

United States Regulation of High-Technology Exports†

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† Numerous abbreviations are employed in this article. To facilitate reader reference to them, a key, prepared by the editor, appears as Appendix A to the article.

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I. Background to U.S. Export Controls Policies

The United States (U.S.) is the world's principal, but far from its only, developer and supplier of high-technology processes, Technical Data and products (Hi-Tech). The U.S. is currently suffering a large trade deficit (\$144.6 billion in 1985), with Hi-Tech exports in the past several years constituting one of the few categories of major U.S. export earners (\$68.4 billion in 1985). Hi-Tech in unfriendly hands may have military and strategic consequences adverse to U.S. interests. These facts underlie the principal reason for U.S. regulation of Hi-Tech exports and the policy controversy regarding the nature of that regulation.

Widely publicized cases in recent years have demonstrated the frequency and ease with which unfriendly foreign powers have obtained sensitive U.S. Hi-Tech. There is little doubt that some of these Hi-Tech "transfers" have had direct and severe adverse impacts on U.S. national security interests. These cases have all involved clear and intentional violations of then existing U.S. export restrictions.

Commentators have reached two directly contradictory conclusions about the purposes and approaches of export controls. Members of the first group have determined that export controls are, due to the mechanics and volume of international trade and the very nature of bureaucratic controls, incapable of denying sensitive Hi-Tech to unfriendly powers. Further, they determined that the administrators/enforcers of U.S. export controls have not shown themselves adept at administering or enforcing existing controls. Consequently, they conclude that strengthened export controls will do little to enhance U.S. security and will compound the bureaucratic ineffectiveness of administrators/enforcers who will be assigned even more complex and voluminous tasks. The second group has

concluded that U.S. national security requires strengthened Hi-Tech export controls, even if these result in delayed and diminished U.S. Hi-Tech export volumes to friendly countries for benign purposes.

U.S. national security decision making in this area is difficult because of a number of factors which are beyond unilateral U.S. governmental control. The volume of Hi-Tech world trade is large in terms of both dollar value and number of transactions and seems certain to overwhelm any meticulous bureaucratic efforts to administer rigid controls. Hi-Tech may be applied to varied uses, with the same item often usable for both commercial and military functions. The common practice of exporting U.S. Hi-Tech to foreign distributors or other middlemen who ultimately sell the products to unidentified, and unidentifiable at the time of export, end-users is an essential element of modern worldwide marketing practice. This makes close bureaucratic scrutiny of reexports and the validation of end-users very difficult. Some commentators have identified this factor as the greatest limitation on effective export controls. The availability from non-U.S. sources of Hi-Tech, essentially the functional equivalent of the U.S. products which are subject to U.S. government export controls, creates two problems. First, it eviscerates U.S. efforts to deny Hi-Tech to unfriendly foreign powers. Second, and compounding the damage to U.S. commercial interests, legitimate foreign purchasers of Hi-Tech will refuse to suffer the uncertainties, costs and delays of purchasing U.S. Hi-Tech if its equivalent is available from countries that impose no export restrictions.

As a reflection of this policy dispute, but with a bureaucratic turf-battle playing a role, the Department of Defense (DOD) and the Department of Commerce (DOC) have each argued their respective cases before Congress and the President while disparaging the arguments, intentions and abilities of the other. DOD is the principal exponent of the security need for strengthened Hi-Tech export controls. It seemingly views DOC, which has—and historically has had—principal authority over the control of exports, as being “soft” on the strenuous control of Hi-Tech exports because of DOC’s commitment to increased U.S. exports and because of the demands of DOC’s exporting business “constituency.” DOD is considered by its advocates to be qualified for a larger role in U.S. export controls because it has national security as its sole concern, without the distracting objective of promoting U.S. export trade.

This rationale, far from persuading DOC and DOD’s other detractors, heightened their concern. They argued that a healthy U.S. economy is vital to U.S. national security and that large U.S. export volumes are fundamental to a healthy U.S. economy. They feared DOD control over U.S. Hi-Tech exports because DOD was perceived as viewing exports of too many things as posing a threat to national security.

II. CoCom

In an effort to counter the multinational dimension of the problem of Hi-Tech export controls, the U.S. and other nations (NATO members, less Iceland, plus Japan) have jointly created an organization called the Coordinating Committee for Multilateral Export Controls (CoCom) to coordinate and make consistent their national programs of denying sensitive Hi-Tech to unfriendly powers.¹

CoCom suffers from the problems afflicting any organization where binding decisions are made by a committee composed of members with fundamental disagreement among themselves. For want of consensus, decisions are often too long deferred. When decisions are finally made, they frequently are of the "lowest common denominator" variety, i.e., the least stringent measures to which all members will agree.

CoCom membership does not include many noncommunist Hi-Tech states whose exports—if controlled at all—are subject to very different, and invariably far more lax, controls than those from the U.S. CoCom only controls Hi-Tech exports and reexports of certain commodities to some communist countries. U.S. regulation of exports of other goods, and to other noncommunist countries (which may be conduits of Hi-Tech to unfriendly countries) has no precise counterpart in CoCom multilateral controls. These shortcomings significantly diminish CoCom's value as a solution to the earlier described problem of foreign purchasers exercising multinational sourcing options for Hi-Tech.

CoCom thoroughly revised its Hi-Tech export control policies and procedures in 1984 (although classified by the U.S. government and not publicly available in this country, summaries of CoCom rules are publicly available in the U.K.). The result of that revision has been to update the list of controlled materials to reflect advancing technology—thus freeing a number of established technologies and products from multilateral export restrictions while making others subject to those controls. CoCom does not perform investigative or enforcement functions. Each member country must implement the CoCom changes through national legislation or regulations.

III. U.S. System of Export Controls

A. RECENT U.S. STATUTES AND REGULATIONS

The U.S., particularly under the Reagan Administration, wishes to be far more strict in its imposition of export controls than do other CoCom

1. 50 U.S.C.A. app. § 2404(i) (West Supp. 1986).

members. It has reflected this attitude in new U.S. statutes, regulations and enforcement practices (including unilateral controls over many commodities and destinations not subject to CoCom review) and in U.S. efforts to extend enforcement of U.S. Hi-Tech export control policies beyond U.S. borders.

After years of congressional deliberation, the Export Administration Amendments Act of 1985 (Act Amendments)² became law on July 12, 1985, amending the Export Administration Act of 1979 (Act).³ The Act is the fundamental U.S. law establishing controls over most U.S. Hi-Tech exports.

DOC, in order to conform U.S. regulations with CoCom directives and in order to follow Administration instructions on strengthening export controls, issued revisions to the Export Administration Regulations⁴ (EAR) in 1984. Subsequent additions or revisions to the EAR have been issued regularly by DOC from then to the present—most of which have been issued to conform the EAR with the new CoCom rules, the Act Amendments, or current Administration policy.⁵ The work of revising and con-

2. Pub. L. No. 99-64, 99 Stat. 120 (1985).

3. 50 U.S.C.A. app. § 2401, et seq. (West Supp. 1986).

4. 15 C.F.R. §§ 368-399 (1986).

5. COCOM Review of the Commodity Control List; Electronics and Precision Instruments, 49 Fed. Reg. 50,608 (1984) (to be codified at 15 C.F.R. §§ 379.4, 386.3, 399.1, & 399.2), COCOM Review of the Commodity Control List, Electronics and Precision Instruments, 50 Fed. Reg. 2,276 (1985) (to be codified at 15 C.F.R. § 399.1), Transfer of Articles from Export Jurisdiction of the Department of State to the Department of Commerce, 50 Fed. Reg. 3,740 (1985) (to be codified at 15 C.F.R. §§ 370 Supp. 2, 376.14, 379.4, 379 Supp. 2, 385.4, 385.7, 399.1 Supp. 1 Groups 4 & 9, & 399.2), Export of Equipment and Software on the Commodity Control List; Revision of Dates in Saving Clause, 50 Fed. Reg. 4,503 (1985) (to be codified at 15 C.F.R. §§ 379, 386 & 399), Change in Reporting Frequency From Monthly to Quarterly Under the Service Supply License Procedure, 50 Fed. Reg. 5,970 (1985) (to be codified at 15 C.F.R. § 373.7), Aircraft and Vessel Repair Station Procedure; Submission of Form ITA-686P, Reduction in Number of Copies Required, 50 Fed. Reg. 5,971 (1985) (to be codified at 15 C.F.R. § 373.8), Change in Reporting Frequency From Monthly to Quarterly on Exports of Parts to Service Equipment Previously Shipped Under a Validated License, 50 Fed. Reg. 11,994 (1985) (to be codified at 15 C.F.R. § 376.4), Change in Reporting Frequency From Monthly to Quarterly Under the Distribution License Procedure, 50 Fed. Reg. 14,373 (1985) (to be codified at 15 C.F.R. 373.3), Clarifications of Export Licensing Policy, 50 Fed. Reg. 15,867 (1985) (to be codified at 15 C.F.R. §§ 370.10 & 399.1(g)), Amendments to Export Controls on Software and Electronic Computers, 50 Fed. Reg. 16,468 (1985) (to be codified at 15 C.F.R. §§ 379.1, 379.4, 379, Supp. 3 & 399.1), Hughes Helicopters, Model 500/530 Series, Civil Version; Licensing Requirement on Exports to All Country Groups, 50 Fed. Reg. 18,461 (1985) (to be codified at 15 C.F.R. §§ 376.5 & 399.1), Revision of Distribution License Procedure, 50 Fed. Reg. 21,562 (1985) (to be codified at 15 C.F.R. §§ 373.1, 373.3, & 373 Supps. 1, 4, 5 & 6), COCOM Review of the Commodity Control List: Chemicals, Metalloids and Petroleum Products, 50 Fed. Reg. 21,800 (1985) (to be codified at 15 C.F.R. § 399.1 Supp. 1. Group 7), Clarifications of Export Licensing Policy, 50 Fed. Reg. 23,110 (1985) (to be codified at 15 C.F.R. §§ 371.6, 379.4, & 399.1, Supp. 1, Group 5), Export Administration Regulations; Editorial Amendments, 50 Fed. Reg. 23,111 (1985) (to be codified at 15 C.F.R. § 373, Supp. 3), Amendments to the Commodity Control

forming the EAR is far from over and many further changes may be expected.

