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M E M O R A N D U M

RE:

THE EXPORT ADMINISTRATION AMENDMENTS ACT OF 1985

by

JOHN F. McKENZIE

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THE EXPORT ADMINISTRATION AMENDMENTS ACT OF 1985

1. Introduction

On July 12, 1985 President Reagan signed into law the Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. __ (hereinafter referred to as the "New Act"), which reenacts and amends the Export Administration Act of 1979, 50 U.S.C. App. §§ 2401 et seq., the statutory authority for the United States program of export control. Enactment of the New Act ends almost two years of uncertainty about the enforceability of various provisions of the export control program, in the sense that the New Act restores a clear-cut legislative authorization for the Export Administration Regulations.* The New Act does, however, mandate a number of

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* 15 C.F.R. Parts 368-399 (hereinafter referred to as the "Regulations").

very important changes in the Regulations and in the export control program as a whole. Indeed, the New Act may represent the most significant revision of United States export control legislation in the past 15 years. This Memorandum surveys the highlights of the New Act and the most important changes in the export control program embodied therein.

Each time that Congress has enacted export control legislation, the legislation has contained a "sunset provision" under which the statute will expire on a specified date unless reenacted by Congress. The intent of including such a "sunset provision" is, of course, to permit Congress to reconsider periodically the overall effects of the export control program. Thus, section 20 of the Export Administration Act of 1979 provided for expiration of that statute on September 30, 1983. Congress was unable to enact new export control legislation by that date, and, as a result the export control program has (more or less) been maintained in force by a series of interim measures. Initially, the Export Administration Act of 1979 was extended by a joint resolution of Congress,* and, since March 30, 1984 the export control regulatory program established by the Export Administration Act has been maintained in force by Executive Order of the President.**

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* Pub. L. No. 98-207, 97 Stat. 1391.

** Executive Order No. 12470, 49 Fed. Reg. 13099 (April 3, 1984). This Executive Order was issued pursuant to the statutory authority of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 et seq.

The lack of a formal and specific legislative authorization for the export control program, however, created a number of uncertainties about specific provisions of the United States export controls. For example, on several occasions Commerce Department officials suggested that they might be unable to impose sanctions for violation of the anti-boycott provisions of the Regulations due to the lack of specific legislative authorization for those provisions.* Similarly, one federal court agreed to review a Commerce Department decision denying an export license, notwithstanding the fact that section 13(a) of the Export Administration Act of 1979 precludes judicial review under such circumstances, on the ground that judicial review of an administrative agency's decision is available in the absence of a clear legislative directive to the contrary.** In effect the court concluded

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* Section 8 of the Export Administration Act of 1979 provides the statutory authority for the establishment of a regulatory program restricting compliance with foreign boycotts. That anti-boycott regulatory program is embodied in Part 369 of the Regulations, 15 C.F.R. §§ 369.1 et seq. In urging passage of the proposed legislation that ultimately became the New Act, Undersecretary of Commerce Lionel Olmer stated that the absence of export legislation raised a significant question of the validity of the anti-boycott provisions of the Regulations. The concerns expressed by Undersecretary Olmer are now at issue in a Commerce Department anti-boycott enforcement proceeding involving Bunker Ramo-Eltra Corporation. See In the Matter of Bunker Ramo-Eltra Corporation, ITA-AB-6-84 (Charging Letter Filed August 15, 1984).

** See Nuclear Pacific, Inc. v. Department of Commerce, C 84-49R (W.D. Wash., June 8, 1984). The court ultimately upheld the Commerce Department's denial of the export license.

that section 13(a) became invalid with the expiration of the Export Administration Act, and could not be continued in force by the President's Executive Order. It appears, however, that these uncertainties have been resolved by the passage of the New Act.

Although the uncertainties caused by the lack of clear statutory authorization for the export control program have been eliminated by the passage of the New Act, the full impact of the changes wrought by the New Act remains to be clarified. As discussed in detail below, in a number of contexts, the New Act is enabling legislation only, and implementing regulations are required before the modifications in the export control program mandated by the New Act will go into effect, and their impact on the operations of United States exporters will be clarified.

2. Multiple Shipment Special Licensing Procedures

In an effort to facilitate the export of controlled commodities and technology for use on specific pre-approved projects or for distribution within friendly countries (i.e., Country Groups T and V), the Department of Commerce has established special licensing procedures which authorize multiple exports under certain prescribed circumstances and/or for prescribed purposes. These special licensing procedures (the project license; the distribution license; the service

supply license) are establsihed and defined in Part 373 of the Regulations.*

The New Act supplements Part 373 of the Regulations by providing specific statutory authorization for these multiple shipment special licensing procedures.** Moreover, section 105(d) of the New Act contains a specific Congressional mandate for the Department of Commerce to facilitate the use of multiplé shipment special licensing procedures in lieu of a multiplicity of individual validated export licenses. Thus, section 105(d)(4) provides:***

> The Secretary [of Commerce] shall periodically review the procedures with respect to the multiple validated export licenses, taking appropriate action to increase their utilization by reducing qualification requirements or lowering minimum threshholds ...

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* 15 C.F.R. Part 373. Under section 373.2 a project license procedure is established, which permits the export of controlled commodities and technical data for use in specific approved projects abroad. Under section 373.3 a distribution license procedure is established, which permits the export of controlled commodities to approved foreign consignees pursuant to an international marketing program. Under section 373.7 a service supply license procedure is established, which permits the export of controlled spare parts and components for the purpose of servicing abroad United States origin goods or foreign made goods which incorporate United States origin components.

** New Act § 104(a), to be codified as 50 U.S.C. App. § 2403(a)(2).

*** Id. § 105(d)(4), to be codified as 50 U.S.C. App. § 2404(e)(4).

This statutory mandate to increase the use of special licensing procedures, such as the distribution license, stands in marked contrast to the Department of Commerce's new amendments to the distribution license provisions of the Regulations.* It appears that those regulatory amendments will have the effect of making it appreciably more difficult than heretofore for United States exporters to qualify for distribution licenses.

Of particular importance in this context is the fact that the New Act establishes a new special licensing procedure, the comprehensive operations license.** This new bulk license is intended to permit the export and reexport of controlled United States orgin goods and technology from a United States firm to, and among, its foreign subsidiaries, affiliates, joint ventures and long-term licensees. As such,

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* 50 Fed. Reg. 21562-76 (May 24, 1985), amending 15 C.F.R. § 373.3. It should be noted, however, that both the New Act and the new distribution license regulations provide that eligibility for a distribution license is to be based principally on the reliability of the United States exporter and its foreign consignees in complying with the United States export controls. Compare New Act § 104(a), to be codified as, 50 U.S.C. App. § 2403(a)(2)(A); with 50 Fed. Reg. 21562 (May 24, 1985), amending 15 C.F.R. § 373.3.

