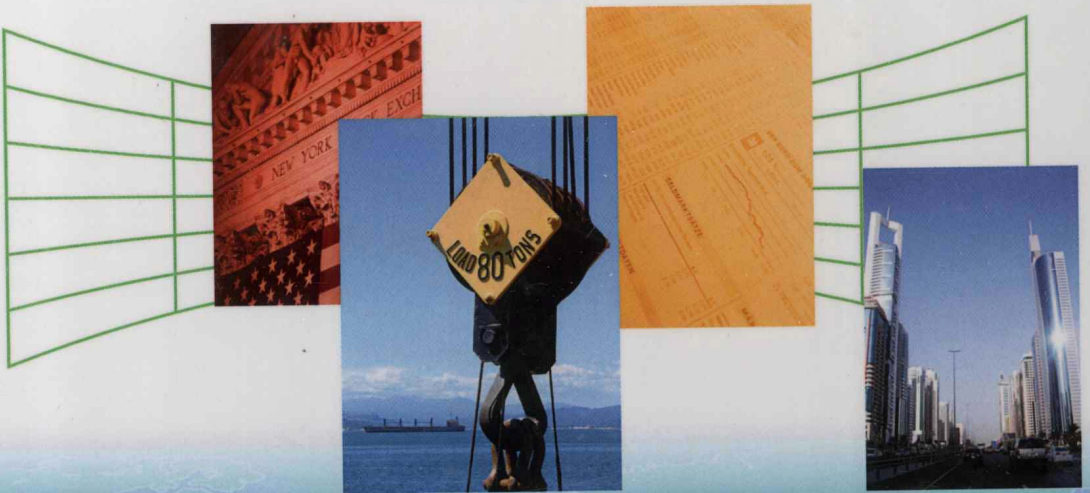


# U. S. Export Strategy for the New Global Main Street



Trade Issues, Policies and Laws

Bradley T. Compton  
Editor

NOVA

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## PREFACE

U.S. exporters are hitting their stride in the global economy, with record exports making an increasingly important contribution to overall U.S. economic growth. The prospects for U.S. exports are better than any time in recent memory across sectors and for U.S. companies large and small, due to the rapid growth of foreign markets and favorable terms of trade. The services sector continues to make an outsized contribution to growth in exports and improvements in the trade balance. American firms are maintaining their innovative and competitive edge in the world while developing their own new culture of exporting. This book explores the U.S. export strategy as it now relates to not only local Main Street USA, but the access to the new global Main Street.

Chapter 1 - The 110<sup>th</sup> Congress may consider legislation to renew, modify, or reauthorize the Export Administration Act (EAA). On August 3, 2007, S. 2000 (Dodd) was introduced and referred to the Senate Banking Committee. The bill would revise the EAA, especially in the areas of penalties and enforcement. In addition, H.R. 3633 (Manzullo) was introduced on September 24, 2007, to clarify the jurisdiction of civil aviation equipment under the EAA. Through the EAA, Congress delegates to the executive branch its express constitutional authority to regulate foreign commerce by controlling exports. The EAA provides the statutory authority for export controls on sensitive dual-use goods and technologies: items that have both civilian and military applications, including those items that can contribute to the proliferation of nuclear, biological, and chemical weaponry. The EAA, which originally expired in 1989, periodically has been reauthorized for short periods of time, with the last incremental extension expiring in August 2001. At other times and currently, the export licensing system created under the authority of EAA has been continued by the invocation of the International Emergency Economic Powers Act (IEEPA). EAA confers upon the President the power to control exports for national security, foreign policy or short supply purposes. It also authorizes the President to establish export licensing mechanisms for items detailed on the Commerce Control List (CCL), and it provides some guidance and places certain limits on that authority. The CCL currently provides detailed specifications about dual-use items including equipment, materials, software, and technology (including data and know-how) likely requiring some type of export license from the Commerce Department's Bureau of Industry and Security (BIS). BIS administers the Export Administration Regulations (EAR), which, in addition to the CCL, describe licensing policy and procedures such as commodity classification, licensing, and interagency dispute resolution procedures.

