be denied.

Second, exports of computers with "processing date rates"<sup>43</sup> (PDR) above certain parameters require individual Validated Licenses.<sup>44</sup> The PDR is a measure developed for export licensing purposes rather than a general industry specification and is intended to describe the speed at which computers can perform. High-speed computers, with large memory access, are necessary and useful for nuclear-related "number-crunching." The relative PDR limits are divided into three country groups. For those countries that have signed neither the Nuclear Non-Proliferation Treaty<sup>45</sup> nor the Treaty of Tlatelolco,<sup>46</sup> computers with a PDR greater than twenty million bits per second (mbs) require individual Validated Licenses.<sup>47</sup> Exports of computers to those signatories listed in Supplement No. 3 to EAR section 373 require individual Validated Licenses if the PDR exceeds sixty mbs.<sup>48</sup> Exports to those listed in Supplement No. 2, essentially the COCOM members, require individual Validated Licenses only if the PDR exceeds two hundred twenty-five mbs.<sup>49</sup>

<sup>41</sup> See *infra* text accompanying notes 138-39.

<sup>42</sup> EAR §§ 373, Supp. No. 1, ECCN 1565 n.4; 399.1, Supp. No. 1, ECCN 1565A; 399.2, Supp. No. 1, Commodity Interp. No. 1(a).

<sup>43</sup> See EAR § 376.10(a)(4)(iv) (definition of PDR), revised by 49 Fed. Reg. 50,608 (1984) (Advisory Note 16 to ECCN 1565A).

<sup>44</sup> EAR §§ 373, Supp. No. 1, ECCN 1565; 379.1, Supp. No. 1, ECCN 1565A; 399.2, Supp. No. 1, Commodity Interp. No. 1(b).

Note that the parallel references to CPU bus rate, formerly defined at EAR § 376.10(a)(4)(i), have been eliminated from consideration. 49 Fed. Reg. 40,568 (1984). The industry long argued that the CPU bus rate was an invalid measure of computer performance, and there is debate over the propriety of the PDR measure as well.

<sup>45</sup> Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161.

<sup>46</sup> Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 762, T.I.A.S. No. 7137, 634 U.N.T.S. 326.

<sup>47</sup> See EAR §§ 373, Supps. Nos. 2, 3, and 378, Supp. No. 2 for signatories.

<sup>48</sup> EAR § 373, Supp. No. 3.

<sup>49</sup> EAR § 373, Supp. No. 2.

Thus, companies having a Distribution License must determine which of their computers will require individual licenses to what countries. The impact is greatest on exports to nonsignatory countries because the PDR threshold of twenty mbs is quite low, and many of the more sophisticated personal computers are above the threshold. Some of the countries affected are Argentina, Brazil, Israel, India, and South Africa.

As an alternative to individual licenses for each computer, it is sometimes possible to obtain individual Validated Licenses to export a year's supply of specified computers and related equipment to a distributor in one of these countries, with up-front authorization to resell. Specified nonnuclear end-use or distribution statements may be required from the consignee/distributor.<sup>50</sup> The EAR does not specifically provide for this, but such end-use assurances are requested pursuant to the authority given to Licensing Officers to request whatever additional information OEA deems necessary.<sup>51</sup> Unfortunately, OEA will often "Return without Action" license applications that do not contain such an end-user certification. The resulting delay especially hinders smaller businesses with less experience in exporting than their multinational competitors.

#### *D. Destinations/Country Groups*

Four principal criteria are considered by OEA in evaluating export license applications: destination, nature of the commodity or technical data, end user and end use, and foreign availability.<sup>52</sup> Destination is one of the most important criteria.

The EAR divides the world into seven country groups design-

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<sup>50</sup> An example of a "standard" written assurance for a South African distributor that incorporates other South African restrictions in EAR § 385.4(a) is as follows:

I (we) certify that the commodities and/or technical data received under this license will not be sold or otherwise made available, directly or indirectly, to or for use by or for military, policy or nuclear entities of the Republic of South Africa or Namibia, Department of Cooperation and Development, Department of Internal Affairs, Department of Community Development, Department of Justice, Department of Manpower Utilization and the Administrative bodies of the Homelands that carry out similar functions in the Republic of South Africa.

*See id.*

<sup>51</sup> EAR § 372.5.

<sup>52</sup> EAA of 1979, § 5(f) required the Commerce Department to set up a system of reviewing whether goods controlled for national security purposes were nevertheless available to, for example, East Bloc countries from other sources, and to consider such information favorably on export license review. Although OEA purportedly has considered foreign availability as a factor in licensing decisions (see EAR § 370.1(b)(3)(vi)), it is now beginning to set up a system to review foreign availability in a sophisticated manner. *See* Department of Commerce, EXPORT ADMIN. BULL. No. 230 at 2 (Apr. 20, 1984) (announcing establishment of Foreign Availability Assessment Division of OEA). *See also* 50 Fed. Reg. 10,501 (Mar. 1, 1985) (proposed "foreign availability" regulations). It will be up to applicants to provide evidence that comparable goods are available to end-users from third sources if they hope to influence classification and licensing decisions.

nated by the symbols Q, S, T, V, W, Y, and Z.<sup>53</sup> Canada is treated separately by name and, for the most part, exports to Canada may be made freely.<sup>54</sup> Exports are considered differently with respect to each of these groups, in the following order of increasing liberality.

### 1. Embargoed Countries (S and Z)

Country Group S currently consists of Libya only, and Z countries are Cuba, Kampuchea, North Korea, and Vietnam. Except for books and films, Validated Licenses are required for export of all commodities and proprietary technical data.<sup>55</sup> Generally, applications for export of computer equipment and technology to S and Z destinations will be denied.<sup>56</sup> With respect to Cuba and Libya, there are de minimus rules under which exports from third countries of non-U.S. goods containing less than twenty percent U.S. origin parts, components, or materials will be considered favorably.<sup>57</sup>

### 2. East Bloc and Laos (Q, W, and Y)

Export license applications for exports to the Soviet Union and other Warsaw Pact countries, Albania, the Mongolian People's Republic, and Laos are reviewed strictly and approved only if the exports are for civilian end use and would not contribute significantly to the military potential of such countries or otherwise contravene specific U.S. foreign policies.<sup>58</sup> Because of their significant capability for military, as well as civilian, end use, computers especially are scrutinized in such export license applications. A special Form 6031P, Computer System Parameters, along with other detailed information, must be included with export license applications for electronic computers and related equipment for these countries and the People's Republic of China.<sup>59</sup> This Form has specified computer parameters categorized in boxes A through D. COCOM review of applications with parameters falling in boxes C and D likely will be

<sup>53</sup> For a complete list of countries under each country group, see Supplement No. 1 to EAR § 370.

<sup>54</sup> See *supra* note 2 and accompanying text.

<sup>55</sup> For Country Groups requiring Validated Licenses, see individual CCL entries EAR § 399.1, Supp. No. 1.

<sup>56</sup> See generally EAR §§ 385.1 (policy on exports to Country Group Z), 385.7 (same *re* Country Group S).

<sup>57</sup> EAR §§ 385.1(b), 385.7(a)(2)(i)(C).

<sup>58</sup> See generally EAR § 385.2 (policy).