** New Act § 104(a), to be codified as, 50 U.S.C. App. § 2403(a)(2)(B).

it appears that the comprehensive operations license is intended to fill a "gap" in special licensing procedures. Like the distribution license, the comprehensive operations license will apparently permit the export of controlled commodities to approved foreign consignees for a variety of purposes, including resale, but unlike the distribution license, the comprehensive operations license will also permit the export and reexport of controlled technology among affiliated corporate entities. Indeed, the legislative history of this provision of the New Act indicates that the principal purpose in establishing the comprehensive operations license was:*

> ... to accommodate the special characteristics of critical technology by facilitating cooperative innovation and transfers of know-how within the international operations of U.S. firms.

Thus, it is anticipated that the comprehensive operations license will be of considerable benefit to those United States high-technology firms that maintain substantial networks of foreign manufacturing and distribution facilities.

It should be noted that the statutory mandate for a comprehensive operations license is not self-executing. It remains for the Department of Commerce to issue implementing regulations to define the qualification requirements for, and scope of permissible activities under, comprehensive operations licenses.

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* S. Rep. No. 98-170, 98th Cong., 1st Sess. 4.

3. National Security Controls

The Export Administration Act of 1979, as amended, authorizes the President to impose export controls in order to achieve three statutory objectives: (i) protecting the national security by controlling strategic goods; (ii) promoting United States foreign policy by restricting exports to certain countries; and (iii) protecting the domestic economy by restricting exports of goods which are in short supply.* Of the controls established by the Regulations, the most important for most United States exporters are the national security controls, and the vast majority of commodities which are subject to export restrictions and/or validated export licensing requirements are controlled for national security purposes. Thus, the various changes in the national security controls embodied in the New Act may be among the most important provisions of the New Act for most exporters. The principal features of the national security provisions of the New Act are discussed below.

a. Exports to COCOM Countries: The United States participates in an informal multinational export control program with the other member nations of NATO (except Iceland and Spain) and Japan. This multinational program, COCOM, is intended to promote the development of a uniform export control program among the major Western industrial and commercial

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* See 50 U.S.C. App. § 2402(a)(A-C).

nations directed at the Soviet Union, the People's Republic of China and the communist countries of Eastern Europe.

In enacting the New Act, one of Congress' key objectives was to strengthen the COCOM export control program and to encourage greater uniformity between the United States export control program and the control programs of the other COCOM member nations.* In that context, section 105(b)(2) of the New Act provides for the elimination of validated licensing requirements for the export of certain controlled commodities to consignees in COCOM member nations.** This decontrol provision is effectively tied to the COCOM controls on proposed exports to COCOM-restricted countries (e.g., USSR; PRC; etc.). Thus, a validated export license will not be required for the export from the United States to another COCOM member nation if the commodity in question could be exported to a controlled country without COCOM prior approval.

Although this decontrol on COCOM exports may ultimately prove to be of substantial benefit to United States

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* Thus, section 105(f) of the New Act, to be codified as 50 U.S.C. App. § 2404(i) specifically delineates certain steps to be taken by the President to strengthen COCOM procedures. Similarly, the legislative history of the New Act reflects Congress' intent to promote increased reliance on uniform multilateral controls. See S. Rep. 98-170, 98th Cong., 1st Sess. 11-12.

** New Act § 105(b)(2), to be codified as 50 U.S.C. App. § 2404(b)(2).

exporters, its effect is difficult to predict in the absence of implementing regulations. Among other things, it is virtually impossible to determine from the Regulations and the Commodity Control List which commodities have been decontrolled for COCOM exports under section 105(b)(2) of the New Act.* Commerce Department officials have indicated informally

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* The commodities that are on the COCOM control list are those ECCN entries on the Commodity Control List, 15 C.F.R. § 399.1, Supp. No. 1, which are identified by the code letter "A". The fact that a particular commodity is an "A"" item does not necessarily imply, however, that license applications to export that commodity to a controlled country require full-scale COCOM review in all cases. Instead, there is a three-tiered structure of COCOM review, which depends on the technological level of the goods, the number of units to be exported, and the identity of the controlled country end-user. Proposed licenses for transactions which fit within the first tier of COCOM controls may be granted by the particular national export control authorities without prior COCOM approval. Instead, the national authorities must simply report the transaction to COCOM after the fact. Proposed licenses for transactions that fit within the second tier of COCOM controls must be submitted to COCOM, but, because of the technical levels of the goods, such license applications will be given "fast track" processing by COCOM. In effect, COCOM approval will be deemed to have been given unless a member nation objects within 30 days of the date on which the proposed license is submitted to COCOM. Finally, proposed transactions that involve the most sophisticated equipment and that fit within the third tier of COCOM controls are subject to full-scale "general exception" COCOM review. In this context, it should be noted that the vast majority of "general exception" cases currently pending before COCOM involve proposed licenses for United States exporters to ship sophisticated equipment to the People's Republic of China. In contrast, the New Act specifically provides that the United States will continue to object to granting general exceptions to the COCOM controls for proposed exports to the Soviet Union. See New Act § 103(15), to be codified as 50 U.S.C. App. § 2402(15).

that the COCOM approval threshholds for some commodities are delineated in certain advisory notes to specific Commodity Control List entries,* but those informal suggestions do not constitute a reliable basis on which to make export control determinations.**

With respect to those commodities and technical data for which a validated export license will still be required for exports to consignees in COCOM member nations, the New Act provides for "fast track" processing of license applications. Under section 111(e)(2) of the New Act,*** a license application to export controlled goods or technology to a COCOM member nation will be automatically approved 15 working days

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* Thus, with respect to electronic computers, the first tier of COCOM controls apparently applies to proposed transactions involving commodities with technical parameters below those specified in Advisory Note 9 to ECCN 1565A; the second tier to commodities with technical parameters above those specified in Advisory Note 9, but below those specified in Advisory Note 12 to ECCN 1565A; and the third tier to commodities with technical parameters above those specified in Advisory Note 12.

** Commerce Department officials have indicated informally that they intend to establish a new general license, G-COCOM, which will identify the commodities that are decontrolled for COCOM country exports under section 105(b)(2) of the New Act.