The new DOC regulations deal generally with revision of Distribution License (DL) practices and procedures; revision of the EAR 399.1 Commodity Control List (CCL) (changed in the Act Amendments to be the "Control List," but this terminology is not yet reflected in the EAR);

Fed. Reg. 23,111 (1985) (to be codified at 15 C.F.R. § 399.1, Supp. 1 Groups 0, 7 & 9), Special Licenses Available to Export Equipment Designed for the Manufacture or Testing of Printed Circuit Boards, 50 Fed. Reg. 23,284 (1985) (to be codified at 15 C.F.R. § 399.1, Supp. 1, Group 3), Clarifications to the Export Administration Regulations, 50 Fed. Reg. 23,404 (1985) (to be codified at 15 C.F.R. §§ 370, Supp. 1, 372, Supp. 1 & 399.1, Supp. 1, Groups 3 & 9), Synthetic Organic Agricultural Chemicals; Amendment to the Commodity Control List, 50 Fed. Reg. 23,405 (1985) (to be codified at 15 C.F.R. §§ 399.1, Supp. 1, Group 7 & 399.2), Revision of Distribution License Procedure, 50 Fed. Reg. 23,666 (1985) (to be codified at 15 C.F.R. § 373.3), Foreign Policy Controls; Police-Model Helmets, 50 Fed. Reg. 27,420 (1985) (to be codified at 15 C.F.R. §§ 376.14 & 399.1 Supp. 1, Group 7), Country Change Name From Kampuchea to Cambodia, 50 Fed. Reg. 29,205 (1985) (to be codified at 15 C.F.R. §§ 368.2, 370, Supp. 1, 376.9, 378, Supp. 2, 385.1, & 386.6), Addition to Commodity Control List; Underwater Photographic Cameras and Associated Equipment, 50 Fed. Reg. 32,169 (1985) (to be codified at 15 C.F.R. § 399.1, Supp. 1, Group 4), Revisions to the Commodity Control List Based on COCOM Review, 50 Fed. Reg. 37,112 (1985) (to be codified at 15 C.F.R. §§ 376.11, 379.1, 379.4, 379, Supp. 3, & 399.1, Supp. 1, Groups 0-4 & 6-9), Revisions to the Commodity Control List Based on COCOM Review; Electronics and Precision Instruments, 50 Fed. Reg. 37,136 (1985) (to be codified at 15 C.F.R. §§ 379, Supp. 3 & 399.1, Supp. 1, Group 5), Exports to COCOM countries, 50 Fed. Reg. 38,511 (1985) (to be codified at 15 C.F.R. §§ 371.8, 374.2, 386.6, & 399.1(f)(3)(i)), Export of "Operation Technical Data," 50 Fed. Reg. 38,639 (1985) (to be codified at 15 C.F.R. § 379.4), Revisions to Short Supply Regulations, 50 Fed. Reg. 41,131 (1985) (to be codified at 15 C.F.R. §§ 371.2, 371.7, 371.16, 377.1, 377.4, 377.6, 377.7, 377.8, 377, Supp. 2, & 399.1, Supp. 1, Group 7), Revision of Temporary Denial Provisions of the Export Administration Regulations, 50 Fed. Reg. 42,666 (1985) (to be codified at 15 C.F.R. § 388.19), Export Controls on the Republic of South Africa, 50 Fed. Reg. 47,363 (1985) (to be codified at 15 C.F.R. §§ 371.2, 373.1, 379.4, 385.4, 385, Supp. 1 & 2, 386.6 & 399.1 Supp. 1, Groups 1-9), Revision of Processing Times for Applications for Export Licenses, 50 Fed. Reg. 48,745 (1985) (to be codified at 15 C.F.R. §§ 370.1, 370.13, 370.14, 372.4, 372.11, & 386.3), Exports to the People's Republic of China; Amendments to the Export Administration Regulations, 50 Fed. Reg. 52,900 (1985) (to be codified at 15 C.F.R. §§ 372.6, 373.7, 374.2, 375.1, 375.2, 375.3, 375.6, 375.7, 375.8, 375, Supp. 1, 379.8, & 379, Supp. 3), Addition of "Foreign Availability Procedures and Criteria" to the Export Administration Regulations, 50 Fed. Reg. 52,912 (1985) (to be codified at 15 C.F.R. §§ 391.1, 391.2, 391.3, 391.4, 391.5, & 391.6), Revision of Enforcement and Administrative Proceedings Provisions of the Export Administration Regulations, 50 Fed. Reg. 53,130 (1985) (to be codified at 15 C.F.R. §§ 370.15, 372.1, 387.1, 387.2, 387.3, 387.4, 387.5, 387.6, 387.7, 387.8, 387.9, 387.10, 387.11, 387.12, 387.13, 387.14, 388.1, 388.2, 388.3, 388.4, 388.5, 388.6, 388.7, 388.8, 388.9, 388.10, 388.11, 388.12, 388.13, 388.14, 388.15, 388.16, 388.17, 388.18, 388.19, 388.20, 388.21, 388.22, 388.23, & 388, Supps. 1 & 2), Export Licensing; Commodity Control List; Electronic Computers and Related Equipment, 51 Fed. Reg. 1,493 (1986) (to be codified at 15 C.F.R. §§ 376.10 & 399.1), Restrictions on Exports Involving Libya, 51 Fed. Reg. 2,353 (1986) (to be codified at 15 C.F.R. §§ 385.7 & 390.7), Organic Chemicals; Amendment to the Commodity Control List, 51 Fed. Reg. 2,683 (1986) (to be codified at 15 C.F.R. §§ 399.2), and Donations of Goods to Meet Basic Human Needs, 51 Fed. Reg. 8,482 (1986) (to be codified at 15 C.F.R. §§ 373.5, 373, Supp. 7, 376.15, 385.1, & 385.7).

easing restrictions on exports to the People's Republic of China (PRC) and tightening restrictions on exports to Libya and South Africa; institution of foreign availability determination procedures and staff; revision of certain Technical Data licensing procedures, largely dealing with software; easing of export licensing procedures for some commodities to CoCom countries; easing of Short Supply restrictions, particularly regarding petroleum-related items; and a general effort to make the EAR consistent with the Act as amended.

B. THE GENERAL SCHEME OF U.S. EXPORT REGULATION

Export controls under U.S. law are imposed for the following broad categories of reasons, which may sometimes overlap in their rationale and application:

National security—The prevention of U.S. goods with military applications from falling into the hands of unfriendly powers, with resulting adverse consequences to U.S. national security⁶;

Foreign policy—The implementation of certain foreign policy objectives and the fulfillment of international obligations⁷; and

Short supply—The prevention of the exportation of goods whose export would lead to shortages or increased inflation in the U.S.⁸

Only the first and second export control categories above will be considered in this article.

Under the general scheme of U.S. export controls, authority to control all exports of commodities and Technical Data from the U.S. is asserted by the U.S. government.⁹ All goods and Technical Data are prohibited for export from the U.S. until a General License (GL) approving exports has been established or a Validated License (VL) has been issued. Exceptions to this requirement have been made for most exports to Canada for use in Canada; exports to the U.S. Armed Forces abroad; and exports of commodities controlled by other agencies.¹⁰ Any export authorization is subject to revocation, suspension, or limitation.¹¹ A party may request DOC to make a determination of the applicability of the EAR for a specific export transaction or of the classification of a commodity under the CCL. Time limits for DOC responses have been established under the Act.¹² Persons not subject to the jurisdiction of the U.S. (who may apply through

6. 50 U.S.C.A. app. § 2404 (West Supp. 1986).

7. 50 U.S.C.A. app. § 2405 (West Supp. 1986).

8. 50 U.S.C.A. app. § 2406 (West Supp. 1986) and 15 C.F.R. § 377 (1986).

9. 15 C.F.R. §§ 372.1(b) & 379.2 (1986).

10. 15 C.F.R. § 370.3(a)(1)–(3) (1986).

11. 15 C.F.R. § 370.3(b) (1986).

12. 50 U.S.C.A. app. §§ 2409(l)(1) & (2) (West Supp. 1986).

qualifying agents) and persons judged to be unsuitable (see the section of this article on Consignee and End-Use Restrictions) may not be eligible to apply for, receive or use an export license.

C. EXPORT LICENSES

A "General License" (which is divided into many special GLs)¹³ has been established by statute and regulation. Most goods are exported from the U.S. under a GL. An exporter does not apply for, nor does DOC formally issue, a GL. A GL simply means that DOC has determined that no export license is needed for the export of certain items to certain consignees in certain countries. Items may be shipped under a GL unless they require a VL under the EAR or are subject to the export controls of an agency other than DOC. The use of a GL may sometimes be subjected to shipment value limitations under individual commodity entries in the CCL. Certain exports may not be made under a GL.¹⁴ Record-keeping requirements for a GL are found at EAR 371.2(g) and 387.13.

If there are significant DOC controlled restrictions on exporting certain goods to certain countries or to certain consignees, a "Validated License" is required.¹⁵ A VL requires formal application by the exporter and formal approval by DOC prior to export. Certain sales within the U.S. (such as to embassies or affiliates of controlled countries or to persons known to be intending to remove commodities from the U.S. without proper authorization) are deemed "exports" for the purposes of export control.¹⁶

An "Individual Validated License" (IVL) is a VL authorizing the export of specific Technical Data or a specific quantity of named commodities during a designated period to a specified consignee. IVLs are generally valid for approximately one year but may be specially extended, usually for no more than six months.¹⁷ Only commodities on the CCL having the same Export Commodity Control Number (ECCN) two letter Processing Code may be submitted on the same IVL application (unless the export is for relief or charity).¹⁸ Application may only be made against an "order" to purchase from abroad—although the order may be merely a written

13. 50 U.S.C.A. app. § 2403(a)(3) (West Supp. 1986) and 15 C.F.R. §§ 370.2 & 371.1. "Definitions"; § 371 generally; & 379.3, .4 (1986) and 51 Fed. Reg. 12,840 (1986) (amending 15 C.F.R. § 379.4).

14. 15 C.F.R. § 371.2(c) (1986).

15. 50 U.S.C.A. app. §§ 2403 (a)(1) & (2) (West Supp. 1986) and 15 C.F.R. § 372 (1986).

16. 50 U.S.C.A. app. §§ 2404 (a)(1) & 2415 (5)(b) & (c) (West Supp. 1986).

17. 15 C.F.R. §§ 372.9(d) & 372.12(c) (1986).

18. 15 C.F.R. § 372.4(d) (1986); *but see* § 376.8 (1986) & 51 Fed. Reg. 12,839 (1986) (amending 15 C.F.R. § 376.8). Although the regulations (C.F.R., 1-1-86 edition) indicate a three-digit processing number, the processing code in fact is, and always has been, two-letters.

expression of an intent to purchase and even this may sometimes be waived.¹⁹ A single IVL may cover a series of partial or periodic shipments to the same consignee.²⁰ Recordkeeping requirements for IVLs are found in EAR 372.9(e), 386.2(d), and 387.13.

D. MULTIPLE OR BULK LICENSES

Congress has recognized the administrative impossibility of obtaining a large number of IVLs: (a) for multiple shipments to a number of consignees (usually in different countries) of goods which may not be itemized or quantified at the time of application; (b) for shipments under long-term contracts from a domestic concern to and among its foreign subsidiaries, affiliates, joint-ventures and licensees; (c) for multiple shipments over time to a large special project; or (d) for exporting spare or replacement parts. Consequently, provision has been made for DOC to grant, respectively, DLs,²¹ Comprehensive Operating Licenses,²² Project Licenses (PLs)²³ and Service Supply Licenses (SLs).²⁴

The newly created Comprehensive Operations License, for which implementing administrative regulations have yet to be issued, is distinguishable from the DL because it can authorize the export of Technical Data and permit the export of higher technology commodities than a DL. As is true for a DL, qualifying license holders must demonstrate adequate export control procedures.

A PL must replace at least twenty-five IVLs and must be for projects which are substantial capital expansions, service supply programs for an existing facility, or materials supply programs for manufacturing operations. A PL is usually valid for one year and is extendable for up to two additional years.²⁵ The commodities to be exported must be listed under at least two Processing Codes.²⁶ Certain exports may not be made under a PL.²⁷ The PL is issued against an aggregate export value limitation, which may not be exceeded.²⁸ If a PL is issued, it will be the only VL

19. 15 C.F.R. §§ 372.6(a) & (c) (1986).

20. 15 C.F.R. § 372.4(f) (1986).

21. 50 U.S.C.A. app. § 2403(a)(2)(A) (West Supp. 1986) and 15 C.F.R. § 373.3 (1986).

22. 50 U.S.C.A. app. § 2403(a)(2)(B) (West Supp. 1986)—no implementing EAR regulations have yet been issued for this License.

23. 50 U.S.C.A. app. § 2403(a)(2)(C) (West Supp. 1986) and 15 C.F.R. § 373.2 (1986).

24. 50 U.S.C.A. app. § 2403(a)(2)(D) (West Supp. 1986) and 15 C.F.R. § 373.7 (1986).

25. 15 C.F.R. § 373.2 (1986).

26. 15 C.F.R. § 373.2(a)(1) (1986); although the C.F.R. 1-1-8 edition indicates a minimum of four processing numbers, the requirement in fact is for a minimum of two processing codes.

27. 15 C.F.R. § 373.2(b) (1986).