In debates on export administration legislation, parties often fall into two camps: those who primarily want to liberalize controls in order to promote exports, and those who believe that further liberalization may compromise national security goals. While it is widely agreed that exports of some goods and technologies can adversely affect U.S. national security and foreign policy, some believe that current export controls can be detrimental to U.S. businesses and to the U.S. economy. According to this view, the resultant loss of competitiveness, market share, and jobs can harm the U.S. economy, and that harm to particular U.S. industries and to the economy itself can negatively impact U.S. security. Others believe that security concerns must be paramount in the U.S. export control system and that export controls can be an effective method to thwart proliferators, terrorist states, and countries that can threaten U.S. national security interests. Controversies have arisen with regard to particular exports such as high performance computers, encryption technology, stealth materials, satellites, machine tools, “hot-section” aerospace technology, and the issue of “deemed exports.” The competing perspectives on export controls have clearly been manifested in the debate over foreign availability and the control of technology, the efficacy of multilateral control regimes, the licensing process and organization of the export control system, and the economic effects of U.S. export controls.

Chapter 2 - Free trade areas (FTAs) are arrangements among two or more countries under which they agree to eliminate tariffs and nontariff barriers on trade in goods among themselves. However, each country maintains its own policies, including tariffs, on trade outside the region.

In the last few years, the United States has engaged or has proposed to engage in negotiations to establish bilateral and regional free trade arrangements with a number of trading partners. Such arrangements are not new in U.S. trade policy. The United States has had a free trade arrangement with Israel since 1985 and with Canada since 1989, which was expanded to include Mexico and became the North American Free Trade Agreement (NAFTA) effective in January 1994.

U.S. interest in bilateral and regional free trade arrangements has surged and the Bush Administration has accelerated the pace of negotiations since the enactment of the Trade Promotion Authority in August 2002. U.S. participation in free trade agreements can occur only with the concurrence of the Congress. In addition, FTAs will affect the U.S. economy, with the impact varying across sectors.

After several months of discussions, congressional leaders and the Bush Administration announced an agreement on May 10, 2007, on policy priorities that are to be included in pending FTAs. These priorities included the enforcement of five core labor standards that are part of the International Labor Organization’s *Declaration on Fundamental Principles and Rights of Work*, commitment to enforce seven multilateral environmental agreements to which FTA partners are parties, the availability affordable generic pharmaceuticals, port security, and foreign investor rights in investor-state disputes.

Chapter 3 - The United States has become increasingly integrated with the rest of the world economy. This integration has offered benefits and presented challenges to U.S. business, agriculture, labor, and consumers. Those who can compete in the more integrated economy have enjoyed opportunities to broaden their success, while those who are challenged by increased foreign competition have been forced to adjust and some have exited the market or relocated overseas. Some observers contend that, in order to remain globally competitive, the United States must continue to support trade liberalization policies, while assisting those

hurt by trade. Others have raised doubts over whether free trade policies benefit the U.S. economy (e.g., some blame such policies for the large U.S. trade deficit, declining wages, and growing income disparity). Many contend that trade liberalization works only when everyone plays by the rules and have urged the aggressive enforcement of U.S. trade laws to address unfair trade practices. Still others maintain that such issues as labor rights, the environment, and climate change should be linked to trade policies. These competing views are often reflected in the struggle between Congress and the Executive branch in shaping U.S. trade policy.

Chapter 4 - U.S. exporters are hitting their stride in the global economy, with record exports making an increasingly important contribution to overall U.S. economic growth. The prospects for U.S. exports are better than any time in recent memory across sectors and for U.S. companies large and small, due to the rapid growth of foreign markets and favorable terms of trade. The services sector continues to make an outsized contribution to growth in exports and improvements in the trade balance. And for smaller firms in particular, e-commerce continues to shrink distances and transaction costs between buyers and sellers.

American firms are maintaining their innovative and competitive edge in the world while developing their own new culture of exporting. In the process, they are discovering that in addition to their local Main Street USA, they now have access to the new global Main Street.

