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BRIEFING MATERIALS ON U.S.

EXPORT CONTROLS

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CONTENTS

The Export Administration Amendments Act of 1985
Public Law 99-64

A Review of the new Act and Its Implications for Companies Engaged in Commerce in COCOM Countries

Harold Paul Luks, Arnold & Porter

I. **REWRITING THE U.S. EXPORT CONTROL LAW**

A. **The Export Administration Act of 1979 -- 4 Goals**

1. Reduce the number of items subject to validated licensing controls.

2. Increase and improve controls over items remaining subject to licensing and of "greatest potential significance to the military capability of countries threatening U.S. national security".

3. Improve the efficiency of the licensing process and reduce the time required for approval or denial of an export license application.

4. Establish new criteria and procedural requirements to govern the use of foreign policy controls.

B. **The Congressional Debate Over Reauthorization of the 1979 Act.**

1. Dissatisfaction within the U.S. business community with the national security and foreign policy provisions of 1979 Act.

2. U.S. Senate proposal to increase the involvement of the Department of Defense ("DOD") in export control policy and administration.

3. U.S. House of Representatives proposal to significantly reduce the scope national security controls and restrict presidential use of foreign policy controls.

4. Presidential decisions to expand the role of DOD in reviewing license applications and to increase the responsibilities of the U.S. Customs Service to enforce export controls

II. SIGNIFICANT PROVISIONS OF THE 1985 ACT

A. Several dozen technical and procedural changes to the 1979 Act. These will require the issuance of many new regulations.

B. National Security Controls

1. The elimination of controls regarding exports of "low technology products" to COCOM countries [Section 105(b)(2)].

   a. Eliminates the requirement that the U.S. Government grant prior approval for the export of goods and technology to COCOM countries. The Department of Commerce estimates this provision will reduce annually the number of individual licenses by 10-15% (15-25,000 licenses).

   b. Such goods require only the notification by a COCOM government to COCOM if such goods are to be transferred to a "controlled country" (i.e., the Eastern Bloc). These goods are identified in the COCOM control list as items below the Administrative Exception Notes ("AEN").

   c. Such goods are identified in the U.S. Commodity Control List ("CCL") as technical advisory notes. This provision will ultimately lead to the elimination of individual licenses in 47 CCL categories.

   d. This provision also enables the Administration to extend the decontrol of low technology items to non-COCOM countries if the Administration determines that such countries maintain a system of controls, comparable in practice to those of COCOM countries, to minimize the risk of diversion of goods and technology to the U.S.S.R. and Eastern Bloc [Section 105(h)].

2. Multilateral Export Controls -- U.S. Negotiating Objectives [Section 105(f)].

   a. Increase funding and technical support for COCOM.

   b. Improve multilateral coordination of Import Certificates and Delivery Verification

Documents to prevent the unauthorized transfer of dual-use items on the COCOM International List.

c. Seek to establish uniform criminal and civil penalties for violations of COCOM controls.

d. Increase on-site inspections by national customs/enforcement authorities to verify that COCOM controlled items exported from one COCOM member to another are under the control of stated end users.

3. Reduced Time Limits for Processing Export License Applications for the shipment of goods to COCOM Countries [Section 111].

a. Within a maximum of 30 working days, the Department of Commerce must approve or deny all license applications.

b. Within 15 working days of a license application being registered with the Department of Commerce, it is considered approved unless:

(i). the license has been denied, or

(ii) the Department has requested an additional 15 working days to make a determination.

c. If at the end of 30 working days, the license has neither been approved or denied, the U.S. exporter may ship the items relying upon an acknowledgement by the Department that the license application was received.

4. Decontrol of Embedded Microprocessors [Section 105(j)]

a. Individual and multiple licenses may not be applied to goods solely because they contain an embedded microprocessor, if that microprocessor cannot be used or altered to perform functions other than those it performs in the good into which it has been incorporated.

b. It is unclear to what extent this provision will result in the decontrol of goods containing embedded microprocessors.

c. Within the past two years, the Department of Commerce, with the agreement of DOD, has eliminated controls on such products, particularly scientific instruments and medical equipment.

5. Foreign Availability and the Elimination of U.S. Export Controls [Section 107].

a. The Act establishes procedures to eliminate U.S. unilateral and COCOM controls on items which are available to controlled countries in "sufficient quantity" and "comparable quality" from a source other than the United States.

(i) If the Secretary of Commerce determines the existence of foreign availability, he may recommend negotiations with other countries to eliminate the foreign availability.

(ii) If at the end of 18 months such availability is not eliminated, the Secretary is obligated to eliminate licensing controls over the item available to controlled countries.

b. Business advisory groups organized under the Department of Commerce -- known as Technical Advisory Committees -- will be able to request the Department to initiate investigations to determine the existence of foreign availability.

c. The amendment also establishes an Office of Foreign Availability within the Department of Commerce to gather and analyze all necessary information to render determinations [Section 107(d)].

6. Development of a Militarily Critical Technologies List ("MCTL") [Section 106]

a. MCTL (Developed by the Secretary of Defense) Definition:

(i) Arrays of design and manufacturing know-how.

(ii) Keystone manufacturing, inspection, and test equipment.

(iii) Goods accompanied by sophisticated operation, application, or maintenance know-how.

(iv) Keystone equipment giving insight into the design and manufacture of a U.S. military system.

b. The 1979 Act contemplated the integration of the MCTL with the CCL, a development which has not occurred.

c. The 1985 Act requires the Secretaries of Commerce and Defense to integrate with all deliberate speed the MCTL with the CCL.

(i) Disagreements between the Secretaries are to be resolved by the President.

(ii) Foreign availability shall be a factor in integrating the two lists.