*** New Act § 111(e)(2), to be codified as 50 U.S.C. App. § 2409(o).

after filing of the completed application unless (i) the license has already been granted; (ii) the license has been denied and the applicant has been so informed; or (iii) the Office of Export Administration notifies the applicant that more time is required to process the application. If this third alternative is taken, the license automatically becomes valid 30 working days after the date of filing unless the license has already been granted or denied. This "fast track" processing for license applications for proposed exports to COCOM countries is to be implemented within four months of the effective date of the New Act (i.e., on or about November 12, 1985).*

As noted above, a key objective of Congress in enacting the New Act is to strengthen international cooperation in maintaining and enforcing controls on exports of sophisticated equipment and technology to controlled countries. To that end, section 105(h) of the New Act directs the President to enter into negotiations with other nations to obtain their cooperation in restricting exports of controlled commodities and technology to controlled countries, such as the Soviet Union. Where negotiations with one or more countries produce agreements on export controls comparable to the COCOM agreements, exports to such countries will be treated in a manner

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* New Act § 111(e), to be codified as, 50 U.S.C. App. § 2409(o).

similar to exports to COCOM. Thus proposed exports to such countries will be entitled to the benefits of the decontrol and "fast track" license processing provisions of the New Act, described above.* The nations to which this preferential export control regime will be applicable remain to be identified by implementing regulations, but, at the outset, it can be anticipated that Australia and New Zealand will be afforded COCOM-comparable status.

b. Diversion of Controlled Commodities: A key concern of Congress and of the export control authorities in the Department of Defense and Department of Commerce about the United States export control program is its effectiveness in preventing diversion of controlled commodities from their stated destinations and uses to unauthorized destinations and/or uses. For that reason, the New Act contains a number of provisions that are intended to control such unauthorized diversion.**

First, section 105(a)(1) of the New Act*** authorizes the Commerce Department to extend export controls to sales

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* Id., § 105(h), to be codified as, 50 U.S.C. App. § 2404(k).

** Similarly, concern about unlawful diversion was a primary factor in the Office of Export Administration's issuance of new regulations governing the distribution license procedure. See 50 Fed. Reg. 21562 (May 24, 1985).

*** New Act § 105(a)(1), to be codified as 50 U.S.C. App. § 2404(a)(1).

within the United States to embassies and consulates of, and corporations affiliated with the governments of, controlled countries (e.g., the Soviet Union). This provision was included in the New Act in response to evidence that the Soviet Union and certain of the communist countries of Eastern Europe have used their diplomatic missions and state-owned "commercial" enterprises in the United States as vehicles for acquiring sensitive United States technology.*

Second, section 105(i) of the New Act specifically directs the Commerce Department to impose an export denial order on all responsible parties where there is reliable evidence that goods or technology that are subject to national security controls have been diverted to an unauthorized use or consignee.**

Third, the New Act codifies the proscription on participating in any transaction involving the sale or transfer of goods or technology either within or outside of the United States where the transferor knows or has reason to know that the goods or technology will be shipped, transmitted or otherwise transferred to an unauthorized recipient.*** This

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* See, e.g., S. Rep. 98-170, 98th Cong., 1st Sess. 6.

** New Act § 105(i), to be codified as, 50 U.S.C. App. § 2404(1).

*** Id. § 112(b)(3), to be codified as 50 U.S.C. App. § 2410(b)(3)(A-B). See also id. § 117(5)(C).

provision, section 112(b)(3) of the New Act, constitutes a codification of section 387.4 of the Regulations,* and effectively establishes a duty of inquiry on the part of United States manufacturers and suppliers of controlled commodities to confirm that goods sold even in domestic transactions will not be exported to an unauthorized destination or recipient.**

Finally, section 121 of the New Act provides for the imposition of special sanctions on persons and firms that participate in the unauthorized diversion of controlled commodities and/or technology.*** Under section 121, any such person or firm that violates the national security provisions of the Export Administration Act or the Regulations may be

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* 15 C.F.R. § 387.4.

** This duty of inquiry under section 112(b)(3) of the New Act is equivalent to the duty of distribution license holders and their foreign consignees to screen their customers against the high diversion risk profile set forth in the new provisions of the Regulations governing distribution licenses. See 50 Fed. Reg. 21562, 21569 (May 24, 1985), amending 15 C.F.R. § 373.3(e)(1)(ix).

*** New Act § 121, to be codified as 19 U.S.C. §§ 1861 et seq. This provision also authorizes the imposition of import sanctions on foreign persons and firms that violate the COCOM controls. This broad extraterritorial assertion of export control jurisdiction by the United States was incorporated into the New Act in response to the perception by United States export control authorities that certain other COCOM nations have been lax or less than zealous in their enforcement of the COCOM controls.

denied the privilege of participating in the importation of goods or technology into the United States. It appears that this new import sanction is directed principally at those foreign persons and firms that ignore or knowingly violate the United States export controls, on the belief that they are outside the effective jurisdiction of the United States. Heretofore, the only sanction that could be invoked against foreign persons and firms was a denial of export privileges (i.e., an order prohibiting such persons and firms from participating in transactions involving the export of goods and technology from the United States). Under the New Act, however, foreign persons and firms that engage in unauthorized diversion of United States goods and technical data may be denied not only export privileges but also access to the United States market for their foreign-made goods.*

It should also be noted in this context that the New Act does not address the issue of Department of Defense review of license applications to export controlled commodities and technical data to Western destinations that are regarded as the principal points for diversion of such commodities and technology to restricted countries and/or to unauthorized uses

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* It is believed that the denial of access to the United States market may be a particularly effective sanction for detering diversion by foreign persons and firms, especially those that look to the United States as a key market for their products. See, e.g., S. Rep. 98-170, 98th Cong., 1st Sess. 19.

(such as nuclear weapons research and production). This issue arises out of section 10(g) of the Export Administration Act of 1979,* which authorizes the Department of Defense to review any category of license applications to export to any country goods or technical data which are controlled for national security reasons. During the legislative consideration of proposed export control legislation in 1983 and 1984, the House of Representatives sought to limit the Defense Department's authority under section 10(g) to proposed licenses to export controlled commodities and technology to restricted (i.e., communist) countries only. In contrast, the Senate took the position that greater participation by the Department of Defense in "West-West" licensing decisions was required in order to ensure that the risk of diversion of potentially strategic items was minimized.** The inability to reach a compromise agreement on the scope of the Defense Department's authority under section 10(g) of the Export Administration Act was a key factor in Congress' failure to meet export control legislation during the 1983-84 legislative session.

The New Act does not address this "section 10(g)" issue, apparently because the issue has been rendered moot by

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* 50 U.S.C. App. § 2409(g).

** See S. Rep. No. 98-170, 98th Cong., 1st Sess. 17.

a directive from the White House, which defines the scope of the Defense Department's review of West-West license applications. Although the terms of that directive are classified, it appears that the directive authorizes the Defense Department to review license applications to export commodities in six ECCN entries* to 15 non-communist destinations.**

c. Foreign Availability of Controlled Commodities: Much of the Congressional debate about the New Act and about the United States export control program generally has been directed to the question of maintaining controls over commodities and technology which are available in the international marketplace on an unrestricted basis. For that reason, a key element of the New Act is the mandate for on-going review of the Commodity Control List with a view to decontrolling those commodities that are freely available in comparable quantities and quality from foreign sources. Thus, section 107 reaffirms the mandate of the prior law to decontrol those commodities that are available from foreign sources.*** Indeed, under section 107(c) of the New Act, where it is determined that

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* I.e., Electronics and semiconductor manufacturing equipment (ECCN 1355A); microcircuits and integrated circuits (ECCN 1564A); computers (ECCN 1565A); silicon and other semiconductor materials and components (ECCN 1757A); sapphire substrates (ECCN 1757A); and carbon-carbon technology and manufacturing equipment.

