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A BASIC DISCUSSION OF U.S. EXPORT REGULATIONS: WHAT EVERY CLIENT NEEDS TO KNOW

KAREN R. SMITH*

I. INTRODUCTION

EVERY export of goods and technology is subject to some form of U.S. export control. Controls may range from slight to stringent, depending on the type of product being exported and its destination. Nevertheless, controls apply to all exports and, as a result, every exporting company needs to be aware of the U.S. export laws and their effect on that company's business. In addition, every exporting company needs to have an export compliance program designed to monitor and maintain compliance with the applicable laws. The degree of sophistication of the compliance program needed will vary considerably from one company to the next, depending on the level of export controls to which the company is subject. Companies engaged in exports of sophisticated, high-technology products will need to be intimately familiar with a wide variety of U.S. export laws and monitor those laws on a regular basis through a well-developed compliance program. Other companies, engaged in exports of low-technology goods to major U.S. trading partners, will usually need only a simple export compliance program.

This Article will discuss the basic U.S. export control framework for commercial goods and technology. This area of the law is complex, and this Article seeks only to alert the reader to the most common aspects of the U.S. export control system; it should not be mistaken as a comprehensive guide for exporters.

II. WHAT IS CONTROLLED BY U.S. EXPORT LAWS?

U.S. export laws control a wide variety of transactions, some of which would be recognized as an "export" by the average person, and some of which would not. The following are examples of transactions that are considered "exports" under U.S. law: exports of goods from

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the U.S.; exports of technical data from the U.S. (whether in tangible or intangible form); reexports of U.S.-origin goods or technical data from one foreign country to another foreign country; transfers of U.S.-origin goods or technical data from one foreign purchaser to another foreign purchaser in the same country; transfers by a U.S. person in a foreign country of U.S. or foreign goods or technical data to another foreign country; and transfers of goods or technical data within the U.S. for the purpose of evading export controls.

A. Export Controls Apply to Both Goods and Technical Data

Give a man a fish, he eats for a day. Teach a man to fish, and he eats for life.

- Ancient Chinese Proverb.¹

The concept expressed by the Chinese philosopher was clearly understood by Congress, and has direct relevance to the structure of U.S. export controls today. Congress recognized that selling the technology needed to make a product itself could be equally damaging to U.S. interests. As a result, U.S. export controls restricted both the export of goods and technology,² regardless of whether such technical data is in tangible or intangible form.

The Export Administration Regulations³ (Regulations) define "technical data" as "information of any kind that can be used, or adapted for use, in the design, production, manufacture, utilization, or reconstruction of articles or materials."⁴ "Tangible" technical data is data embodied in a physical form, such as a model, prototype, blueprint or operating manual.⁵ "Intangible" technical data is the same type of information in an intangible form, for example, operational information memorized by an employee, but not committed to print, or it may be a technical service.⁶ All software is considered technical data.⁷

Exports of technical data can occur whenever technical data is transferred to a foreign person.⁸ For example, exports are deemed to

1. The original quote is an ancient Chinese proverb, origin unknown. It was re-popularized by President John F. Kennedy, who used it as a rallying slogan during the creation of the Peace Corps.

2. See 15 C.F.R. § 770.3(a) (1991).

3. 15 C.F.R. §§ 730-799 (1991).

4. 15 C.F.R. § 779.1(a) (1991).

5. *Id.*

6. *Id.*

7. *Id.*

8. 15 C.F.R. § 779.1(b) (1991).

have occurred in the following situations: when operating manuals, blueprints or similar technical documents are sent to a foreign purchaser of U.S. products; when a sales representative takes written product specifications with him on a foreign sales trip, and shows those specifications to a prospective foreign buyer (even if the foreign buyer does not keep a copy of the specifications); when a prospective foreign buyer tours a U.S. facility, and during the tour is allowed to see tangible evidence of technical data, or hear discussions of technical data; and when a U.S. employee discusses technological data with a foreign person, regardless of whether the discussion occurs in the U.S. or in a foreign country.

III. WHO IMPLEMENTS EXPORT CONTROLS?

The United States Constitution grants Congress the power "To regulate Commerce with foreign Nations."⁹ Accordingly, the federal government regulates all exports, and authority for overseeing and regulating exports is divided among a number of federal agencies. Appendix One lists the various agencies and their areas of responsibility.¹⁰ The jurisdiction of the agencies may overlap, and tie-breaking rules have been instituted to resolve most, but not all, of these jurisdictional conflicts.

