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Harvey G. Sherzer
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Export Controls Over Direct Commercial Sales of Military and Strategic Goods and Technologies: Who's in Charge?

by Harvey G. Sherzer*
and Donna Lee Yesner**

I. Introduction

Direct commercial sales of arms and militarily critical goods and technologies by U.S. firms to foreign buyers are subject to controls imposed by the United States for national security and foreign policy reasons. Although the need for such controls is obvious, it is also clear that overly restrictive export laws would have an adverse impact on the country's economic health. Consequently, export controls endeavor to strike a balance between the government's needs and the competing interests of exporters in unencumbered trade.

Congress has enacted legislation that governs exportation of arms and militarily critical goods and technologies; however, because the President has been delegated broad authority to act in this area, the federal agencies charged with administering the export laws are caught in a power struggle between the legislative and executive branches over trade policy regarding strategic goods.1 The administrative agencies that make up the export control community implement the President's policies through the regulatory framework, but these regu-

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* Partner, Pettit & Martin, Washington, D.C.
** Associate, Pettit & Martin, Washington, D.C.

1. One of the most publicized clashes between Congress and the President over the exercise of power in the area of export control occurred when President Reagan amended the regulations controlling exports of oil and gas commodities and technical data to Russia to include exports of foreign-origin goods and technologies by U.S.-owned or controlled companies, and foreign-produced products utilizing U.S. technical data. See 47 Fed. Reg. 27,250 (1982). As a result, certain companies were denied export privileges based on alleged violations of the Export Administration Regulations. Congress proposed specific legislation to prohibit the President's action; however, the President yielded to public and political pressure and repealed all regulations prohibiting export to the Soviet Union of oil and gas transmission and refining commodities and technical data. 47 Fed. Reg. 51,858 (1982).

The 98th Congress is presently considering a bill to amend the Export Administration Act. See H.R. 3231, 98th Cong., 1st Sess. (1983) (approved by House Foreign Affairs Comm. May 25, 1983); see also S. 979, 98th Cong., 1st Sess. (1983) (counterpart bill to H.R. 3231). The bill would limit the President's authority to impose foreign policy controls through the following provisions: 1) the President would be required to report to Congress before the controls take effect; 2) controls could not have extraterritorial application unless specifically authorized by Congress; and 3) newly issued controls could not interfere with existing export contracts or licenses received before the date of implementation. An exception would exist for controls relating directly to international terrorism, acts of aggression, human rights violations, or nuclear weapons tests.
lations are subject to statutory constraints. Thus, when Congress disagrees either with an action taken by the President or with his failure to act, it may enact specific legislation to remove some of the President's discretion by imposing or lifting controls on the statutory level.²

The highly political nature of strategic trade has resulted in a patchwork of differing delegations of authority over export controls and inconsistent governmental action, creating an uncertainty for U.S. exporters as to the legality of their actions. To make matters worse, the present system of export controls involves overlapping and confusing administrative responsibilities, particularly with respect to licensing approval and enforcement of the regulations that implement export policy.³

There are two principal statutes that impose export restrictions on defense-related or strategic goods: the Arms Export Control Act of 1976⁴ and the Export Administration Act of 1979.⁵ Under the Export Administration Act, the Department of Commerce, through the Office of Export Administration, has general jurisdiction over exports and re-exports of U.S.-origin commodities and technical data, and foreign products either containing U.S.-origin parts and components or based on U.S.-origin technical data.⁶ The scope of authority delegated to Commerce to restrict exports differs, however, depending on the purpose for imposing the control. Other agencies have limited jurisdiction over particular categories of strategic goods.⁷ The Arms Export Control Act confers

2. For example, the International Security Act of 1981, Pub. L. No. 97-113, 95 Stat. 1519 (1981), curtails the President's authority to sell defense articles, extend credit for military sales, or grant export licenses under the Arms Export Control Act to or for the Government of Chile until the President certifies that Chile has made significant progress in the area of human rights and has taken steps to bring to justice the alleged murderers of Orlando Letelier and Ronni Moffit. Id. at § 726, 95 Stat. 1554 (codified at 22 U.S.C. §§ 2311, 2346-48, 2370, 2751 (1982)).

3. H.R. 3231, supra note 1, would continue the present system in which the Departments of Defense, Commerce, and State share the responsibility for export control policy and licensing. Proposals to shift responsibility to a single Department or a new Office of Strategic Trade were rejected. The bill would, however, increase Commerce's ability to enforce the Export Administration Act (see infra note 5) by giving it authority to execute warrants, search and seize export shipments, and bear firearms. At the same time, the bill would limit the enforcement authority of the U.S. Customs Service primarily by limiting its activity to preseizure targeted inspections, detentions, preliminary investigations, and seizures, and by requiring it to forward cases to the Department of Commerce.


7. Exports which are not controlled by the Department of Commerce are set forth in 15 C.F.R. § 370.10 (1983). For example, the Maritime Administration, Department of Transportation, administers export controls over certain watercraft of five net tons or more and vessels of war; the Nuclear Regulatory Commission administers controls over exports of nuclear equipment, facilities, and mate-
on the State Department, through the Office of Munitions Control, jurisdiction
to control exports of munitions and other defense-related articles and services.

These agencies have promulgated separate regulations to implement the stat­
utory authority delegated to them, but the jurisdictional lines are often blurred. Furthermore, export controls are subject to interagency review, and the en­
forcement of these controls also requires the involvement of other federal agencies, primarily the U.S. Customs Service and the Department of Justice. Thus, exporters of technology that could be used militarily may find their export activity regulated by either the Commerce or the State Department, monitored
by the Defense Department, and investigated by four different agencies.

This paper will discuss the current restrictions on commercial sales of muni­
tions and militarily critical goods and technologies, focusing on the inter-agency
export control functions, the fractured licensing approval authority, and the
enforcement of export controls by the various administrative agencies charged
with regulating strategic trade. It will not discuss the national security and
foreign policy decisions underlying export controls nor detail the specific licens­
ing procedures used by the agencies to effectuate these policy goals. The practical
concerns for exporters of military-related articles and technologies are mostly
on the administrative level; nevertheless, exporters should keep in mind that
current foreign policy will always affect individual exporters because these policy
decisions are implemented through the regulatory scheme.

II. Export Administration Act

The President has broad discretion to impose and enforce export controls
within the parameters of the export statutes. The extent to which strategic
exports are controlled thus depends on current national security and foreign
policy objectives. During the cold war, all exports to communist countries were
restricted, but in the late 1960s, policies shifted away from strict control to an
emphasis on export promotion. The Export Administration Act of 1979 (EAA) recognized the importance of exports to the U.S. balance of trade and the
ability of U.S. citizens to compete in international commerce. Accordingly, ex­
ports may be restricted only when controls are necessary to prevent exports from
making a “significant contribution to the military potential of any other country
... which would prove detrimental to the national security of the United States,”
or from thwarting U.S. foreign policy or short supply objectives.

trative licensing decision must be based on the relationship between the destination country and the United States rather than on its form of government, and no license may be denied, regardless of the destination, if the goods or technologies are available without restriction from sources outside the United States. 12

Although there may be both foreign policy and national security reasons for restricting particular exports, the EAA distinguishes the scope of the President's authority to act based on the purpose for which export control is sought. For exporters of strategic goods and technologies, the most significant controls are those imposed for national security reasons.