(iii) By July 1986, the Secretaries are required to jointly report to Congress on efforts to integrate the MCTL with the CCL.

d. The practicality of developing a U.S. control list based on the concept of militarily critical technologies (emphasizing controls over technology rather than goods) is likely to shape U.S. export control policy in COCOM.

(i) Congress has requested its investigative agency, the General Accounting Office, to submit a report on the feasibility of integrating the MCTL with the CCL.

(ii) The Department of Defense has released a comprehensive index to the current version of the MCTL.

7. Import Sanctions [Section 121].

a. Authorizes the President to prohibit the importation into the United States of any goods or technology from persons who violate U.S. national security export controls, including both unilateral and multilateral controls.

b. Possible exception for violations of regulations issued under multilateral export control agreements -- import controls may be applied, but only if:

(i) U.S. negotiations with the government(s) party to the control agreement have been unsuccessful in restoring compliance with the control involved.

(ii) If negotiations fail, the President provides 60 days' notification of his intention to impose sanctions against the person violating export controls.

(iii) Before the end of these 60 days, a majority of the governments party to the control agreement concur, or abstain from stating a position, with the proposed controls.

c. It is expected that this sanction will not be invoked by the President except in the most egregious circumstances.

8. **Export Licenses [Section 104].**

a. Provide a statutory basis for the issuance of the following licenses authorizing multiple exports: distribution, comprehensive operation ("COL"), project, and service supply.

b. The COL will authorize the export and reexport of goods and technology, including items on the MCTL, between a U.S. firm and its foreign subsidiaries, affiliates, joint venturers, and licensees. COLs are issued by the Secretary of Commerce subject to approval of the exporter's system of export control.

c. The Act also eliminates the requirement for the issuance of individual validated licenses for replacement parts exported on a one-for-one basis to replace parts in a good lawfully exported from the United States.

B. Foreign Policy Controls

1. Congressional Efforts To Minimize the Use of Foreign Policy Controls

   a. In recent years, there has been widespread dissatisfaction within Congress over the President's imposition of foreign policy controls.

      (i) Examples: grain embargo and the Yamal Natural Gas Pipeline controls involving the extraterritorial application of export controls and the interruption of preexisting export contracts.

      (ii) Congressional concern that distinctions have become unclear for the President invoking national security and/or foreign policy controls.

      (iii) Lack of consultation by the President with Congress prior to the imposition of controls.

2. Presidential Determinations and Consultations prior to the Imposition of Export Controls for Reasons of Foreign Policy [Section 108].

   a. The President may impose, extend, or expand controls only if he determines [Section 108 (b)], among other things, that the controls:

      (i) Are likely to achieve their intended foreign policy purpose.

      (ii) Are compatible with U.S. policy toward the country to which exports are restricted.

      (iii) Will not cause a reaction by other exporting countries which renders the controls ineffective.

      (iv) Will not harm the international reputation of the United States as a supplier of goods and technology.

      (v) Can be effectively enforced by the United States.

b. The President is required to consult at the earliest appropriate opportunity with COCOM members and other countries regarding the imposition of controls [Section 108(d)].

c. Prior to the imposition of controls, the President must submit a detailed report to Congress, an outline of which is contained in the Act [Section 108(e)].

d. Foreign availability determinations are made applicable to foreign policy controls [Section 108(g)].

3. Contract Sanctity [Section 108(l)].

a. In addition to other consultation and reporting requirements, the President may not prohibit or curtail the export or reexport of goods, technology, or other information in performance of a preexisting export contract, agreement, or validated license. The President may act, if he determines and certifies to Congress that:

(i) A "breach of the peace" poses a serious and direct threat to the strategic interest of the United States,

(ii) Breaking a contract or license will be instrumental in remedying the direct threat, and

(iii) Controls will continue only so long as the direct threat persists.

b. The meaning of "breach of the peace" is not clear in either the statute or its "legislative history."

(i) The Administration interprets this provision as preserving considerable discretion for the President to break contracts and to apply extraterritorially foreign policy controls.

(ii) Many members of Congress interpret this section was significantly restricting the President's discretion to break export contracts.

Recent Regulatory Developments

Stephan E. Becker, Arnold & Porter

I. **New COCOM Guidelines**

A. **COCOM completed an extensive review of portions of the COCOM List in July 1984. COCOM's general goal is to update this list to take into account technological developments. The major product areas reviewed included --**

1. **Computers**
2. **Software**
3. **Telecommunications Switching Equipment**
4. **Machine Tools**
5. **Integrated Circuits**

COCOM intends to review one-fourth of the COCOM List each year from now on.

B. New COCOM Guidelines on Computers (as interpreted by U.S.)

1. **Key element is the computer's "processing data rate" (although other factors can be important).**
2. **General Rules**

   a. **If PDR 2 million bits/second, prior Commerce Department approval is not needed.**

   b. If 2 PDR 28, need prior Commerce Department approval. No COCOM review; report only. **(Advisory Note 9).**

   c. If 28 PDR 48, need Commerce Department and COCOM approval. Presumption of approval by COCOM. (Advisory Note 12).

d. If PDR 48, need Commerce Department and COCOM approval. Case by Case COCOM review; unanimous approval required. (General Exception Level).

-- Other detailed rules apply to peripherals and computers that are incorporated or imbedded in other equipments.

3. **Effect of New Rules**

Computer	Old	New
Vax 11/780	G.E.	G.E.
Vax 11/750	G.E.	12
CDC 730	G.E.	12
DG Nova 45	G.E.	12
DG Eclipse 0/30	12	9
DG MV/400/W/O Accel	12	9
HP 1000/A600	12	9
IBM 4331-11 W/Cache	12	9
Commodore 64	9	Free
Apple IIC	9	Free

C. <u>Controls on Software</u>

1. COCOM agreed to control exports of software to Communist countries.

2. The United States already had such controls in place. Under the EAR, software was treated, for the most part, as technical data. Therefore, most software could be exported under general license GTDR to free world countries, while exports to Communist countries normally required a validated license. (The media on which the software is stored is treated as a commodity and requires a separate license.)