28. 15 C.F.R. § 373.2(c)(2)(iv)(d), *but see* § 386.7 (1986) & 51 Fed. Reg. 12,840 (1986) (amending 15 C.F.R. § 386.7).

issued to the licenseholder for the project. Only one PL will be issued for any one project and applicants other than the licenseholder must ship under other VLs.²⁹

An SL is established to expeditiously service with spare and replacement parts: (a) exported U.S. manufactured goods; (b) goods produced abroad by subsidiaries, affiliates or franchisees of U.S. firms; or (c) goods produced abroad by manufacturers who use parts from the U.S. to manufacture the goods. There are three types of SL: (a) for exports from the U.S.; (b) for reexports by a foreign-based service facility; and (c) for reexports by foreign manufacturers.³⁰ For exports from the U.S. under an SL, the applicant must be the U.S. person or firm, or the U.S. parent of the foreign subsidiary, that manufactured the goods to be serviced; must supply parts as a normal function of its business; and must be making exports for the purpose of servicing U.S. equipment in the possession of the consignee.³¹ Reexports by a foreign-based service facility are controlled by EAR 373.7(d) (2) and (h) (1). Reexports by a foreign manufacturer are controlled by EAR 373.7(d) (3) and (h) (2). An SL may be used to ship spare and replacement parts to Country Groups (CGs) *T* and *V* and replacement parts to CGs *Q*, *W* or *Y*.³² "Enhancing" parts or "upgrades," testing equipment, or operating supplies are not replacement parts.³³ Certain parts, and parts to service certain goods, may not be shipped under an SL.³⁴ An SL is valid for one year and is extendable for an additional one or two years. Renewed licenses will be valid for two years. ECCN code letter "A" items shipped under an SL are limited to the authorized commodity value, but shipment of other items is limited only by the SLs aggregate authorized value.³⁵ Recordkeeping requirements for SLs are found at EAR 373.7(j) and (k) and 387.13.³⁶ Additionally, EAR 373.8 provides a special Aircraft and Vessel Repair Station Procedure for supplying parts to "Repair Stations."

Subsequent sections of this article provide guidance to commodity, consignee and country restrictions; to the DL and the requisite standards necessary to qualify for and use the DL; and to Technical Data export restrictions.

29. 15 C.F.R. § 373.2(h) (1986).

30. 15 C.F.R. § 373.7 (d) (1986).

31. 15 C.F.R. § 373.7 (d) (1) (i) (1986).

32. 15 C.F.R. §§ 373.7 (c); (d) (2) & (3); (e); (h) (1) (i) & (ii) (1986) *but see* § 376.4 (1986).

33. 15 C.F.R. § 373.7 (a) (7) (1986).

34. 15 C.F.R. § 373.7 (b) (1986).

35. 15 C.F.R. § 373.7 (g) (2) (1986), *but see* § 386.7 (1986) & 51 Fed. Reg. 12,840 (1986) (amending 15 C.F.R. § 386.7).

36. *See also* GL GLR at 15 C.F.R. §§ 371.17 (1986) [51 Fed. Reg. 12,839 (1986) (amending 15 C.F.R. § 371.17)]; 374.2 (a) (4) & 376.4 (1986) for the export of spare and replacement parts.

IV. Restrictions in Commodity, Consignee, End-Use and Country Destinations

A. COMMODITY RESTRICTIONS

1. *General Commodity Classifications*

The CCL is contained in EAR 399.1, Supplement 1.³⁷ The CCL covers all commodities controlled by DOC, but does not include those items exclusively controlled for export by other agencies.³⁸ DOD has established a Military Critical Technologies List (MCTL), which is incorporated into the CCL and which is subject to foreign availability limitations.³⁹ A general guide to the use of the CCL is found in EAR 399.1(f). Supplement 1 to EAR 391.2 offers DOCs interpretations of the categorization of some commodities within the CCL.

Commodities in the CCL are divided into ten general groups. The ten groups (numbered from 0 to 9) are: (0) Metalworking Machinery; (1) Chemical and Petroleum Equipment; (2) Electrical and Power-Generating Equipment; (3) General Industrial Equipment; (4) Transportation Equipment; (5) Electronics and Precision Equipment; (6) Metals, Minerals, and their Manufactures; (7) Chemicals, Metalloids, Petroleum Products, and Related Materials; (8) Rubber and Rubber Products; and (9) Miscellaneous. Each CCL entry is preceded by a four-digit ECCN and a code letter. The first digit relates to the strategic level of control; the second digit identifies the Group to which the commodity belongs; and the remaining two digits identify related commodities within a Group. Within each Group, the entries are numbered consecutively by the third and fourth digits. The four digit ECCN is followed by a code letter, which is a key to documentation requirements and is also an indication of the level of imposed control. The code letters are as follows, with their general indication of CG level of control: *A*—multilaterally controlled to all destinations; *B*—unilaterally controlled to all destinations; *C* through *I*—controlled to a progressively diminishing number of CGs and countries; and *M*—CG control level is governed by another entry on the CCL.

Each ECCN will state the reason or reasons for its control, e.g., national security. Each ECCN will advise which special licenses may be used to export the commodity and will state the GL GLV value limit for exporting the commodity under that license to specific destinations. The GL G-DEST in EAR 371.3 and the GL G-COM in EAR 371.8 permit the export under a GL of some CCL controlled items to some destinations.

37. 50 U.S.C.A. app. §§ 2403 (b), 2404 (c) & 2405 (l) (West Supp. 1986).

38. 15 C.F.R. § 370.10 (1986) & 51 Fed. Reg. 12,839 (1986) (amending 15 C.F.R. § 370.10).

39. 50 U.S.C.A. app. § 2404 (d) (West Supp. 1986).

2. *Special Commodity Restrictions*

Certain "Special Commodity Policies and Provisions" are established in EAR 376. Commodities covered include chemicals,⁴⁰ machinery, equipment and parts,⁴¹ aircraft and equipment,⁴² ship and plane stores, supplies and equipment,⁴³ computers and related equipment,⁴⁴ machine tools and numerical controls,⁴⁵ parts, components and materials in foreign made products,⁴⁶ communications intercepting devices,⁴⁷ crime control and detection commodities,⁴⁸ and regional stability commodities.⁴⁹

Of particular interest are the provisions of EAR 376.10, which specify that applications for the export of computers and related equipment to controlled countries must contain equipment configurations, software descriptions and associated training requirements. Regular visits by the licensee to equipment use sites for a period of up to six years after export are also required.

"Special Nuclear Controls," for which Department of Energy (DOE) has the leading role, is dealt with in EAR 378. Commodities which could, if used for purposes other than those intended, be of significance for nuclear explosive purposes are listed in the CCL, indicate nuclear non-proliferation as a reason for control, and are collectively called the "Nuclear Referral List." Items exported to nuclear end-uses/end-users and controlled for national security are subject to EAR 378, Supplement 1, procedures. Nuclear procedures are in addition to, rather than in lieu of, other export procedures.⁵⁰

The export of Technical Data is specially controlled by EAR 379. This will be treated in detail in a later section of this article. Under the Act, no IVL is required to export replacement parts, one to one, for use on goods previously legally exported,⁵¹ but no implementing regulations have been issued. Under the Act, there are no export controls for foreign policy reasons on medicine, medical supplies, certain foodstuffs, and various donations if made to meet "basic human needs."⁵²

Every CCL Group has been subject to numerous and often significant regulatory changes since the end of 1984. Some of the most significant

40. 15 C.F.R. § 376.6 (1986).

41. 15 C.F.R. § 376.7 (1986).

42. 15 C.F.R. § 376.8 (1986) & 51 Fed. Reg. 12,839 (1986) (amending 15 C.F.R. § 376.8).

43. 15 C.F.R. § 376.9 (1986).

44. 15 C.F.R. § 376.10 (1986) and 51 Fed. Reg. 1,493 (1986) (amending 15 C.F.R. § 376.10).

45. 15 C.F.R. § 376.11 (1986) and 51 Fed. Reg. 16,674 (1986) (amending 15 C.F.R. § 376.11).

46. 15 C.F.R. § 376.12 (1986).

47. 15 C.F.R. § 376.13 (1986).

48. 15 C.F.R. § 376.14 (1986).

49. 15 C.F.R. § 376.16 (1986).

50. 15 C.F.R. § 378.8 (1986).

51. 50 U.S.C.A. app. § 2404 (e) (3) (West Supp. 1986).

52. 50 U.S.C.A. app. § 2405 (g) (West Supp. 1986).

of these changes have dealt with Group 5, Electronics and Precision Instruments. These changes are lengthy and complex (with provisions qualified by as many as four tiers of exceptions—and often the exceptions have greater practical consequences than the provisions themselves).

The revised EAR extensively modified ECCN 1565A, which covers electronic computers and similar or related equipment, and created ECCN 1567A, which covers communication switching equipment. Export controls over low-level computer products (such as most eight-bit computers) and basic computer peripherals (such as impact printers) have generally been eliminated and export controls over other similar items have generally been reduced. Many standard personal computers still subject to export controls may be licensed for export, sometimes without inter-agency or CoCom review. Generally, the greater the performance capabilities of the equipment, the more extensive the review procedures and the greater the likelihood of ultimate denial of the export license.

Embedded and incorporated digital computers are now subject to multilateral controls. "Embedded" digital computers or related equipment are those items which may not be feasibly removed from the "host" equipment or system nor used for other purposes. Under the Act, embedded microprocessors, if they cannot be used or altered to perform other functions, will only be controlled for export to the degree the commodity they are embedded in is controlled.⁵³ They will be so treated unless the capabilities of the embedded microprocessors exceed permitted parameters such as to bring the embedded microprocessors under ECCN 1565A. "Incorporated" digital computers or related equipment are those items which may feasibly be removed from the "host" equipment or system or used for other purposes but which are essential to the operation of the "host" equipment or system. "Associated" digital computers or related equipment are the same as "incorporated" ones, except in this case the computers/equipment are not essential to the operation of the "host" equipment or system.⁵⁴

All digital computer products and related equipment covered by paragraph (h) of the "List of Electronic Computers and Related Equipment Controlled by ECCN 1565A" require a VL for export unless *specifically excepted*. Subparagraph (h)(2) sets forth the list of exceptions to the general paragraph (h) [but not to the specific list in (h)(1)] and commodities covered by these exceptions may be exported to all destinations except CGs S and Z under GL G-DEST.

53. 50 U.S.C.A. app. § 2404 (m) (West Supp. 1986).

54. See ECCN 1565A Advisory Note (AN) 16.

B. CONSIGNEE AND END-USE RESTRICTIONS

Consignee and end-use restrictions are intended to assure that exported items will not be diverted to controlled destinations without authorization; will not be used without authorization for nuclear end-uses; will not be used for certain activities or at certain locations (notably in the U.S.S.R.); or will not be used for certain activities or by certain state agencies in South Africa or South West Africa (Namibia).