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*Chapter 1*

# **THE EXPORT ADMINISTRATION ACT: EVOLUTION, PROVISIONS, AND DEBATE\***

*Ian F. Fergusson*

## **SUMMARY**

The 110<sup>th</sup> Congress may consider legislation to renew, modify, or reauthorize the Export Administration Act (EAA). On August 3, 2007, S. 2000 (Dodd) was introduced and referred to the Senate Banking Committee. The bill would revise the EAA, especially in the areas of penalties and enforcement. In addition, H.R. 3633 (Manzullo) was introduced on September 24, 2007, to clarify the jurisdiction of civil aviation equipment under the EAA. Through the EAA, Congress delegates to the executive branch its express constitutional authority to regulate foreign commerce by controlling exports. The EAA provides the statutory authority for export controls on sensitive dual-use goods and technologies: items that have both civilian and military applications, including those items that can contribute to the proliferation of nuclear, biological, and chemical weaponry. The EAA, which originally expired in 1989, periodically has been reauthorized for short periods of time, with the last incremental extension expiring in August 2001. At other times and currently, the export licensing system created under the authority of EAA has been continued by the invocation of the International Emergency Economic Powers Act (IEEPA). EAA confers upon the President the power to control exports for national security, foreign policy or short supply purposes. It also authorizes the President to establish export licensing mechanisms for items detailed on the Commerce Control List (CCL), and it provides some guidance and places certain limits on that authority. The CCL currently provides detailed specifications about dual-use items including equipment, materials, software, and technology (including data and know-how) likely requiring some type of export license from the Commerce Department's Bureau of Industry and Security (BIS). BIS administers the Export Administration Regulations (EAR),

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which, in addition to the CCL, describe licensing policy and procedures such as commodity classification, licensing, and interagency dispute resolution procedures.

In debates on export administration legislation, parties often fall into two camps: those who primarily want to liberalize controls in order to promote exports, and those who believe that further liberalization may compromise national security goals. While it is widely agreed that exports of some goods and technologies can adversely affect U.S. national security and foreign policy, some believe that current export controls can be detrimental to U.S. businesses and to the U.S. economy. According to this view, the resultant loss of competitiveness, market share, and jobs can harm the U.S. economy, and that harm to particular U.S. industries and to the economy itself can negatively impact U.S. security. Others believe that security concerns must be paramount in the U.S. export control system and that export controls can be an effective method to thwart proliferators, terrorist states, and countries that can threaten U.S. national security interests. Controversies have arisen with regard to particular exports such as high performance computers, encryption technology, stealth materials, satellites, machine tools, “hot-section” aerospace technology, and the issue of “deemed exports.” The competing perspectives on export controls have clearly been manifested in the debate over foreign availability and the control of technology, the efficacy of multilateral control regimes, the licensing process and organization of the export control system, and the economic effects of U.S. export controls. This report will be updated periodically.

## INTRODUCTION

Legislation to rewrite and reauthorize the Export Administration Act of 1979 (EAA)(P.L. 96-72) again may be considered in the 110<sup>th</sup> Congress. On August 3, 2007, Senator Dodd introduced the Export Enforcement Act of 2007 (S. 2000), which was referred to the Senate Banking Committee. The bill would revise the EAA, especially in the areas of penalties and enforcement. In addition, legislation (H.R. 3633, Manzullo) was introduced on September 24, 2007, to clarify the jurisdiction of civil aviation equipment under the EAA. The EAA provides the statutory authority for export controls on sensitive dual-use goods and technologies, items that have both civilian and military applications, including those items that can contribute to the proliferation of nuclear, biological and chemical weaponry. The EAA, which originally expired in 1989, periodically has been reauthorized for short periods of time, with the last incremental extension expiring in August 2001. At others times, including currently, the export licensing system created under the authority of EAA has been continued by the invocation of the International Emergency Economic Powers Act (IEEPA)(P.L. 95-223).

The EAA is the statutory authority for the Export Administration Regulations (EAR), which are administered by the Bureau of Industry and Security<sup>1</sup> (B IS) located in the Department of Commerce. These regulations establish the framework for regulating exports of dual-use, potentially sensitive commodities, software, computers, and technology. Exports are restricted by item, country, and recipient entity. The EAA, which was written and amended during the Cold War, focuses on the regulation of exports of those civilian goods and technology that have military applications (dual-use items). Export controls under the EAA were based on strategic relationships, threats to U.S. national security, international

business practices, and commercial technologies many of which have changed dramatically in the last 20 years. Some Members of Congress and most U.S. business representatives see a need to liberalize U.S. export regulations to allow American companies to engage more fully in international competition for sales of high- technology goods. Other Members and national security analysts contend that liberalization of export controls over the last decade has contributed to foreign threats to U.S. national security, that some controls should be tightened, and that Congress should weigh further liberalization carefully.