<sup>59</sup> EAR § 376.10(a)(1). Form 6031P and EAR § 376.10 are being revised to implement regulatory changes governing computers. See *infra* notes 73-75 and accompanying text. Computer equipment, with parameters all below the levels in Advisory Note 9 to ECCN 1565A can be approved for export to East Bloc countries without COCOM review. Those with parameters beyond the Note 9 limits but all below the parameters listed in Advisory Note 12 require COCOM review after a U.S. recommendation of approval, but will be approved if no COCOM Member objects within 30 days. Those with parameters above the Note 12 limits require a 90-day COCOM review, and any COCOM Member may veto such an export.

required after U.S. agencies have completed their reviews and have recommended approval. Such applications also must contain detailed statements of end use by the customer and from the applicant. In addition, visitation requirements may be imposed.<sup>60</sup>

### 3. *Free World Countries (T and V)*

Country Group T contains primarily the Latin American countries, and Country Group V contains all other countries not listed in a particular Country Group. Generally, these countries are treated similarly with respect to types of exports that require a Validated License. Particular countries are treated with varying degrees of liberality, however, depending on the possibility of diversion to other destinations, other national security or foreign policy concerns, and nuclear nonproliferation concerns. The following list subdivides some of these countries, in order of increasing liberality, according to this author's experience.<sup>61</sup>

- a. *The People's Republic of China and Afghanistan*;<sup>62</sup>
- b. *Special Sensitivities* (nuclear or foreign policy including diversion potential): India, Brazil, Argentina, Taiwan, Israel, South Africa,<sup>63</sup> Yemen, Syria, Iran,<sup>64</sup> Iraq,<sup>65</sup> Pakistan, South Korea, Hong Kong;
- c. *Certain Neutral Countries*: Austria, Finland, Lichtenstein, Singapore, Sweden, Switzerland, Yugoslavia;
- d. *Others not listed*;
- e. *COCOM Members*: (Belgium, Canada, Denmark, France, Federal Republic of Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, United Kingdom).<sup>66</sup>

#### E. *Licensing of Commodities and Technology Exports (Hardware and Software)*

For some time, there have been two separate, though parallel,

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<sup>60</sup> EAR § 376.10(a)(2), (3).

<sup>61</sup> See generally EAR § 385.4 (policy on exports to Country Groups T and V).

<sup>62</sup> See EAR §§ 385.4(c) (policy on exports to People's Republic of China), 385.4(f) (Afghanistan). On November 21, 1983, OEA revised the EAR to place the People's Republic of China in Country Group V instead of the former Country Group P. 48 Fed. Reg. 53,064. Despite the announcements that the United States was liberalizing export controls on trade with China and treating them like a Free World country, a careful review by this author revealed that, in almost every significant instance where the EAR treats exports to V destinations more liberally than to Q, W, and Y destinations, the People's Republic of China specifically is excepted and treated more as before. See also McKenzie, *China and U.S. Trade: Recent Export Regulations*, 18 INT'L LAW. 455 (1984).

<sup>63</sup> See EAR § 385.4(a) (antiapartheid foreign policy controls on exports to South Africa).

<sup>64</sup> See EAR § 385.4(d) (antiterrorism policy on exports to Yemen, Syria, and Iran).

<sup>65</sup> See EAR § 385.4(e) (policy re Iran-Iraq war).

<sup>66</sup> See EAR § 374.3(e)(1)(ii).

licensing schemes for exports of commodities and technical data.<sup>67</sup> The long expected implementation of the Military Critical Technologies List should achieve a further integration of these schemes.<sup>68</sup> Because OEA currently is revising section 379 of the EAR, this article does not discuss technical data in general,<sup>69</sup> but concentrates on exports of computer-related hardware and the evolving schemes for software licensing. The EAR's changing regulation of software exemplifies this increasing merger of commodity and technical data regulation, as it has moved from a fairly confusing mixture of commodities and technical data controls over most software to a no less confusing mixture of treating some types of software programs as commodities and others as a mixture.

1. *Commodity Classification—The "Commodity Control List" (CCL)*

The first step in determining whether a Validated License is required to export a particular commodity is to examine the CCL.<sup>70</sup> The CCL, particularly Group 5, which governs Electronics and Precision Instruments with respect to computer-related commodities, lists virtually all commodities not covered by other export control jurisdictions and sets forth which country group destinations require Validated Licenses pursuant to the applicable Export Control Commodity Number (ECCN). Therefore, determining what ECCN applies to a particular commodity is crucial. Unfortunately, the CCL often is so complex and vague because of an inability to keep pace with changing product technology that it takes a combination of lawyers, engineers, and businesspersons to determine the appropriate ECCN.

Frequently, a commodity classification request should be filed with OEA to achieve maximum assurance that exports will be made legally and appropriately. Exporters should approach such requests as advocates because most marketing brochures "oversell" their products and may alter the classification that would be made from straight examination of the product specifications. Furthermore, as with any regulations, the CCL is subject to different interpretations. Few businesspersons would approach a tariff classification issue with-

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<sup>67</sup> See EAR § 379 for rules governing exports of technical data.

<sup>68</sup> EAA of 1979, § 5(d), required the Secretary of Defense to develop an MCTL for the purpose of assuring that national security export controls are limited to military critical goods and technologies and the mechanism through which they may be effectively transferred. The list was intended to become part of the CCL. In conjunction with this difficult effort, OEA has also been redrafting EAR § 379 to incorporate the MCTL concept but has issued no proposed regulations as of this date. See also *supra* note 18.

<sup>69</sup> See generally Conner, *An Introduction to U.S. Government Controls on Exports of Technology*, in CURRENT INTERNATIONAL LEGAL ASPECTS OF LICENSING AND INTELLECTUAL PROPERTY 191 (1980).

<sup>70</sup> See EAR § 399.1, Supp. No. 1; § 399.2, Supp. No. 1 (commodity interpretations).

out seeking to persuade the Customs Service as to the applicable TSUS, because the *ad valorem* percentage difference between two potentially applicable classifications will have an obvious monetary impact. While not as readily apparent, the administrative costs of having to make virtually all exports under Validated Licenses when they could be made under General Licenses are important.<sup>71</sup>

Set forth below are the principal ECCNs that govern general purpose computer equipment and require Validated Licenses for export to all destinations other than Canada.

ECCN 1564A — Electronic component assemblies, subassemblies, printed circuit boards, and microcircuits;

ECCN 1565A — Electronic computers and related equipment;

ECCN 1572A — Recording and/or reproducing equipment (if exported with computers, covered by ECCN 1565A);

ECCN 1527A — Cryptographic and ancillary equipment;

ECCN 1529A — Electronic measuring, testing, and calibrating equipment, and digital instruments incorporating a computer;

ECCN 4529A — Computerized electronic testing equipment (now removed);<sup>72</sup>

ECCN 1541A — Cathode-ray tubes;

ECCN 4590B — Multispectral/digital image processing/display systems.

The parameters under each ECCN should be studied carefully to determine whether a product falls within its coverage. Also, the full CCL should be consulted, because other ECCNs not listed above may apply to more specialized computer equipment.

As the computer industry moves forward, the CCL is changed constantly so as hopefully to keep pace and to control only those

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<sup>71</sup> For example, certain commodities may qualify as "General Industrial Equipment" under ECCN 6399G and require Validated Licenses only for export to S and Z destinations. See EAR § 399.2, Supp. No. 1, Commodity Interp. No. 29. As such products increasingly are improved and, rely more on computers, the classification may change to ECCN 1529A or 1565A, particularly in view of the revisions to ECCN 1565A governing equipment "associated" with computers or containing an "incorporated" or "embedded" computer. The point at which the classification will change can be determined only on a case-by-case basis, and commodity classification determinations often provide essential assurance in a case in which a Customs Inspector believes a more restrictive classification is warranted.

When it is necessary to export before obtaining a commodity classification determination, it is wise to apply for a Validated License simultaneously with a classification request and to note on the face of the license application that such a request has been filed, but that the application processing should not be delayed.