3. In December 1984, the Commerce Department issued regulations treating software as a COCOM list commodity. Consequently, validated licenses would have been needed

for exports of software to the free world, as well as to Communist countries. After considerable complaints and confusion among exporters, Commerce repealed those regulations and now again treats software as technical data.

II. Distribution License Regulations

Because individual resales of goods exported to distribution license ("DL") consignees do not require prior Commerce Department approval, there has been concern that diverters of U.S. technology can easily take advantage of the DL system. In response to this concern, the Commerce Department has determined that stricter requirements must be placed on use of the DL.

A. The Commerce Department published its first proposed revision to the DL regulations in January 1984. This proposal, which was very restrictive, generated overwhelmingly negative comments from over 250 U.S. companies and several foreign governments.

B. After a second proposal was published in September 1984, the final regulations were published on May 24, 1985. These regulations, although not as restrictive as those proposed in January 1984, still made significant changes. Some of the key changes are as follows:

1. The regulations place increased emphasis on self-regulation by DL holders and their consignees. To this end, all DL holders and their foreign consignees are required to implement an internal control program that is acceptable to the Commerce Department. The internal control program for foreign consignees must include the following elements:

   - a statement of policy from the consignee's management to its employees responsible for compliance with the Export Administration Regulations;

   - maintenance of a list of employees responsible for export compliance;

- a system for screening hardware, software, training, and servicing transactions against the Denial List;

- a system for assuring compliance with the product and country restrictions on authorized reexports, and for exports of products incorporating commodities received under the DL;

- a system for complying with nuclear end-use restrictions;

- an internal audit program;

- an education program for employees;

- a process for screening customers against a "diversion risk profile" described in the amendments;

- a recordkeeping and reporting system; and

- an order-processing system that documents employee clearance of transactions in accordance with the systems described above.

2. The revised rules will prohibit export under DL to countries (other than COCOM, Australia, or New Zealand) of certain products unless the exporter submits a list of the end-customers for prior approval. The products that will be covered by this restriction are as follows:

   -- machine tools for generating optical quality surfaces (ECCN 1307A);

   -- certain linear and angular measuring systems (ECCN 4585B);

   -- oscilloscopes exceeding 500 MHZ (ECCN 1584A)

   -- certain aerial camera film (ECCN 4585B)

-- certain materials used for the manufacture of high temperature fine technical ceramic products (ECCN 1733A);

-- certain polymeric substances (ECCN 1746A);

-- certain silicone fluids and resins (ECCN 4755B);

-- certain semiconductor materials (ECCN 1757A).

In addition, digitally controlled equipment designed for testing individual digital integrated circuits will be subject to new restrictions.

3. DL consignees will have to certify that they have made at least 6 sales during the previous year within each country in their sales territory that is not a COCOM country, Australia, or New Zealand.

C. The Commerce Department has created a special unit to audit DL holders and their consignees. Auditors visit the company to inspect records and interview employees.

1. The Commerce Department intends eventually to audit 100 companies, including foreign consignees, each year.

2. Among other factors, auditors are interested in how closely U.S. DL holders monitor and coordinate with their foreign consignees.

III. <u>Foreign Availability Regulations</u>

The Commerce Department published its proposed rules on foreign availability on March 15, 1985. The Department's foreign availability program is intended to lead to elimination of export controls that are ineffective in achieving national security objectives.

A. Companies and trade associations may make a Foreign Availability Submission (FAS) to support either a license application or a request for decontrol. An FAS must contain detailed and specific information.

B. "Foreign availability" is defined as "available in fact to proscribed countries in quantities sufficient to satisfy their needs so that U.S. exports of such an item would not make a significant contribution to the military potential of such countries." The U.S. and non-U.S. commodities must be of "comparable quality" and available in "sufficient quantity" to proscribed countries.

C. The Commerce Department will retain a large amount of discretion. Even if a positive finding of foreign availability is made, the Department can reject the license application or refuse decontrol if it determines that to do otherwise would be "detrimental to the national security."

IV. Exports to COCOM Countries

On September 23, 1985, the Commence Department published a new regulation loosening controls over exports of certain commodities to the COCOM countries, including the Federal Republic of Germany. Under this regulation, exports and reexports of items covered by specified Advisory Notes to various Commodity Control Entries can now be made to COCOM countries under a newly-created General License G-COM. Lasers, integrated circuits, computers, and recording equipment are among the products to which the regulation applies. However, exports of only relatively unsophisticated versions of these products will be allowed under general license.

Export Licenses for Products and Technology -- Practical Considerations

Stephan E. Becker, Arnold & Porter

I. Structure of Export Administration Regulations ("EAR")

A. All exports must be licensed. There are two categories of licenses:

1. Validated--prior written approval needed from the Commerce Department.

2. General--these "licenses" are granted by the regulations if the export meets specified requirements.

B. U.S. exporters must state on a Shippers Export Declaration filed with the Customs Service what license authorizes each export.

1. If the export needs a validated license, the exporter enters the license number.

2. If the export is authorized by general license, the exporter enters the specific type of general license.

C. The Office of Export Administration ("OEA") has separated the nations of the world into Country Groups. In general, Country Groups T and V contain the free world countries (Germany is in Country Group V).

D. OEA also publishes the Commodity Control List ("CCL"), which classifies all commodities subject to OEA's jurisdiction. The CCL contains entries with detailed descriptions of products and technology. Each entry has a classification number. For example, computers are described in Export Commodity Control Number ("ECCN") 1565A.

1. ECCNs with the suffix A are on the COCOM list. ECCNs with other suffixes are controlled unilaterally by the U.S.

2. Commodities described by ECCNs with the suffixes A and B require a validated license (that is, prior written approval) for export to all destinations except Canada.