This paper discusses the Export Administration Act in terms of its evolution in the 20<sup>th</sup> century, its major features including the types of controls authorized by the act, the Commerce Control List and export licensing procedures, and issues concerning the maintenance of export controls under IEEPA. It then highlights several controlled commodities that have been featured prominently in export control discussions. Finally, it discusses competing business and national security perspectives concerning several of more contentious themes in the export control debate: the controllability of technology, the effectiveness of multilateral control regimes, the organization of the export control system, and the impact of export controls on the U.S. economy and business.

## THE EVOLUTION OF THE EXPORT ADMINISTRATION ACT

Export controls in time of war have been an element of U.S. policy for almost one hundred years.<sup>2</sup> The end of WWII, however, ushered in a new era in which export control policy would become an extensive peacetime undertaking. The start of the cold war led to a major refocusing of export control policy on the Soviet-Bloc countries. Enactment of the Export Control Act of 1949 (P.L. 81-11) was a formal recognition of the new security threat and of the need for an extensive peacetime export control system.

The 1949 Act identified three possible reasons for imposing export controls. Short-supply controls were to be used to prevent the export of scarce goods that would have a deleterious impact on U.S. industry and national economic performance. Foreign policy controls were to be used by the President to promote the foreign policy of the United States. The broad issues of regional stability, human rights, anti-terrorism, missile technology, and chemical and biological warfare have come to be controlled under this rubric. National security controls were to be used to restrict the export of goods and technology, including nuclear non-proliferation items, that would make a significant contribution to the military capability of any country that posed a threat to the national security of the United States.

Coincident with the establishment of the post-war U.S. export control regime was the establishment of a multilateral counterpart involving our NATO allies. The large amount of critical technology being transferred from the United States to the NATO allies, and the growing capability for technological development by the allies themselves required the establishment of a multilateral control regime. Toward this end, the Coordinating Committee for Multilateral Export Controls (CoCom) was established in 1949. CoCom controls were not a mirror image of U.S. controls but generally did reflect a uniformly high level of restrictions.

With little change in the perceived threat, the Export Control Act was renewed largely without amendment in 1951, 1953, 1956, 1958, 1960, 1962, and 1965. With the onset of the U.S.-Soviet era of "detente" in the late 1960s, however, the first serious reexamination and

revision of the U.S. export control system occurred. At this time, the growing importance of trade to the U.S. economy and those of our allies began to exert significant political pressure for some liberalization of export controls. Congress passed the Export Administration Act of 1969 to replace the near-embargo characteristic of the Export Control Act of 1949. The continued shift of policy toward less restrictive export controls continued in the renewal of the act in 1974 and 1977. The act was comprehensively rewritten in 1979, and this act forms the basis of the export control system today. It was amended in 1985, and some moderate further liberalization occurred in the following years.

The collapse of the Soviet Union in 1989, an event some have partially attributed to the success of U.S. cold war export control policy, marked a dramatic change in the nature of the external threat the United States. Beginning with the George H.W. Bush Administration, the export control system has been reduced in scope and streamlined, but the basic structure of the law remains intact. There are many who see a need to revamp the act, whether to enhance exports, to shift the focus to current national security threats, or to increase penalties for violations.

The dissolution of CoCom in 1994 and its replacement by the Wassenaar Arrangement in 1997, also significantly changed the export control environment.<sup>3</sup> This new multilateral arrangement is more loosely structured than CoCom and members do not have the authority to block transactions of other members. Generally more liberal control practices abroad raise important questions about the ultimate effectiveness of U.S. export controls (under either the current or a revised EAA) in achieving national security objectives and the fairness of unilateral controls to American industry.