The DOC periodically publishes Table of Denial Orders (TDOs) which list persons or organizations deemed to be inappropriate consignees because of DOCs belief that they are about to commit an imminent violation of U.S. export regulations. Other persons or organizations may also be determined to be inappropriate consignees.⁵⁵ Names of inappropriate consignees may be published in the Federal Register. No sale in the U.S. nor any export abroad may be made to a person or organization which the seller/exporter knows or has reason to know intends to divert, reexport or export the commodity or Technical Data without proper U.S. government authorization.⁵⁶

ECCNs often provide special instructions or limitations for special consignees or destinations, e.g., South Africa or the Zama River truck plant, for a specific commodity. Exports to consignees in South Africa and Namibia are closely controlled to assure that the consignee is not any branch or agency of the police, military forces, or enforcers of apartheid (including such branches or agencies of the "Tribal Homelands").⁵⁷ Exports of commodities and Technical Data to the Kama River and ZIL truck plants in the U.S.S.R. are closely controlled and export approval will generally be denied.⁵⁸ A VL is required for export (except for some commodities to some destinations) if the exporter knows, or should know, that the exported item will be ultimately received by a nuclear end-user or used for a sensitive nuclear end-use.⁵⁹

Consignees may be deemed inappropriate recipients under U.S. export licenses if they are affiliates or embassies of controlled countries, both in the U.S. and in noncontrolled countries; are serving equipment owned or controlled by or under lease or charter to Iran, Libya, Afghanistan, the PRC, or CG *Q*, *W*, *Y* and *Z* countries or their nationals for which parts

55. 50 U.S.C.A. app. §§ 2404 (l) (i) (a), 2410 (c) (2) (A), (c) (3), (d), & (h) & 2412 (d) (West Supp. 1986) and 15 C.F.R. §§ 370.15; 371.2 (f); 372.1 (h); 373.2 (f); 373.7 (h) (3); 387.1 (b); 387.12; 388.3; 388.16 (c); 388.19; 388, Supps. 1 & 2; & 390.2 (1986).

56. 15 C.F.R. § 371.2 (c) (5) & 374.1 (b) (1986).

57. 15 C.F.R. § 371.2 (c) (11); 373.1 (a); 373.2 (b); 373.3 (d) (3) (ii) (E) (3); 373.7 (b) (6); 379.4 (e); 379, Supp. 2; 385.4 (a); 385, Supps. 1 & 2 & 386.6 (a) (2) (1986).

58. 15 C.F.R. § 379.4 (f) (1) & 385.2 (e) (1986).

59. 15 C.F.R. §§ 378.3; 379.4 (c) & 399.1 (f) (4) (i) (1986).

are to be shipped under an SL⁶⁰; are serving aircraft or vessels owned or operated by certain countries⁶¹ or are repair or supply operations serving controlled country aircraft or vessels.

C. COUNTRY RESTRICTIONS

1. *General Country and Country Group Classifications*

For export control purposes, foreign countries are separated into seven CGs, designated by the symbols *Q*, *S*, *T*, *V*, *W*, *Y*, and *Z*. The countries that fall within these CGs are listed in EAR 370, Supplement 1. Canada falls within no CG and is treated separately. All the rest of the Western Hemisphere (except Cuba) is in CG *T*. Communist countries, except for a few singled out for favorable or embargoed treatment, are in CGs *Q*, *W* and *Y*. CG *V* is a "catchall" group containing most of the world's other noncommunist countries (plus a few communist and "Marxist" states, including the PRC). CGs *Z* and *S* are groups of especially disfavored states against which a virtual U.S. embargo has been imposed.⁶² The Act⁶³ defines "controlled countries," which may be characterized as potential military adversaries of the U.S., as that list of countries set forth in the Foreign Assistance Act of 1961, but the President has the power to add or delete countries to or from that list.

Each ECCN and EAR 379, Supplement 3, have sections entitled "Validated License Required" which name those CGs and countries for which a VL is required in order to export the listed commodity. ECCNs and EAR 379, Supplement 3, may have ANs which give advice regarding the likelihood of obtaining approval for exports of the commodity or software to specific destinations.

2. *Special Country and Country Group Restrictions*

Some items on the Nuclear Referral List are controlled to all CGs (and in some cases to Canada as well) and some are only controlled to countries other than those listed in Supplements 2 and 3 to EAR 373.⁶⁴ Supplement 2 to EAR 378 lists those countries which have signed the Nuclear Non-Proliferation Treaty or a regional equivalent.

60. 15 C.F.R. §§ 373.7 (c); 390.6 & 390.7 (1986).

61. 15 C.F.R. §§ 371.2 (c) (3) & 371.22 (c) (iv), but see 371.9 (a) (3) & 371.10 (a) (3) (1986).

62. 15 C.F.R. § 399.1 (c) (1986).

63. 50 U.S.C.A. app. § 2404 (b) (1) (West Supp. 1986).

64. 15 C.F.R. §§ 378.2 (a) & 379.4 (c) (1986).

CG and country destination restrictions on the export of Technical Data are found in EAR 379.4(a) and (b). EAR 385 lists "Special Country Policies and Provisions" and, *inter alia*, provides for special treatment of some exports to CG Z,⁶⁵ CGs Q, W and Y,⁶⁶ the People's Democratic Republic of Yemen, Syria and Iran,⁶⁷ Iran and Iraq,⁶⁸ Afghanistan,⁶⁹ other CG T and V countries,⁷⁰ and Libya.⁷¹ Exports to South Africa and Namibia are closely controlled to assure that commodities and Technical Data do not come into the possession of certain state agencies in those territories. These controls are examined in detail in the immediately previous section.

Country restrictions under the DL will be discussed in detail in the later section dealing with the DL. Shipments under the Comprehensive Operations License may not be made to controlled country destinations.⁷² The PL may not be used for exports to Libya or Iran.⁷³ The SL may not be used to ship parts to CGs S or Z or Iran.⁷⁴ There are special destination limitations that apply to the SL or servicing equipment, particularly to CGs Q, W and Y; Afghanistan; and the PRC.⁷⁵ Multilaterally controlled parts shipped to the PRC under an SL may now have a maximum value of \$50,000, rather than the former maximum value of \$8,000.⁷⁶ Parts may not upgrade the performance of legally exported equipment and replaced parts must be returned to a CoCom country for disposal.

Supplements 2 and 3 to EAR 373 are, respectively, Lists A and B "Computer Consignee Destinations." List A contains NATO countries (less Spain and Canada), Australia, Japan and New Zealand. List B is a general list of "unthreatening" countries to which exports are subject to lesser controls. References are made to these lists in the ANs to ECCN 1565A and in EAR 378 (a).

The special commodity policies and provisions of EAR 376 often have special CG or country export restrictions which apply to special commodity categories. For countries determined by the Department of State (DOS) to be supporting international terrorism, the DOC must report to Congress thirty days before issuing an export license for goods or tech-

65. 15 C.F.R. § 385.1 (1986) & 51 Fed. Reg. 8,484 (1986) (amending 15 C.F.R. § 385.1 (a)).

66. 15 C.F.R. § 385.4 (c) (1986).

67. 15 C.F.R. § 385.4 (d) (1986).

68. 15 C.F.R. § 385.4 (e) (1986).

69. 15 C.F.R. § 385.4 (f) (1986).

70. 15 C.F.R. § 385.4 (g) (1986).

71. 15 C.F.R. § 385.7 (1986).

72. 50 U.S.C.A. app. § 2403 (a) (2) (B) (West Supp. 1986).

73. 15 C.F.R. § 373.2 (b) (8) (1986).

74. 15 C.F.R. § 373.7 (c) (1) (1986).

75. 15 C.F.R. § 373.7 (c) (2) & (i) & 376.4 (1986).

76. 15 C.F.R. § 373.7 (i) (4) (1986).

nology to be exported to any of them in excess of a value of \$7 million.⁷⁷ Sales to CG S and Z countries, Nicaragua and some other countries are regulated or reviewed by Treasury Department's Office of Foreign Assets Control, which may deny export licensing under standards other than those of the EAR. U.S. treatment of exports to Poland (after its declaration of martial law) and the U.S.S.R. (after its invasion of Afghanistan) have been held to a stricter standard than exports to the rest of Eastern Europe. Exports to Afghanistan have been treated in most cases as the equivalent of exports to the U.S.S.R.

3. *Canada, CoCom, PRC and Other Exceptions*

Exports to Canada for use in Canada generally do not require any export license.⁷⁸ Exports of Technical Data to Canada for use in Canada may be made without any export license, except for the restrictions under EAR 379.4 (c).⁷⁹

Under the Act, no export authority is required for exports to CoCom countries for goods or technology at levels requiring only notification to CoCom. DOC has established a new GL G-COM for such shipments.⁸⁰ Reference to the appropriate ECCN in the category entitled "Special Licenses Available" will indicate which commodities are eligible to be exported under GL G-COM. About one-third of the 75,000 license applications processed each year by DOC are for exports to CoCom countries. It is estimated that this GL will eliminate VLs for the shipment of forty-seven ECCN commodities to CoCom countries and may reduce by 10–15 percent the total annual number of export applications filed with the DOC.

CoCom, at the urging of the U.S., determined in the autumn of 1984 to make special provision for Hi-Tech exports to the PRC. DOC thereafter issued implementing regulations.⁸¹ These implementing regulations increase from seven to twenty-seven the categories of commodities and software that may be exported to the PRC without CoCom review. Over 75 percent of PRC directed U.S. exports which have in the past required multilateral review will now receive expedited U.S. licensing. This should reduce processing time for these export license applications from six months to one year to approximately one month. There are some reports

77. 81. 50 U.S.C.A. app. § 2405 (j) (West Supp. 1986).

78. 15 C.F.R. §§ 370.3 (a) (1) & 385.6 (1986).

79. 15 C.F.R. §§ 379.2, f.n. 7 (1986) & 51 Fed. Reg. 12,839 (1986) (amending 15 C.F.R. § 379.4, f.n. 3a).

80. 50 U.S.C.A. app. § 2404 (b) (2) (West Supp. 1986) and 15 C.F.R. § 371.8; *see also* § 370.14 (1986).

81. 15 C.F.R. §§ 379.4 (i), 379.8 (b) (4), 379. Supp. 3, AN 13 (1986), and 51 Fed. Reg. 1494 (1986) (amending 15 C.F.R. § 399.1, Supp. 1), *but see* 15 C. F. R. § 385.4 (c) (1986).

that DOD is reluctant to approve many of those exports to the PRC which are subject to its review.

For purposes of promoting regional stability, the export of various munitions and armaments requires VLs except to NATO countries, Australia, Japan or New Zealand.⁸² Exports of crime control equipment and related Technical Data to NATO countries, Australia, Japan and New Zealand do not require VLs.⁸³

V. International Import Certificates

Exports of commodities to Switzerland (including Liechtenstein), Yugoslavia and the PRC must be accompanied by special International Import Certificates, which also provide for certified verifications of delivery. These certificates are issued by the government of the recipient country in order to certify that the exported item will be received in its territory and will not be reexported without the exercise of receiving country controls.⁸⁴ A PRC End-User Certificate was established to replace Form ITA-629P for all U.S. exports or reexports to the PRC of multilaterally controlled CCL commodities valued at \$5,000 or more, although a Form 629 may be substituted for the PRC End-User Certificate for commodities described in an AN for CGs *Q*, *W* and *Y*.⁸⁵

The U.S., through the provisions of EAR 368, provides similar U.S. Import and Delivery Verification Certificates. Other countries, listed in EAR 375.3 (b) and 375, Supplement 1, require similar documents when certain commodities or Technical Data are exported to them.⁸⁶

VI. The Distribution License

A. TERMS, GENERAL PRECONDITIONS, AND PARTIES

The DL authorizes exports from the U.S. by a licenseholder of unlimited quantities of certain commodities, but not Technical Data, under an international marketing program to preapproved consignees. The DL is a valid export license for the shipment of specified goods to specific consignees in their designated territories without additional DOC authorization. For most manufacturers of Hi-Tech, the DL has been an essential

82. 15 C.F.R. §§ 376.16; 385.4 (g) (3) (1986); and 51 Fed. Reg. 2,554; 8,484; 9,649 (1986) (amending 15 C.F.R. § 385.7).

83. 50 U.S.C.A. app. § 2405 (k) (2) (West Supp. 1986) and 15 C.F.R. §§ 379 (h) & § 385.4 (g) (2) (1986).

84. 15 C.F.R. §§ 372.11 (k), 373.3 (h) & (j) (1) (ii), 373.7 (e), 375.6 (1986); and 51 Fed. Reg. 10,366–10,367 (1986) (to be codified at 15 C.F.R. §§ 375.4–.5, 375.7–.8).