<sup>72</sup> For years ECCN 4529B and its predecessors applied unilateral controls to certain exports. 4529B was recently removed from the CCL because COCOM agreed to control such exports multilaterally. 49 Fed. Reg. 50,608, 50,632 (1984). This move may be good for industry because ECCN 4529B often was used as catch-all category to control exports of many devices that incorporated microprocessors, and much effort was devoted by certain industries to declassify such goods by moving them to ECCNs 6399G or 6599G. See 49 Fed. Reg. 17,932 (1984). It remains to be seen whether ECCN 1529A and the newly revised 1565A will be used in a similar fashion.



exports deemed "strategic." While regulatory changes in the CCL lag far behind technological progressions, and too few products are decontrolled for most exporters' liking, the amendments should be reviewed carefully by knowledgeable technicians and attorneys for helpful changes. In addition, such amendments may create Validated License requirements for certain exports not previously subject to control. Such was the case recently when the Commerce Department announced that it was "decontrolling"<sup>73</sup> exports of certain low-end computer equipment pursuant to a revision of multilateral export controls by COCOM.<sup>74</sup> These amendments decontrolled certain low-end equipment but also imposed export controls on certain types of "strategic" software not previously subject to Validated License requirements by adding a new ECCN 1566A—"Software and technology therefor for equipment described . . . therein."<sup>75</sup> Also, it appears likely that the new 1565A regulations will impose export controls on certain equipment that contains an "incorporated" or "embedded" computer or microprocessor, but the proper interpretation of those terms has not yet been settled.

## 2. Software

The regulation of software exports has been in a state of flux, and further regulatory changes are anticipated. A few years ago, the export licensing community debated whether software exports were controlled as "commodities" under the CCL or as "technical data" under EAR section 379. Many have argued persuasively that some types of software programs were not controlled at all because they were not commodities and did not meet the definition of "technical data."<sup>76</sup>

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<sup>73</sup> The term "decontrol" and similar terms often are used in export licensing lexicon to describe regulatory changes that lift Validated License requirements for exports of certain commodities to certain destinations, e.g., by changing the ECCN classification from 1565A to 6599G.

<sup>74</sup> See Fed. Reg. 50,608 (effective Jan. 1, 1985, with savings clause allowing orders before January 15, to be shipped under old general license provisions up to January 29, 1985), as amended by 50 Fed. Reg. 4503 (Jan. 31, 1985) (extending savings clause to April 29, 1985). See also *Export Rules Relaxed for Low and Only*, COMPUTERWORLD, Jan. 14, 1985, at 89; *Commerce Lifts Controls on Many Embedded CPUs*, ELECTRONIC NEWS, Jan. 7, 1985, at 4.

<sup>75</sup> *Id.* at 50,622. Subsection (h)(2) of the newly revised ECCN 1565A contains the decontrol provisions. If an exporter can satisfy itself that its products are decontrolled by those regulations, they can be exported under General License G-DEST to most countries. In contrast, the only prior procedure for decontrolling certain low end computers was by an application for Commerce Department approval pursuant to EAR § 376.10(a)(5).

<sup>76</sup> The definition of "technical data" in the EAR is quite broad.

"Technical Data" means information of any kind that can be used, or adapted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials. The data may take a tangible form, such as a model, prototype, blueprint, or an operating manual; or they may take an intangible form such as technical service.

EAR § 379.1(a) (footnotes omitted). Software now has been specifically defined in the EAR in ECCN 1566A:

As recently as July 1983, in a memorandum distributed by the Association of Data Processing Service Organizations to its members,<sup>77</sup> this author indicated that exports of most types of software could be made to most Free World (T and V) countries under General Licenses as long as the exporter followed the EAR and had obtained written assurances from the end user/customer that it would not re-export the software or related technical data, or any direct product thereof, to any Q, S, W, Y, or Z destinations. Most types of software were treated as a combination of technical data (the programs) and commodities (the media).

Certain exceptions that still exist in the CCL treated four types of software as commodities: software exported in conjunction with computer hardware (ECCN 1565A); software designed for use with numerically controlled machine tools (as defined in ECCN 1091A); Computer Aided Design software usable in the manufacture or development of integrated circuits (as defined in ECCN 1355A(b)(2)(iv)); and software designed to control or perform the function of cryptographic equipment (as defined in ECCN 1527A). In addition, Validated Licenses often were and still are required for exports to all destinations of software designed for use for any aircraft equipment or military end uses or intended for use in connection with nuclear activities.<sup>78</sup> Also, media exceeding the limits set forth in Exception 3 to ECCN 1572A require a Validated License for export to most countries.

Although software exporters had to examine a checklist carefully and review the destination before exporting,<sup>79</sup> the vast majority of software exports to T and V destinations could be made without Validated Licenses pursuant to the requirements of General License

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“Software”—

A collection of one or more “programs” or “microprograms” fixed in any tangible medium of expression.

“Program”—

A sequence of instructions to carry out a process in, or convertible into, a form executable by an electronic computer.

“Microprogram”—

A sequence of elementary instructions, maintained in a special storage, the execution of which is initiated by the introduction of its reference instruction into an instruction register.

49 Fed. Reg. 50,608, 50,623 (1984) (adding ECCN 1566A, Technical Note No. 1), transferred to EAR § 379, Supp. No. 3, by 50 Fed. Reg. 16,468 (Apr. 26, 1985). Software has further been categorized as development system software, programming system software, maintenance system software, operating system software, and application software. *See id.* (Technical Note No. 2). Also, the broad definitions of “export” and “re-export” of technical data in EAR § 379.1(b) and (c) apply to all software. *Id.* at 50,609 (amending EAR § 379.4(g)).

<sup>77</sup> Arent, Fox, Kintner, Plotkin & Kahn, Memorandum on U.S. Export Controls over Exports of Computer Software (July 1983) (available from ADAPSO).

<sup>78</sup> *See* EAR § 379.4(c), (d).

<sup>79</sup> It is rare that software exports can be made under General License GTDR to Country Groups Q, S, W, Y, or Z or Afghanistan or the People’s Republic of China. *See* EAR § 379.4(a), (b), (i).

GTDR<sup>80</sup> for the program and G-DEST<sup>81</sup> or GLV for the media. The list of exceptions, however, has increased. In March 1984, as a result of COCOM review of the CCL, the EAR added two new types of software programs to the list of those included on the CCL: specially designed software for equipment made for manufacturing or testing printed circuit boards and related components and accessories (ECCN 1354A); and specially designed software for precision linear and angular measuring systems (ECCN 1532A).<sup>82</sup> The United States was still pressing its allies in COCOM to go further in controlling software exports,<sup>83</sup> and in midsummer 1984 COCOM members agreed to restrict a host of software that have potential strategic uses.<sup>84</sup>

As a result, the EAR was amended on December 31, 1984, to add two new ECCNs governing software. The first is the broadest yet—ECCN 1566A, which is the first specific category dedicated solely to software exports. Software exporters should review the technical parameters of this category because the category covers a number of software systems that previously did not require Validated Licenses. Also added to the regulations was specially designed software for the use of stored program controlled communication switching equipment or systems (ECCN 1567A). *As this article was going to press, the EAR was amended by removing the new ECCN 1566A from the CCL and transferring its substantive provisions to a new Supplement No. 3 to EAR § 379, 50 Fed. Reg. 16,468 (Apr. 26, 1985). This change again treats most software as technical data and removes validated license requirements for exports of software covered under EAR § 379, Supp. No. 3, to T and V Country Groups.*

Thus, software exporters first should review the CCL to determine whether their software programs are covered by a particular ECCN. Reference to EAR section 379.4(g) should alert exporters to what ECCNs on the CCL cover software exports. All software listed in those ECCNs currently requires a Validated License for export to any destination other than Canada. Second, all software exports not covered by a CCL entry must comply with the technical data provisions of EAR section 379. In general, this means that Validated Licenses will be required for exports to Q, S, W, Y, and Z destinations, as well as Afghanistan<sup>85</sup> and the People's Republic of China.<sup>86</sup>

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<sup>80</sup> See EAR § 379.4.