** I.e., Austria, Finland, Hong Kong, India, Iran, Iraq, Libya, Liechtenstein, Malaysia, Singapore, South Africa, Spain, Sweden, Switzerland and Syria.

*** New Act § 107, to be codified as 50 U.S.C. App. § 2404(f).

particular commodities are freely available from foreign sources in sufficient quantity and comparable quality so as to render United States export controls ineffective, the controls must be removed, unless the President makes a formal determination that elimination of the controls would be detrimental to United States national security. Under such circumstances, the President effectively has 18 months in which to negotiate with other nations to eliminate such foreign availability. If the goods remain freely available from foreign sources at the end of this 18 month period, the goods are to be decontrolled.

In order to implement the foreign availability provisions of section 107, the New Act provides for the establishment of an Office of Foreign Availability within the Commerce Department.* This new Office of Foreign Availability, which replaces the current Foreign Availability Assessment Division, is charged with making foreign availability determinations for export control purposes. Such determinations will be made on the basis of Office of Foreign Availability investigations, initiated by the Office itself, by export license applicants and other interested members of industry, or by certification by one of the Technical Advisory Committees.

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* See id., § 107(d), to be codified as, 50 U.S.C. App. § 2404(f)(5).

Foreign availability investigations are to be conducted, and determinations made, in accordance with regulations issued by the Department of Commerce within six months of the effective date of the New Act.* Presumably, these regulations will be substantially similar to the proposed regulations published on March 15, 1985.** One important procedural matter is, however, specifically delineated in the New Act. Under section 107(b) of the New Act, the Office of Foreign Availability is to accept as valid, the representations of an export license applicant as to foreign availability, unless such representations are contradicted by reliable evidence.*** In effect, the burden of proof as to the existence or non-existence of foreign availability has been shifted from the exporter to the Department of Commerce.

The prior version of the Export Administration Act also contained a mandate to decontrol commodities on the basis of foreign availability, but it appears that this mandate was

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* Id., § 107(e), to be codified as, 50 U.S.C. App. § 2404(f)(7).

** 50 Fed. Reg. 10501-05 (March 15, 1985), adding 15 C.F.R. Part 391.

*** New Act § 107(b), to be codified as, 50 U.S.C. App. § 2404(f)(3). See also S. Rep. No. 98-170, 98th Cong., 1st Sess. 10.

not effectively implemented by the Commerce Department. As noted above, proposed regulations for making foreign availability determinations were not issued until last March.* At this point, however, Congress has clearly assigned high priority to the foreign availabiity issue, in order to eliminate those controls which inhibit United States exports but which do not materially enhance the national security objectives of the export controls, because of the availability of the goods in question from foreign sources. To that end, Congress has specifically assigned approximately ten percent of the Commerce Department's export control budget to foreign availability investigations and determinations.**

d. Decontrol of Commodities with Embedded Microprocessors: In the past few years, there has been considerable controversy about the propriety of controlling otherwise non-sensitive commodities solely because they contain a microprocessor or microcomputer. In that context, by amended regulations issued on December 31, 1984, the Office of Export Administration purported to decontrol equipment containing "embedded" microprocessors and microcomputers, provided that the operating parameters of such microprocessors

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* See 50 Fed. Reg. 10501-05 (March 15, 1985).

** See New Act § 119, to be codified as 50 U.S.C. App. § 2417(b)(1-2).

or microcomputers do not exceed certain specified limits.* Members of industry have argued, however, that the definition of an "embedded microprocessor" in the December 31, 1984 amendments is so restrictive that few commodities containing microprocessors have actually been decontrolled.

In response to these concerns, Congress added 105(j) to the New Act to provide:**

> Export controls may not be imposed under this section on a good solely on the basis that the good contains an embedded microprocessor, if such microprocessor cannot be used or altered to perform functions other than those it performs in the goods in which it is embedded.

More or less simultaneously with the incorporation of section 105(j) into the draft legislation which became the New Act, the Office of Export Administration issued amended regulations which purport to change the standards for controlling equipment containing embedded microprocessors.*** These amended regulations, which were issued on April 26, 1985, do not, however, change the definition of an "embedded microprocessor",

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* 49 Fed. Reg. 50608-50632 (December 31, 1984), amending, 15 C.F.R. § 399.1, Supp. No. 1, ECCN 1565A(h)(2)(i).

** New Act, § 105(j), to be codified as, 50 U.S.C. App. § 2404(m).

*** 50 Fed. Reg. 16468, 16472-73 (April 26, 1985), amending 15 C.F.R. § 399.1, Supp. No. 1, ECCN 1565A(h)(2)(i), Note.

and, as a result, it is difficult to determine how the control status of particular commodities is affected by the April 26, 1985 regulatory amendments. Similarly, it is not yet clear how, or whether, section 105(m) of the New Act affects particular commodities or relates to the recent regulatory amendments. The entire question of the control status of equipment containing microprocessors requires substantial clarification by the Office of Export Administration. Such clarification should be consistent with the legislative intent manifested in section 105(j) of the New Act that equipment containing a microprocessor which cannot be effectively utilized for any other purpose should not be controlled, unless the equipment itself performs potentially strategic functions.

e. Decontrol of Exports of Replacement Parts: Section 371.17 of the Regulations establishes general license GLR, which authorizes the export of repaired or replacement parts for commodities that were originally exported from the United States under a validated export license.* An important deficiency in the general license GLR procedure, however, is that it does not permit the export of controlled repaired and replacement parts for commodities that were originally exported from the United States under a general license (e.g., general license G-DEST). This deficiency has taken on

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* See 15 C.F.R. § 371.17.

increased importance in recent months with the decontrol of low-level computers and peripherals and equipment and instrumentation with "embedded" or "incorporated" microprocessors, embodied in the December 31, 1984 regulatory amendments.* Thus, although certain personal computers have been decontrolled by the December 31 amendments, a number of components for such products, such as circuit boards and semiconductor chips, remain controlled.** Replacement boards and chips for such personal computers may not therefore be exported under general license GLR if the computers themselves had been exported under general license G-DEST.

Section 105(d)(3) of the New Act is intended to remedy this gap in the general license GLR procedure. Under section 105(d)(3), the Office of Export Administration:***

> ... shall not require an individual validated export license for replacement parts which are exported to replace on a one-for-one basis parts that were in a good that has been lawfully exported from the United States.

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* 49 Fed. Reg. 50608-50632 (December 31, 1984).

** See 15 C.F.R. § 399.1, Supp. No. 1, ECCN 1564A (Commodity Control List entry for electronic assemblies, sub-assemblies, printed circuit boards and microcircuits).

*** New Act § 105(d)(3), to be codified as, 50 U.S.C. App. § 2404(e)(3).

Because the statute refers to goods that have been "lawfully exported from the United States", the decontrol of exports of replacement parts contemplated in section 105(d) of the New Act will apply to replacements for equipment properly exported either under a validated license or under a general license.