As Appendix One indicates, most federal agencies regulate a narrow group of exports. The exception is the Department of Commerce, which is a "catch all" agency charged with regulating virtually all exports not regulated by any other agency.¹¹ As a result, the Department of Commerce has jurisdiction over a wide range of goods, covering everything from horses for export by sea¹² to biohazard containment equipment.¹³ The Department of Commerce is the agency most companies will come in contact with when exporting commercial goods or technology, and it holds a leading position in the administration and enforcement of U.S. export control laws. The remainder of this Article will focus on export controls administered by the Department of Commerce.

IV. DEPARTMENT OF COMMERCE EXPORT CONTROLS-THE EXPORT ADMINISTRATION ACT AND REGULATIONS

U.S. export controls for general commercial goods are set forth in both the Export Administration Act of 1979, as amended¹⁴ (Act), and

9. U.S. CONST. art. I, § 8.

10. This table was produced by the author.

11. 50 U.S.C. § 2403 (1988).

12. 15 C.F.R. § 799.1 (Supp. I 1991) ECCN OA80D. § 799.1 has been revised by incorporating a new system of ECCN numbers. The revisions are located in 56 Fed. Reg. 42,824 (1991).

13. 15 C.F.R. § 799.1 (Supp. I 1991) ECCN 1B71Eb.

14. See *supra* note 3. According to its provisions, the Act terminated on September 30,

its accompanying regulations (contained in the Regulations¹⁵). Responsibility for administration of the Act and the Regulations has been delegated to the Department of Commerce.

A. *Objectives Under the Act*

The Act has three major objectives:

- (A) To restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States;
- (B) To restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and
- (C) To restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.¹⁶

Controls referred to in category (C) above, generally referred to as "short supply controls", restrict exports of goods that are in short supply in the U.S. Goods controlled for short supply reasons are usually natural resources or organic products, rather than manufactured goods. For example, export of the following are restricted for short supply controls: horses for export by sea,¹⁷ certain inorganic chemicals,¹⁸ certain types of petroleum¹⁹ and natural gas,²⁰ and red cedar.²¹ Short supply controls make up a small minority of export controls.²²

The majority of the Act and the Regulations focus on export restrictions for national security or foreign policy reasons (categories (A) and (B) above). National security and foreign policy concerns are frequently commingled; clear distinctions between the two do not exist. In fact, in many instances, exports will be restricted for both national security and foreign policy reasons. National security controls can apply to all countries, including both those with which the U.S. has traditionally been at military odds and those countries which have been traditional U.S. allies. Foreign policy controls can be similarly broad in scope.

1990. However, President Bush issued an Executive Order on September 30, 1990, effectively extending the Act until such time as pending legislation revising the Act is passed. Exec. Order No. 12,730, 3 C.F.R. § 305 (1991). New legislation was proposed in 1990 but was vetoed by President Bush. Legislation was again proposed in 1991, but has not been passed into law.

15. 15 C.F.R. §§ 730-799 (1991).

16. 50 U.S.C. app. § 2402(2) (1988). *See also* 15 C.F.R. § 770.1(a) (1991).

17. 15 C.F.R. § 799.1 (Supp. 1 1991) ECCN 0A80D.

18. 15 C.F.R. § 799.1 (Supp. 1 1991) ECCN 1C80D.

19. 15 C.F.R. § 799.1 (Supp. 1 1991) ECCN 1C81D.

20. 15 C.F.R. § 799.1 (Supp. 1 1991) ECCN 1C83D.

21. 15 C.F.R. § 799.1 (Supp. 1 1991) ECCN 1C88D.

22. Regulations regarding short supply controls can be found at 15 C.F.R. § 777 (1991).

National security controls apply to those products that contribute to the military potential of any other country which would prove detrimental to the security of the U.S. In the purest sense, these controls would apply to military goods, arms; ammunition and similar products. In practice, however, national security controls impact a wide variety of products that have an *indirect* impact on military goods, and may have non-military uses as well, such as certain types of software,²³ computers,²⁴ and general purpose electronic equipment.²⁵

Foreign policy controls are politically-based restrictions on exports, imposed to further the foreign policy of the U.S. For example, in furtherance of the U.S. foreign policy prohibiting trade with North Korea, Vietnam and Cuba, an embargo is in effect for virtually all exports to these destinations.²⁶ However, foreign policy controls are frequently indistinguishable from national security controls. For example, the U.S. maintains foreign policy-based restrictions on nuclear explosives, missile technology and items related to biological warfare.