3. Commodities described by other ECCNs require a validated license only for export to certain Country Groups.

II. Types of Validated Licenses

A. Individual Validated Licenses

The IVL authorizes the export of a specified quantity of products to one customer. It can authorize multiple shipments to the customer for up to one year.

B. Distribution Licenses

The Distribution License authorizes unlimited exports for two years (with renewals possible) of specified commodities to approved consignees in free world countries. Distribution Licenses are commonly used by U.S. companies to cover shipments to foreign distributors. As long as the distributors have been approved by OEA, they may reexport commodities to approved territories without individual approval by OEA of each transaction.

C. Other Validated Licenses

Other types of validated licenses include the Project License, which authorizes export of commodities for one year for use in specified projects, and the Service Supply License, which authorizes the export of spare and replacement parts.

III. Types of General Licenses

A. General License G-DEST

If the CCL does not specify that the export of a commodity to a certain Country Group requires a validated license, the export to that Country Group is authorized under General License G-DEST.

B. General License GLV

General License GLV permits the export of commodities of limited value. The dollar limit for this license is specified in each CCL entry. For example, the dollar limit under ECCN 1565A, the entry covering computers and related equipment, is $1,000 for free world destinations and $0 for Communist countries. This means that a validated license is not required for the export to free world destinations of computers valued at not more than $1,000.

C. General License GTE

General License GTE authorizes temporary exports to free world countries of commodities to be used for exhibition, demonstration, testing, or repair abroad. The exporter must register with OEA in advance of using this general license.

D. General License GLR

General License GLR permits the return of commodities to the destinations from which imported into the U.S. or replacement of defective parts previously exported under validated license.

IV. Exports of Technical Data

The EAR define "technical data" as information of any kind that can be used, or adopted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials. The data can be in tangible form (e.g., a prototype, blueprint, or operating manual) or intangible form (i.e., technical advice). The definition is intended to be as broad as possible, and is intended to cover any technical information relating in any way to an article or material (as opposed to purely theoretical scientific data).

A. Types of Exports

The technical data controls apply to the export of technical data in any fashion. The most obvious means of export is the actual shipment or transmission of technical data out of the U.S. However, the controls also apply to visual inspection by foreign nationals of U.S.-origin equipment and facilities, oral exchanges of information with foreign nationals in the U.S. or abroad, and the application to situations abroad of personal knowledge or technical experience acquired in the U.S.

B. License Requirements

All exports of technical data must be licensed. There are two types of general license that apply to technical data. In addition, all of the various types of validated license can be used.

1. General License GTDA

This general license is available for exports to all destinations. It covers data that have been made generally available to the public (a) through publications (readily available at nominal cost[1] or in libraries open to the public) or (b) through release at conferences, lectures, trade shows or other media open to the public. It also covers scientific or educational data that is not directly and significantly related to design, production, or utilization in industrial processes.

2. General License GTDR

(i) Free World Destinations. The vast bulk of technical data subject to OEA's jurisdiction can be exported to free world destinations under General License GTDR. As in the

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[1] "Nominal cost" is defined by the EAR as a cost that reflects only the cost of preparing and distributing the publication, and not the intrinsic value of the technical data contained therein.

case of GTDA, it is not necessary to obtain prior approval from OEA for exports under GTDR. However, in the case of some types of technical data exported under GTDR, the U.S. exporter must obtain a written assurance from the foreign recipient of the data that it will not reexport the data itself, and, in many cases, will not export the product of that data to restricted destinations.

(ii) Communist Countries and Afghanistan. Technical data exports to most Communist countries[2] and Afghanistan are only eligible for GTDR in two circumstances. First, data in the form of manuals, instruction sheets, or blueprints may be sent without separate approval if they are part of a transaction involving a commodity licensed for export from the United States. Such materials must be delivered within one year of shipment of the commodity to which they relate, and they may not extend beyond the type of materials normally provided with such commodity. In addition, the materials must relate to the assembly, installation, maintenance, repair or operation of the commodity and not to its production, manufacture or construction. Second, GTDR may be used for certain technical data supporting a prospective or actual quotation, bid, or offer to sell, lease or otherwise supply any commodity, plant, service or technical data, provided that the data do not relate to nuclear technology or COCOM list items. The data must also be customary for such bids and must not disclose the detailed

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[2] I.e., the USSR, Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Laos, Mongolia, Poland, Romania, and the People's Republic of China. Yugoslavia is treated as a free world destination. No GTDR exports may be made to Cuba, Kampuchea, North Korea, Vietnam or Libya, which are subject to a general embargo.

design, production or manufacture of the item or its product.

3. Validated License

A validated license is required for the exportation of all technical data which is ineligible for GTDA or GTDR. For free world destinations, validated licenses are required for the types of data listed in EAR § 379.4(c) and (d), which include data relating to such areas as nuclear technology, civil aircraft, airborne electronic direction-finding equipment, hydrofoil and hovercraft watercraft, and infrared imagery equipment. Validated licenses are required for all exports of technical data to Communist countries that are not covered by GTDA or one of the two very limited situations in which GTDR may be used.

V. Reexports

The EAR assert control over reexports, as well as exports, of U.S.-origin products and technology. As a general rule, the restrictions on a reexport will be the same as those that would apply if the product or technology was being exported directly from the U.S. to the destination of the reexport.

A. If a validated license would be needed to export the product directly from the U.S. to the ultimate destination, a validated license is required for the reexport.

   1. Permission for the reexport can be obtained either by describing the reexport in the original validated license application submitted for the export to Germany, or by submitting a separate application for reexport authority.

   2. The reexport application can be submitted either by the U.S. exporter or the German reexporter.

B. If the product could be exported directly from the U.S. to the ultimate destination under general license, prior Commerce Department approval is not needed.