85. 15 C.F.R. § 375.6 (1986).

86. See generally 51 Fed. Reg. 10,366 (1986) (amending 15 C.F.R. § 375.3).

device to permit the expeditious and reliable exportation of multiple shipments to a large number of consignees in different countries. It is estimated that 80 percent of U.S. Hi-Tech exports are made under DLs.

Generally, an exporter that demonstrates the ability to adhere to DL requirements and which has more than three qualifying foreign consignees and an acceptable Internal Control Program (ICP) may request and obtain a DL which is valid for two years and renewable for two additional years. Subsequent DLs are valid for four years.⁸⁷ The applicant must have a reasonable expectation that the DL, in its first year, will replace at least twenty-five IVLs. DOC will consider requests for relief from provisions of the EAR by small exporters, but the existence of an adequate ICP may not be waived.⁸⁸ Generally, DL applications which require no supplemental information will be processed by DOC within ninety days⁸⁹ and amendments to DLs will be processed by DOC within sixty days.⁹⁰ Applicants may be subject to a prelicense audit by DOC of their ICPs and past transactions.⁹¹

DOC must preapprove DL consignees. Factors in determining consignee acceptability may include whether the consignee has had an ongoing business relationship with the applicant for at least one year, whether the consignee was an approved consignee under another DL, whether the consignee has a satisfactory record as a consignee under IVLs, and whether the consignee is controlled-in-fact by the applicant or another approved consignee.⁹² DOC has stated that it is flexible regarding the existence of a previous one-year relationship. DOC may require some evidence of the firm intention of the consignee to place orders on a continuing basis on the applicant.⁹³ To receive DOC approval, a consignee must generally agree to comply with DL and EAR requirements; to establish and maintain an acceptable ICP; to keep and maintain prescribed records which are available for DOC audit; and to comply with U.S. reexport conditions. Renewal applicants must demonstrate ongoing economic activity with each renewed consignee.⁹⁴ Existing foreign consignees under DLs must have had an ICP in place by April 23, 1986, and must have so certified to their licenseholders by September 23, 1985, or they will have been dropped as consignees under the DL. Consignees may be subject to an audit of their ICPs.

87. 15 C.F.R. §§ 373.3 (f) (3) (ii) & (k) (3) (i) (1986).

88. 15 C.F.R. § 373.3 (o) (1986).

89. 15 C.F.R. § 373.3 (f) (2) (iii) (1986).

90. 15 C.F.R. § 373.3 (1) (2) (ii) (1986).

91. 15 C.F.R. § 373.3 (f) (1) & (n) (1986).

92. 15 C.F.R. § 373.3 (c) (4) (ii) (1986).

93. 15 C.F.R. § 373.3 (c) (5) (1986).

94. 15 C.F.R. § 373.3 (k) (3) (iii) (1986).

A new addition to the EAR, EAR 373, Supplement 4, lists those items ineligible for shipment under DLs to any but specifically preapproved end-users. Some listed items require preapproved end-users only if they are to be sent outside EAR 373, Supplement 2, countries.⁹⁵

Consignees must be identifiable as "resellers" or "end-users" for purposes of reporting and recordkeeping. "Resellers" are parties which receive U.S. origin commodities for the purpose of resale to other parties. This category includes parties which resell U.S. commodities in the basic form received, parties which make modifications or add value to the U.S. commodity before reselling or reexporting commodities primarily of U.S. origin, parties which attach a U.S. commodity in the same or essentially the same form as received to foreign equipment, and parties which supply U.S. commodities as support equipment for foreign products.

"End-users" are parties which actually use U.S. origin commodities permanently or which incorporate them as integral parts, components or materials in the production of primarily foreign origin commodities. Foreign manufacturers incorporating U.S. commodities into items essentially of foreign manufacture are now required to submit more detailed information about end-products and end-uses.

Consignees may be added to or deleted from the DL at the request of the licenseholder upon DOC approval and, for added consignees, upon the consignee's compliance with DOC requirements. The licenseholder must advise DOC if a consignee is being deleted for failure to comply with the DL or the EAR.⁹⁶

B. COMMODITY AND DESTINATION RESTRICTIONS

Approved commodities on DL applications must be listed by CCL entry and paragraph number and must identify portions in EAR 373, Supplement 1, which are ineligible for DL shipment. Listing to entry level only is permitted, without reference to paragraph numbers, when the applicant expects to be shipping a broad range of goods within a CCL entry. Spare or replacement parts need not be listed by CCL entry if they will not exceed 20 percent of the value of the total exports under the DL.⁹⁷

The DL must not be used for certain exports.⁹⁸ Those items ineligible for shipment under DLs (but not under PLs or SLs) are listed in EAR 373, Supplement 1. It refers to complete machines only and not to parts of listed machines. A Floating Point Processing Data Rate (PDR) is used

95. 15 C.F.R. § 373.3 (b) (2) (1986).

96. 15 C.F.R. § 373.3 (1) (4) (1986).

97. 15 C.F.R. § 373.3 (d) (3) (1986).

98. 15 C.F.R. § 373.3 (b) (1986).

in Supplement 1 descriptions.⁹⁹ Certain Supplement 1 items (essentially electronic computers) have higher cutoff performance levels for shipment to EAR 373, Supplement 2, destinations. A special provision was added to the revised EAR 373, Supplement 1, for semiconductor manufacturing equipment under ECCN 1355A. The DL is valid only for CGs *T* and *V* (with the exclusion of Afghanistan, Iran and the PRC). There is a restriction on the sale or transfer of DL shipped items to entities controlled by governments in CGs *Q*, *S*, *W*, *Y* or *Z* or Afghanistan.¹⁰⁰

Approved sales (i.e., where the consignee is located) or reexport territories for each consignee under a DL constitute those (and only those) countries where the consignee is authorized to receive or reexport commodities received under the DL. Approved sales or reexport territories are those countries shown on the approved Form ITA-6052P for each consignee.¹⁰¹ Resellers must certify that there have been at least six sales of controlled commodities in each country of their authorized reexport territories in one year preceding application, but this standard seems to be waived for EAR 373, Supplement 2, countries.¹⁰² Consignees which cannot satisfy this criterion may otherwise justify projected levels of economic activity in those countries.

A consignee may make temporary exports for exhibition or demonstration to those countries specifically authorized on its ITA-6052P.¹⁰³ Permissive reexports are permitted by DL consignees under GLs GLV (for items of limited value) and GTE (for temporary reexport for demonstrations or exhibits, although this is available only to the U.S. registrant).¹⁰⁴ Temporary exports for exhibition or demonstration may also be made by approved consignees, upon compliance with written assurance requirements, to certain countries outside their reexport territories.¹⁰⁵ Consignees may request authorization to make specific reexports under EAR 373.3 (j) (4).

Consignees may reexport to any other consignee on the DL, except for those commodities in EAR 373, Supplement 4, which may only be reexported to specifically approved consignee end-users.¹⁰⁶ An end-user may reexport manufactured products incorporating U.S. commodities received

99. The definition of PDR is established in ECCN 1565A AN 16 and is intended to express the relative performance speeds of computers. This is a measure developed for export licensing and is not an industry devised or used measure.

100. 15 C.F.R. § 373.3 (a) (1) (1986).

101. See also 15 C.F.R. § 373.3 (j) (1986).

102. 15 C.F.R. § 373.3 (d) (3) (iii) (D) (1986).

103. See 15 C.F.R. § 373.3 (d) (3) (ii) (C) (1986).

104. 15 C.F.R. § 373.3 (j) (5) & 374.2 (1986).

105. 15 C.F.R. § 373.3 (j) (2) (iii) (1986).

106. 15 C.F.R. § 373.3 (j) (3) (1986).

under a DL to any destination listed in its Form ITA-6052P that has been approved by DOC. An end-user will generally be granted permission to reexport parts to service manufactured products incorporating those parts if the volume of parts is reasonable, it agrees to maintain records and it agrees to permit DOC to audit those reexports.¹⁰⁷

Consignees must notify customers through submitted invoices of U.S. restrictions on reexports, but the exceptions almost swallow this rule, e.g., notice is not required for shipments to retail customers; to customers in EAR 373, Supplement 2, countries (unless there is a special condition on a license); to approved consignees; or to governments.¹⁰⁸

“Drop shipments,” i.e., the licenseholder—at the direction of the consignee—shipping directly to customers within the consignee’s territory, is permitted (except for EAR 373, Supplement 4, commodities unless prior approval is granted by DOC) under the revised EAR. An approved consignee can also request another approved consignee to ship directly to the consignee’s customer. Drop shipment payment may be made directly from the customer to the licenseholder.¹⁰⁹

Those records that must be maintained in accordance with the EAR and the DL (including their retention periods) are found at EAR 373.3 (m) and 387.13. Prelicense, postlicense, and mini audits are provided for and described in EAR 373.3 (n) and 387.13 (f).

C. INTERNAL CONTROLS

A major change to U.S. Hi-Tech export control practice is the new emphasis on the establishment and exercise of ICPs by licenseholders and consignees under DLs. It had been a longstanding requirement for licenseholders and consignees to agree to abide by U.S. export regulations; to maintain records and make these available for inspection; to review and circulate TDOs; and to take other “self-enforcing” measures. The new regulations¹¹⁰ make this duty of “self-enforcement” more explicit and the requirements far more detailed. Loss of a DL is provided by regulation if ICPs prove ineffective or are improperly implemented. Self-enforcement is a major element in efforts to make U.S. Hi-Tech export controls more effective.

Licenseholders and consignees are unquestionably the most knowledgeable about their day-to-day exporting and distributing activities and about their product-lines. Self-enforcement may overcome the perceived

107. 15 C.F.R. § 373.3 (j) (1) (1986).

108. 15 C.F.R. § 373.3 (j) (3) (iii) (1986).

109. 15 C.F.R. § 373.3 (k) (1986).

110. 15 C.F.R. § 373.3 (e) & (g) (1986).

inability of bureaucrats to properly administer or enforce controls. By combining the licenseholder's and consignee's economic self-interest in the DL with self-administered control measures, both the efficiency and the effectiveness of those controls may increase. The cost to the licenseholder and consignee of administering ICPs will be significant. Under the DL's new and more stringent standards, it is feared that some current licenseholders may not receive renewals or extensions of expiring DLs.