4. Foreign Policy Export Controls

Perhaps the most controversial aspects of the United States export control program are the foreign policy export controls. In furtherance of certain foreign policy objectives, controls have been imposed on the export to certain "target" countries of commodities and technology that would not otherwise be subject to export controls (e.g., for national security reasons). Such controls have proven controversial because the restricted goods and technology may be freely available from foreign sources, so that, in the opinion of many representatives of industry and members of Congress, the impact of the foreign policy export controls is felt more by United States exporters than by the country that is the target for the controls.* This controversy reached its zenith in 1982 when the United States sought to restrict the sale of oil and gas production and transmission equipment and technology and foreign-made equipment, which incorporated United States origin components or technology, to the Soviet Union

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* See, e.g., H.R. Rep. 98-257, 98th Cong., 1st Sess. 6-8.

for use on the Yamal natural gas pipeline.* These controls provoked significant diplomatic tensions between the United States and its Western European allies and ultimately proved largely unsuccessful.

As a result of the perceived problems with foreign policy export controls, Congress sought in the New Act to restrict the power of the President to impose such controls, except after consultation with Congress, members of industry and other nations, particularly the COCOM nations. Congress particularly sought to curtail the power of the President to impose foreign policy export controls that would affect existing contracts, as discussed below. Ironically, the foreign policy control provision of the New Act that is likely to have the most direct and immediate impact on United States exporters involves the reimposition by Congress of additional controls on exports to the Republic of South Africa, which President Reagan has heretofore opposed.

a. Foreign Policy Export Controls on Trade with South Africa: In recent months Congress has become increasingly impatient with the continued enforcement of apartheid in South Africa, and has sought to impose economic sanctions on South Africa until substantial progress is made in eliminating

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* The pipeline controls were initially imposed in January, 1982, and were ultimately withdrawn in November of that year. See 47 Fed. Reg. 141 (January 4, 1982), as amended by id., at 27250 (June 24, 1982). See also 47 Fed. Reg. 51858-61 (November 18, 1982).

apartheid. South African sanctions legislation has recently been passed by both Houses of Congress, and a compromise version of that legislation is awaiting final Congressional action, which may be forthcoming within the next 30 days.* Most of the public attention with respect to the imposition of restrictions on trade with South Africa has been focused on this proposed economic sanctions legislation, and the fact that new controls on exports to South Africa have already been imposed by section 108(n) of the New Act** has been largely overlooked. Since the controls embodied in section 108(n) have already entered into effect, however, United States exporters that do business with or in South Africa should be aware of these new foreign policy export controls.

The United States has maintained special foreign policy controls on exports to South Africa since 1977. The

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* H.R. 1460, 99th Cong., 1st Sess.; S. 995, 99th Cong., 1st Sess. This legislation would, among other things, prohibit the export from the United States of computers, computer software, and goods and technology to service computers directly or indirectly to the South African Government or any entity controlled by the South African Government. The economic sanctions embodied in this proposed legislation are substantially similar to the provisions contained in Title III of the House version of the proposed 1983 Export Administration Amendments Act, H.R. 3231. The dispute between the House and the Senate over the South African sanctions was a principal reason for Congress' inability to enact export control legislation in 1984.

** New Act § 108(n), to be codified as 50 U.S.C. App. § 2405(n).

controls that were in effect until July 12, 1985 (the effective date of the New Act) are set forth in section 385.4(a) of the Regulations.* These provisions of the Regulations incorporate various liberalizing amendments that were made on March 1, 1982, September 15, 1982 and January 20, 1983.** The New Act, however, reverses the liberalizations made by these 1982 and 1983 regulatory amendments, and provides that the controls on exports to South Africa that were in effect on February 28, 1982 are reinstated.*** This reinstatement of controls on exports to South Africa entered into force on the effective date of the New Act (July 12, 1985), and is to remain in effect for at least one year.****

The principal effect of section 108(n) of the New Act is to reinstitute a complete embargo on the export of all

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* 15 C.F.R. § 385.4(a).

** 47 Fed. Reg. 9201 (March 4, 1982); id., at 40538 (September 15, 1982); 48 Fed. Reg. ____ (January 20, 1983).

*** The February 28, 1982 South African controls are published in 15 C.F.R. § 385.4(a) (1982). Because those regulations are not generally available, they are reprinted as Appendix A to this Memorandum.

****New Act § 108(n), to be codified as, 50 U.S.C. App. § 2405(n).

United States origin goods and technology to, or for use by, military or police entities. This embargo covers all commodities, including those which could otherwise be exported to South Africa under a general license. This embargo extends not only to the armed forces and police, but also to the Arms Development and Production Corporation ("ARMSCOR") and its affiliated companies, the Department of Prisons, the National Intelligence Service and the Railways Police.* In addition, it appears that validated export licenses to export computers to, or for use by, South African Government entities that are engaged in the enforcement of apartheid will generally be denied.

b. Foreign Policy Export Control Review Criteria and Procedures: As noted above, a principal Congressional objective in structuring the foreign policy export control provisions of the New Act has been to curtail the power of the President to impose foreign policy controls. To that end, section 108(b) of the New Act provides that the President may impose, extend or expand foreign policy export controls only if he determines that the statutory review criteria are

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* See 15 C.F.R. Part 385, Supp. No. 2.

satisfied.* It should be noted that these review criteria appeared, in slightly different form, in the Export Administration Act of 1979, but that statute only required that the Preisdent take the various review criteria into consideration in imposing, expanding or extending foreign policy export controls.** In the opinion of many members of Congress, serious consideration by the Administration of the foreign policy export control review criteria has been the exception rather than the rule,*** and by the statutory

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* New Act § 108(b)(1), to be codified as, 50 U.S.C. App. § 2405(b)(1). Under this provision the President must determine that the proposed foreign policy export controls

(i) are likely to achieve the intended foreign policy purpose in light of other factors including foreign availability of the goods in question, and the foreign policy objectives cannot be achieved by other means;

(ii) are compatible with the foreign policy objectives of the United States;

(iii) are not likely to provoke a reaction among other countries that will render the proposed controls ineffective, or harm other United States foreign policy objectives;

(iv) will produce foreign policy benefits that outweigh any harm to United States export performance and/or to individual United States firms and their employees; and

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

** See Pub. L. No. 96-72, § 6(b), 93 Stat. 513.

*** See S. Rep. 98-170, 98th Cong., 1st Sess. 13-14.

amendment embodied in section 108(b) of the New Act, Congress sought to make such consideration mandatory.

Congress probably realized that a mere change in the statutory language might not produce the desired Presidential consideration of the statutory review criteria. For that reason, section 108(e) of the New Act provides that the President may impose, extend or expand foreign policy export controls only after consultation with Congress,* including the submission of a report to Congress specifying (a) the purpose for the proposed controls; (b) the bases for the determinations made under the statutory review criteria; (c) the plans for consulting with appropriate members of industry and with foreign nations (particularly the COCOM nations);** (d) the alternatives attempted to achieve the intended foreign policy objectives; and (e) the foreign availability of the goods to which the proposed controls will apply and efforts

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* New Act § 108(e), to be codified as, 50 U.S.C. App. § 2405(f).