C. The same general rules apply to reexports of technical data. Thus, if the technical data could be exported directly from the U.S. to the ultimate destination under General License GTDA or GTDR, it may be reexported to that destination without prior Commerce Department approval.

Note: If the technical data has been exported under General License GTDR, the consignee has provided the U.S. exporter a written assurance that neither the data nor the "direct product" of the data will be exported to Communist countries without prior Commerce Department approval.

VI. Parts and Components

A. Commodities

The EAR controls reexports of U.S. origin parts and components incorporated into end-products manufactured abroad. To determine whether prior approval from the Commerce Department is required for the export from a foreign country of a foreign-made end product containing U.S.-origin parts or components, the following three-part test is used:

"1. Could the U.S.-origin part or component be exported from the United States to the new country of destination under General License G-DEST? If the answer is yes, prior written approval for incorporation in the foreign-made end product is not required.

"2. If the answer to 1. is 'no,' does the U.S.-origin part or component constitute the principal element in the end product and can it feasibly be used for another purpose? If the answers to both are 'yes,' prior written approval is required.

"3. If the answer to either question in 2. is 'no,' could the foreign-made end product, if it were of U.S.-origin, be exported to the new country of destination under General License G-DEST? If the answer is 'no,' prior written approval is required."

EAR § 376.12.

B. Technology

The EAR also controls reexports of U.S.-origin technology that has been mixed with foreign-origin technology. The EAR provides as follows:

> "U.S.-origin technical data does not lose its U.S.-origin when it is redrawn, used, consulted, or otherwise commingled abroad in any respect with the technical data of any other origin. Therefore, any subsequent or similar technical data prepared or engineered abroad for the design, construction, operation, or maintenance of any plant or equipment, or part thereof, which is based on or utilizes any U.S.-origin technical data, is subject to the same U.S. Export Administration Regulations that are applicable to the original U.S.-origin technical data, including the requirement for obtaining Office of Export Administration authorization prior to reexportation."

Supplement No. 1 to EAR § 379.

The Organization and Structure of COCOM
The Role of the United States

Harold Paul Luks, Arnold & Porter

I. INTRODUCTION

A. Purpose of COCOM: to prevent the transfer of "strategic goods" to communist countries.

B. Establishment of COCOM -- the role of the United States.

1. The post-World War II control system.

2. U.S. cooperation with the British and French to embargo exports to the Soviet Union.

3. Emergence of COCOM.

a. Diplomatic efforts to secure cooperation of the Western Alliance (1949-50).

b. Membership: Nato Alliance (minus Iceland) plus Japan (expected participation by Spain).

c. Informal cooperation by other free-world countries.

d. Original scope of controls.

II. OPERATIONAL PRINCIPLES AND PROCEDURES

A. COCOM functions as an informal association of member governments. It is not a treaty organization.

1. COCOM controls are recommendations to participating countries.

a. Recommendations/decisions are based on unanimous agreement.

b. COCOM does not enforce its recommendations and cannot impose sanctions against governments which do not enforce COCOM controls.

2. Cooperation by other free-world countries in the COCOM-approved export licensing control system.

B. COCOM attempts to conduct its deliberations in secret.

1. Problems posed for certain governments by participating in COCOM

2. Greater exposure of COCOM to the public resulting from consideration of U.S. export control laws by the U.S. Congress

C. The COCOM Lists: Munitions; Atomic Energy; and, Industrial/Dual Use Lists & U.S. Export Controls

1. Munitions: There has been little disagreement within COCOM over the scope of these controls.

   a. U.S. munitions controls are broader in scope and are enforced under the Arms Export Control Act of 1976.

   b. The U.S. list is known as the International Traffic in Arms Regulation (ITAR).

   c. ITAR governs the export of military systems -- definition of what constitutes the export of military systems or technology

2. Atomic Energy: includes all sources and production processes for fissionable materials, reactors, and reactor components.

   a. Scope of U.S. controls includes many technologies not controlled by COCOM.

   b. Description of U.S. atomic energy and nuclear export control statutes.

3. Dual Use Items.

   a. Definition of Dual Use.

   b. Area of greatest controversy within COCOM and among those countries which informally cooperate with COCOM controls.

   c. Items the shipment of which to proscribed countries requires unanimous approval.

   d. "National discretion" regarding the issuance of export licenses -- technological parameters dividing goods with sensitive military applications from less militarily sensitive goods.

(i) Note 12 -- Definition and procedures.

(ii) Note 9 -- Definition and procedures.

D. Scope and regulation of the Industrial/Dual Use List.

1. The progressive reduction in the scope of controls.

2. The U.S. position regarding which items make "a significant contribution to the military potential" of a country, or group of countries, potentially hostile to the United States.

   a. What is "significant" -- comparison of Carter and Reagan Administration definitions.

3. Considerations of Foreign Availability.

4. The "List Review" Process -- Definition.

   a. Development of the U.S. position for the List Review.

   b. Implementation of the latest COCOM agreement to modify the Dual Use List.

5. COCOM control of goods versus technology.

   a. limited agreement to control certain technologies.

   b. The Militarily Critical Technologies Approach.

      (i) The Bucy Report and its implications for U.S. and COCOM control policy.

E. "Exceptions" to East-West Controls.

1. Requests for COCOM approval to export embargoed items to communist countries.

2. The United States as the most frequent requestor of administrative exceptions.

3. COCOM and U.S. control policy toward the PRC.

    a. Difficulty in applying a different control standard to the PRC and the U.S.S.R.

    b. The U.S. China control policy as a means to reduce the overall scope of COCOM controls.