A. General Licensing Authority of the Office of Export Administration

Under the EAA, the Office of Export Administration (OEA) within the Department of Commerce controls exports of all goods and unclassified technical data through licensing procedures described in the Export Administration Regulations. 13 The regulations instruct exporters on the types of commodities and technical data under control and the types of licenses for which to apply. The list of commodities and countries subject to export control by the Department of Commerce is known as the Commodities Control List (CCL). 14

For each category of commodities, the CCL identifies those destinations that require a validated export license (as opposed to a general export license authorization), 15 the reason for control, and any dollar value limits. If export activity is permitted under a general license, no specific application is necessary and no documents are issued by the Department of Commerce. 16 If a validated license is required, an exporter must apply to OEA for a permit to export to the particular destination for a particular end-use, and if approved, exportation may proceed only in accordance with the limitations specified in the license document. 17 Sometimes a third type of license, a qualified general license, may be obtained for multiple exports by a specific exporter for exports requiring less restrictive controls. At this writing, however, Commerce has proposed to tighten regulations governing multiple exports of potentially strategic products to non-

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14. The CCL, set forth at 15 C.F.R. § 399.1 (1983), lists goods and technologies controlled for reasons of national security and foreign policy and indicates by code letters the country groups to which controls apply. For example, Country Group "Z" includes North Korea, Vietnam, Kampuchea, and Cuba; Country Group "W" includes Hungary and Poland; and Country Group "T" includes most of North, Central, and South America. See 15 C.F.R. § 370 (Supp. I 1983).
16. In order to prevent export law violations, certain exports may require a "Shipper's Export Declaration," which certifies that the shipment meets the conditions of the general license authorization, and, if the commodity would require a validated license for export to a restricted destination, a "Destination Control Statement" on the shipping documents. 15 C.F.R. § 386 (1983).
Exporters must keep in mind that licenses are also required for re-exports, that is, when U.S.-origin goods are shipped from one foreign destination to another.

In determining whether to grant an export license to a controlled destination, OEA considers the following factors: kinds and qualities of commodities and technologies to be shipped, their military and civilian uses, the unrestricted availability abroad of the same or comparable items, the country of destination, and the intended end-use. Generally, applications for exports of any goods or technologies to Country Group "Z" (North Korea, Cambodia, Cuba, and Vietnam) will be denied while exports to Country Group "Y" (Russia and some of its satellites) are subject to strict scrutiny. Occasionally, a complex license application presents difficult policy problems and cannot be handled routinely by OEA. In that event, the application is referred to another agency, a technical advisory committee, or to the Operating Committee level of the Advisory Committee for Export Policy (ACEP) for their recommendation. If OEA rejects the interagency recommendation, the application is referred to higher levels within the ACEP or to the Export Administration Review Board.

Whenever OEA rejects a license application, the exporter must be notified within five days. Once an application is denied or a license revoked, the exporter has the right to appeal the decision to the Assistant Secretary for Trade Administration. In addition, a license applicant has the right to enforce the time periods mandated by the Act for the licensing process.

21. Technical advisory committees are established by the Secretary of Commerce to assist on matters involving unilateral or multilateral export control of technical data and production technology. Examples of commodities covered by technical advisory committees include computer systems and components, electronic instrumentation, and telecommunications equipment. Procedures and criteria for the establishment and operation of technical advisory committees are set forth in 15 C.F.R. § 390.1 (1983).
22. The Advisory Committee for Export Policy (ACEP) operates at five levels: 1) the Operating Committee of the ACEP, which is made up of senior staff and is chaired by a Commerce official; 2) the Sub-ACEP, at the Deputy Assistant Secretary level, which is chaired by the Deputy Assistant Secretary for Export Administration; 3) the ACEP, at the Assistant Secretary level, which is chaired by the Assistant Secretary for Trade Administration; 4) the Export Administration Review Board, at the Secretary level, which is chaired by the Secretary of Commerce and includes the Secretaries of State and Defense; and 5) the President, who has final authority to resolve all interagency disputes. Membership in ACEP includes representatives from the Departments of Commerce, Defense, State, Energy, Transportation, and Treasury, the National Security Council, the Arms Control and Disarmament Agency, the National Aeronautics and Space Administration, the Central Intelligence Agency, and other agencies as is appropriate (although not all those listed are voting members on each issue). Other agencies may be invited to participate when matters of interest to them are under consideration. The system is designed to operate on a consensus basis; a failure to agree at any level moves a policy issue or licensing decision to the next higher level.
B. National Security Controls and the Role of the Defense Department

As discussed above, the EAA confers on the President authority to impose or continue export controls at his discretion on the basis of the intended recipient's communist or non-communist status and its belligerent or friendly relationship with the United States and its allies. The Act, however, includes certain provisions that limit this discretion. For example, the Act requires the Secretary of Commerce to review the CCL annually in order to minimize controls and ensure that the country groups appearing on the list are in accordance with current U.S. policies. In addition, the Act prohibits OEA from denying a license application or imposing export controls if it determines that the goods or technologies at issue are available from foreign sources in sufficient quantity and quality to make the denial of the license or maintenance of controls ineffective, unless doing otherwise would be detrimental to the national security of the United States. Finally, the Act mandates that the CCL be narrowly defined through an indexing system, which increases performance levels of goods and technologies subject to national security controls. This measure was intended to provide a systematic means of removing controls as the controlled items become obsolete. The indexing system was not intended, however, to decontrol items that, though obsolete by U.S. standards, would contribute to the military potential of a U.S. adversary. Thus, the system would be appropriate for computers but not munitions or nuclear technology.

The Department of Commerce does not possess exclusive jurisdiction over exports controlled for national security reasons. The EAA authorizes the Department of Defense to review such license applications and to determine in consultation with Commerce which applications will be subject to DOD review. This authority does not extend to non-communist countries. Generally, DOD will review only those applications that raise acute national security concerns. If, however, DOD recommends denial of a license, Commerce cannot ignore it. Only the President can overturn a DOD decision, and when he does, he must report his decision to Congress. Consequently, if DOD determines that the items to be transferred are strategic or militarily critical, these export licenses will not be approved even if Commerce obtains end-use statements declaring that the

31. EAA § 10(g)(2), 50 U.S.C. app. § 2409(g)(3), (4) (Supp. V 1981). In fiscal year 1982, 1,675 applications were reviewed bilaterally by the Commerce and Defense Departments, and no referrals to the President were necessary. U.S. DEP'T OF COMMERCE, 1982 EXPORT ADMINISTRATION ANNUAL REPORT 27 (1983).
items will not be used for military purposes. Furthermore, a license can be approved on the belief that the goods or technologies are available from foreign sources or that they will not be used for military purposes. Such licenses can be withdrawn upon discovery that the exports are being diverted for military use or upon reassessment of the export's foreign availability, strategic status, or adverse effect on national security.  