** Sections 108(c) and 108(d) of the New Act provide for consultation with industry and with appropriate foreign countries respectively as part of the process of imposing or extending foreign policy export controls. Unlike the provisions of section 108(e) mandating consultation with Congress, the language of sections 108(c) and 108(d) is an expression of Congressional intent rather than a statutory directive.

made to eliminate such foreign availability.* As a practical matter, these Congressional consultation and reporting requirements are much more likely to achieve Congress' purpose in restricting the power of the President to impose foreign policy export controls than is the change in statutory language with respect to consideration of the review criteria, discussed above.**

c. Foreign Policy Export Controls and Contract Sanctity: Much of the impetus to curtail the President's power to impose foreign policy export controls stems from Congress' perception of the deleterious effects on the United States economy of those controls that have required United States exporters to abandon existing contracts. It is Congress' perception that foreign policy export controls which effectively abrogate existing contracts not only adversely affect particular United States exporters but also harm the

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* Section 108(g) of the New Act, to be codified as, 50 U.S.C. App. § 2405(h) provides for the elimination of foreign policy controls for those commodities for which the Department of Commerce has made an affirmative determination of foreign availability with respect to the country that is the target of the foreign policy controls.

** A joint resolution of Congress is required for the President to impose foreign policy export controls without observing the procedures and conforming to the requirements of section 108 of the New Act. See New Act § 108(o)(1), to be codified as, 50 U.S.C. App. § 2405(o)(1).

reputation of the United States as a reliable exporter in the international marketplace.* For that reason, the New Act limits the President's power to impose foreign policy export controls that affect existing contracts. Specifically, section 108(m) provides that the President may not prohibit the export of goods under any contract that is in effect on the date the President reports to Congress his intention to impose foreign policy export controls, unless the President certifies to Congress that (i) a breach of the peace poses a serious and direct threat to the interests of the United States; (ii) the curtailment of existing contracts and licenses will be instrumental in remedying the situation; and (iii) the controls will remain in effect only so long as the direct threat persists.** As a practical matter, it remains to be seen what effect this statutory mandate for contract sanctity will have, but section 108(m) of the New Act does represent a clear expression of Congressional intent that foreign policy export controls not be allowed to impair existing contracts or to further damage the United States' reputation as a reliable supplier.

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* See S. Rep. No. 98-170, 98th Cong., 1st Sess. 13; H.R. Rep. No. 98-257, 98th Cong., 1st Sess. 21.

** New Act § 108(m), to be codified as, 50 U.S.C. App. § 2405(m).

5. Enforcement

Enforcement of the Export Administration Act and the Regulations has become a matter of very high priority for the Reagan Administration. This enforcement priority is reflected in the New Act. As noted above, in an effort to prevent unauthorized diversion, the New Act specifically prohibits United States firms from participating in any transaction where they have reason to know that goods or technology may be illegally exported or diverted, and provides for the imposition of import sanctions on firms, particularly foreign firms, that engage in illegal diversion. Moreover, in an effort to improve the efficiency of the enforcement effort, the New Act attempts to clarify the allocation of enforcement responsibility between the Commerce Department's Office of Export Enforcement and the Customs Service, and to promote greater cooperation between those entities.

a. Allocation of Enforcement Responsibility: During the Congressional consideration of the proposed legislation which ultimately became the New Act, an area of major dispute between the House of Representatives and the Senate involved allocation of export control enforcement responsibility between the Office of Export Enforcement and the Customs Service. In that process, the Senate sought initially to vest enforcement responsibility with the Customs Service, on the ground that the Customs Service's extensive network of ties

with foreign customs agencies would facilitate the effort to prevent diversion.* In contrast, the House sought initially to vest enforcement responsibility with the Commerce Department's Office of Export Enforcement, on the ground that the Customs Service's Operation Exodus had been ineffective, and the Customs agents' lack of technical expertise had, on occasion, disrupted legitimate export transactions.**

Section 113 of the New Act attempts to resolve this enforcement controversy.*** Under section 113, the Customs Service is assigned primary responsibility for conducting investigations (e.g., of unauthorized diversions) outside the United States. The Office of Export Enforcement's extraterritorial role is limited to conducting pre-license checks of proposed foreign consignees and post-shipment verification of deliveries of exported goods at their stated destinations. Parenthetically, it should be noted that the Department of Commerce (through its Office of Antiboycott Compliance) may also conduct investigations of possible anti-boycott violations outside the United States.

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* See S. Rep. No. 98-170, 98th Cong., 1st Sess. 20-22.

** See H.R. Rep. No. 98-257, 98th Cong., 1st Sess. 5.

*** New Act § 113, to be codified as, 50 U.S.C. App. § 2411.

Within the United States, the Customs Service now has primary enforcement responsibility under section 113 of the New Act at ports of exit (e.g., airports, ports, border crossings, etc.) from the United States. The Office of Export Enforcement may participate in enforcement activities at ports of exit only with the specific concurrence of the Customs Service. In contrast, the Office of Export Enforcement has primary responsibility under section 113 for carrying out investigations and conducting other enforcement activities within the United States. In order to permit each of the two agencies to discharge its responsibilities efficiently, section 113(b) of the New Act specifically mandates the exchange of information between the two agencies. Heretofore the coordination and exchange of information between the two agencies has been, at best, imperfect.

Section 113 of the New Act also specifically vests agents of the Office of Export Enforcement with general police powers.* It appears that this statutory provision was included in the New Act in response to a recent decision by the federal district court in Sacramento, California, which held that agents of the Office of Export Enforcement did not have authority to obtain and execute search and seizure

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* Id., § 113(a)(3)(B), to be codified as, 50 U.S.C. App. § 2411(a)(3)(B).

warrants in the enforcement of the United States export controls.* Section 113(a)(3)(B) of the New Act specifically authorizes OEE agents (i) to execute search and seizure warrants; (ii) to make warrantless arrests upon probable cause to believe that the suspect has committed or is committing a violation; and (iii) to carry firearms. These powers are to be exercised under guidelines to be issued and approved by the Attorney General within 120 days of the effective date of the New Act.

b. Temporary Denial Orders: Section 388.19(a)(2) of the Regulations authorizes the Department of Commerce to issue temporary denial orders denying export privileges of any person or firm that is under investigation, or subject to administrative or judicial proceedings for alleged violations of the Export Administration Act, the Regulations or any license or order issued thereunder.** Such temporary denial orders are issued on an ex parte basis, based solely on the allegations of Commerce Department officials, but such an order can have a devastating impact on a person or firm that derives a substantial portion of its revenue from exporting

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* United States v. Whiting, Crim. No. S-84-183 MLS (E.D. Cal., March 7, 1985).