F. Procedures for COCOM consideration of Export Licenses.

1. Submission and deadlines for approval.

2. U.S. and COCOM review of exception requests containing U.S. components.

3. Deadlines for approval.

G. COCOM-approved control documents.

1. Import Certificates (ICs).

2. Delivery Verification Documents (DVs).

3. Transit Authorization Certificates (TACs).

4. Potential as a means to substitute for formal export licenses.

III. AN ASSESSMENT OF COCOM'S EFFECTIVENESS TO PREVENT/DELAY THE TRANSFER OF STRATEGIC GOODS TO COMMUNIST COUNTRIES

A. A Conflicting U.S. View.

1. U.S. and foreign intelligence agency reports (public documents).

2. Other studies of the degree to which Western goods and technology have aided the expansion of Soviet military power (e.g., the National Academy of Sciences).

3. Evaluation by Members of the U.S. Congress.

4. Differing view of the Carter and Reagan administrations.

B. Strategic items approved by COCOM for export to the Soviet Union.

C. Allocation of resources by member and nonmember governments to the enforcement of export controls.

D. Other methods to assess COCOM's effectiveness -- the percentage of East-West trade subject to COCOM review.

IV. POSSIBLE FUTURE UNITED STATES OBJECTIVES

A. Increase the role of military advisors and defense-related technical services in shaping COCOM policy.

B. COCOM Procedures and Administration.

1. Minimize the number of exceptions.

2. Secure greater funding for COCOM -- upgrading the number of professional staff, translation services, data base maintenance, facilities.

C. Improved coordination of export control documents to prevent/delay diversion to proscribed countries of COCOM-controlled items.

D. Enforcement

1. Increasing and harmonizing criminal and civil penalties to deter diversion.

2. Increasing the number of on-site inspections to ensure that end users/final consignees are maintaining effective controls over COCOM-controlled items

F. Formalization of the COCOM arrangement into a treaty organization.

G. Expanding the degree to which COCOM "cooperates" with other free-world countries.

H. Liberalization of export control documentation among COCOM members.

1. Proposal before Congress in 1983-84 to eliminate export licensing requirements for shipments from the United States to COCOM and other free-world destinations.

2. Raising the level of "National Discretion" to decontrol items now identified on the Industrial/Dual Use List.

EXPORT ENFORCEMENT POLICIES AND PROCEDURES

I. SANCTIONS FOR VIOLATIONS OF EXPORT CONTROL RULES

Jeffrey Burt, Arnold & Porter

A. Criminal Fines and Imprisonment

1. Knowing violations of the Export Administration Act, or any regulation, order, or license issued thereunder, are punishable by fines of not more than five times the value of the export, or $50,000, whichever is greater, and five years imprisonment, or both.

2. Exports undertaken in violation of the Act, or any regulation, order, or license, issued thereunder, and with knowledge that such exports will be used for the benefit of any country in which exports are restricted for national security or foreign policy purposes, may subject a corporation to fines of not more than five times the value of the exports involved or $1,000,000, whichever is greater. (In the case of an individual, fines of not more than $250,000, imprisonment not more than 10 years, or both, may be imposed.)

3. Any person who is issued a validated license for the export of goods or technology to a controlled country, and, with knowledge that the export is being used by such controlled country for military or intelligence gathering purposes, willfully fails to report such use to the Secretary of Defense, can be fined not more than five times the value of the exports involved, or $1,000,000, whichever is greater. (In the case of an individual, the fine shall be not more than $250,000 and/or imprisonment not more than five years.)

4. The submission of false or misleading information or the concealment of material facts, whether in connection with license applications, shippers' export declarations, investigations, compliance proceedings,

appeals, or otherwise, is punishable by an additional fine of not more than $10,000, or by imprisonment for not more than five years, or both, for each violation under the False Statement Act, 18 U.S.C. § 1001.

5. In prior periods, the courts were inclined to regard export control cases in "a lenient fashion;" the average export control violator often was sentenced to less than one year in prison and fined only a few thousand dollars.

6. As a result of increased concern by both the U.S. Government and the courts about the diversion of high technology products to Eastern bloc countries, stiffer penalties have recently been imposed for violations, not only of national security controls, but for violations of foreign policy controls as well. According to a Commerce Department official, "Commerce, like other export control enforcement sensitive federal agencies, is no longer working under constraints of the past detente environment which did not encourage pro-active enforcement initiatives."

a. In United States v. Spawr Optical Research, Inc. (1980), involving the illegal diversion through Switzerland and West Germany of high energy laser optics to the Soviet Union, defendant Walter Spawr was sentenced to 10 years in prison, of which all but six months were suspended. Frances Spawr was sentenced to five years in prison, which was suspended, and she was placed on five years probation. Both were ordered to perform 500 hours of community service, and their company was fined $100,000.

b. In United States v. Bruchhausen and Anatoli Maluta, et al. (1981), the key American defendant was sentenced to five years in prison and fined $60,000. Another defendant was given a two-year prison sentence and ordered to pay a $25,000 fine.[1]

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[1] The underlying scheme was quite complex. Of the four companies Bruchhausen created in 1974, the principal enterprise was CTC California Technology Corporation. From its inception through 1980, CTC utilized 18 other trade styles, 12 of which were incorporated in California. In the four-year period of 1977 to 1980, CTC and its variants, under the direction and supervision of Anatoli Maluta and Sabina Dorn Tittel, purchased high technology electronic equipment, peripherals and components valued in excess of $10.5 million. Most of the items purchased

[Footnote continued on following page]

c. In United States v. Tencom (1982), involving a conspiracy to export $17 million of aircraft parts to Libya, a five-year prison term and a criminal fine of $4 million were imposed.

d. Klaus Talleur, a West German consulting engineer, was given a six-month suspended sentence in August 1985 for aiding the illegal export of high-technology devices (microwave circulators valued at $12,000) believed destined for the Soviet Bloc. Talleur's willingness to talk to federal investigators contributed to his suspended sentence. The American businessman who had shipped the items to his firm had been sentenced to 90 days in jail in 1983.

e. Pressures are mounting for increased civil penalties. In a recent case involving Datasaab Contracting A.B., a criminal fine of $3.12 million was imposed involving the illegal export of sophisticated air control systems to the Soviet Union.