In 1977, DOD adopted an approach to national security export controls that shifted the focus from end products to militarily critical technologies that transfer design and manufacturing know-how. This approach recognizes that all technologies are not of equal military value and need not be controlled to the same degree. Congress endorsed the strategic technologies approach when it enacted the EAA and directed DOD to develop a Militarily Critical Technologies List to be used in the export license approval process, and eventually incorporated into the CCL. The Secretary of Defense has primary responsibility for developing the Militarily Critical Technologies List, but the Secretary of Commerce must agree on those items to be placed on the CCL.

The EAA provides DOD with broad guidelines for developing the Militarily Critical Technologies List. Accordingly, the list must emphasize the following general categories of technologies: 1) arrays of design and manufacturing,

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32. For example, export approval was withdrawn when U.S.-origin technology and equipment were used to produce trucks at the Soviet Kama River truck plant and these trucks were then used to invade Afghanistan. See Kama River Truck Factory: Best and Worst of Technology Export, INDUS. RESEARCH & DEV. 56 (1980). Since that time, the license requirements for export of engine assembly lines to the Kama River complex have been expanded to include technical data for the manufacture of trucks. Licenses for these exports will generally be denied. None were issued in 1982. U.S. DEP'T OF COMMERCE, 1982 EXPORT ADMINISTRATION ANNUAL REPORT (1983).


34. Critical technologies consist of know-how in fields of science or engineering that, if acquired by a potential enemy, would contribute significantly to its military potential. Hearings on Revision of the EAA, supra note 29, at 405 (prepared statement of Ruth M. Davis, Deputy Director of Defense for Research and Advanced Technology).

35. Id. at 403. H.R. 3231, supra note 1, would encourage the eliminating of lower technology from both the MCTL and the CCL due to foreign availability.


37. In the event that DOD and Commerce disagree on items to be placed on the CCL, the President has the responsibility for resolving the disagreement. EAA § 5(c)(2), 50 U.S.C. app. § 2404(c)(2) (Supp. V 1981).
know-how; 2) keystone (revolutionary technological advances) manufacturing, inspection, and test equipment; and 3) goods accompanied by sophisticated operation, application, or maintenance know-how not possessed by countries to which exports are controlled and which, if exported, would permit a significant advance in a military system of any such country.38 Currently, there are eighteen specific categories of technologies listed.39 Within this framework, it is DOD's policy that sales of end products to potential U.S. adversaries should be recommended only where: 1) the product's technology content is either difficult, impractical, or economically infeasible to extract; 2) the end product will not of itself significantly enhance the recipient's military or warmaking capability, either because of its technology or the quantity to be sold; and 3) the product cannot be analyzed so as to reveal U.S. system characteristics and thereby contribute to the development of countermeasures to equivalent U.S. equipment.40 Although the Militarily Critical Technologies List is primarily used by DOD in license application reviews, it has been updated and much of its supporting documentation reformatted in hopes of enhancing use of the list and its supporting documentation by all agencies involved in the export control process.41

One particular problem in controlling strategic technology exports is the problem presented by transfers of computer software. Demand is strong for U.S. exports of automatic data processing equipment; such equipment cannot be exported without programs and technical instructions.42 As a result, Commerce has issued special licensing regulations for computer software.43 These regulations require exporters to submit detailed information on proposed exports so that OEA can determine when software and technical instructions would transfer militarily critical technologies. The required information includes an explanation of why the software must be exported in that form, the scope of personnel training and maintenance proposed, and the relationship of programs to the end-use of the data processing equipment.44


39. Seventeen categories were included in the initial list, and an eighteenth category was added in the second revision of the MCTL published on October 1, 1982.


41. To date, the initial list published in the Federal Register has not been integrated with the CCL as required by section 5(d)(5) of the EAA; however, H.R. 3231, supra note 1, would require integration by 1985.


43. 15 C.F.R. § 376.10 (1983). In addition, the MCTL includes eleven categories of software technology. 45 Fed. Reg. 65,016 (1980).

44. 15 C.F.R. § 376.10(a) (1983).
C. Foreign Policy Controls: The Role of the State Department

In addition to the export controls imposed for national security reasons, the EAA authorizes the President to restrict strategic and nonstrategic export activities as necessary to further U.S. foreign policy. Although national security controls are likely to embody foreign policy as well as national security objectives, the EAA provides for separate controls based solely on foreign policy concerns without regard to whether the exports would contribute to the military strength of a potential enemy. In other words, the purpose of these controls is to further specific U.S. foreign policy objectives such as human rights and anti-terrorism. As a result, these controls change with every administration.

Examples of foreign policy controls include: 1) the embargo on exports to South Africa and Namibia of aircraft, certain computers, commodities and technical data for use by military or police entities, and all items controlled by the United Nations arms embargo to South Africa; 2) control over strategic goods valued at $7 million or more destined for military end-use, certain aircraft, and other military-related equipment to Libya, Yemen, and Syria; 3) the embargo on most commercial exports to Cuba, North Korea, Kampuchea, and Vietnam; and 4) control over exports to the USSR of equipment and technical data for oil and gas exploration and production.

The State Department is authorized by statute to identify those items to be controlled for foreign policy reasons, with the concurrence of the Department of Commerce. Whenever foreign policy controls are imposed, however, the President must notify Congress of the decision and the reasons for imposing controls. Although the Act contains no provisions for a congressional veto of new foreign policy controls, it does provide for automatic expiration of such controls unless specifically extended. In addition, the Act mandates that the President, before imposing any controls through the State Department, consider the probability that the controls will achieve their intended foreign policy purposes in light of the following factors: 1) foreign availability; 2) compatibility of the proposed controls with overall foreign policy objectives of the United States; 3) the reaction of other countries to such controls; 4) the likely effects of the controls on exports, employment, and the competitive position and reputation of the United States; 5) the ability of the United States to enforce the controls effectively; and 6) the foreign policy consequences of failing to impose con-

46. In 1982, the Secretary of State determined that, pursuant to current Administration policies, Iraq should be deleted and Cuba added to the list of countries providing repeated support for international terrorism.
47. These regulations have been the subject of considerable controversy. See supra note 1.
controls.\textsuperscript{50} No comparable restriction exists on DOD decisions for national security controls.

As part of its jurisdiction over foreign policy controls, the State Department has the right to review export license applications. Unlike licenses issued with national security controls, however, Commerce can issue licenses for articles controlled for foreign policy purposes without State Department approval,\textsuperscript{51} although, as a practical matter, Commerce issues such licenses only after State has agreed.