** 15 C.F.R. § 388.19(a)(2).

activities. Apparently, for that reason, Congress sought to establish stricter standards for the issuance and continued maintenance of temporary denial orders.

Under section 114(d) of the New Act,* a temporary denial order may be issued on an ex parte basis where it is necessary to prevent an imminent violation of the Export Administration Act, the Regulations, or any license or order issued thereunder. Such a temporary denial order may be maintained in force for no more than 60 days, unless renewed in writing to prevent an imminent violation and only after notice and an opportunity to be heard. The issuance or renewal of a denial order is appealable by the person or firm affected thereby, and any such appeal is to be handled on an expedited basis. Specifically, the presiding hearing officer (a Department of Commerce administrative law judge) must make his recommendation on any such appeal of a temporary denial order within 10 working days of the filing of the appeal, and the Secretary of Commerce must make his decision on the appeal within five working days after receipt of the administrative law judge's recommendations. It is anticipated that these procedural safeguards will help to minimize the harm caused to persons and firms that are subject to denial orders but that ultimately establish their innocence of any violation.

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* New Act § 114(d), to be codified as, 50 U.S.C. App. § 2412(d).

c. Exclusion of Decisions Imposing Administrative Sanctions from Judicial Review: Section 11 of the Export Administration Act* and section 387.1 of the Regulations** authorize the Department of Commerce to impose various administrative sanctions on persons and firms that violate the Act, the Regulations or the terms of any license or order issued thereunder. These administrative sanctions, which include fines of up to $10,000 per violation and restriction or denial of export privileges, may be imposed only after formal administrative proceedings conducted in accordance with the procedural requirements of the Adminstrative Procedure Act.***

Heretofore, there has been some doubt about the appellate remedies available to respondents in a Commerce Department administrative proceeding. Specifically, because such administrative proceedings can culminate in the imposition of severe sanctions, the question has arisen as to whether respondents in such a proceeding are entitled to judicial review of any unfavorable administrative decision.

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* 50 U.S.C. App. § 2410(c).

** 15 C.F.R. § 387.1(b).

*** See 50 U.S.C. App. § 2410(c)(2)(B), providing that Commerce Department administrative sanctions may be imposed only after notice and an opportunity for a hearing in accordance with 5 U.S.C. §§ 554-557.

The New Act, however, lays to rest any uncertainty in this area. Under section 114(3) of the New Act,* decisions of the Secretary of Commerce with respect to the imposition of administrative sanctions are final, and not subject to judicial review.

6. Administrative Procedures

A major concern of both Congress and members of industry is that the delays in the export licensing process have had an adverse impact on the export performance of the United States. It has been asserted by various industry representatives that United States firms have lost major contracts to foreign competitors as a result of delays in the processing of export license applications. In response to these concerns, Congress has attempted to streamline the export licensing process. Congress' desire to expedite the processing of license applications is manifested in a number of provisions of the New Act. For example, as noted above, the New Act provides for increased use of special licensing procedures, by directing the Commerce Department to reduce eligibility requirements for such special licenses. Similarly, the process of exporting controlled commodities to COCOM countries should be substantially facilitated by the

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* New Act § 114(3), to be codified as, 50 U.S.C. App. § 2412(c)(1).

decontrol of a large number of items, and the "fast track" processing of license applications, for COCOM country exports embodied in sections 105(b)(2) and 111(o) of the New Act. The importance of these COCOM amendments becomes clear when it is noted that heretofore license applications for exports of controlled commodities and technology to COCOM countries have accounted for approximately 30 percent of all export license applications.* Moreover, the New Act establishes a series of much-shortened deadlines for Commerce Department processing of export licensing matters, as discussed below.

a. Export License Processing Deadlines: Section 10 of the Export Administration Act of 1979** established a series of deadlines by which the Department of Commerce and where applicable, other government agencies, were required to complete various steps in the export licensing process. The New Act provides for a shortening of the time permitted for each of these steps. Thus, section 111(a) of the New Act provides for a general reduction of processing deadlines from 90 to 60 days; from 60 to 40 days; and from 30 to 20 days.***

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* See H.R. Rep. No. 98-257, 98th Cong., 1st Sess. 6.

** 50 U.S.C. App. § 2409.

*** New Act § 111(a), to be codified as, 50 U.S.C. App. § 2409.

The effects of these amendments should be significant. For example, an export license application for which interagency review is not required must now either be approved or denied within 60 days of filing, rather than within 90 days as heretofore permitted.

It remains to be seen whether the Department of Commerce will be able to handle export license applications within the reduced time lines established by the New Act, without a substantial addition of new licensing officers. United States exporters should be aware, however, of the procedures set forth in section 10(j) of the Export Administration Act* for both administrative and judicial relief in the event that the Commerce Department fails to process an export license within the statutory time lines.

b. Interagency Review: As noted above, section 10(g) of the Export Administration Act of 1979 authorizes the Department of Defense to review export license applications for commodities and technical data that are controlled for national security reasons. Pursuant to section 10(g) the Defense Department is actively involved in reviewing license applications to export commodities and technical data to controlled countries, and also reviews applications to export certain categories of commodities to specific high diversion risk Western countries, as described above. It has been the

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* 50 U.S.C. App. § 2409(j).

perception of members of Congress and industry that this interagency review process has substantially delayed the processing of a number of export license applications. For that reason, section 111(b)* of the New Act embodies two important amendments that are designed to expedite the interagency review process. First, license applications that do require interagency review are to be submitted to the appropriate agencies (i.e., the Defense Department, the State Department, etc.) immediately upon receipt in completed form by the Commerce Department. Thus, the other agencies are to conduct their review concurrently with the Commerce Department. Heretofore, such interagency review has been conducted after initial review by the Commerce Department, and, in fact, the Commerce Department was required to provide its analysis and recommendations at the time an export license application was submitted to another agency. Second, the New Act requires other agencies to complete their review process and submit their recommendations to the Commerce Department within 20 days of their receipt of the license application. Thus, the interagency review process should generally be completed while the Commerce Department is completing its internal license application processing.

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* New Act § 111(b)(2)-(3), to be codified as, 50 U.S.C. App. § 2409(d)-(e).

c. Procedures for Increasing Commerce Department Responsiveness to Industry: Congress has also included several provisions in the New Act which are intended to increase the responsiveness of the Department of Commerce to the needs of industry. Specifically, in section 111 of the New Act, Congress has established deadlines for the first time for Commerce Department responses to export control and licensing inquiries.* Under the new statutory provisions, requests for classification determinations for particular commodities or technology are to be answered within 10 working days of receipt by the Commerce Department. Requests for information about the export licensing requirements of particular transactions are to be answered within 30 working days of receipt. It is hoped that these deadlines will lead to a considerable improvement in Commerce Department response time. In the past, such inquiries have been allowed to languish, sometimes for many months.