Each licenseholder and applicant is required to have an ICP (which is subject to DOC audits) designed to ensure compliance with the EAR and the terms of the DL. Specifics of the ICP may vary, depending on circumstances, but will generally include:

1. A clear statement of corporate policy communicated to all levels of the firm involved in export sales, traffic and related functions, emphasizing the importance of DL compliance
2. The identification of positions (with updated listings of persons holding those positions) in the licenseholder firm and the consignee who are responsible for DL compliance
3. A system for timely distribution to consignees (with verification of receipt) of TDOs and other regulatory materials necessary to ensure compliance
4. A methodology for screening shipments to customers covering servicing, sales of commodities, software sales, and training against TDOs
5. A system for insuring compliance with product and country restrictions, including controls over reexports by consignees' customers
6. An internal audit system or compliance review program for the applicant or licenseholder, extending to all consignees
7. A system for assuring compliance with the limits on delivery of commodities to nuclear end-uses/end-users
8. A continuing program for informing and educating appropriate licenseholder, applicant and consignee personnel in the applicable regulations, limits and restrictions of the DL procedure
9. A program for licenseholders to screen and identify relevant customers with high risk of diversion profiles which are scheduled to receive drop shipments (consignees should not ship to identified high-risk customers before advising and receiving the approval of licenseholders, and licenseholders which are unable to authenticate identified high-risk customers should request assistance from DOC in writing to determine if DOC has information on the identified high-risk customers)—screening factors will include:
 - a) Small or little-known customers for which financial information and identification of principals are not available from normal sources
 - b) Customers unwilling to use normal installation and maintenance services

- c) Customers reluctant to provide end-user/end-use information
 - d) Customers requesting atypical payment terms or currencies
 - e) Customers requesting order amounts, packaging or routing at variance with normal industry practice
 - f) Customers requesting commodity performance or design characteristics inappropriate for their businesses or stated end-uses
 - g) Customers using only "P.O. Box" addresses or with facilities inappropriate for the shipped commodities
 - h) Customers ordering parts for which they have no legitimate need, e.g., prior authorized shipments of systems containing the ordered parts; and
 - i) Customers known to have, or suspected of having, unauthorized dealings with parties and/or destinations in CGs *Q, S, W, Y* and/or *Z* and/or the PRC, Afghanistan and/or Iran.
10. A program for recordkeeping required by the EAR
 11. An order processing system affixing responsibility for all required internal control reviews
 12. A system for monitoring intransit shipments and shipments to bonded warehouses and Free Trade Zones; and
 13. A system for notifying DOC promptly if the licenseholder has knowledge that a consignee is not in compliance with the terms of the DL.
- Each approved consignee under a DL must certify to the existence of an ICP (which is subject to DOC audits) that generally includes the following elements:
1. A statement of consignee policy, communicated from management to employees, directing compliance with the EAR as it applies to DLs
 2. The maintenance of a current list of employees charged with export compliance responsibilities
 3. A system for screening hardware, software, training and servicing transactions against updated TDOs provided by the licenseholder
 4. A system for assuring compliance with the product and country reexport restrictions on the Form ITA-6052P, and for the restrictions on the export of products incorporating commodities received under the DL
 5. A system for complying with nuclear restrictions under DL procedure
 6. An internal audit program to verify consignee compliance with its ICP
 7. An education program for consignee employees processing transactions involving products received under DLs
 8. A process for screening customers against the diversion risk profile earlier described
 9. A recordkeeping and reporting system required under EAR 373.3 (h) and (m); and

10. An order processing system that documents the employee clearance of transactions in accordance with the applicable internal control elements above.

DOC has prepared and made available a detailed booklet entitled *Export Management Internal Control Guidelines for U.S. Exporters and Foreign Consignees* (September 1985).

VII. Technical Data

“Technical Data” is defined by statute and regulation as any information of any kind, whether in a tangible or intangible form, that can be used, or adapted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials. It includes providing technical service, offering verbal advice or permitting visual inspections of equipment or facilities. The export of “classified” Technical Data is not controlled by DOC.¹¹¹ All software is now Technical Data, but may also be controlled under specific CCL entries. Models and prototypes are commodities as well as Technical Data and are subject to the most rigorous of whichever controls apply.¹¹² EAR 379, Supplement 1, offers some of DOC’s Technical Data interpretations.

Technical Data may be exported or reexported by sending Technical Data out of the U.S., permitting the release of Technical Data in the U.S. when it is expected that this will result in its transfer to a foreign country, or releasing U.S.-origin Technical Data in a foreign country.¹¹³ Technical Data may be exported under an IVL; a Comprehensive Operations License; a PL, but the PL is restricted regarding Technical Data;¹¹⁴ a GL GTDA; or a GL GTDR. Most Technical Data may be sent to Canada without an export license.

A GL GTDA is available to all destinations. It covers Technical Data that is “generally available,” scientific or educational data, and patent applications.¹¹⁵ A GL GTDR may be used to export Technical Data which is under the restrictions of EAR 379.4 and for which “written assurances” by recipients are required. No Technical Data may be exported under GL GTDR to CGs *S* or *Z* and may only be exported to CGs *Q*, *W*, *Y*, *T* and *V*; Afghanistan; or the PRC under certain limitations.¹¹⁶ Generally, exports under GL GTDR may only be made of Technical Data that is “Operation Technical Data” shipped in conjunc-

111. 15 C.F.R. § 379.1, f.n. 1 (1986).

112. 50 U.S.C.A. app. § 2415 (4) (West Supp. 1986) and 15 C.F.R. § 379.1 (a) (1986).

113. 15 C.F.R. §§ 379.1 (b) & (c) (1986).

114. 15 C.F.R. § 373.2 (e) (1986).

115. 15 C.F.R. § 379.3 (1986).

116. 15 C.F.R. § 379.4 (a) (1986).

tion with an authorized export or reexport of a commodity; or "Sales Technical Data" shipped in conjunction with a bid or offer to sell or supply a commodity, plant or Technical Data. EAR 379.4 (e) specifies restrictions on the use of a GL GTDR which are applicable to exports to South Africa and Namibia. The written assurance requirements for GL GTDR are described in EAR 379.4 (f). Software listed in ECCN 1391A may be exported or reexported under GL GTDR only to CGs *T* and *V* (except Afghanistan and the PRC), subject to written assurance requirements. Exports of this software to any other CG and exports or reexports to any CG of any other software listed on any ECCN in the CCL requires a VL.¹¹⁷ Crime and detection Technical Data¹¹⁸ may be sent under a GL GTDR only to NATO countries, Australia, Japan, and New Zealand. Unless authorized under a GL GTDA, this Technical Data must be sent under an IVL to all other destinations.¹¹⁹ EAR 379.4 (i) lists additional restrictions on the GL GTDR for exports of Technical Data to the PRC.

VLs are required for all destinations, including Canada, for the export of nuclear-related Technical Data described in EAR 379.4 (c). Exports of Technical Data described in EAR 379.4 (d) to all destinations except Canada require a VL. EAR 379.5 and 379.6 generally establish the procedures for obtaining and using an IVL (which is valid for two years and is extendable for two years) to export Technical Data.

An agreement between a U.S. nongovernmental entity (except educational institutions) and the agency of a controlled country which provides for the export from the U.S. of unpublished U.S.-origin Technical Data shall be reported in detail by the U.S. party to the DOC.¹²⁰

Software was previously subject only to unilateral U.S. export controls. In late 1984, all software was declared to be a commodity and was given ECCN 1566A in the CCL. DOC soon reversed its position, eliminated ECCN 1566A, and moved its categorization of software to that of Technical Data. This move also eliminated VL licensing requirements for the export of some software to CGs *T* and *V* (except Afghanistan and the PRC) and authorized the export of certain software to all destinations except CGs *S* and *Z* under GL GTDR. EAR 379 now deals with software and most detailed software export restrictions are found in EAR 379.4 (f) (1) (i) (K), 379.4 (g), 379.5 (e) (3), and 379,

117. 51 Fed. Reg. 12,840 (1986) (amending 15 C.F.R. § 379.4 (g)).

118. See 15 C.F.R. § 376.14 (1986) for CCL items affected.

119. 15 C.F.R. § 379 (h) (1986).

120. 50 U.S.C.A. app. § 2404 (j) (West Supp. 1986).

Supplement 3. Nonetheless, there remain many references to software in the CCL. An exporter must examine EAR 379 *and* the CCL entry for the equipment on which the software will be used in order to be assured that the proper controlling regulations have been discovered. About 10 percent of commercially available software now requires a VL for export to all destinations except Canada and is subject to multilateral review.

VIII. Reexports and Temporary Exports

Efforts by the U.S. to continue to exercise controls over U.S.-origin Hi-Tech that has entered the commerce of foreign countries has generated protests and opposition from foreign countries. Nevertheless, all such reexports of U.S.-origin Hi-Tech remain subject to U.S. controls. Reexport is defined in EAR 370.2 as "reexport, transshipment or diversion" of Hi-Tech from "one foreign destination to another." The reexport of goods shipped under a PL between consignees under the license,¹²¹ under a DL,¹²² and under an SL¹²³ are addressed in some detail in the regulations. Permissive reexports are authorized.¹²⁴ Reexports between Switzerland and Liechtenstein,¹²⁵ from CoCom countries to CGs *Q*, *W* or *Y* or the PRC,¹²⁶ and to Canada,¹²⁷ are explicitly permitted under certain conditions.

EAR 374 is devoted entirely to the subject of reexports and EAR 374.3 describes in detail the procedure for requesting reexport authorization. Reexport authorizations to CGs *Q*, *W*, *Y* or *Z* or Afghanistan are usually valid for a year and may only be extended one time, but other reexport authorizations are generally not limited in time.¹²⁸ The reexportation of Technical Data is controlled by EAR 379.8.

The International Import Certificate and Delivery Verification Certificate Program of EAR 368 and 375.3 has as its principal goal the prevention of reexports without the exercise of local foreign government controls. The U.S. also permits the temporary export of goods for purposes such as demonstrations, exhibits, repairs, or to perform "value added" work under the "maquiladora" program in Mexico.¹²⁹

121. 15 C.F.R. § 373.2 (g) (1986).

122. See the section on the DL.

123. 15 C.F.R. §§ 373.7 (d) (2) & (3); (e); (h) (1) (ii) & (3) (1986).

124. 15 C.F.R. §§ 374.2, 379.8 (b) & (c) (1986).

125. 15 C.F.R. § 374.2 (d) (1986).

126. 15 C.F.R. § 374.2 (i) & (j) (1986).

127. 15 C.F.R. § 374.2 (h) (1986).

128. 15 C.F.R. § 374.5 (1986).

129. 15 C.F.R. § 371.22, 372.8 (c); & 373.3 (d) (3) (ii) (C) (1986).

IX. Other Agency Review, Processing Time and Likelihood of Approval

A. GENERAL

Under U.S. export statutes and regulations, all applications for VLs (including multiple licenses) are submitted to DOC.¹³⁰ Depending upon the product (including configurations or cumulative capabilities), consignee (including end-use), destination, and total export value, some applications may also be subject to review by CoCom, DOD, DOE, Department of Treasury, Department of Agriculture and/or DOS. Review by organizations other than DOC will significantly delay processing times and may diminish the likelihood of ultimate approval. More than 90 percent of applications for exports to CG *T* and *V* destinations are acted upon within two weeks by DOC. For other destinations, 75 percent are acted upon within four weeks of receipt.¹³¹ These assertions are those of DOC, which also defines but does not disclose what it means by "acted upon." DOC claims that less than 1 percent of the export applications that it processes are ultimately denied.

The most critical factors to an exporter are the speed and certainty with which export licenses may be obtained. In the past, there has been substantial dissatisfaction on both these counts. Although new and shorter processing times have been provided by statute and regulation, some DOC representatives have expressed doubts that these time limits will, or can be, met.

Exports to CoCom member countries are treated differently than those to all other countries and their treatment will be described in a later portion of this section.

B. PROCESSING TIME

"Date of Receipt" is defined by DOC to be the date on which a case number is assigned to the application¹³² which must be within ten days of submission of an accepted application.¹³³ Where no referral to any other agency is required, DOC will approve or deny the application within sixty (ninety per the Act) days after receipt.¹³⁴ Where referral to other agencies is required, DOC will submit the application, together with any appropriate analysis or recommendation, to such other agencies within

130. 50 U.S.C.A. app. § 2409 (a) (1986).

131. 15 C.F.R. § 370.11 (a) (2) (ii) (1986).

132. 15 C.F.R. § 370.13 (a) (2) (1986).

133. 15 C.F.R. § 370.13 (b) (1986).