D. \textit{Multilateral Export Controls Over Military Articles}

In 1949, the United States and six allies created an informal Consultative Group on Export Controls, and the following year the Group formed a Coordinating Committee (CoCom) to develop, review, and update lists of goods embargoed from export to communist countries from CoCom members.\textsuperscript{52} The Consultative Group no longer exists, but CoCom continues as an informal trade organization whose function is to coordinate unilateral controls imposed by its members\textsuperscript{53} on exports of military goods to communist countries.

Each member country is responsible for implementing, through domestic legislation, the CoCom list of goods embargoed because of their strategic military value to communist powers. CoCom approval of exports on its list is required on a case-by-case basis.\textsuperscript{54} Thus, after the Departments of Defense and Commerce have approved a validated license to export strategic goods on the CoCom list, the application must go through a second approval process. The EAA provides, however, that if multilateral review has not resulted in a determination within sixty days, the approval of the Secretary of Commerce becomes final.\textsuperscript{55}

E. \textit{Enforcement of the EAA}

Export controls are of course only as effective as their enforcement. The EAA prohibits violation of the Act and its implementing regulations and provides certain criminal penalties for noncompliance.\textsuperscript{56} In addition, the Department of

\begin{footnotesize}
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\item \textsuperscript{50} EAA § 6(b), 50 U.S.C. app. § 2405(b) (Supp. V 1981).
\item \textsuperscript{51} EAA § 6(a), 50 U.S.C. app. § 2405(a) (Supp. V 1981).
\item \textsuperscript{52} CoCom maintains three embargo lists: the International Atomic Energy List, the International Munitions List, and the International List, which contains dual-use items not included in the other lists.
\item \textsuperscript{53} CoCom members include the U.S., Japan, and all members of NATO except Ireland and Spain.
\item \textsuperscript{54} The necessity for CoCom approval has been criticized as hampering U.S. trade, and the United States is currently taking action to promote uniform implementation of export controls by CoCom members. For a discussion of CoCom policy and its effectiveness, see Comptroller General, \textit{Report to Congress, Export Controls: Need to Clarify Policy and Simplify Administration} 10, 15 (Mar. 1, 1979).
\item \textsuperscript{55} EAA § 10(h), 50 U.S.C. app. § 2409(h) (Supp. V 1981).
\item \textsuperscript{56} EAA § 11(a), (b), 50 U.S.C. app. § 2410(a), (b) (Supp. V 1981). H.R. 3231, \textit{supra} note 1, would more clearly define those acts which constitute violations of the export laws.
\end{itemize}
\end{footnotesize}
Commerce may impose civil sanctions in accordance with the enforcement provisions of the Export Administration Regulations (EAR). The same conduct can give rise to both criminal and civil liability. An exporter's activity thus may trigger simultaneous investigations by several agencies, or it may be the subject of an investigation initiated by Commerce alone, but later referred to Justice for prosecution.

1. Policing the Export Laws

On May 18, 1982, the investigative division was removed from the Office of Export Administration and elevated to office status. The new Office of Export Enforcement (OEE) strengthened its enforcement capabilities by expanding its present field offices in New York, opening two new field offices on the West Coast, and working in cooperation with other agencies responsible for investigating and enforcing export regulations, particularly the U.S. Customs Service.

OEE functions primarily in investigations of license applications, allegations of wrongdoing, and inspections of shipments. When OEE learns of a possible violation, it evaluates the information received to determine whether the allegation is sufficient to warrant investigation or compliance action and to establish primary investigative responsibility. Frequently OEE shares intelligence with Customs, which has the primary responsibility for investigating violations of the Arms Export Control Act.

According to the Department of Commerce, Commerce is particularly concerned with preventative enforcement. Thus, OEE reviews export license applications to prevent potential violations, conducts pre-license checks on the suitability of intended recipients, and employs the U.S. Foreign Service to investigate the probable disposition of shipments for which applications are pending. As expected, the most difficult problem for OEE is enforcement of controls over transfers of technical data, particularly computer software.

Customs officials are authorized to examine all goods and technologies de-
clared for export, demand for inspection any necessary export documents, and seize commodities shipped in violation or attempted violation of the EAA or its regulations.\(^{64}\) OEE inspectors are authorized to physically examine and detain questionable shipments.\(^{65}\) In addition, Customs officers are authorized to seize commodities shipped in violation or attempted violation of the EAA. Vehicles used to transport such commodities are also subject to seizure and forfeiture.\(^ {66}\)

When OEE has completed an investigation, the case may be closed for lack of evidence or appropriate compliance action may be taken. Depending on the nature of the violation, compliance action may consist of a simple warning letter for minor infractions or more severe administrative sanctions, such as a civil fine up to $100,000 or denial of export privileges for a specified time.\(^ {67}\) Unless the Department of Justice is conducting its own investigation or the matter has been referred there by another agency, the decision to pursue criminal penalties will not be made until OEE's investigation is complete. The decision whether to prosecute, however, is entirely within the discretion of the Department of Justice.\(^ {68}\)

2. Sanctions

Criminal penalties under the EAA may be imposed for three different types of conduct. First, anyone who knowingly violates any provision of the Act or the Export Administration Regulations (EAR) may be fined up to $50,000 or five times the value of the exports involved, whichever is greater.\(^ {69}\) Second, anyone who willfully violates any provision of the Act or the EAR, with knowledge that the exports will be used to benefit a country to which exports are controlled for national security or foreign policy purposes, may be: 1) fined not more than five times the value of the exports involved or $1,000,000 in the case of a non-individual; or 2) fined not more than $250,000 or imprisoned not more than ten years or both in the case of an individual.\(^ {70}\) These latter penalties also apply to individuals and non-individuals that have been issued a validated license to export to a controlled country and that, with knowledge that the exports will be


\(^{67}\) EAA § 11(a)-(c), 50 U.S.C. app. § 2410(a)-(c); 15 C.F.R. § 387.1 (1983). In 1982, out of 268 completed investigations, eight cases were referred to the Commerce Department's Office of General Counsel for initiation of the administrative proceedings necessary to impose civil sanctions, and thirteen cases were referred to the Department of Justice for possible criminal prosecution through the courts. U.S. Dep't of Commerce, 1982 Export Administration Annual Report 55 (1983).

\(^{68}\) Frequently, the Justice Department will prosecute simultaneously for violations of the EAA and the Arms Export Control Act, as well as for conspiracy, fraud, and tax evasion. See U.S. Dep't of Commerce, 1982 Export Administration Annual Report 57-58 (1983).


used for military or intelligence gathering purposes contrary to the conditions under which the license was obtained, wilfully fail to report such use to the Secretary of Defense. 71

The EAA allows all agencies exercising any functions under the Act to impose civil fines not to exceed $10,000 for each violation of the Act or any regulation, order, or license issued under it, except that fines not to exceed $100,000 may be imposed for violations of national security controls or controls on defense articles and services imposed under the Arms Export Control Act. 72 These penalties may be imposed in addition to or in lieu of any other criminal or civil sanction. It is advisable for penalized exporters to pay their fines because payment may be a condition for up to a year to the granting or restoration of an export privilege. 73 The Department of Commerce is also authorized to bring a civil action to recover the fines.