Due to the overlapping and complicated restrictions imposed by national security controls and foreign policy controls, companies must review *all* aspects of the Regulations before determining whether their products are subject to restrictions. These determinations cannot be made by the exporter on an intuitive basis.

V. HOW ARE EXPORTS REGULATED UNDER THE ACT AND REGULATIONS?²⁷

The U.S. controls exports through the use of licenses. The Regulations state that, except for certain exceptions specifically set forth in

23. See, e.g., 15 C.F.R. § 799.1 (Supp. I 1991) ECCNs 2D01A, 2D02A, 2D18A.

24. 15 C.F.R. § 799.1 (Supp. I 1991) ECCN 4A04A.

25. 15 C.F.R. § 799.1 (Supp. I 1991) ECCN 3A02A.

26. North Korea, Vietnam and Cuba are members of Country Group Z. A review of the Commerce Control List at 15 C.F.R. § 799.1 (Supp. I 1991) reveals that virtually all products listed in the Commerce Control List are prohibited from export to Country Group Z.

27. The Act outlines the principles of U.S. export control law. The Regulations provide the detailed rules by which exporters must conduct their business. The Regulations are printed in the Code of Federal Regulations, at 15 C.F.R. §§ 730-799. However, an important note of caution—the C.F.R. volume containing the Regulations is printed just once each year. During the course of the year, updates to the Regulations are published in the *Federal Register*, which is printed daily. In an average year, there may be 100 or more updates to the Regulations printed in the *Federal Register*, containing over 1,000 individual amendments to the text of the Regulations. Most amendments are effective as of the date of publication in the *Federal Register*. For legal purposes, exporters are deemed to be aware of all amendments to the Regulations published in the *Federal Register*. It is imperative that *Federal Register* amendments to the Regulations be tracked throughout the year, and that the Regulations, as printed in the C.F.R., be read in conjunction with the *Federal Register* amendments.

the Regulations, "the export from the United States of all commodities, and all technical data . . . is hereby prohibited unless and until a general license authorizing such export shall have been established or a validated license or other authorization for such export shall have been granted by the Office of Export Licensing."²⁸ As indicated, the Regulations provide two main categories of licenses: General Licenses and Validated Licenses.

A. *General Licenses*

Qualifying goods and technical data may be exported under a General License.²⁹ There are over twenty different General Licenses for goods,³⁰ and two General Licenses for technological data.³¹ The various General Licenses for goods provide specialized designations for exports of different types of goods. For example, General License "G-DEST"³² may be used for shipments of goods to destinations not requiring a Validated License;³³ General License "BAGGAGE" permits individuals leaving the U.S. to take personal baggage with them when they leave the country;³⁴ and General License "GLV" covers exports of limited value.³⁵ The two General Licenses for technical data are General License GTDA, which covers exports of technical data available to the world at large, such as data published in books or journals;³⁶ and General License GTDR, which covers exports of technical data that is not available to the public, but nevertheless qualifies for a general license, such as qualifying proprietary information (*e.g.*, blueprints).³⁷

If, after reviewing the Regulations, a company determines that the product (or technology) to be exported qualifies for shipment under a General License, the company must identify the correct General License on its shipping documents, and should keep an internal record of the license relied upon for each shipment. General Licenses are self-certified by the exporter; no application is filed with the Department

28. 15 C.F.R. § 770.3(a) (1991).

29. A discussion of how to determine whether goods qualify for a General License may be found in Section VI of this Article.

30. *See* 15 C.F.R. § 771 (1991).

31. *See* 15 C.F.R. § 779 (1991).

32. G-DEST is a catch-all license, covering qualifying exports that do not fit within the scope of the more specialized General Licenses.

33. 15 C.F.R. § 771.3 (1991).

34. 15 C.F.R. § 771.6 (1991).

35. 15 C.F.R. § 771.5 (1991).

36. 15 C.F.R. § 779.3 (1991).