7. Since the inception of Operation Exodus by the U.S. Customs Service in 1981 and through November 1983, the Department of Justice has accepted 315 cases

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[Footnote 1 continued from preceding page] were classified as strategic commodities, controlled for national security purposes and requiring United States export licenses granted by the Department of Commerce.

In the same four-year period, CTC exported from the United States to Germany, the Soviet Union, or the Soviet Bloc more than 300 shipments consisting of strategic commodities. None of the commodities had proper export licenses. The shipments were documented with fraudulent U.S. Shipper's Export Declarations (SED's). Most of the exports were sent to West Germany consigned to companies controlled by or associated with Werner J. Bruchhausen. From West Germany, most of the commodities were transhipped to Switzerland or Austria or to other intermediate countries and then transported to the USSR or to a Warsaw Pact nation.

for prosecution.[2] There have been 224 indictments, 293 arrests, and 199 convictions in that two-year period. As of early 1984, there were 150 active investigations.

8. The U.S. Department of Justice and U.S. Attorney offices located in each state are responsible for prosecuting individual cases. They work with the Department of Commerce, the Customs Service and the FBI. There are four attorneys in the Criminal Division in Washington, D.C. that have a supervisory responsibility for reviewing case files from local U.S. Attorney offices.

9. There are several dozen active cases of firms or persons either under indictment or about to be indicted for violations of either the Arms Export Control Act or the Export Administration Act. These cases all involve the unauthorized export of high technology products to Eastern bloc countries.

10. The Department of Justice proceeds with criminal indictments where they find there was a specific intent by the exporter to violate the law and where the exporter clearly knew he or she was in violation of the law.

11. According to Department of Commerce and Justice Department officials, no foreign citizens have even been extradited to the United States for violating U.S. export control laws.

B. <u>Seizures</u>

1. Commodities or technical data which are being exported or shipped from the United States in violation of the Export Administration Act or any regulation thereunder are subject to being seized and detained.

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[2] Operation Exodus was established by the Customs Service during 1981 and represents an increased enforcement effort to stop illegal export of high technology equipment, computer parts, classified defense items, etc. The U.S. Customs Service has no administrative or policy making responsibility in the export control area. It is an enforcement agency only, and usually works with the Justice Department in pursuing a case of suspected willful violations.

2. Seized commodities or technical data are subject to forfeiture.

3. In 1982 and 1983, the U.S. Customs Service seized 1444 shipments consisting of controlled U.S. technology. The shipments were seized because the attempted exportations were in violation of the Export Administration Act or the Arms Export Control Act. Virtually all of the seizures which occurred from Customs' inspection activity were administratively remedied and the concerned merchandise was ultimately licensed for export. Most seizures by Customs involve inadvertence or negligence on the part of the exporter.

4. Very few criminal investigations resulted from export merchandise that has been detained or seized through inspection efforts.

C. Civil Penalties

1. A civil penalty may be imposed for each violation of the Export Administration Act or any regulation, order or license issued thereunder, either in addition to, or instead of, any other liability or penalty which may be imposed.

2. The civil penalty may not exceed $10,000 for each violation, except with respect to violations involving national security controls, where the penalty may not exceed $100,000.

D. Placement of Firm(s) or Person(s) on the Denial List

1. One of the more potent sanctions the Department of Commerce may impose involves the denial of all export privileges. Such denial does not require the initiation of any court proceeding, but rather can take place through administrative action, and may result in the suspension, revocation, or denial of export privileges under the Export Administration Act.

2. For these purposes, it is important to remember that all exports of commodities or information from the United States require a license (which may be a general license, in which case prior approval of the Department of Commerce is not required, or a validated license, in which case prior approval is required).

Denial of export privileges means that <u>all</u> licenses, including general licenses, are revoked. The person or firm is prohibited from receiving any U.S.-origin product or technology, not simply those products or technology that have been subject to controls for national security or foreign policy reasons. Consequently, the person who has received a denial order is barred from effectively receiving <u>any</u> U.S.-origin product or information.

3. The regulations of the Department of Commerce also prohibit firms or persons from having any dealings whatsoever with persons or firms who have been denied export privileges. The typical denial order will include a provision that reads as follows:

> "No person, firm, corporation, partnership or other business organization, whether in the United States or elsewhere, without prior authorization from the Office of Export Administration, shall do any of the following acts, directly thereto, in any manner or capacity, on behalf of or in any association with the respondent [<u>i</u>.<u>e</u>., person on the denial list] or any related party, or whereby the [person on the denial list] or any related party may obtain any participation therein, directly or indirectly: (a) apply for, obtain, transfer, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to any exportation, reexportation, transshipment, or diversion of any commodity or technical data exported or to be exported from the United States, by, to, or for said respondent or any related party denied export privileges; or (b) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any exportation, reexportation, transshipment, or diversion of any commodity or technical data exported or to be exported from the United States."

4. At the current time, there are in excess of 200 firms or persons on the Denial List. Sample pages are attached to this outline as Appendix A.

E. Temporary Denial Orders

1. The Department of Commerce is authorized to seek a "temporary denial order" where the public interest so requires. Such a temporary denial order may be imposed on an *ex parte* basis, which means that it may be imposed immediately without any prior notice to the affected person, and without providing any opportunity to respond to the charges.

2. The regulations provide that such an order should generally not exceed 30 calendar days in duration. However, in practice, where such orders are imposed, they may extend for a considerable period of time (sometime indefinitely) until the administrative or judicial proceeding has been completed.

3. Administrative sanctions against foreign companies are considered particularly important. Cutting off the flow of high technology products and information is considered as the only effective sanction in many instances.