Pursuant to its authority to administer the EAA, Commerce may take other action appropriate to enforce compliance with the export regulations. These administrative sanctions include denial of export privileges, exclusion from practice before the Domestic and International Business Administration of the Department of Commerce, and seizure of the unlawful exports, as well as civil fines. 74 The EAR specifies which activities are punishable by administrative sanctions, including direct violations of the regulations, aiding and abetting another in violation of the regulations, making false statements to the OEA, and trafficking in export documents. 75 Exporters may be liable also for violations committed by third parties in connection with export documents within their control. 76

Aside from the penalties authorized by the EAA, every misrepresentation on a license application or shipping document is punishable by a $10,000 fine or imprisonment up to five years or both under the False Statements Act. 77 Moreover, failure to report income from unauthorized export activities is subject to liability under the income tax laws. Finally, exporters should note that there are other serious repercussions for noncompliance with the export laws. First, a conviction or civil judgment may be grounds for debarment from contracting with the United States, 78 and second, enforcement actions may result in disclosure of otherwise classified information. OEA often requires considerable information to complete its review of license applications or to answer the ques-

71. Id.
74. 15 C.F.R. § 387.1(b) (1983).
76. 15 C.F.R. § 387.2 (1983).
tions of other reviewing agencies. The information submitted in connection with a specific export application ordinarily is nondisclosable under the Act in order to protect the exporter's business interests. However, if an exporter is prosecuted for criminal violations of the export laws or if administrative proceedings are initiated against an exporter, details regarding the license application may be disclosed publicly.  

3. Administrative Proceedings

The regulations set forth the procedures that must be followed whenever the Department of Commerce intends to impose administrative sanctions. Administrative proceedings are initiated by service of a “charging letter” which alleges the essential facts of the specific violation charged. The respondent must answer the charges within thirty days or be held in default, and the allegations deemed admitted. The respondent has a right to an oral hearing, which is conducted by a presiding officer, but judicial rules of evidence and procedure do not apply to these hearings. Although the regulations authorize the use of subpoenas by both parties to obtain documents and provide that all relevant evidence will be received, it should be noted that, under the EAR, respondents may be precluded from inspecting classified materials entered into evidence by the government.

If there is insufficient evidence to support the charges, the presiding officer will dismiss the matter; otherwise, the officer will issue an appropriate order. Before hearings commence, the parties by agreement may propose that the presiding officer issue a consent order. If the officer rejects the proposal, the matter proceeds into hearings. Respondents have the right to appeal any decision denying export privileges or imposing a civil penalty, but there are only three grounds upon which an appeal can be based, with requests to issue,
amend, or revoke a regulation not subject to the appeals process. An appeal must specify which ground is being invoked and must be filed with the Assistant Secretary for Trade Administration within thirty days after receipt of a copy of the order. A hearing before the Assistant Secretary is not a trial de novo; rather, the appeal is limited to the record as developed before the presiding officer. Furthermore, an appeal will not stay the operation of any order. Where the appellant so requests or the Assistant Secretary believes it to be necessary, the appellant may be granted an opportunity for an oral presentation.

In addition to any administrative sanction which may be imposed at the conclusion of a hearing, the Department of Commerce can obtain temporary sanctions which will remain in effect during the pendency of the hearing. A temporary denial order can be imposed at the time the charging letter is issued. Such an order prohibits the respondent from participating directly or indirectly in any transaction involving a validated export license. The charging letter may also suspend or revoke any outstanding validated license and require its return for cancellation.

To issue a temporary denial order of export privileges, the Department of Commerce must conclude that such an order is required: 1) to permit or facilitate enforcement of the EAA; 2) to avoid circumvention of administrative or judicial proceedings; or 3) to permit the completion of an investigation. The order is issued summarily, without prior notice or opportunity for hearing, and it is valid for a limited period of time, ordinarily not to exceed thirty days or as may be required to complete the investigation or the proceeding. An application for a temporary denial order is made by the OEE to the presiding officer. The officer will review the application and approve it, in whole or in part, or deny it. Any respondent subject to a temporary denial order can move to vacate or modify the order. This motion is filed with the presiding official whose decision on the matter is final.

III. ARMS EXPORT CONTROL ACT

The Arms Export Control Act (AECA) authorizes the President to control exports of munitions and other defense articles and services and to designate which items will be subject to control. This list of restricted items is known as the

90. Id.
91. Id.
92. A list of parties currently subject to denial and probation orders affecting export privileges is published in 15 C.F.R. § 388 (Supp. 1, 2 1983).
United States Munitions List. The President must review the Munitions List periodically to determine whether any items should be added or removed, and any decision to remove an item must be reported to Congress before that item can be removed from the list.

The AECA requires that all commercial firms engaged in manufacturing or exporting articles on the Munitions List register with the federal government, regardless of whether they actually import or export such articles. The Act further prohibits any firm from engaging in export activities involving any item on the Munitions List without first obtaining an export license. The State Department, through the Office of Munitions Control (OMC), is responsible for administering the AECA. The OMC's implementing regulations are known as the International Traffic in Arms Regulations (ITAR).

Although a detailed description of the entire ITAR is beyond the scope of this paper, a general discussion of the ITAR is necessary for the reader to understand the relationship between the AECA and the EAA, and the enforcement problems which these regulations present to potential exporters.

A. General Overview of the ITAR

The ITAR imposes a licensing system, enumerates what exports are subject to that system, outlines the steps necessary to gain approval of export activities by the State Department, exempts certain exports from its requirements, and specifies the procedures for enforcing its provisions. The State Department has the discretion to issue export licenses, temporary export licenses, and intransit licenses for three categories of exports: 1) unclassified arms, ammunition, and implements of war (defense equipment on the Munitions List); 2) manufacturing license and technical assistance agreements (agreements by which U.S. citizens either grant persons in foreign countries the right to manufacture abroad defense equipment on the Munitions List or furnish foreign persons with technical assistance in connection with the manufacture abroad of such equipment); and 3) unclassified technical data and classified data and equipment. The OMC has

93. 22 C.F.R. § 121.01 (1983). The Munitions List is divided into eighteen categories: firearms; artillery and projectors; ammunition; missiles, rockets, torpedos, bombs and mines; propellants, incendiaries and explosives; vessels of war; tanks and military vehicles; aircraft and spacecraft; military training equipment; protective personnel equipment; military and space electronics; fire control and guidance and control equipment; auxiliary military equipment; nuclear weapons design and test equipment; classified articles; technical data relating to articles in other categories; submersible vessels and oceanographic equipment; and miscellaneous articles having significant military applicability.