<sup>81</sup> See *infra* text accompanying note 114. See also EAR § 399.1, Supp. No. 1, ECCN 1572A.

<sup>82</sup> 49 Fed. Reg. 12,678 (1984) (amending EAR §§ 379.4(g); 399.1, Supp. No. 1).

<sup>83</sup> See *U.S. Asks Allies to Curb Software Exports*, Washington Post, Apr. 14, 1984, at D9, col. 3.

<sup>84</sup> See *U.S., Allies Restrict Technological Exports to East Bloc*, COMPUTERWORLD, July 30, 1984, at 16; *Allies Agree To Restrict Computer Sales to East Bloc*, Washington Post, July 17, 1984, at 1A, col. 2.

<sup>85</sup> See EAR § 379.4(a), (b).

<sup>86</sup> See EAR § 379.4(i).

Validated Licenses may be required for exports of software designed for use for any aircraft equipment or military end-uses or intended for use in connection with any kind of nuclear activities.<sup>87</sup> Other restrictions apply to exports to South Africa and Namibia.<sup>88</sup>

All other software programs that pass these tests should qualify for export under General License GTDR<sup>89</sup> as long as written assurances have been obtained from the end-user customer prior to export that the software or its direct product will not be exported to Country Groups Q, S, W, Y, or Z, or Afghanistan or the People's Republic of China.<sup>90</sup> Finally, one should assure that the media on which the software programs are stored qualify for General License G-DEST treatment pursuant to ECCN 1572A.

Unfortunately for software exporters, the earlier days of light restrictions on most exports have passed, and the EAR's coverage of software has become more complex and burdensome. Given the desire of the United States to control software exports more vigorously, further changes can be expected.

#### F. *Re-Exports*

The U.S. Government asserts broad extraterritorial jurisdiction over "re-exports"<sup>91</sup> from outside the United States to other destinations. Prior authorization from the OEA is required for re-exports of U.S. origin commodities and technical data,<sup>92</sup> U.S. origin parts and components incorporated in foreign made commodities,<sup>93</sup> and certain commodities manufactured abroad by use of United States technical data and destined for certain prohibited countries.<sup>94</sup>

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<sup>87</sup> See EAR § 379.4(c), (d) for details.

<sup>88</sup> See EAR § 379.4(e) (restrictions apply where reason to know of intended end use by or for South African military or police entities, and special written assurance requirements for all others).

<sup>89</sup> EAR § 379.4.

<sup>90</sup> EAR § 379.4(f) (written assurance requirements). Written assurances may be made in many forms, and often an exporter of software can argue successfully that clauses in a license agreement restricting copying or distribution of the software program without specific written permission from the U.S. licensor are adequate. More specific export-related written assurance provisions are preferable, however, and should be included in all licensing agreements.

<sup>91</sup> "The term 're-export' in the [EAR], or any license, order, or export control document issued thereunder, includes re-export, transshipment, or diversion of commodities or technical data from one foreign destination to another." EAR § 370.2.

<sup>92</sup> EAR § 374.1(a).

<sup>93</sup> EAR § 376.12. This short regulation is the basis for an entire unwritten set of procedures for obtaining a type of "Validated License," called a "Parts and Components Authorization." The three-part test in EAR § 376.12 (note) should be reviewed to determine if a P&C authorization is required prior to re-export of the U.S. parts and components contained in the foreign end product. If so, OEA should be consulted as to the information it will require on a P&C application, which requirements are not set forth in the EAR.

<sup>94</sup> See EAR § 379.8(a)(3).

In addition, exports made from the United States that the exporter has reason to know are intended to be re-exported, directly or indirectly, require prior authorization from OEA.<sup>95</sup> Otherwise, illegal re-exports by an overseas customer may result in liability for the United States exporter.

Certain re-exports may be made without prior OEA authorization, generally if they could have been exported from the United States under a General License.<sup>96</sup> For re-exports not falling within these guidelines, the procedures in EAR section 374 should be followed.

U.S. trading partners have vociferously challenged the legality and propriety of the U.S. assertion of extraterritorial jurisdiction in these areas, particularly when extraterritorial controls are imposed on foreign policy as opposed to direct national security grounds.<sup>97</sup> The issue has not yet been fully litigated in court,<sup>98</sup> but the debate continues.

### G. Enforcement

An entire article could be devoted to the subject of export control enforcement<sup>99</sup> because the topic is broader and more important than coverage in this overview reasonably can provide. The objective of most exporters is to avoid having to address enforcement issues entirely, hopefully by complying with the law. Some mistakes are inevitable even for the most careful exporters, however, and the emphasis on tougher enforcement of export control laws makes risk awareness even more important.

Two principal agencies currently are responsible for enforcement. The U.S. Customs Service reviews exports at the border and is in the position to intercept individual shipments violating the ex-

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<sup>95</sup> EAR § 374.1(b).

<sup>96</sup> See EAR § 374.2 (permissive re-exports).

<sup>97</sup> See generally Yittman, *Extra-Territorial Application of U.S. Export Control Laws on Foreign Subsidiaries of U.S. Corporations: An American Lawyer's View from Europe*, 16 INT'L LAW. 737 (1982).

<sup>98</sup> In the Siberian Gas Pipeline case of 1982, President Reagan's authority to enforce extraterritorial controls was never determined because the controls were lifted before court challenges were decided. See Hunt, *Export Administration Act Penalties and Enforcement Process*, THE COMMERCE DEPARTMENT SPEAKS, *supra* note 1, at 225, 246.

In most cases in which an export has been made under a Validated License, the foreign consignee will have signed a form agreeing not to re-export without U.S. Government permission. See EAR §§ 375, 379.4(f); Forms ITA-629, Statement by Ultimate Consignee or Purchaser, ITA-645P, International Import Certificate, ITA 6052, Statement by Foreign Consignee in Support of Special License Application. Arguably, such statements constitute a consent to U.S. jurisdiction. Notice is also provided on all shipments by destination control statements under EAR § 386.6. On the other hand, foreign customers have no choice but to execute such documents if they wish to purchase U.S. products.

<sup>99</sup> See generally Hunt, *supra* note 98; Murphy, *Enforcement of Export Controls: A Private Practitioner's Perspective*, THE COMMERCE DEPARTMENT SPEAKS, *supra* note 1, at 291.

port control laws. Its heavily publicized "Operation Exodus"<sup>100</sup> has been quite aggressive in detaining exports believed to be illegal. In 1981 the Commerce Department set up a special agency with the same status as OEA, the Office of Export Enforcement (OEE).<sup>101</sup> While the Commerce Department has primary authority for enforcement of the Export Administration Act of 1979, it works in coordination with the Customs Service.<sup>102</sup> The turf battle over which agency should have primary jurisdiction over enforcement activity is still being fought in Congress.

### 1. Commerce Department Enforced Penalties

Criminal penalties for violations of the EAR range from the greater of \$1 million or five times the export value for companies. For individuals, such penalties are up to \$250,000 and/or ten years in prison.<sup>103</sup> Traditionally, criminal penalties rarely were sought, but the Government has been seeking criminal indictments in greater numbers in recent years.<sup>104</sup>

Civil penalties may include up to \$10,000 per violation and, even more damaging, denial of the privilege to export or participate in U.S. export activities.<sup>105</sup> Such penalties can add up quickly, as evidenced in the recent case settled by Digital Equipment Corporation for a \$1.5 million fine.<sup>106</sup> Civil law enforcement responses require carefully planned and tactful advocacy because judicial review is precluded.<sup>107</sup>

OEE investigations may stem from a particular violation, but they are comprehensive and usually focus on the exporter's history of, and efforts toward, compliance with the EAR and cooperation with the investigation. Thus, exporters subjected to "charging letters" and resulting compliance investigations must decide with their attorneys whether to disclose voluntarily or invoke the fifth amend-

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<sup>100</sup> In Fiscal Year 1983 the Defense Department provided \$30 million from its budget to the Customs Service for Operation Exodus. Department of Defense, *Report to the 98th Cong. on the Technology Transfer Control Program* 55 (Feb. 1984).