37. 15 C.F.R. § 779.4 (1991).

of Commerce and no document is issued by the Department of Commerce to the exporter.³⁸

The majority of products exported from the U.S. qualify for some form of General License. Because General Licenses are self-certified, many companies export their products with little or no knowledge of the Act or Regulations. Their products qualify for export under a General License by chance, not because the exporters actually determined that a General License was available, as required under the Regulations.³⁹ However, each use of a General License (whether such use is by design or by chance) constitutes a certification by the exporter that all of the terms of that license have been met.⁴⁰ The company will be liable if that certification proves incorrect.

In addition, even if a company remains in compliance with the terms and conditions of its General License, the company must be aware of, and take into account, special individual and country restrictions on its exports which may prohibit a particular export, regardless of whether that export otherwise qualifies for export under a General License.⁴¹ Severe penalties can be imposed for violations of these restrictions.⁴² Ignorance can thus be a dangerous form of bliss for exporting companies.

B. Validated Licenses

Under certain circumstances, a company's review of the Regulations may indicate that its product (or technical data) does not qualify for export under a General License, and that a Validated License will be required. There are four main types of Validated Licenses. Individual Validated Licenses authorize the export of a specific product (or technical data) on a specific date to an identified purchaser.⁴³ Project Licenses permit the export of all goods (and technology) needed in order to perform a specific activity (such as a construction project) for a limited period of time, usually one year.⁴⁴ Distribution Licenses permit repeated exports of an identified product (or technical data) to an

38. See 15 C.F.R. § 771.1 (1991). However, it is important to note that a General License is not applicable to the export of commodities or technical data under the licensing jurisdiction of agencies other than the Department of Commerce.

39. See 15 C.F.R. § 770.3(a) (1991).

40. See 15 C.F.R. § 771.2(b) (1991).

41. Special individual and country restrictions are discussed in Sections VI (b) and (c) of this Article.

42. See *infra* text and accompanying notes 82-83.

43. 15 C.F.R. § 772.2(b)(1) (1991).

44. 15 C.F.R. § 772.2(b)(2) (1991).

identified purchaser for a period of one year.⁴⁵ Lastly, Service Supply Licenses authorize the export of spare or replacement parts for equipment previously sold, for a limited period of time.⁴⁶

In order to obtain a Validated License, the exporter must file a request for a Validated License with the Department of Commerce, Office of Export Licensing.⁴⁷ Validated Licenses are not self-certified by the exporter; the exporter may not ship its product unless and until a Validated License is actually issued by the Department of Commerce.⁴⁸

Validated Licenses are not automatically granted upon application by the exporter. Products requiring Validated Licenses are those that present particularly significant national security or foreign policy concerns to the U.S. All relevant facts will be considered by the Department of Commerce when making the determination of whether to grant a Validated License. An application for a Validated License may be rejected, in whole or in part, by the Department of Commerce if it deems such action necessary "to fulfill the purposes of the export control program" set forth in the Regulations.⁴⁹ There is no single objective standard for approval or rejection of Validated License applications. Through discussions with the Department of Commerce, the exporter may be able to amend the terms of the proposed sale to alleviate the Department's concerns, in which case, the Validated License may be granted.⁵⁰ At this level of exporting, however, Validated License requests are not routine; each request will typically involve written and oral presentation of information and assurances designed to facilitate the issuance of the Validated License.⁵¹ If an exporter disagrees with the Department of Commerce's decision to deny its application for a Validated License, the exporter has the right to appeal the Department's decision.⁵²

Validated Licenses are more restrictive than General Licenses, typically requiring an exporter to ship specifically identified products or technical data within a limited period of time to an identified foreign

45. 15 C.F.R. § 772.2(b)(3) (1991). The purchasers must be foreign distributors or users of the licensed goods.

46. 15 C.F.R. § 772.2(b)(4) (1991).

47. See 15 C.F.R. § 772.1 (1991). This office, however, does not issue export licenses for commodities subject to the export licensing jurisdiction of other government agencies.

48. See 15 C.F.R. § 772.1(b) (1990).

49. 15 C.F.R. § 772.1(d) (1991).

50. 15 C.F.R. § 789.2 (1990).

51. *Id.*

52. See 15 C.F.R. § 789 (1991). The information in support of the appeal should include a statement showing why the denial of the license has an adverse effect and why the license should be granted.

purchaser. In addition, Validated Licenses are usually transaction-specific; in other words, they are good only for the specific transaction or series of transactions listed on the license. They may not be reused or transferred, even if a subsequent transaction is identical to the transaction for which a Validated License was previously issued.