97. 22 C.F.R. Parts 121-130 (1983). OMC proposed a revision to the ITAR on December 19, 1980, 45 Fed. Reg. 83,970-95; however, the proposal has yet to be promulgated.

considerable discretion to deny, revoke, suspend, or amend any license, although applicants and licensees have a limited right to challenge the denial of a license application or the revocation, suspension, or amendment of an outstanding license. The ITAR requires the State Department to notify applicants and licensees promptly of adverse decisions and the reasons therefor, and it accords the adversely affected applicant or licensee an opportunity to present additional information and obtain review of the matter by the Department.

There are numerous exemptions to the licensing requirement for the first category of exports, i.e., defense equipment on the Munitions List. For example, the ITAR authorizes Customs to permit the following exports of defense equipment without a license: 1) shipments between the United States and U.S. possessions and the Panama Canal Zone; 2) certain equipment destined for Canada; 3) firearms manufactured before 1898; 4) sample shipments of non-automatic firearms that are not for sale and will be returned to the original owner; 5) minor components for firearms not exceeding $100 per transaction; 6) certain propellants and explosives; 7) a maximum number of non-automatic firearms and cartridges per U.S. citizen or resident alien if the firearms are intended exclusively for personal use (hunting or self-protection), are not for resale, and are not being exported permanently; and 8) nuclear materials to the extent that they are controlled by the Nuclear Regulatory Commission. In addition, a commodity may be exempt from AECA licensing if it has a dual use, i.e., military and nonmilitary, in which case it would be licensed by the Department of Commerce.

Once a license has been obtained for exporting defense equipment, but prior to actual shipment, the export license must be filed with the district director of the U.S. Customs Service at the port where shipment of the goods will be made, or with the postmaster at the post office where the goods will be mailed. In addition, exporters must file a Shippers Export Declaration with the Customs director or postmaster even if an export license is not required. In that event, the declaration must certify that the proposed export is exempt from the license requirement and identify the section of the ITAR under which the exemption is claimed. All unused, expired, suspended, amended, or revoked licenses must

99. An export license may be denied or revoked whenever the State Department believes such action would further world peace, national security, or foreign policy. 22 C.F.R. § 123.05(a) (1982). All three categories of exports are subject to a prohibition against shipments to or from certain communist countries and from areas where it has been deemed contrary to U.S. foreign policy.
100. 22 C.F.R. §§ 123.05(b), (c) (1983).
102. The Export Administration regulations specifically exempt from their scope items on the Munitions List, 15 C.F.R. § 370.10 (1983), which is included in the EAR as Supplement 2 to Part 370. However, Commerce can assume jurisdiction if the State Department determines that an item has a civilian use and its intended end-use is non-military.
104. For example, § 123.30 permits small arms manufactured before 1898 to be exported without a license. 22 C.F.R. § 123.30 (1983).
be returned to the Department of State, and failure to return immediately a used or lapsed temporary license constitutes a violation of the ITAR.105

One important provision of the ITAR section governing exports of defense equipment is the requirement for OMC approval as a condition precedent to any proposal or presentation designed to provide the basis for an informed decision to purchase “significant combat equipment”106 on the Munitions List if: 1) the equipment would be sold under a contract for $7 million or more; 2) the equipment is intended for use by the armed services of a foreign country; and 3) the sale would involve the export of an item on the Munitions List or technical data relating to an item on the Munitions List.107 In other words, a potential exporter who meets these three criteria must obtain OMC approval before making a sales presentation, although prior approval is not necessary for advertising, market surveys, or notification of the availability of an item of significant combat equipment.108

Every application for a license to export significant combat equipment in connection with a transaction that meets the three criteria must be accompanied by a reference to the approval granted by the OMC or a certification that no proposal or presentation requiring prior approval has been made.109 Failure to obtain the requisite approval for a proposal or sales presentation may constitute a reason for disapproving a subsequent license application.110 The converse, however, is not necessarily true. OMC approval does not mean that the agency will also approve a license application to export the equipment that was the subject of the proposal.

The second category of exports regulated by the ITAR consists of agreements between U.S. exporters and persons of foreign countries to provide technical information and know-how possessed by the exporter, which would enable such foreigners to manufacture abroad items on the Munitions List.111 As with defense equipment, the ITAR requires prior OMC approval before a prospective exporter can make a proposal or sales presentation112 if: 1) the subject of the proposal or presentation is a technical assistance or manufacturing license agreement for the overseas production of significant combat equipment on the

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105. 22 C.F.R. § 125.55(g) (1983).
106. “Significant combat equipment” is defined at 22 C.F.R. § 121.03 (1983), and includes certain articles (not including technical data) enumerated in the Munitions List categories.
108. 22 C.F.R. § 123.16(b) (1983).
109. 22 C.F.R. § 123.16(c) (1983).
110. 22 C.F.R. § 123.16(e) (1983).
111. 22 C.F.R. Part 124 (1983). Sales representation agreements, however, are not subject to State Department approval.
112. A “proposal or presentation designated to constitute a basis for a decision to purchase” is not limited to a formal sales presentation. Rather, it includes any communication of information in sufficient detail that the communicating person should have known that it would permit an intended purchaser to decide to enter into the proposed technical assistance or manufacturing license agreement. 22 C.F.R. § 124.06(b) (1983).
Munitions List; 2) the equipment is intended for use by the armed forces of a foreign country; and 3) the agreement would involve the export of any item on the Munitions List or of technical data relating to an item on the Munitions List. Unlike the other categories of exports, however, a license is not required to export unclassified technical data in furtherance of an approved manufacturing license or technical assistance agreement unless the technical data to be exported exceeds the technical or product limitations in the agreement approved by the State Department. Rather, exporters meeting the criteria of this section submit requests for approval of manufacturing or technical assistance agreements accompanied by either a reference to an approval previously granted or a certification that no proposal requiring approval has been made.

Offshore procurements are exempt from the requirements of this section of the ITAR in certain circumstances. Accordingly, a person in the United States may make arrangements to manufacture equipment on the Munitions List in a foreign country without OMC approval, provided: 1) the delivery of equipment is only for use of the U.S. exporter or an agency of the Department of Defense; 2) the foreign manufacture is pursuant to a contract for delivery of equipment only to the U.S. exporter or a federal agency; 3) the contract limits the use of technical data to that required by the contract, prohibits the disclosure of data except to duly qualified subcontractors for equipment within the same country, prohibits the acquisition of any rights in data by foreign persons without State Department approval, and requires subcontracts to contain the above-described limitations and prohibitions; and 4) the U.S. exporter provides OMC with a copy of each executed subcontract.