<sup>101</sup> See DEP'T OF COMMERCE, EXPORT AD. ANN. REP. FY 1982, 55-56 (1983). Theodore Wu, a former federal prosecutor, was appointed Deputy Assistant Secretary for Export Enforcement.

<sup>102</sup> See White House Press Release of Mar. 23, 1984, reprinted in THE COMMERCE DEPARTMENT SPEAKS, *supra* note 1, at 365.

<sup>103</sup> EAR § 387.1(a). See also 18 U.S.C. § 1001 (1984); EAR § 387.1(a)(2) (violation of False Statements Act); 18 U.S.C. § 371 (1984) (general conspiracy).

<sup>104</sup> See, e.g., *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1875 (1983); *United States v. Edler Indus., Inc.*, 579 F.2d 516 (9th Cir. 1978); *United States v. Moller-Butcher*, 506 F. Supp. 550 (D. Mass.), *appeal dismissed*, 723 F.2d 189 (1st Cir. 1983). See also McDonough & Roosevelt, *Criminal Actions Under Export Act Present Catch-22*, Wash. Legal Times, May 14, 1984, at 32.

<sup>105</sup> EAR § 387.1(b).

<sup>106</sup> See *Digital Equipment Corp. Fined \$1.5 Million by U.S.*, Washington Post, Sept. 5, 1984, at F1, col. 4.

<sup>107</sup> See EAA of 1979, § 13.

ment privilege against self-incrimination, realizing of course that the corporate entity cannot claim such a fifth amendment privilege. Such decisions can be made only on a case-by-case basis, but most exporters choose to disclose and cooperate after careful review.<sup>108</sup> Of course, the same issues arise in a different context when a company itself discovers a series of (hopefully inadvertent) violations.

### 2. *Customs Service (OPEX) Enforcement*<sup>109</sup>

If a Customs Inspector believes a particular shipment is being exported in violation of the EAR, he will "detain" the shipment for investigation. Generally, he will notify the exporter, or at least its freight forwarder, and request information. Prompt action may result in early release of shipments that are in fact legal but may have technical problems in documentation. Even if the shipment is in compliance, the detention delay may harm the exporter's business. Simultaneously, the Inspector will consult with OEA/OEE officials to determine whether a violation exists. If Customs and OEA finds the export to be illegal, the "detention" becomes a "seizure."

Upon seizing a shipment, Customs begins its own penalty proceedings. Generally, the exporter may post a bond equal to a percentage of the value of the goods and export them if a proper license has been obtained. Forfeiture proceedings involve fines ranging from forfeiture to fractional values of the goods, but fines generally range from ten percent of valuation or less.

Even though fines may be minimal, it is important to file timely a "Petition for Mitigation of Fine or Forfeiture" with appropriate documentation to establish a record of reasons for the violation and steps taken to correct any problems. Additionally, such petitions can minimize the likelihood that OEE will view an isolated case as the "tip of the iceberg" and conduct a more in-depth investigation. Parallel citations for the same offense are possible because double jeopardy protection does not apply in civil proceedings.

### 3. *Potential Liability for Domestic Sales*

Illegal exports by domestic customers also can make the original seller vicariously liable in certain circumstances. If a U.S. sale is made when there is reason to know that goods are intended to be re-exported illegally, the original seller may be held liable, as well as the

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<sup>108</sup> EAR § 387.5(c) requires disclosure of change in material fact after representations, statements, or certifications have been made. *See also* EAR § 372.7(b) (disclosure to OEE required of exports made without a required validated license).

<sup>109</sup> Regulations for Customs enforcement procedures are few. Authority to seize goods exported in violation of the law is taken from 22 U.S.C. § 401 (1982). *See also* EAR §§ 386.8, 387.1(b)(4); Bureau of Customs Cir. EXP-3-PEN (Dec. 28, 1966) (export control; settlement of forfeitures for violation of export control regulations of Commerce Department).

exporter.<sup>110</sup> For example, consider a company that has tried repeatedly to export a particular computer to a Libyan concern only to have had OEA categorically deny it a license. The company is then approached by a U.S. person whom he knows is an agent of the Libyan concern and who requests to buy the same computer, saying, "Let me worry about the export license." If the computer ends up in Libya illegally, the U.S. company's exculpatory clause in its contract with the agent probably will not help.<sup>111</sup> Such clauses, which notify most domestic customers of sensitive products for which United States Government export authorization is required are recommended for normal sales, however.

### III. Methods of Licensing

#### A. General Licenses

General Licenses<sup>112</sup> require neither filing of an export license application nor issuance of a license document (except GTE), only self adherence to regulatory requirements. Some of the more important General Licenses for computer equipment shipments are discussed below.<sup>113</sup>

General License G-DEST<sup>114</sup> perhaps is the most often used license. It applies to a particular export only if upon examining the CCL it is concluded that a Validated License is not required for export of commodities under the applicable ECCN. Unfortunately, most computer-related commodities will not qualify for G-DEST treatment unless it can be established that ECCNs 6399G or 6599G apply instead of, for example, 1565A.

General License GLV<sup>115</sup> also is important for exports of limited value. Each ECCN sets forth a GLV threshold, and exports falling below such levels qualify for GLV for the countries specified. Shipments cannot be split to qualify for GLV, however, and close attention must be paid to the definition of "value" in the regulation.<sup>116</sup>

Portable personal computers, testing equipment, and similar devices generally can be exported temporarily for use or servicing and returned pursuant to the provisions of General License BAGGAGE<sup>117</sup> or GTE.<sup>118</sup> BAGGAGE applies if the person carrying out

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<sup>110</sup> See EAR §§ 387.2 (causing, aiding, and abetting a violation), 387.3 (solicitation, contempt, and conspiracy), 387.4 (acting with knowledge of a violation).

<sup>111</sup> See, e.g., *In re Applied Sys. Corp.*, Dep't of State (Sept. 20, 1982) (consent decree), reprinted in Dep't of State, Munitions Control Newsletter No. 97 (Oct. 1982).

<sup>112</sup> EAR § 371.1.

<sup>113</sup> See also EAR §§ 371.21, 379.3, 379.4 (GTDA and GTDR for technical data exports).

<sup>114</sup> EAR § 371.3.

<sup>115</sup> EAR § 371.5.

<sup>116</sup> Generally, "value" constitutes the greater of the actual selling price or market price. *Id.* § 371.5(b)(1).

<sup>117</sup> EAR § 371.6.

<sup>118</sup> EAR § 371.22.



the good personally owns it, while GTE is used if the product is owned by the employer. GTE requires prior application and OEA validation of the exporter's certification.<sup>119</sup>

General License GLR<sup>120</sup> can be used for return or replacement of certain commodities, pursuant to servicing under warranty. Its requirements are specific, and it can be used only for goods originally exported under Validated Licenses. For instance, a copying machine originally exported G-DEST cannot be serviced GLR if its microprocessor is defective, and a Validated License must be obtained to export a new microprocessor.

General License GTE<sup>121</sup> authorizes certain temporary exports intended to be returned within one year. A specific certification must be validated by OEA and a GTE registration number assigned before exporting such items as tools of the trade, temporary exports for demonstration in T and V countries, items sent for inspection, testing, or repair, and others.<sup>122</sup>

General Licenses provide the easiest mechanism for exporting qualified items. Nevertheless, because they are based on self adherence, exporters carefully should assure that they come within the particular regulations and otherwise comply with EAR requirements.