F. Consent Orders

1. Most of the administrative cases that the Department of Commerce pursues result in a "consent order," usually involving payment of a civil fine and denial of export privileges for a certain period of time.

2. Of the 81 cases for which information is publicly available for the 1981 to 1985 period, over half has been resolved through consent agreements.

3. A consent order between a firm and the Department of Commerce will not necessarily immunize the person or firm from subsequent criminal prosecution by the Department of Justice.

4. The Department of Commerce has stated that it will always view as a mitigating factor the extent to which the firm or persons involved have voluntarily disclosed all of the facts upon learning of the violation, and have cooperated with Commerce in the investigation.

G. Denial of Access to U.S. Markets

1. Under the 1985 amendments to the Export Administration Act, the President is authorized to issue whatever controls he considers appropriate on the importation of goods or technology into the United States from persons found to have violated national security export controls under the Export Administration Act, or under any regulation, order, or license issued thereunder. Thus, violators may now be prohibited from marketing their products in the United States.

II. INVESTIGATIONS

A. Information That May Trigger Investigations

1. According to the Department of Commerce, its major cases have not been the result of inspection of cargo at international ports. They attribute their major cases to investigatory activities, frequently triggered by foreign intelligence information, or reports by domestic businesses which have suspicions.

2. The Office of Export Enforcement relies on the assistance of technical personnel at the Department of Commerce to provide them with lists of commodities and technologies which have been targeted by Eastern bloc countries for acquisition.

3. The Office of Export Enforcement also works with the Office of Export Administration in recommending whether export licenses should be denied. During the period October 1982 through March 1984, the Office of Export Administration rejected 78 export license applications, amounting to approximately $60 million in controlled commodities, on the recommendation of the Office of Export Enforcement which had received information indicating possible risks to national security.

4. Where a domestic or foreign company is suspected of violating export controls (or where its internal control procedures are considered weak and susceptible to diversions), a staff official at the Office of Export Enforcement may have the final review authority in connection with license applications.

5. The Office of Export Enforcement will frequently use U.S. Embassies or Consular offices to assess the reliability of foreign recipients of commodities as to which a validated license will be issued. U.S. foreign posts may be contacted in connection with the pre-license review, as well as post shipment checks.

6. The Department of Commerce has circulated a "red flag" list highlighting characteristics of a transaction that suggest possible illegal export or diversions. Attached to this outline as Appendix B is a copy of that list, which includes such items as:

-- Stated-end-use incompatible with:

  The business of the consignee

  The customary industrial applications of the equipment being purchased

  The technical capability of the consignee or the destination country

-- Customer willingness to pay cash for a large volume item or order

-- Little or no customer business background information is available

-- Apparent lack of customer familiarity with the commodity performance/design characteristics or uses

-- Customer's purchasing agent's reluctance to provide end use or end user information

C. <u>Initial Stages</u>

1. Where the Department of Commerce has reason to believe that a violation may have occurred, its staff will usually conduct an informal investigation prior to the time a "charging letter" is issued and the formal proceedings as set forth in the regulations are initiated.

2. The Department of Commerce has at its disposal several techniques to assure cooperation with its investigations. The Office of Export Enforcement, which is charged with conducting investigations, may work closely with the Office of Export Administration, which is charged with issuing validated licensess. Investigators in the Office of Export Enforcement may, under some circumstances, be given responsibility for deciding whether a company's cooperation with the investigation warrants the issuance of validated export licenses of U.S.-origin products and technology. Thus, if the investigator believes that the firm has not been forthcoming in providing information that may be requested, the firm may experience delays, and possibly denials, of export licenses, notwithstanding the fact that there has been no finding of a violation, or an opportunity to respond to any charges.

3. After an investigation is completed, the investigator will prepare a report, and a lawyer from the Office of the Assistant General Counsel for Export Enforcement will review the file to determine if there is prima facie evidence of a violation. The investigator will have made a recommendation in that respect.

4. If the attorney agrees that there is such evidence, a charging letter will be issued to the suspect firm, setting forth the facts upon which the allegations are based.

5. In some cases, the Commerce Department attorney will authorize a "pre-charging" letter indicating that a charging letter will be issued, and soliciting information from the firm as to any mitigating factors. Frequently, this letter is designed to provide an opportunity to settle the case at an early stage before formal charges are issued and adverse publicity released.

D. Administrative Hearings

1. Administrative proceedings are initiated by the issuance of a "charging letter" which will set forth the essential facts about the alleged violation, and give notice that the respondent, if found to have committed the alleged violation, will be subject to sanctions.

2. The respondent must answer the charging letter within 30 days, and must fully set forth the nature of the respondent's defense or defenses. If the respondent desires a hearing, he must request one.

3. The Department of Commerce may serve the respondent written interrogatories or request that documents be made available for inspection and copying. In addition, depositions may be ordered, requiring persons so designated to submit to questioning. Transcript of the questions and answers will be made.

4. Subpoenas may also be issued by the administrative law judge in the Department of Commerce hearing requiring the attendance of witnesses or the production of such books, records or other documentation or physical evidence as deemed relevant and material.

5. The administrative law judge may conduct a hearing for the purpose of hearing oral argument or hearing testimony of witnesses who must testify under oath or affirmation.

E. Decisions of the Presiding Officer

1. After considering the entire record, the administrative law judge issues a written decision. He may dismiss the charges, in whole or in part, or, if he finds that one or more violations have been committed, he will order an appropriate disposition, including administrative sanctions and/or civil penalties.

2. An adverse decision by the administrative law judge may be appealed to the Assistant Secretary of Commerce for Trade Administration.

F. No Judicial Review

1. Congress has specifically exempted export licensing decisions and administrative decisions placing persons or firms on the Denial List from judicial review. Section 13(a) of the Export Administration Act. 50 U.S.C. § 2412.