The third category of exports includes unclassified technical data and classified information, i.e., equipment or technical data which has been assigned a U.S. security clearance. Export licensing requirements for this category apply not only when such data or information is exported in the normal sense of the word, but also when it is disclosed to foreign nationals abroad or in the United States. Two important exemptions from these licensing requirements are classified information delivered solely for the foreign use of U.S. citizen employees of U.S. firms, if the firm has complied with DOD's Industrial Security Manual, and classified information disclosed during a DOD-approved visit by a foreign national, again if the U.S. firm has complied with DOD's Industrial Security Manual. Because of the separate agency functions, the United States

113. 22 C.F.R. § 124.06(a) (1983).
114. 22 C.F.R. § 124.06(c) (1983).
117. 22 C.F.R. § 125.03 (1983). Disclosure extends to plant visits and participation in briefings and symposia.
118. 22 C.F.R. § 125.11 (1983). In addition, the ITAR identifies seven exempt categories of unclassified technical data:
may permit strategic trade with countries to which exports of Munitions List commodities are strictly controlled or prohibited.\textsuperscript{119} In other words, there may be a complete embargo on military shipments to a country that is classified in a CCL country group which requires only a general license authority, the least restrictive method of export licensing.\textsuperscript{120} Thus, it is usually advantageous for an exporter to have an article considered nonmilitary or "dual use." In cases where an article is not clearly included on the Munitions List, an exporter may apply for a commodity jurisdiction ruling, being alert to the fact that policy in this area is subject to frequent changes.\textsuperscript{121}

B. \textit{Enforcement}

The AECA and the ITAR make it unlawful for anyone to violate any provision of or contribute to the commission of any act prohibited by the AECA and the regulations, licenses, and orders issued under it. Specifically, the regulations prohibit anyone from exporting or attempting to export any article or technical data for which a license or approval is required from the State Department.\textsuperscript{122} In addition, anyone who knows that another person is debarred or suspended from export privileges under the AECA is prohibited from applying for, obtaining, or using an export control document, or participating in any export transaction

\begin{itemize}
\item[(1)] Data which has already been publicly released;
\item[(2)] Data which export will further either a previously approved manufacturing license or technical assistance agreement, or a United States government contract;
\item[(3)] Data relating to small caliber firearms;
\item[(4)] Data relating to items which have previously been approved for export;
\item[(5)] Data being reexported to the original source of import;
\item[(6)] Data in support of a "U.S. Government approved project;" and
\item[(7)] Data exported solely for the use of American citizen employees of a United States firm.
\end{itemize}

\textit{Id.}

\textsuperscript{119} For example, exports to Chile of items on the Munitions List are prohibited. However, Chile is classified in country group "T" for purposes of the Commodities Control List, and exports to this country group are generally unrestricted.

\textsuperscript{120} \textit{See supra} note 102.

\textsuperscript{121} For example, the State Department has lifted the embargo on exports of defense-related goods and technologies to Argentina.

\textsuperscript{122} Exporters should be aware that criminal penalties can be imposed for the unauthorized export of technical data "relating to" items on the U.S. Munitions List. The courts have been in disagreement as to the exact meaning of "relating to." In \textit{United States v. Van Hee}, 551 F.2d 352 (6th Cir. 1976), the court held that a conviction could be premised on the disclosure of general technical knowledge. In other words, you can be held criminally liable for the disclosure of technical data which relates only generally to items on the U.S. Munitions List; the technical data need not specifically relate to items on the list. \textit{Id.} at 356-57. More recently, however, in \textit{United States v. Edler Indus.}, 579 F.2d 516 (9th Cir. 1978), the court held that there must be more than a mere general relationship between the item on the Munitions List and the technical information which is disclosed. Specifically, the court held that conviction is permissible only for the "exportation of technical data significantly and directly related to specific articles on the Munitions List." \textit{Id.} at 521 (emphasis added). In \textit{United States v. Wieschenberg}, 604 F.2d 326 (5th Cir. 1979), the court also gave a more limited construction to the statute. The court there reversed a conviction of conspiracy to violate the AECA and ITAR. The court ruled that mere discussion of an illegal act (exporting an item on the Munitions List without an export license) is not sufficient to warrant a conspiracy conviction. \textit{Id.} at 335-36. There must be some act in furtherance of the conspiracy. \textit{Id.}
involving a controlled article or technical data, for the benefit of such debarred or suspended person.\textsuperscript{123} The regulations also make it unlawful to use any document containing a false statement or material omission for the purpose of obtaining an export permit from the OMC.\textsuperscript{124} The false statement or material omission not only will be a violation of the ITAR and the AECA, but also will subject the exporter to liability under the False Statements Act.\textsuperscript{125}

Finally, the ITAR makes it clear that an attempt to export or remove from the United States any article on the Munitions List in violation of the export licensing regulations is an offense also punishable under section 401 of title 22 of the U.S. Code.\textsuperscript{126} Accordingly, whenever there is possible cause to believe a violation has occurred or is about to occur, the U.S. Customs Service is authorized to seize and dispose of such articles and any vessel, vehicle, or aircraft involved in the illegal act.\textsuperscript{127}

Several sanctions can be imposed on an exporter for violating the AECA or failing to comply with the regulations. In addition to forfeiting articles seized by Customs, a person who willfully violates the export licensing provisions of the AECA or the ITAR, or who willfully makes an untrue statement or omits a material fact in any registration, license application, or report required by the Act or the regulations, may be fined up to $100,000 or imprisoned not more than two years or both.\textsuperscript{128} Interestingly, these penalties are less severe than the corresponding penalties for criminal violations of the export laws administered by the Department of Commerce.\textsuperscript{129} Moreover, two basic civil sanctions are authorized by the ITAR: civil fines and suspension or debarment from exporting activities.\textsuperscript{130} This authority is, however, rarely invoked.

The OMC Enforcement Division is not staffed to investigate or try alleged export violations. In practice, most cases involving illegal exports of arms and defense-related goods regulated by OMC are criminal matters initiated by the Justice Department; the majority of these cases involve "gun running" to foreign countries.\textsuperscript{131} It is the responsibility of the U.S. Customs Service to conduct

\begin{footnotesize}
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\item[123.] 22 C.F.R. § 127.01(b) (1983).
\item[124.] 22 C.F.R. § 127.02 (1983).
\item[126.] 22 C.F.R. § 127.06 (1983).
\item[127.] In contrast to the enforcement authority under the Export Administration Act, primary authority to investigate illegal shipments of defense-related articles and services is delegated to U.S. Customs officials. 22 C.F.R. § 127.05 (1983).
\item[129.] See supra text accompanying notes 69-71. To constitute an offense under the AECA, the alleged conduct must be willful. There is no sanction imposed for knowingly violating the Act as there is under the AECA.
\item[130.] 22 C.F.R. §§ 127.07, 127.10 (1983).
\item[131.] The most recent example of this is the highly publicized Edmund Wilson case involving shipments of rifles to Libya. United States v. Wilson, 565 F. Supp. 1416 (S.D.N.Y. 1983). See also United States v. Swarowski, 592 F.2d 131 (2d Cir. 1979) (export of military aircraft gunsite camera to the Soviet Union); United States v. Cahalane, 560 F.2d 601 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1978) (export
\end{itemize}
\end{footnotesize}
investigations, with assistance from OMC, and forward the resulting information to the Justice Department.¹³² If the Justice Department determines there is evidence sufficient to warrant prosecution, the government will bring criminal charges against the exporter in federal court.¹³³

It is only in certain rare instances, when the Justice Department either declines to prosecute or reaches a settlement agreement with the exporter pursuant to which the government drops the criminal charges in lieu of a civil penalty, that OMC will bring charges of its own. In fact, OMC has concluded only three actions,¹³⁴ and all three have been settled by consent order rather than by proceeding through the formal administrative procedures set forth in the regulations.