### *B. Individual Validated Licenses*

Generally, applications for individual exports (Form ITA-622P) or re-exports (Form ITA-699P) are completed pursuant to instructions,<sup>123</sup> filed with OEA, reviewed, validated with or without conditions, and returned to the applicant or its authorized agent. Exports then may be made pursuant to the terms of the license and in accordance with the export clearance procedures in the EAR.<sup>124</sup> Careful attention to how the application is worded and processed through various stages is important to reduce delays and possible "Returns without Action" (RWAs), negative considerations, or restrictions on one's ability to export.

Often it is wise to consult with OEA licensing officers before filing a particular application to determine the amount of information necessary for review. For example, commodities generally should be described in terms of quantity per type per model number. In the case of disk drives for various types of personal computers, however,

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<sup>119</sup> EAR § 371.22(d).

<sup>120</sup> EAR § 371.17.

<sup>121</sup> EAR § 371.22.

<sup>122</sup> EAR § 371.22(b)(1)-(6).

<sup>123</sup> See EAR §§ 372.4, 374.3, 379.5, 379.8. See also EAR §§ 376.4 (special procedures for servicing of equipment previously exported or re-exported to Country Groups Q, W, and Y), 376.10 (special procedures for electronic computers and related equipment).

<sup>124</sup> EAR § 386.

the manufacturer may make the same type of drive for several different PCs, and the model numbers will change with each new version. In such a case, for an export license to authorize shipment of a variety of drives to a foreign distributor in a Free World country, OEA licensing officers often will accept a designation by type of disk drive (for example, Zeta-8) without requiring each part number to be specified. The descriptions must be specific enough to allow the product to be evaluated, and greater specificity is required for the higher technology exports. Significant technological changes, such as moving from double density to tri-density disk drives, will require license amendments.

Documentary attachments are an important part of each license application. Except for exports to T countries and certain specified exceptions, the foreign end-user and purchaser generally must obtain from its government or execute particular end-user documentation and provide it to the applicant before an export license application may be filed.<sup>125</sup> Exporters should request such documents early to allow sufficient time for processing the application.

Other documents describing the products and the transaction often are helpful, especially for new products that may be unfamiliar to OEA. Brochures are useful, but in sensitive cases marketing materials that oversell the capabilities of a particular product may cause difficulties. The statement that "this personal computer not only helps Johnny do his homework faster, but is also used by NATO to control nuclear battlefield strategy" may sell more computers but may not be so warmly received by Defense Department reviewers.

Applications to export or re-export computers must include the computer's PDR.<sup>126</sup> Applications to export or re-export digital computers to destinations in Country Groups Q, W, Y, and the People's Republic of China, or to upgrade existing digital computers in those destinations, must include an executed Form 6031P, Computer System Parameters.<sup>127</sup> Certain information specified in EAR section 376.10(a)(1) also must be supplied for such exports. If any of the parameters fall within boxes "C" or "D" of Form 6031P, special statements signed by the end user and the applicant must accompany the application, and visitation requirements likely will be imposed if the application is granted.<sup>128</sup> Also, COCOM review of the latter applications is likely.

In addition to the documentation required by the regulations, OEA licensing officers often ask for further information on certain

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<sup>125</sup> See EAR § 375 (documentation requirements and exceptions for particular commodities and destinations).

<sup>126</sup> EAR § 399.1, Supp. No. 1, ECCN 1565A. See *supra* note 43 and accompanying text.

<sup>127</sup> EAR § 376.10(a)(1).

<sup>128</sup> EAR § 376.10(a)(2), (3). See *supra* note 60 and accompanying text.

applications pursuant to their authority to request such information as they deem necessary.<sup>129</sup> Certain information is requested so consistently that regulations should be adopted so as not to penalize new exporters and small businesses unaware of such "secret laws." For instance, Swedish distributors of certain equipment must undergo a clearance procedure through the U.S. embassy for OEA to approve licenses authorizing them to resell in Sweden. Also, specific information is consistently required in letters of explanation for technical data applications<sup>130</sup> generally, and specifically for training foreign persons and for computer programs. Particular information not listed in the EAR is required for "Parts and Components" applications.<sup>131</sup> For up-to-date lists of the information required to be submitted with such applications and others, exporters should contact OEA directly.

Finally, exporters should include a stamped, self-addressed postcard with each application so that OEA will notify them of the case number assigned to their application. Although this is not mentioned in the regulations,<sup>132</sup> it is nearly impossible to ascertain the status of an application without the case number.

Processing times for export license applications vary depending on whether an application requires referral to other agencies for review and comment. Table 1 shows the general time limits.<sup>133</sup> Such time limits are often not adhered to, unfortunately. While section 10(j) of the Export Administration Act of 1979 provided a right to seek an injunction or other appropriate relief if the Commerce Department exceeded such time limits,<sup>134</sup> the Assistant General Counsel of Commerce for International Trade has reinforced this author's opinion that such actions are not helpful.<sup>135</sup> Only one such action appears to have been brought, and OEA denied the license application and mooted the case.<sup>136</sup> Exporters generally realize that reluctantly acceding to delays beyond the time limits in hope that arguments or compromises will overcome government objections is preferable to resorting to pressure that likely will speed a denial.

Therefore, effective advocacy before OEA and the agencies to whom an application is referred is often crucial in processing sensi-

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<sup>129</sup> See EAR § 372.5.

<sup>130</sup> See EAR § 379.5(d).

<sup>131</sup> See EAR § 376.12. See also *supra* note 93.

<sup>132</sup> EAR § 370.13(b) states that OEA will notify applicants of the case number and certain other processing information within ten days, but this requirement rarely is adhered to. See DEP'T OF COMMERCE, EXPORT ADMIN. BULL. No. 222 at 2 (Aug. 9, 1982) (recommending postcard).

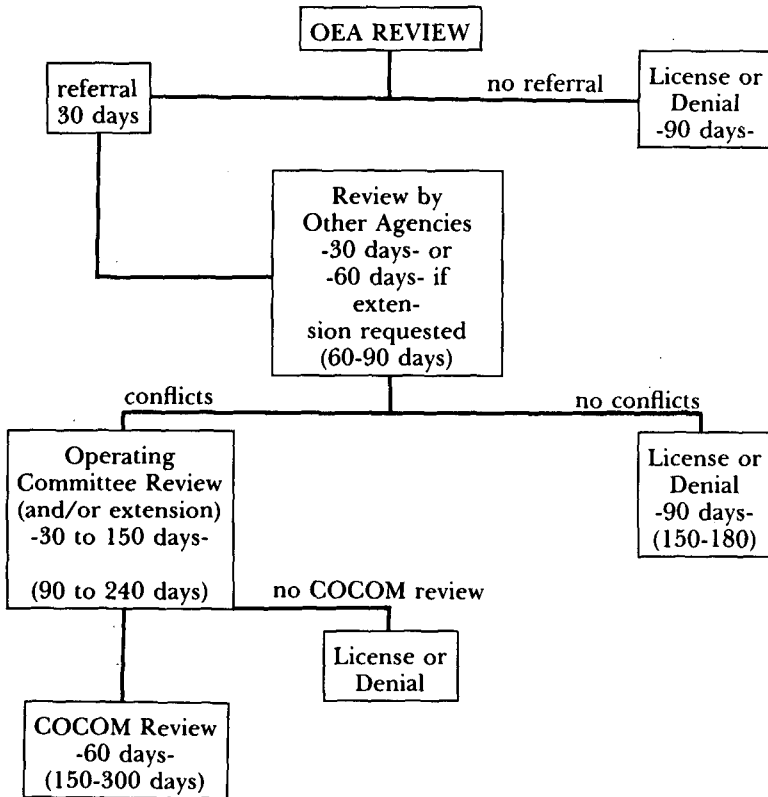
<sup>133</sup> See EAR § 370.13 (specific processing times).

<sup>134</sup> See EAR § 370.13(m) (procedures for administrative petition).