One other legislative effort to improve accessibility to, and the responsiveness of, the Commerce Department should also be noted. Section 122 of the New Act provides that the Office of Export Administration should expand its office hours for at least four days per week to cover normal business hours

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* New Act § 111(e), to be codified as, 50 U.S.C. App. § 2409(1) (1)-(2).

throughout the United States.* Although this statutory amendment may not appear to be of great significance, it should substantially facilitate communications between the Department of Commerce and the many firms on the West Coast that export controlled commodities and technical data.

7. Effective Dates

The New Act was signed into law on July 12, 1985 and entered into effect for most purposes on that date. As noted above, however, a number of provisions of the New Act are not self-executing and require the issuance of implementing regulations before they will have any practical effect on the United States export control program. Moreover, certain provisions, such as the "fast track" processing of COCOM country license applications, have a delayed effective date, as specified in the New Act.**

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* New Act § 122.

** For example, the fast track license processing for licenses to export controlled commodities or technology to COCOM countries goes into effect on November 12, 1985. See New Act § 111(o)(5), to be codified as, 50 U.S.C. App. § 2409(o)(5).

Like prior export control legislation, the New Act contains a "sunset provision". Under section 120, the New Act expires on September 30, 1989.*

Respectfully Submitted

BAKER & McKENZIE

By: John F. McKenzie

August 15, 1985

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* Id., § 120, to be codified as, 50 U.S.C. App. § 2419.

THE WASHINGTON POST MONDAY, JANUARY 12, 1987

export controls

Panel Hits U.S. Curbs On Exports

Limits on High-Tech To East Bloc Called Costly, Ineffective

By Stuart Auerbach
Washington Post Staff Writer

A National Academy of Sciences study has found that attempts to keep high technology from Soviet bloc nations have not significantly improved America's national security, but have cost the country 188,000 jobs and $9 billion a year and "are having an increasingly corrosive effect" on U.S. relations with its allies.

The academy panel recommended ending the Defense Department's "de facto veto" over technology sales and easing U.S. controls on strategic exports to match those of the NATO allies.

The committee, headed by former Air Force chief of staff Gen. Lew Allen Jr., includes former Defense secretary Melvin Laird and Bobby Ray Inman, former director of the National Security Agency and deputy director of the Central Intelligence Agency. It also includes a number of business executives and academics.

Veteran defense officials and others on the panel questioned Pentagon estimates that export controls saved the United States billions of dollars in defense costs.

The benefit to U.S. national security from stringent export controls "is feasible only in the shrinking number of cases in which the United States is the only country possessing the technology," according to the study, which was made available to The Washington Post in the form of a preliminary draft report.

Export restrictions "have greater potential to damage the U.S. economy than . . . reduce exports to the East bloc," the draft report said.

"Executive-branch decisions concerning national security export controls [should] accord greater importance than they currently do to maintaining U.S. technical strength, economic vigor and allied unity," the study concluded.

The study sides with American business in a dispute that has split the Reagan administration, with the Commerce Department and high-technology companies pressing for export controls to be relaxed and the Pentagon insisting they be strengthened.

The finding echoed complaints by William Root, a longtime State Department official concerned with export control. Root resigned over the Pentagon's domination of Reagan administration policy in the field.

The study was started in 1984 after Congress, also split on the issue, failed to agree on how to renew the Export Administration Act, forcing the government to use its emergency powers to maintain controls until Congress acted on a compromise measure in 1985.

The defense and intelligence backgrounds of several members of the NAS committee gives the findings more weight than if they had come from a group solely composed of academics and business executives.

Inman started the trend toward strict controls on high-technology exports in 1982 when he released a CIA report that found a "hemorrhage" of U.S. technology to the Soviet Union.

Coupled with another report investigating the increasing dependence of the military on foreign technology—especially semiconductors, which are vital for all defense systems—the study is expected to play a major role in the upcoming debate on U.S. competitiveness in the world economy.

Despite the leadership of former defense and intelligence officials, Assistant Defense Secretary Richard N. Perle denounced the NAS report because there are business representatives on the committee, including officers of Hewlett-Packard Co. and General Electric Co.

Perle described the report as "comments by a group of largely interested parties about public policy that affects their financial interests." He added that the membership is "predominantly represent-community." He said there is "a tremendous amount of unproven assertions in this report . . . . We had misgivings about the report from the very beginning."

The study was partially funded by the Defense Department, but Perle said the money came from a Pentagon branch headed by a former undersecretary for research and engineering, Richard D. DeLauer, who opposed Perle in internal debates on the value of export controls. DeLauer, now in private industry, "did not care for the policy of this administration" on export controls, Perle said.

Nonetheless, the NAS panel findings mirror the results of a less-extensive study that the Center for Strategic and International Studies, a conservative think tank, completed more than a year ago.

The NAS emphasized in its study that the United States' economic well-being depends on being able to sell overseas. U.S. dominance in high technology has been eroded by Japan, Western Europe and the newly industrialized nations of Asia and the Pacific. Until 1981, a booming U.S. high-technology trade surplus helped offset deficits in other sectors, the study said. But that surplus decreased, and high-technology trade ran in the red for the first time last year, it noted.

"Export controls are not a leading cause of this recent decline," the study said, "but they may tend to exacerbate the U.S. trade deficit by contributing to an environment that discourages export activities by U.S. firms."

The study found that export controls provided "clear incentives" against buying American products if other countries can supply comparable products. "The trend toward non-U.S. sourcing is already evident in Europe," the draft report said.

A special study included in the draft report found that "a reasonable estimate of direct short-run economic costs to the U.S. economy in 1985 was in the order of $9.3 billion." That translated to 188,000 American jobs lost as a result of export controls and—when the multiplier effect of that spending on other business is included—an overall drag on the nation's economic vitality of $17.1 billion, the study said. William Finan, an economic consultant specializing in high-technology issues, conducted the special study for the NAS com-

LEW ALLEN JR.
. . . headed study of export controls

During the panel's European trip, the report said, it "heard repeatedly . . . that companies are in the process of switching to non-U.S. sources for items controlled by the United States," the draft report continued.

"These actions stem not only from concerns about the additional costs and delays imposed by U.S. export controls, but even more importantly from a view that the United States is not a reliable supplier—a view that was given credence by U.S. efforts to control gas and oil equipment in recent years in the face of strenuous opposition by our allies."

The NAS committee said the United States and its allies hold a five- to 10-year technological advantage over the Soviet Union.

The NAS report cited Defense Department studies estimating the impact of export controls on the Soviet Union. These studies said the Soviet military would save between $500 million and $1 billion a year if it were able to obtain technology denied it by export controls. That would require additional U.S. defense spending of $7.3 billion to $14.6 billion to match the Soviet advances, the Pentagon studies indicated.

But the NAS panel questioned these estimates, along with higher ones contained in another Pentagon study, and said the Defense Department declined to supply backup data.

"Despite an intensive acquisition effort," the report said, "the Soviets in general have not succeeded in matching the West's technology edge . . . . It is unlikely that an influx of western technology will enable the Soviet Union to substantially reduce the current gap—as long as the West continues its own pace of innovation."