Nevertheless, the regulations authorize the Director of the Bureau of Politico-Military Affairs in the State Department to debar persons from exporting items subject to the licensing requirements of the AECA and ITAR if the debarment is based on one of four specified grounds.¹³⁵ Before a decision to debar an exporter is made, the Director of OMC can order a temporary debar-

¹³³ The Attorney General is required to inquire into cases reported to him by Customs officers and, if necessary, to prosecute such cases in U.S. district court. 19 U.S.C. § 1604 (1982). Exporters violating the AECA may also find themselves charged with conspiracy; tax evasion and fraud.
¹³⁴ The first of these actions, In re Olin Corp., No. MC 78-1, U.S. DEP’T OF STATE, MUNITIONS CONTROL NEWSLETTER No. 67 (Dec. 27, 1978), arose out of an earlier criminal conviction for violation of the AECA. After Olin pled no contest and was fined in the criminal case, OMC initiated a debarment action which was settled by a consent decree. The decree debarred Olin for a period of sixty days, put Olin on probation for a period of one year starting with the end of the debarment period, and required Olin to make available to OMC a wide variety of records. The second action, In re Smith & Wesson Co., No. M102, U.S. DEP’T OF STATE, MUNITIONS CONTROL NEWSLETTER No. 70 (Mar. 20, 1979), was initiated by OMC. This action also was settled by a consent decree after Smith and Wesson pled no contest. While not debarred, Smith and Wesson was fined $120,000, and was required to make available a wide range of records for OMC inspection. The final action, In re Applied Systems Corp., U.S DEP’T OF STATE MUNITIONS CONTROL NEWSLETTER No. 97 (Sept. 30, 1982) (consent order), originated as a criminal investigation during which the parties agreed that the proceedings against the exporter would be terminated if the Department of State agreed to impose a civil penalty. Unlike the other two civil actions, this matter was disposed of completely outside the agency’s administrative procedures because the exporter agreed to waive its procedural rights. The decree simply imposed on Applied Systems a fine of $10,000.
¹³⁵ Debarment is authorized if based on the following grounds: 1) Conviction under 22 U.S.C. §§ 2778 and 2779, or any rule or regulation issued thereunder; 2) A violation of 22 U.S.C. § 2778 when a violation is such as to provide a reasonable basis to believe that the violator cannot be relied upon to comply with relevant laws; 3) A second or subsequent violation which impels the belief that the violator cannot be trusted to comply with relevant laws; or 4) A decision by the Department of Commerce to suspend, deny or revoke export practice before the Bureau of East-West Trade provided that the Hearing Commissioner makes a factual finding that the facts reasonably impel the conclusion that a person cannot be relied upon to comply with relevant laws. 22 C.F.R. § 127.07(a) (1983).
ment by issuing an order of interim suspension. To do so, the Director of OMC must conclude that at least one of the four stated grounds for debarment exists and that an interim suspension is reasonably necessary “to protect world peace or the national security or foreign policy of the United States.” suspend. Suspension can be for no more than sixty days, but the order does become effective immediately, without prior notice and hearing. Any person who is subject to an interim suspension order can ask for a hearing on the matter, and the Director of the Bureau of Politico-Military Affairs ultimately will decide the matter.

Permanent debarments, on the other hand, are subject to an extensive set of procedural rules. Most importantly, a permanent debarment cannot be made without notice and a hearing. These debarments, however, are not subject to the Administrative Procedure Act, 5 U.S.C. §§ 553-554. To initiate a permanent debarment action, the Director of OMC sends a letter stating the charges. The charged person (the respondent) then has thirty days in which to answer and can request an oral hearing. The answer must respond fully to the charging letter, and any allegations which are not contested will be deemed to be admitted. Failure to answer constitutes a default justifying the issuance of a permanent debarment order.

Permanent debarment cases are not tried before a State Department tribunal, but before the Hearing Commissioner for the Bureau of East-West Trade in the Department of Commerce. Both the government and the respondent are entitled to discovery, and the hearing officer has subpoena power. Upon completion of discovery, a pre-hearing conference is held, followed by the hearing. The hearing is not subject to the rules of evidence prevailing in the courts of law. Instead, “all evidentiary material relevant and material to the inquiry will be received and given appropriate weight.”

After the hearing, the hearing commissioner prepares a report stating findings of fact and law, conclusions as to whether a violation has occurred, and specific recommendations. The report is then reviewed by the Director of OMC, and if “the evidence is not sufficient to support the charges,” the director will dismiss the matter. The hearing commissioner can also dismiss the case. When the Director of OMC concludes, however, that a violation has occurred, this conclusion is only advisory; the Director of the Bureau of Politico-Military Affairs makes the final decision on debarments.

The hearing commissioner may grant a rehearing at any time to hear any

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137. 22 C.F.R. § 128.01 (1983).
140. 22 C.F.R. § 128.06 (1983).
141. 22 C.F.R. § 128.08 (1983). If relevant evidentiary materials are classified, diligent efforts must be made to declassify them or to secure unclassified summaries or extracts.
relevant and material evidence which was not known or obtainable at the time of the original hearing, and a respondent has the right to appeal from any final debarment or imposition of a civil penalty. The appeal, which must be filed within thirty days, is heard before the Appeals Board of the Commerce Department, and the decision of the Appeals Board is final. Unlike under the Export Administration Act, however, appeals under the Arms Export Control Act may not be taken from denials of license applications.

IV. Conclusion

Dissatisfaction with the administration of export controls has prompted Congress to propose improvements to the present system. At this writing, however, all proposals to confer upon a single agency the responsibility for controlling strategic trade have been rejected because it is believed that the present system is necessary to ensure that economic, national security, and foreign policy considerations will be weighed fully in export control decisions. Although the existing problem of interagency turf fights may be alleviated by redefining each agency’s authority, the fragmentation of administrative functions and the differing licensing procedures will continue to present difficulties for exporters, particularly in the area of militarily critical technology. In addition, the broad delegation of authority to regulate exports in strategic goods and technologies will necessarily continue to cause policy conflicts between the political branches. Thus, exporters should carefully monitor policy changes which are implemented through the various export control mechanisms.

144. 22 C.F.R. § 128.15 (1983). As with appeals from adverse actions under the EAA, an appeal will not stay any final debarment order, and it must be based on one or more of the following grounds: 1) that the findings of violation are not supported by any substantial evidence; 2) that prejudicial error law was committed; or 3) that the provisions of the order are arbitrary, capricious or an abuse of discretion. Id.
145. Id.