<sup>135</sup> See Hunt, *supra* note 98, at 247.

<sup>136</sup> *Id.* See *Daedalus Enters., Inc. v. Baldrige*, 563 F. Supp. 1345 (D.D.C. June 21, 1983) (order granting summary judgment for plaintiff and requiring compliance with section 10 of the Export Administration Act).

TABLE 1 - Export License Application Processing Times



tive applications.<sup>137</sup> It is important to discuss sensitive applications with an OEA commodity specialist to ascertain the issues that should be addressed, the other agencies that likely will review the application, and the concerns of those agencies. Consultations with the referral agencies, as appropriate, also are useful to resolve questions and shorten processing time.

### C. Special Licensing Procedures

Because individual Validated Licenses are too awkward for most high-volume exporters, the EAR contains special licensing procedures that authorize multiple exports to specified consignees.<sup>138</sup>

<sup>137</sup> See generally Berlack, *Practical Tips on Obtaining Export Licenses*, in THE COMMERCE DEPARTMENT SPEAKS, *supra* note 1, at 253.

<sup>138</sup> EAR § 373. Special limitations apply to exports to South Africa or Namibia under all such procedures. EAR § 373.1(a).

The principal multiple licenses are the Distribution License and the Service Supply License.<sup>139</sup> An alternative worth considering is the individual "bulk" license.

### 1. *Distribution Licenses*

The Distribution License (DL) is a multiple license that authorizes exports under an international marketing program to consignees/distributors that have been approved in advance by the Multiple License Branch of OEA.<sup>140</sup> Under certain conditions, re-exports to authorized territories may be made under a DL. Although certain commodities are excluded, the DL is an invaluable mechanism that, after approval of a very detailed application, authorizes most exports to be made without individual Validated Licenses to T and V Country Groups, except for Afghanistan and the People's Republic of China.

Exporters using a DL must be particularly careful to observe the commodity restrictions and to be certain that their consignees do so for re-exports. As discussed earlier, many computers cannot be exported under the DL procedure to various countries if they have a PDR exceeding one of the three applicable thresholds or if they are nuclear-related or are being sent to nuclear end users.<sup>141</sup> Similarly, certain lasers and laser systems, certain spectrum analyzers applying Fast Fourier techniques, multispectral image processing equipment, and other specified commodities cannot be exported under a DL.<sup>142</sup> Individual licenses are therefore necessary to supplement even the most comprehensive DL.

At this writing, controversial proposed regulations<sup>143</sup> are likely to be adopted in some form and should tighten the DL requirements and procedures significantly. These proposals result from the belief by some government officials that the flexibility of the DL system has

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<sup>139</sup> Others are the Project License, EAR § 373.2, the Qualified General License for multiple exports to Q, W, and Y destinations of certain commodities to certain end-users for certain approved end-uses, EAR § 373.4, and the Aircraft and Vessel Repair Station Procedure, EAR § 373.8.

The Project License procedure should offer a good opportunity to combine several applications that are necessary for one system sale due to different processing codes. See EAR §§ 372.4(d), 373.2(a)(1). Experience indicates, however, that the Project License is disliked by OEA licensing officers, and that it is often easier to submit a coordinated series of export licenses for a turnkey project, for instance.

<sup>140</sup> EAR § 373.3.

<sup>141</sup> See *supra* notes 41-50 and accompanying text.

<sup>142</sup> See EAR § 373, Supp. No. 1.

<sup>143</sup> See 49 Fed. Reg. 35,790 (1984). These proposals revised earlier more draconian changes that had been proposed but had received strong objections from industry. See 49 Fed. Reg. 2264 (1984); see also *Export Rule Revisions Expected*, J. Comm., Dec. 11, 1984, at 1A; *Commerce Export Plan Attacked*, J. Comm., Mar. 23, 1984, at 1A, col. 6; Samuelson, *How We Harm Our Advanced Industries*, Washington Post, Mar. 7, 1984, at 1, col. 6; McKenzie, *The Commerce Department Proposes New Restrictions on Distribution Export Licenses*, 1 COMPUTER LAW. 24 (Mar. 1984).

been abused and is partly the cause of diversion of high technology equipment to the Soviet Union.<sup>144</sup> Unfortunately, the proposed restrictions may limit the utility of the DL procedure, particularly for small and emerging businesses. Exporters will have to exercise even greater care than previously to ensure that their exports comply with EAR requirements.

Significant facets of the proposed new regulations include:

- (1) a detailed compliance program that must be adopted by licensees and their consignees;
- (2) audits of all licensees by OEA on an expected six to seven-year basis;
- (3) notifications to customers of U.S. jurisdiction over re-exports;
- (4) customer approval by OEA for export of semiconductor manufacturing equipment and certain other exports;
- (5) a minimum volume of sales to authorized re-export territories to qualify;
- (6) exclusion of additional commodities from eligibility for export under a DL, including specialized computer processors with an "equivalent multiply rate" over two million operations per second and certain semiconductor manufacturing and testing equipment; and
- (7) significantly increased detail in applications and review thereof.<sup>145</sup>

OEA already has begun instituting the audit procedure in particular by splitting its Multiple License Branch into two separate units, a Licensing Unit and an Auditing Unit. More changes in this area can be expected, and similar tightening efforts may be imposed on other export licensing procedures after some experience with new DL rules.

## 2. *Service Supply License*

The Service Supply License (SL) is a multiple license that, after approval of a fairly detailed application, authorizes export of replacement parts, as well as spares to some countries, and servicing of equipment located abroad.<sup>146</sup> The SL allows for prompt servicing by a U.S. company or its foreign service facility.

An SL is especially useful for servicing expensive industrial equipment exported G-DEST but having parts that require Validated Licenses because General License GLR cannot be used to export replacement parts for such equipment.<sup>147</sup> It is also useful for servicing of equipment located in Country Groups Q, W, and Y, as well as Afghanistan and the People's Republic of China, because the DL procedure cannot be used for such countries.<sup>148</sup> Special restrictions

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<sup>144</sup> See *supra* note 143.

<sup>145</sup> 49 Fed. Reg. 35,790 (1984).

<sup>146</sup> EAR § 373.7.

<sup>147</sup> See EAR § 371.17.

<sup>148</sup> Compare EAR § 373.3(a) with § 373.7(c).

nevertheless apply to SL exports to those destinations, such as the requirement that all exports be on a one-for-one replacement basis with no authorization for spares.<sup>149</sup> Thus, exporters of computer equipment to those countries should include provisions for necessary spare parts in their original individual Validated License applications.

### 3. *Individual "Bulk" Licenses*

Individual licenses often can be obtained to authorize, for example, a year's supply of exports of specified products, such as personal computers, to a foreign distributor with up-front authorization to resell within the country or to re-export to specified destinations.<sup>150</sup> Such licenses are known in the trade as "bulk" licenses, and they often are useful to supplement special licensing procedures. For instance, some personal computers are above the PDR limit of twenty megabits per second and cannot be exported under a DL to South Africa and other countries.<sup>151</sup> An individual bulk license often can be obtained to allow such exports to a specified distributor in South Africa.

Small businesses beginning to export frequently may use bulk licenses when their volume of exports and sales territories do not yet seem large enough to justify a DL. Exporters should try to consult with OEA licensing officers before filing such applications for the first time because there may be special requirements not mentioned in the regulations, such as the Swedish clearance procedure discussed earlier. Also, exporters should investigate the laws in their distributor's country because it is very difficult to terminate relations with distributors in some countries even if they are unreliable.<sup>152</sup>

### D. *Export Clearance Procedures*

Finally, one of the more mundane aspects of export licensing is one that nevertheless requires careful attention—the export clearance procedures.<sup>153</sup> Shipper's Export Declarations must be completed correctly and delivered to carriers,<sup>154</sup> and destination control statements and Validated License numbers and/or General License symbols must be placed on invoices and shipping documents<sup>155</sup> prior to export. Such tasks should not be left to the discretion of an

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<sup>149</sup> EAR § 373.7(i). As with the DL, certain commodities are ineligible for export under an SL. EAR § 373.7(b).