VI. HOW DOES AN EXPORTER DETERMINE WHICH LICENSE IS REQUIRED?

A. *Review of Commerce Control List and Determination of the Applicable ECCN*

Assuming the company is familiar with the general provisions of the Act and Regulations, each determination of which license is required to export a particular product must start with a review of the Commerce Control List (CCL).⁵³ The CCL is a comprehensive list of all products (and related technology) regulated by the Department of Commerce.⁵⁴ It divides products into ten general categories, a list of which is provided in the following section of this Article. It divides each of those ten general categories into four subcategories, and then lists each product according to its characteristics under the applicable general and subcategory. Each product is identified by a code number, known as an "Export Control Classification Number" or "ECCN".⁵⁵ ECCN listings describe, among other things, what the product is, what specifications the product must have to fall within that ECCN, which countries the product may (or may not) be exported to, and what type of license is required for exports to each country.

The CCL routinely needs to differentiate among countries, allowing certain exports to one country while denying the same exports to another country, for national security or foreign policy reasons. To simplify matters, the Regulations divide all countries in the world into "Country Groups" identified by the letters Q, S, T, V, W, Y and Z.⁵⁶ Countries are assigned to a particular country group based on an analysis of the political and military risk posed by that country. ECCN

53. 15 C.F.R. § 799.1 (1991).

54. 15 C.F.R. § 799.1(a) (1991).

55. 15 C.F.R. § 799.1(b) (1991).

56. The country group list is found at 15 C.F.R. § 770 (Supp. I 1991). Canada is not included in any country group and is referred to by name throughout the Export Administration Regulations.

listings will state that the products are restricted for export to "Country Groups ____, ____ and ____, " rather than naming each restricted country individually.

After a full review of the CCL, the exporter will be able to identify each product it sells by the product's applicable ECCN number. This ECCN designation will remain constant for that product unless (i) the product is changed (e.g., upgraded, computerized, hardened for harsh conditions); or (ii) the ECCN specifications relating to that product are changed. If neither of these events occur, the exporter may designate its product under the same ECCN year after year. The ECCN designation is product-specific and does not vary from sale to sale.

The restrictions set forth in the applicable ECCN designation for each product will provide the exporter with information regarding the license(s) required to export that product to particular countries. However, in addition to the license information provided in the ECCN listings, the exporter must be sure to review the special country restrictions and the special individual restrictions before each export transaction.

B. Review of Special Country Restrictions

Before each sale, the exporter should review all special country restrictions to determine whether the export information listed in the ECCN governing its product has been overridden or augmented by these special rules. Special country restrictions identify particular countries by name, and establish special rules in addition to those set forth in the ECCN listings with respect to exports to that country.⁵⁷

Although the Department of Commerce attempts to coordinate the restrictions listed in the ECCNs with the special country restrictions, it is not always able to do so. Exporters should not rely on the ECCN listings alone to alert them to special country restrictions; the restrictions themselves must be checked. Special country restrictions overrule contradictory provisions in the ECCN listings.

C. Review of Individual Restrictions

Before each sale, the exporter must also determine whether its buyer has been prohibited from participating in U.S. export transactions. The Regulations prohibit exports of goods and technical data to cer-

57. Special country provisions may be found in both the Regulations, at 15 C.F.R. § 785 (1991), and in the Department of Treasury, Office of Foreign Assets Control Regulations at 31 C.F.R. §§ 500 - 575. At times, special country restrictions may also be imposed by Executive Order and published in the *Federal Register*.

tain individuals and companies who have been found to violate U.S. export laws.⁵⁸ If the Department of Commerce charges a person with export violations, an administrative hearing is held to examine the charges.⁵⁹ If the person is found to have violated a U.S. export law, that person may be made subject to a Denial Order, as well as other penalties.⁶⁰ Denial Orders vary in their scope and duration, however, in general, they prohibit the named person from participating in U.S. export transactions for a period of several years. More importantly for the average law-abiding exporter, the Regulations prohibit other U.S. businesses from engaging in export-related business, such as export sales, with any person subject to a Denial Order.⁶¹ Therefore, before accepting a purchase order, the U.S. exporter must confirm that the person to whom the sale is to be made is not subject to a Denial Order. The Department of Commerce prints a semi-annual Table of Denial Orders⁶² that lists all persons currently subject to Denial Orders. The Table of Denial Orders is updated through the *Federal Register*. Exporters are deemed to be on notice of all Denial Orders printed in the *Federal Register* upon publication.