134. 50 U.S.C.A. app. § 2409 (c) (West Supp. 1986) and 15 C.F.R. § 370.13 (c) (1986).

twenty days of its receipt. DOC may refer it at a later time if referral only then becomes necessary or obvious. The applicant will be advised if the application is referred and the applicant may request to review referred documents for accuracy.¹³⁵ Reviewing agencies or departments must respond to DOC within twenty days of receiving the referred application. If a reviewing agency notifies DOC that it needs more time, it will receive an additional twenty days. Agencies not timely responding will be deemed to have no objection to the application.¹³⁶

DOC will formally approve or deny an application within sixty days of receipt by DOC of reviewing agency recommendations or expiration of the periods for comment, whichever is earlier.¹³⁷ When questions or negative recommendations are received from reviewing agencies, DOC—to the extent compatible with national security and foreign policy—will notify the applicant. The applicant will have thirty days to respond in writing or fifteen days to submit a written request to respond in person to such questions or recommendations.¹³⁸ When the applicant is offered the opportunity to respond to questions or negative recommendations, processing of the application is suspended and the tolling of time limits stops until the applicant responds.¹³⁹ Where DOC determines to deny the application, the applicant will be notified in detail within five days of such determination and the applicant will have thirty days to respond in writing before the application is denied.¹⁴⁰

Except for designated exports to CoCom member countries, the DOC may extend any times where it determines that applications are of exceptional importance or complexity and that additional time is needed to negotiate modifications of the application.¹⁴¹

For certain nuclear-related applications, and to the degree consistent with EAR 378, Supplement 1, if DOC does not process any application within 180 days of receipt, the applicant has the right of petition provided in EAR 370.13 (m).¹⁴²

C. OTHER AGENCY AND CoCOM REVIEW

Where the export is of goods to a country to which exports are controlled for national security reasons, DOD will be notified. DOD and DOC

135. 50 U.S.C.A. app. § 2409 (d) (West Supp. 1986) and 15 C.F.R. §§ 370.11 (b) & 370.13 (d) (1986).

136. 50 U.S.C.A. app. § 2409 (e) (West Supp. 1986) and 15 C.F.R. § 370.13 (e) (1986).

137. 50 U.S.C.A. app. § 2409 (f) (1) (West Supp. 1986) and 15 C.F.R. § 370.13 (h) (1986).

138. 50 U.S.C.A. app. § 2409 (f) (2) (West Supp. 1986) and 15 C.F.R. § 370.13 (i) (1986).

139. 15 C.F.R. § 370.13 (k) (4) (1986).

140. 50 U.S.C.A. app. § 2405 (a) (4) & 2409 (f) (3) (West Supp. 1986) and 15 C.F.R. § 370.13 (j) (1986).

141. 50 U.S.C.A. app. § 2409 (f) (4) (West Supp. 1986) and 15 C.F.R. § 370.13 (k) (1986).

142. 15 C.F.R. § 370.13 (g) (1986).

jointly determine which types and categories of such transactions DOD will review. DOD must review the application submitted by DOC and, not later than twenty days after receipt, must (a) notify the President (per the Act) or DOC (per EAR) that DOD recommends disapproval of the application for national security reasons; (b) notify DOC that DOD recommends approval subject to specific conditions; or (c) notify DOC that DOD recommends approval. If DOC disagrees with DOD's negative recommendation and the dispute cannot be resolved between the agencies, it will be referred to the President who will be given an opportunity (thirty days per the Act) to review the application. If the President notifies DOC that he/she concurs in DOD's negative recommendation, the License will not be issued.¹⁴³

Pursuant to a classified but widely publicized directive of the National Security Council, DOD has been authorized to select and review export applications for seven ECCN commodities and to fifteen free-world countries. The selected list is classified, DOD may change its selection of countries and ECCNs from time-to-time, and an applicant will not know which ECCNs or countries are covered at the time of application. It is believed that the seven ECCNs now reviewed are from among the following list of eight: 1355A, 1529A, 1564A, 1565A, 1567A, 1757A, 1763A, and 4757A. The country destinations currently reviewed by DOD are thought to include: Austria, Finland, Hong Kong, India, Liechtenstein, Singapore, South Africa, South Korea, Sweden, Switzerland, Taiwan and Pakistan. Presumably, DOD review of these applications must be completed within the applicable processing times as though DOD had not been a reviewing agency. It is also believed that DOD may now review DL applications.

DOE will review any export application of a good on the CCL Nuclear Referral List and any export to a nuclear end-use or end-user, regardless of commodity.¹⁴⁴ DOS may review any licensing application for commodities controlled for foreign policy purposes.¹⁴⁵ Department of Treasury's Office of Foreign Assets Control will review applications to export commodities or Technical Data to embargoed countries.

Where multilateral review by CoCom is required, after necessary agency review and upon tentative DOC approval, the application will be submitted for multilateral review. Forty days after tentative approval is given, if multilateral review is not complete, an export license shall issue unless DOC decides that this would be detrimental to national security. If DOC so decides, it will provide status reports on the application then and at

143. 50 U.S.C.A. app. § 2409 (g) (West Supp. 1986) and 15 C.F.R. § 370.13 (f) (1986).

144. 15 C.F.R. § 378, Supp. 1 (1986).

145. 50 U.S.C.A. app. § 2405 (a) (5) (West Supp. 1986).

the end of each subsequent forty day period.¹⁴⁶ Submission of an export application to CoCom is said by DOC to add at least two months to processing time,¹⁴⁷ but often adds six months to one year. Application to export certain multilaterally controlled items requires only notification to CoCom. Approval by CoCom of such an application is automatic unless CoCom raises an objection during the thirty-day review period. Total processing time for these applications usually is 120–150 days, but may be longer. An application to export items with performance parameters exceeding preestablished levels requires *formal CoCom approval*. These applications are considered by CoCom as “General Exceptions” for a period of ninety days (plus extensions if questions are raised). Formal approval by CoCom requires the unanimous consent of represented member countries. Such cases usually take well over a year to process and are likely to result in negotiated restrictions being imposed on the export license. Multilateral review processing time is said to be reduced if the applicant submits appropriate document translations at the time of application.

For exports (except those subject to certain nuclear nonproliferation controls) of multilaterally controlled items¹⁴⁸ to CoCom member countries, fifteen working days after application an export license shall become valid unless: (a) sooner approved; (b) sooner denied; or (c) DOC determines and notifies applicant that it requires an additional fifteen working days. If more time is required, the export license will be valid thirty working days after the initial filing unless: (a) sooner approved or (b) sooner denied.¹⁴⁹ For these export applications, application documents will be sent upon receipt to the reviewing agencies which must review the documents concurrently with DOC.¹⁵⁰ If no timely response is given by DOC to the applicant, the applicant may ship without a license, referring only to the assigned case number on shipping documents.¹⁵¹

D. LIKELIHOOD OF APPROVAL

In the CCL entries and in EAR 379, Supplement 3, ANs will often give explicit indications of the likelihood of export license approval to certain destinations of specific commodities. Generally, the phrases “likely to be approved” and “favorable consideration” will indicate how DOC will

146. 50 U.S.C.A. app. § 2409 (h) (West Supp. 1986) and 15 C.F.R. § 370.13 (1) (1986).

147. 15 C.F.R. § 370.11 (c) (1986).

148. I.e., for all ECCNs having the code letter “A” and for Technical Data described in 15 C.F.R. §§ 379.4 (d) (10), (12), (13), (16), (17) & (18) (1986).

149. 50 U.S.C.A. app. § 2409 (o) (West Supp. 1986) and 15 C.F.R. § 370.14 (1986).

150. 50 U.S.C.A. app. § 2409 (d) (West Supp. 1986).

151. 50 U.S.C.A. app. § 2409 (o) (West Supp. 1986) and 15 C.F.R. § 370.14 (f) (1986).

treat an export application for exports to controlled countries, whether the application will be subject to other agency review, and whether the application is subject to multilateral review. Except for applications for exports to Poland and the U.S.S.R., "likely to be approved" means that applications are not subject to interagency or CoCom review. Those to Poland and the U.S.S.R. are subject to interagency review. "Favorable consideration" means that applications are subject to CoCom, but not interagency, review. In most cases, this requirement is satisfied by thirty-day notification to CoCom, rather than by demanding formal CoCom approval.

ANs in ECCN 1565A give unusually specific parameters for the likelihood of approval. If the parameters of the goods to be exported are below the levels of AN 9, DOC need not refer the application to CoCom and there is a presumption of approval. If some of the parameters of the goods to be exported exceed those of AN 9, but all are below those of AN 12, the U.S. would probably recommend approval, but would be required to notify CoCom for its review. If any parameter of the goods to be exported exceeds those of AN 12, it is questionable whether the U.S. would recommend approval for export. If the U.S. did recommend approval, CoCom would have to review the application as a "General Exception."

X. Foreign Availability

In recognition of the futility of restricting the export of U.S. goods and Technical Data readily available to controlled countries from uncontrolled non-U.S. sources and in recognition of the poor competitive position in which U.S. exporters would be placed by such restrictions, there is a "foreign availability" exception to U.S. Hi-Tech export controls. It is currently available for those items which: (a) are under the jurisdiction of the Act and/or are subject to U.S. export controls; (b) are controlled for national security purposes; (c) are competing with foreign available goods not subject to U.S. export controls; (d) are competing with foreign available goods which are available to countries in Country Groups *Q*, *W* and *Y* and Afghanistan; (e) are competing with foreign available goods substantially similar in quality, function, technology approach, performance threshold, and maintainability and service life; and (f) are competing with foreign available goods available in sufficient quantity to meet the military requirements of the countries in (d) above.¹⁵² A claim of foreign availability for items on a specific export license application may

¹⁵² 50 U.S.C.A. app. §§ 2403 (c), 2404 (f) & 2405 (h) (West Supp. 1986) and 15 C.F.R. § 391 (1986).

be submitted only by export license applicants. Decontrol claims for all exports of a commodity may be submitted by any person or organization or may be independently initiated by DOC.

Current regulations apply only to national security controls.¹⁵³ Foreign policy export controls are expected out much later, but their scope is so restricted by 50 U.S.C. App. 2405 (i), (j), and (k), which limit or exclude foreign availability determinations for controls under international agreements, for exports of crime control equipment, and for exports to terrorist states that it is unlikely they will be of much significance when and if they do appear.

The foreign availability exception has long been provided for by statute. It has not been utilized largely because of the perception that such an application would not receive serious DOC consideration. DOC had neither established regulations concerning such a review, nor had it designated a staff to handle such a review. Now that DOC has established both requisite regulations and staff, practical exploration of the real utility of such an exemption will undoubtedly soon be more forcefully explored by Hi-Tech exporters. Experience with foreign availability determinations to date has been generally negative.

The EAR requires the submission of a foreign availability request within ninety days following denial of an export application. With certain qualifications, DOC must publish the assessment or a decision on whether or not to decontrol an item within thirty days of completion of such an assessment. A ninety-day processing time for foreign availability applications is a standard, but is explicitly not mandatory.¹⁵⁴ Applications should be submitted with all available supporting evidence, although DOC has the obligation to independently assemble other and more complete information.¹⁵⁵

Despite a finding of foreign availability, DOC in consultation with DOD (or the President in the case of general decontrol) may determine that approval of a VL (or decontrol) will be detrimental to national security.¹⁵⁶ Subsequent negotiations will be pursued under which the President will attempt to eliminate the foreign availability by negotiations with the exporting country. Negotiations may continue for six months from publication of a finding of foreign availability and are extendable for an additional twelve months if the President certifies to Congress that those

153. Including the items on the MCTL, see 50 U.S.C.A. app. § 2404 (d) (4) (West Supp. 1986).

154. 15 C.F.R. §§ 391.4 (a) (3) & (b) (3) (1986).

155. 50 U.S.C.A. app. §§ 2403 (c) & 2404 (f) (6) (West Supp. 1986) and 15 C.F.R. § 391.2 (d) (2) (ii) (1986).