<sup>150</sup> See EAR § 374.3(a).

<sup>151</sup> See *supra* notes 41-50 and accompanying text.

<sup>152</sup> See, e.g., Sales, *Termination of Sales Agents and Distributors in France*, 17 INT'L LAW. 741 (1983); Simons, *Termination of Sales Agents and Distributors in Belgium*, *id.* at 752.

<sup>153</sup> EAR § 386.

<sup>154</sup> EAR § 386.3; 15 C.F.R. § 30.50-.57 (1984) (exemptions).

<sup>155</sup> EAR § 386.4, .5, .6.

independent freight forwarder, at least not without careful review and instructions. Often, detentions by Customs Inspectors result from mistakes in such documentation, and knowledgeable persons at this stage can serve as a check on a company's export licensing system.

Exporters also must pay attention to the requirements of recording shipments on the back of Validated Licenses and returning used licenses to OEA.<sup>156</sup> If the new auditing procedures in the DL area are implemented in other areas, review of licenses returned or not will be an obvious first step, especially given the increased use of computers at OEA. Likewise, exporters should maintain records in accordance with the various recordkeeping requirements of the EAR,<sup>157</sup> but they should maintain the records for at least the five-year statute of limitations period as opposed to the two-year EAR requirement.<sup>158</sup>

#### IV. Compliance Programs

##### *A. Reasons for Having a Compliance Program*

It is increasingly vital for exporters to have programs of procedures for compliance with U.S. export control laws. As indicated in this article, the EAR and other export control regulations have become exceedingly complex. Mistakes are bound to occur, and it is important to minimize the risk of inadvertent violations. The recent emphasis on enforcement activities and the institution of auditing procedures make formal corporate compliance programs mandatory.

Moreover, a compliance program makes sense from the standpoint of efficiency alone. U.S. export licensing delays can hamper sales efforts, and therefore, it is important to coordinate export license applications and processing with marketing and sales efforts. A coordinated program also can reduce customer relations and contract problems that can arise because of export licensing delays. Establishing a chain of command to resolve export licensing issues can assure appropriate responses to legal or policy problems, as can proper adherence to recordkeeping requirements.

Every company that exports in any volume should establish a company policy of legal compliance in all areas, and export licensing is no exception. Setting forth such a policy in a program of which all

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<sup>156</sup> EAR § 386.2.

<sup>157</sup> EAR § 387.13. See also EAR §§ 371.2(g) (general licenses); 371.22(f) (GTE); 372.6(c) (evidence of order); 373.3(l) (DL), 373.7(j) (SL); 374.7 (re-exports); 375.6 (originals); 386.3(e)(5) (agent's authority); 386.3(r) (summary monthly reports); 388.15 (request to produce records).

<sup>158</sup> 18 U.S.C. § 3282 (1982) (criminal); 22 U.S.C. § 2462 (civil). The EAR provision implies that five-year recordkeeping would be wise. EAR § 387.13(e)(1).



affected personnel are aware helps to assure such legal compliance in the least burdensome manner possible.

### *B. Personnel*

Responsibility for obtaining export licenses and ensuring that all exports are made legally should be centralized. Corporations with many divisions can profit by having the parent company hold a Distribution License so that more exports can be made to various territories without cumbersome individual licenses. Small businesses should have at least one person knowledgeable in export licensing, preferably with backup. Similarly, overseas offices and distributors should centralize responsibility for re-export compliance.

The personnel centrally responsible for export licensing must have backing from top management officials. Such backing is necessary not only to enable them to be effective, but Commerce Department officials have indicated that their DL audits will be focusing on the extent of involvement by top corporate management in export compliance.

Companies should educate their sales force to export licensing requirements so that delivery commitments can be coordinated with the realities of export licensing. Also, salespersons should be aware of the possibility of illegal diversion by United States as well as foreign customers and the potential for vicarious liability as a result. A system for incorporating the Table of Denial Orders<sup>159</sup> into a checklist for exports is important to protect against illegal exports. On the other end of the delivery chain, shipping departments should be aware of export clearance procedures and should coordinate with those responsible for obtaining the licenses.

Of course, these efforts should be coordinated with legal counsel familiar with export licensing issues, both inside and outside the corporation. In this way, policy issues and legal issues that arise can be addressed promptly and accurately.

### *C. Contracting*

Several contract terms are important for export control reasons. First, contingency clauses should be inserted in any export sales contract to avoid liability for licensing delays, restrictions imposed on licenses, denials of licenses, and future regulatory actions inhibiting delivery, servicing, warranty performance, and software updates. Often a standard force majeure clause can be construed to cover such U.S. Government actions beyond the exporter's control. In sensitive cases in which licensing problems can be anticipated, how-

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<sup>159</sup> EAR § 388, Supp. No. 1 lists orders that deny export privileges in whole or in part to various companies and individuals, both foreign and domestic. It is illegal to participate in exporting activities with persons subject to denial orders. EAR § 387.12.

ever, it is best to address the issue specifically, at the very least to assure that both parties are on notice. Methods of resolving issues arising from export licensing restrictions that limit the equipment that may be exported also are recommended. Such direct contingency clauses can be tempered with a "best efforts" clause obligating the seller (and perhaps the buyer) to use its best efforts to obtain a satisfactory export license.

Responsibility clauses that place export licensing responsibility on the customer should be considered in domestic sales contracts for especially sensitive equipment or technology or where the customer intends to export it. Such clauses will not insulate a company from liability if there is reason to know of an intended violation.<sup>160</sup> Nevertheless, such an undertaking by a customer should help to avoid vicarious liability in most cases.

Written assurance provisions<sup>161</sup> regarding re-export of technology or the direct product thereof should be incorporated in all foreign licensing contracts as appropriate. Also, other export licensing related contract provisions may be useful in specific cases.

#### *D. Response to Issues and Problems*

Prompt, careful, and informed responses to issues that arise in export licensing are important to resolve problems quickly and control damages without creating additional problems. Often prompt action can resolve a problem immediately that would take longer if delays allowed a chain of administrative procedures to begin. Uninformed action, however, also can create more problems.

OEA will sometimes Return without Action (RWA) license applications, issue Negative Consideration Letters (NCLs) based on the views of a reviewing agency, or deny an application entirely. Often RWAs can be avoided by proper filing and homework on issues likely to arise. Also, unavoidable NCLs or denials can at times be reversed or successful compromises developed, pursuant to skillful presentations addressing legal, political, and technical issues.

As discussed earlier, prompt responses to detentions by Operations Exodus often can result in quick release of items legally exported. Petitions should be filed to mitigate penalties, establish a record, and reduce the likelihood of an OEE compliance investigation. Investigations of such violations, even small ones, can minimize similar problems in the future. OEE compliance investigations should be coordinated with counsel to assure appropriate legal responses and minimize present and future risks.

Finally, all responses to export licensing issues should be timely

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<sup>160</sup> See *supra* notes 110-11 and accompanying text.

<sup>161</sup> See EAR § 379.4(f) (GTDR).

and cooperative. Although export licensing is considered a nuisance by most exporters, most government officials in this area are willing to be helpful in civil cases. Disclosures should be considered and usually should be made, but only after careful consideration of the legal issues involved.

#### **V. Conclusion**

Export licensing of computer equipment and technology has become complex and cumbersome. The recent extension of Validated License requirements to many types of software demonstrates that the burdens likely will continue to increase rather than decrease. New legislation, however, could provide some assistance in the Free World area. Nevertheless, the underlying policies ensure that export controls will continue to be dynamic and involve interesting debates.