VII. MAJOR REVISIONS TO THE CCL

In 1991, the U.S. rewrote the CCL in its entirety in response to a multilaterally-agreed revision of export controls. A brief background discussion is needed to set the stage for these changes.

Shortly after World War II, the U.S. and the other members of NATO formed the "Coordinating Committee," commonly referred to as "COCOM", to negotiate multilaterally-agreed export controls.⁶³ The members of COCOM met periodically to determine which goods, technologies and countries should be subject to export restrictions. Voting in COCOM was conducted on a unanimous basis. After COCOM reached its decision on a set of issues, each member adopted the mutually-agreed COCOM restrictions into its sovereign law. Members were also free to add unilateral controls on their exports that exceeded or differed from those established by COCOM. These unilateral con-

58. 15 C.F.R. § 787.12 (1991).

59. The procedure for administrative proceedings is set forth at 15 C.F.R. § 788 (1991).

60. Penalties for export violations will be discussed in greater detail in a succeeding section. See *infra* notes 82-84 and accompanying text.

61. 15 C.F.R. § 787.12 (1991).

62. See 15 C.F.R. § 788 (Supp. Nos. 1, 2 1991). The Table of Denial Orders is usually updated in March and October, and copies are available from the Department of Commerce.

63. The current members of COCOM are: Australia, Belgium, Canada, Denmark, France, Germany (unified), Greece, Italy, Japan, Luxembourg, The Netherlands, Norway, Portugal, Spain, Turkey and the United States of America.

trols were typically restrictions that did not receive a unanimous vote in COCOM, but were advocated by the adopting country. The U.S. imposed a number of unilateral controls on its exports when it was unable to obtain a unanimous vote in COCOM.

Not surprisingly, given the post-World War II genesis of COCOM, the committee's controls focused on East-West exports. The primary concern was the export of sensitive products and technology to the Warsaw Pact countries⁶⁴ and, to a slightly lesser degree, China. In the late 1940s and early 1950s, COCOM's controls on exports to the Warsaw Pact countries and China were very broad, although reductions in the restrictions occurred in 1954 and 1958.⁶⁵ From 1958 to 1990, the underlying philosophy of COCOM controls remained virtually unchanged, although a number of cosmetic changes were made and new products not previously in existence were added to the COCOM restricted list.

Then, in the late 1980s and 1990-1991, changes occurred that placed increasing pressure on COCOM to review the basis of its export controls. After forty years of negotiation, the unification of Europe began to become a reality, bringing to question the need for export restrictions between European nations. The withdrawal of the U.S.S.R. from Eastern Europe, unification of Germany and fledgling democratization of countries such as Poland, Hungary and Czechoslovakia, encouraged COCOM to relax its export restrictions to Eastern Europe. Initial political reforms in the former U.S.S.R. prompted calls for relaxation of export controls to that country, although the recent political and economic chaos has caused lawmakers to re-examine their initial enthusiasm for relaxing controls. Most recently, the Gulf War in Iraq in 1990 caused COCOM to re-examine its focus on East-West export controls, and devote more attention to the national security implications of exports to countries such as Iraq. As a result of these and other political changes, in 1990 COCOM began negotiating a new International Industrial List (commonly referred to as the "Core List") of restricted exports. The multilaterally-agreed revised Core List was finalized in 1991. Subsequently, the Department of Commerce issued a completely revised CCL which incorporated the Core List, as well as those unilateral export controls the U.S. chose to retain.⁶⁶ The new CCL superceded the old CCL in its entirety, effec-

64. The Warsaw Pact was composed of Bulgaria, Czechoslovakia, Hungary, Poland, Romania and the former U.S.S.R.

65. For a discussion of the history of COCOM and the scope of its restrictions, see W. ROOT & J. LIEBMAN, *United States Export Controls*, 10/1-10/10 (3d ed. 1991).

66. 56 Fed. Reg. 42,824 (1991) (to be codified at 15 C.F.R. § 799 (1991)).

tive as of September 1, 1991, and exporters were required to comply with the new CCL controls as of that date.

Because of its extremely detailed and technical nature, a full discussion of the changes incorporated into the new CCL is beyond the scope of this Article. However, a brief discussion of the general types of changes made is in order.