156. 15 C.F.R. §§ 391.4 (a) (5) & (b) (4) (1986).

negotiations are progressing and that issuance of the license would disrupt those negotiations.¹⁵⁷

XI. Transshipment and Foreign Trade Zones

The EAR makes special provision for goods passing intransit through some countries en route to an approved final destination; goods unladen in some countries en route to an approved final destination; and goods shipped to an approved final destination in vessels or aircraft under the control of certain countries. Goods unladen from a vessel or aircraft in CGs *Y* or *Z*, or transshipping through CGs *Y* or *Z* while en route to Canada or CGs *Q*, *S*, *T*, *V* or *W* require a VL specifically authorizing such transshipment, unless transshipped through East Germany to West Berlin or unless they are items not having ECCN code letters *A*, *B* or *M* and are exportable to CG *Y* or *Z* countries under a GL.¹⁵⁸

Commodities intransit through Canada from the U.S. en route to other destinations are subject to EAR 386.1 (d). If goods are shipped via means with optional ports of unloading, EAR 386.3 (k) applies.¹⁵⁹ In addition, EAR exercises control over goods passing intransit through, being unladen in, or passing through the territorial waters of the U.S. en route to another destination.¹⁶⁰ There are also special EAR provisions which apply to exports from U.S. Foreign Trade Zones.¹⁶¹

XII. Administrative Provisions

DOC (and other parties exercising control over U.S. exports) must continuously review those commodities subject to controls to assure that controls over them continue to be required and may be effectively applied.¹⁶² Instructions regarding the completion of various export license applications are found in pertinent EAR parts and, generally, in EAR 375.¹⁶³ The disposition made by DOC of various export license applications is found in their relevant EAR parts and has been examined in earlier sections.

157. 50 U.S.C.A. app. § 2404 (f) (4) (West Supp. 1986) and 15 C.F.R. § 391.6 (1986).

158. 15 C.F.R. §§ 370.9, 371.2 (c) (2) & 372.8 (b) (1986).

159. See also 15 C.F.R. §§ 376.9 (c) (4) & 386.5 (a) (3), (4) & (5) (1986).

160. 15 C.F.R. §§ 370.5, 371.4, 372.8 (a) & 386.3 (p) (1986).

161. 15 C.F.R. §§ 370.6, 371.7, 377.1 (b) & 386.3 (p) (2), but see 370.7 (e) (1986).

162. 50 U.S.C.A. app. §§ 2404 (b) (1), 2404 (c) (3), & 2404 (d) (5) & (6) (West Supp. 1986) and 15 C.F.R. § 370.1 (b) (1) (1986).

163. For VL Applications, see 15 C.F.R. §§ 372 (generally), 372.4, 372.5, 372.6, 372.7, 372.10, 372.11, 372.13 & 372, Supp. 1 (1986). For DL Applications, see 15 C.F.R. §§ 373.3 (d) & 373, Supps. 5 & 6 (1986). For PL Applications, see 15 C.F.R. §§ 373.2 (c), (d), (e) & (f) (1986). For SL Applications, see 15 C.F.R. § 373.7 (d) (1986).

General instructions regarding export clearance are found in EAR 386, but see EAR 370.14 (f). For more specific guidance, refer to EAR 371.2 (a) and (b) for GL export declarations; EAR 373.3 (i) for DL export clearance; and EAR 386.7 for shipping quantity tolerances. Recordkeeping and reporting requirements for various export licenses are found in their pertinent EAR parts and, generally, in EAR 387.13, but see 386.3 (r).

What constitute "violations" of the Act and the EAR are covered generally in 50 U.S.C. App. 2410 and EAR 387. Of particular interest is the fact that a failure to report a violation under certain circumstances constitutes a violation.¹⁶⁴ The Act Amendments and the revised EAR have added as violations an attempt or conspiracy to violate or willfully evade compliance with the Act or the EAR, and the possession of goods or technology with the intention to violate export restrictions or with knowledge or reason to believe that the goods will be illegally exported. It is unlikely that these additional "violations" materially expand the Act or the EAR.

Violations of the Act or the EAR may result in criminal penalties (administered by the U.S. Attorney General) or civil penalties or fines (administered by DOC).¹⁶⁵ A new penalty imposed by the Act Amendments¹⁶⁶ and the revised EAR 387.1 (b) (4) is the forfeiture of the property (or any interest in or proceeds derived from the property) involved in an executed or attempted illegal export. The Act Amendments also gave statutory legitimacy to the TDO, but limited its use to the prevention of "imminent violations," which DOC has construed as an endorsement of precisely its earlier use of the TDO.¹⁶⁷ TDOs may initially be imposed on an ex parte basis, but the imposition of a TDO may be appealed and may not be extended, or reextended, beyond a sixty-day effective period without a formal hearing.¹⁶⁸ The assessment of civil penalties and administrative sanctions are imposed through public hearings before an administrative law judge. The administrative law judge will issue recommendations (except in the case of boycott proceedings where a "decision" will be rendered) to the Assistant Secretary of DOC for Trade Administration, who will determine and exercise the final decision.¹⁶⁹ Under the Act Amendments, the President may also impose import restrictions on violators of unilateral or multilateral export controls which are instituted for national

164. 15 C.F.R. §§ 387.1 (a) (1) (ii) (B) & 387.4 (a) (1986).

165. 15 C.F.R. § 387 (1986).

166. 50 U.S.C.A. app. § 2410 (a) (West Supp. 1986).

167. 50 U.S.C.A. app. § 2412 (d) (i) (West Supp. 1986) and 15 C.F.R. § 388, Supp. 3 (1986).

168. 50 U.S.C.A. app. § 2412 (d) (West Supp. 1986) and 15 C.F.R. § 388.19 (1986). For citations regarding DOC's ability to deny export and related privileges, see *supra* note 55.

169. 15 C.F.R. §§ 388 (generally) & 388.16 (1986).

security purposes. This authority, if it is ever asserted, is not administered under the EAR.

In an effort to resolve a heated dispute through compromise, the U.S. Congress seems to have determined on a Solomonic splitting of the baby. Unlike Solomon, Congress not only rendered but executed the decision. DOC enforcement agents now have extensive police powers, but other than overseas audits, their territory is now confined to the U.S., exclusive of points of entry and exit.¹⁷⁰ U.S. Customs has been given export controls enforcement authority abroad and at points of entry and exit in the U.S.¹⁷¹

The applicant may petition DOC to comply with the newly-established export license application processing times¹⁷² and may appeal failures of DOC to comply.¹⁷³ Export license denials may also be appealed within forty-five days of the denial.¹⁷⁴ Although the efficacy of these rights of petition and appeal may seem slight, they may offer some relief to the applicant because of the threat of unwelcome public exposure to non-complying reviewing agencies' practices such proceedings would give.

The President is now restricted in his/her ability to force U.S. companies to abrogate or suspend existing export contracts, as happened in the case of the Russian pipeline. Under the new restrictions, the President may only take such actions temporarily and when faced with an imminent "breach of peace."¹⁷⁵ Technical Advisory Committees are established under the Act and in EAR 390.1. They include industry representatives who perform a significant role in foreign availability determinations and in the formulation of the CCL. Hardship relief from export controls is provided for in the Act.¹⁷⁶

XIII. Unresolved Issues and Likely Developments

There are many changes to the EAR that must be made in order to not only conform the EAR to the amended Act, but to make the EAR internally consistent and to make it current with various changes in U.S. government and world nomenclature. Exporters are cautioned that the EAR found in U.S. government printings of the Code of Federal Regulations (which this writer found to his dismay when preparing this article) may not be relied upon to be an accurate, let alone an up-to-date, version

170. 50 U.S.C.A. app. § 2411 (a) (3).

171. 50 U.S.C.A. app. § 2411 (a) (2) (West Supp. 1986).

172. 15 C.F.R. § 370.13 (m) (1986).

173. 50 U.S.C.A. app. § 2409 (j) (West Supp. 1986) and 15 C.F.R. § 389.2 (1986).

174. 50 U.S.C.A. app. § 2412 (e) (West Supp. 1986) and 15 C.F.R. § 370.13 (j) (2); 370.14 (e) (2) & 389 (1986).

175. 50 U.S.C.A. app. § 2405 (m) (West Supp. 1986).

176. 50 U.S.C.A. app. § 2408 (West Supp. 1986).

of the EAR being administered by DOC. A continuing flow of EAR changes may be expected from DOC in the next few months. These include a possible change of the EAR provision reference methodology to a decimal system—which will commend itself to anyone who has tried to locate items in the EAR under the present system.

The DOC's Office of Export Administration, to which the EAR constantly refers, has been eliminated administratively and will soon be deleted from the regulations. Its functions have been split into three parts, i.e., Technical Policy Analysis, Foreign Availability and Export Licensing. This administrative change occurred on December 15, 1985.

Although DOD seemed to have lost authority in the area of export regulation during a direct confrontation with DOC before the President in 1984, and despite some earlier efforts by DOD to present a more palatable image to Hi-Tech industry, DOD's authority in this area now seems to again be ascendant and its attitudes are increasingly those most feared by the exporting community. The policy conflict between DOD and DOC continues and may result in the accretion of additional powers in the hands of DOD.

Foreign availability regulations under foreign policy export controls are required under the Act, as discussed in an earlier section, but it is unclear whether the limited sphere left under the Act for such foreign availability determinations will make these regulations meaningful if they ever do appear.

Foreign availability determinations as they are now administered are unsatisfactory to industry. Most sales under U.S. export licenses are made to free-world countries. Consequently, the availability in a free-world country of a controlled commodity is thought by many industry members to be sufficient to justify its U.S. export release to that country under "foreign availability." The reexport from that country of the U.S. origin product would be as closely controlled as the reexport of the comparable local product. DOC has already considered this argument and rejected it, so the likelihood of industry success on this point seems poor.

The joint export control policy negotiations with non-CoCom countries proposed by the Act¹⁷⁷ will continue. It has been reported that successful negotiations have already been completed with Austria and India. More such negotiations may be expected. If each country establishes unique export controls with the U.S., each will receive special and presumably individual consideration under the EAR, but with what resulting confusion to the administration of the export regulations remains to be seen.

A thorough revision of Technical Data export controls (including inclusion of the MCTL in the list of controlled Technical Data) has long been

177. 50 U.S.C.A. app. § 2404 (k) (West Supp. 1986).

expected. The present procedures have been faulted by their administrators and by academics and exporters. Nonetheless, the failure of that thorough revision to occur is indicative of the difficulty of the task. It is uncertain when, or if, extensive Technical Data revisions will be formulated by DOC.

In his February 20, 1986, annual report, the Secretary of Commerce proposed to Congress that certain petroleum and gas pipeline equipment and Technical Data export restrictions to the Soviet Bloc be reduced or eliminated. These proposals may be accepted and made operating practice. New DOC audits are expected to focus on the semiconductor and electronics industries as well as the computer industry, which had been the almost exclusive subject of earlier audits.

Industry intends to request participation as part of the U.S. "team" in future CoCom meetings. Although Congress has stated its desire for the publication of CoCom rules and proceedings,¹⁷⁸ these are now classified and not available to the public. This has left industry attempting to work under rules it can only discern by extrapolation and empirical experience.

An analysis from the National Academy of Sciences of U.S. export regulations and controls has been commissioned by the U.S. government and is expected by the end of this year. Its conclusions may provide a strong impetus to the speed and direction of future U.S. policy in this area.

178. 50 U.S.C.A. app. § 2404 (i) (1) (West Supp. 1986).

Appendix A: Abbreviation Key

Act	— Export Administration Act of 1979
Act Amendments	— Export Administration Amendment Act of 1985
AN	— Advisory Note
CCL	— Commodity Control List
CG	— Country Group
CoCom	— Coordinating Committee for Multilateral Export Controls
DL	— Distribution Licenses
DOC	— Department of Commerce
DOD	— Department of Defense
DOE	— Department of Energy
DOS	— Department of State
EAR	— Export Administration Regulations
ECCN	— Export Commodity Control Number
GL	— General License
ICP	— Internal Control Program
IVL	— Individual Validated License
MCTL	— Military Critical Technologies List
PL	— Project License
PRC	— People's Republic of China
SL	— Service Supply License
TDO	— Temporary Denial of Export Privileges Order
VL	— Validated License