On May 24, 1991, White House Press Secretary Marlin Fitzwater announced that the U.S. and its allies had agreed to a revision of the Core List.⁶⁷ Mr. Fitzwater stated that the agreement "brings to a close a major review of allied East-West export control policy initiated in January 1990 in response to the President's call to the member states of COCOM to adapt their export control regimes to the rapidly changing international and political and military environment,"⁶⁸ and further stated that the new Core List would result in a fifty percent reduction in existing export controls.

Experts outside of the government were not as effusive in their praise for the new Core List, noting that substantial controls still applied to many technologies, including telecommunications, computers and networking devices, and questioned the White House's claim of a fifty percent reduction in controls.⁶⁹ Root and Liebman conducted a numerical review of the CCL changes.⁷⁰ They determined that of the eighty commodity items on the old CCL, only two were deleted by COCOM, and the U.S. retained both of those commodity items as unilateral controls. Of 600 comparable commodity sub-items, 216 were deleted, and coverage was decreased in 134 more.⁷¹ Of the remaining 250 comparable commodity sub-items, 124 were unchanged, twenty-nine were increased in coverage and ninety-seven were both increased and decreased.⁷² In addition, 101 new sub-items were added to the new CCL.⁷³ The effect of all of these changes cannot be determined for some time, at least until companies work with the new CCL and discover, first-hand, how its changes impact their export businesses.

The new CCL reorganized products and technology into new commodity groups which reflect the industrial changes that have occurred since the World War II era. Many of the commodity groups used in the old CCL have been eliminated, and new groups of products have

67. 8 INTERNATIONAL TRADE REPORTER No. 22, 800 (May 29, 1991).

68. *Id.*

69. See ROOT & LIEBMAN, *supra* note 65, at 10/12-10/13.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

been added. The old and new CCL commodity groups are reproduced below:

<u>Former CCL Commodity Groups</u> ⁷⁴	<u>New CCL Commodity Groups</u> ⁷⁵
0 - Metal-Working Machinery	1 - Materials
1 - Chemical and Petroleum Equipment	2 - Materials Processing
2 - Electrical and Power- Generating Equipment	3 - Electronics
3 - General Industrial Equipment and Cryptography	4 - Computers
4 - Transportation Equipment	5 - Telecommunications
5 - Electronics and Precision Instruments	6 - Sensors
6 - Metals, Minerals and Their Manufactures	7 - Avionics and Navigation
7 - Chemicals, Metalloids, Petroleum Products and Related Materials	8 - Marine Technology
8 - Rubber and Rubber Products	9 - Propulsion Systems and Transportation Equipment
9 - Miscellaneous	0 - Miscellaneous
<u>Subcategories:</u> Not standardized.	<u>Subcategories:</u> Standardized: A - Equipment, Assemblies and Components B - Production and Test Equipment C - Materials D - Software E - Technology

In addition to revising the commodity groups, the new CCL revised the ECCN numbering system used to identify each product. The old CCL used a four-digit number followed by a single code letter to identify each product, for example 2018A. The first digit indicated the level of control while the second digit identified the commodity group to which the product belonged. The remaining two digits identified

74. 15 C.F.R. § 799.1(b) (1991). This CCL list was effective prior to Sept. 1, 1991.

75. 56 Fed. Reg. 42,826 (1991) (to be codified at 15 C.F.R. § 799.1(b)(1)). This amendment became effective as of September 1, 1991.

related commodities within the commodity group to which the product belonged.⁷⁶ Within each group, products were numbered consecutively by the third and fourth digits.⁷⁷ The code letter at the end of each number indicated the level of control for that entry. For example, any product identified by an ECCN ending in code letter A would require a Validated License for export to all destinations.⁷⁸

The new CCL changed ECCNs to a five-digit combination of letters and numbers, for example 1A01A. The first number identifies the commodity group to which the product belongs. The following letter indicates the product group within the commodity group to which the product belongs.⁷⁹ The last two numbers indicate the particular type of control with respect to that product.⁸⁰ Lastly, the final character identifies the country group level of control, similar to the controls specified by the code letter in the old CCL numbering system.⁸¹

Although confusing at first, the new ECCN numbering system provides more information to the trained reader than the old system. The old system allowed the reader to determine, at a glance, the level of control, commodity group, specific type of product and licensing requirements for each product. The new ECCN numbering system provides the commodity group, general type of product, type of control imposed on the product, and licensing requirements for that product.

VIII. PENALTIES FOR FAILURE TO COMPLY WITH U.S. EXPORT LAWS

Failure to comply with the U.S. export laws can result in the imposition of administrative, civil and criminal penalties. There are several

76. 15 C.F.R. § 799.1(b) (1991), effective prior to September 1, 1991.

77. *Id.*

78. See 15 C.F.R. § 799.1(f)(2) (1991), effective prior to September 1, 1991.

79. 56 Fed. Reg. 42,826 (1991) (to be codified at 15 C.F.R. § 799.1(b)(2)). There are five product groups within each category, identified by the letters A through E, as follows:

A - Equipment, Assemblies and Components

B - Production and Test Equipment

C - Materials

D - Software

E - Technology.

80. 56 Fed. Reg. 42,826 (1991) (to be codified at 15 C.F.R. § 799.1(b)(3)). The basic paragraph numbering system is as follows:

01-19 - COCOM Controls

20-39 - Missile Technology Controls

40-59 - Nuclear Non-Proliferation Controls

60-79 - Chemical and Biological Weapons Controls

80-99 - Other Controls.

81. 56 Fed. Reg. 42,826 (1991) (to be codified at 15 C.F.R. § 799.1(b)(4)).

administrative penalties, the most severe of which is the issuance of a Denial Order.⁸²

Civil penalties may also be imposed, in the form of civil fines. In 1991, in a settlement with the Government, a U.S. company was fined \$2.4 million dollars for sixty-two alleged violations of the Act and Regulations, the largest civil penalty levied under the Act to date.⁸³

Moreover, if the violator can be shown to have had criminal intent when violating the U.S. export laws, criminal penalties may be imposed. Criminal fines equal to the greater of five times the value of the noncomplying export or \$1 million may be levied. In extreme cases, the violator may also be imprisoned.⁸⁴

IX. CONCLUSION

The U.S. export laws have never been called "simple." A significant burden is placed on all exporters, large and small, to not only learn the laws, but to keep informed of the myriad of changes to the laws that are put into effect each year. Keeping abreast of the changes requires, above all, organization. An export compliance program should be considered mandatory by every exporter. With a well-developed export compliance program, companies can track the law, identify the changes, and avoid violations, all with a minimum of effort. Without such a program, it is virtually impossible for any company to remain in compliance with the U.S. export laws and violations are inevitable.

82. Pursuant to the Export Administration Act, the authorities have the power of denying "export privileges" to violators here or abroad. 15 C.F.R. § 787.12 (1991).

83. United States Department of Commerce News, Bureau of Export Administration, BXA-91-34, 12/20/91. For a copy of this news release, contact John C. Thomas of the Department of Commerce at (202) 377-2721.

84. 15 C.F.R. § 787.1(a) (1991).

APPENDIX ONE

U.S. Government Agencies that Control Specific Exports

<u>Agency</u>	<u>Responsibility</u>	<u>Authority</u>
Agriculture, Department of	Tobacco Seeds And Plants	U.S.C. § 516 (1988)
Commerce, Department of	All other Goods and Technology Not Specified Elsewhere	50 U.S.C. App. § 2403 (1988)
Consumer Product Safety Commission	Hazardous Substances	15 U.S.C. §§ 1202, 1264, 1273, 2067
Energy, Department of	Nuclear Weapons & Technology, Natural Gas & Electric Energy	42 U.S.C. § 2011 (1988)
Environmental Protection Agency	Hazardous Substances, Certain Chemicals	42 U.S.C. § 6938; 15 U.S.C. § 2611(b); 7 U.S.C. § 1360(a), (b) (1988)
Food And Drug Administration	Foods, Drugs, Biological Products and Devices	21 U.S.C. §§ 801, 802, 3816; 42 U.S.C. 262 (1988)
Interior, Department of	Endangered Fish and Wildlife	16 U.S.C. §§ 668, 703, 1531 (1988)
Justice, Department of	Narcotics and Drugs	21 U.S.C. § 951
Nuclear Regulatory Commission	Nuclear Equipment and Materials	42 U.S.C. § 2011 (1988)
Patent and Trademark Office	Patent Applications for Filing in a Foreign Country	35 U.S.C. §§ 6, 181 (1988)
State, Department of	Munitions	22 U.S.C. §§ 2751-2796(c) (1988)
Various	Classified Information	Executive Order 12356