Congress has not been able to agree on measures to reform the Export Administration Act that regularly have been introduced since the 101<sup>st</sup> Congress. The export control process was continued from 1989-1994 by temporary statutory extensions of EAA and by invocation of the International Emergency Economic Powers Act (IEEPA). Thereafter, export controls were continued for six years under the authority of Executive Order No. 12924 of August 19, 1994, issued under IEEPA authority. Many of those who favor reforming the act, whether to liberalize or to tighten controls, contend that operating under IEEPA imposes constraints on the administration of the export control process and makes it vulnerable to legal challenge, thus undermining its effectiveness. (See p.10) Legislation passed by the House and Senate and signed by the President on November 13, 2000 (P.L. 106-508) extended the EAA of 1979 until August 20, 2001, temporarily removing the need to operate the export control system under IEEPA powers. Since then, export control authority has again been operating under IEEPA provisions pursuant to Executive Order 13222, issued August 17, 2001.<sup>4</sup>

Legislation to rewrite the Export Administration Act has been introduced in the last several Congresses. In the 104<sup>th</sup> Congress, the House passed the Omnibus Export Administration Act of 1996 (H.R. 361) on July 16, 1996, after hearings and consideration by the Committee on International Relations, the Committee on Ways and Means, and by the Committee on National Security. On July 17, 1996, the bill was received by the Senate and referred to the Committee on Banking, Housing and Urban Affairs, which held a hearing but took no further action. Export control legislation (H.R. 1942) was introduced in the 105<sup>th</sup> Congress, but no action was taken. In the 106<sup>th</sup> Congress, the Export Administration Act of 1999 (S. 1712) was introduced by Senator Michael P. Enzi. On September 23, 1999 the Senate Banking Committee voted unanimously (20-0) to report this legislation to the Senate

floor (S.Rept. 106-180). However, action by the Senate on S. 1712 was not taken due to the concerns of several Senators about the bill's impact on national security.

## 107<sup>th</sup> Congress

Export control legislation was again introduced in the 107<sup>th</sup> Congress. On January 23, 2001, Senator Enzi introduced the Export Administration Act of 2001 (S. 149). Hearings were held on this legislation by the Senate Banking Housing and Urban Affairs Committee in February 2001, and the measure was reported favorably for consideration by the Senate by a vote of 19-1 on March 22, 2001 (S.Rept. 107-10). The Senate debated the legislation on September 4-6, 2001, and it passed with three amendments by a vote of 85-14. This bill was similar though not identical to S. 1712, introduced by Senator Enzi in the 106<sup>th</sup> Congress.

The House International Relations Committee held hearings on EAA and export controls on May 23, June 12, and July 11, 2002. The House version of the Export Administration Act, H.R. 2581, was introduced on July 20, 2001 by Representative Benjamin Gilman. As introduced, it was identical to S. 149, except for the additions of provisions related to oversight of nuclear transfers to North Korea. At the markup session on August 1, the House International Relations Committee passed the legislation with 35 amendments. The House Armed Services Committee (HASC) and the House Permanent Select Committee on Intelligence (HPSCI) received H.R. 2581 through sequential referral. On March 6, 2002, HASC further amended H.R. 2581 and reported out the legislation by a vote of 44-6 (H.Rept. 107-297). HPSCI held hearings on the legislation but did not alter it. The legislation received no further consideration in the 107<sup>th</sup> Congress. The Administration supported S. 149 and opposed House attempts to revise it. In the 108<sup>th</sup> Congress, Representative Dreier introduced EAA legislation (H.R. 55), which was identical to S. 149, but no action was taken on it.

The National Defense Authorization Act (NDAA) has also been used periodically as a vehicle to attempt to amend the export control regime. In 2004, the House version of NDAA 2005 (H.R. 4200) contained two export control-related provisions that would have affected dual-use export controls. The first (Sec. 1404) would have required a license for dual-use goods controlled under the Export Administration Regulations (EAR) for technology and items contained in the Militarily Critical Technology List (MCTL), a list compiled by the Department of Defense (DOD) (see p. 6). The provision is in response to a March 2004 DOD study, which noted that several MCTL technologies were not controlled under the EAR or the International Traffic in Arms Regulations (ITAR). The second provision (Sec. 1405) would have required that exporters obtain licenses for items controlled under the EAR or the ITAR to a destination if that destination had previously exported such items to China. In addition, the granting of the license would be conditional on the written assurance of the foreign government or entity not to transfer the licensed item without the written consent of the President. The House NDAA report (H.Rept. 108-491) expresses concern that military embargoes on China imposed after the Tiananmen Square massacre may be repealed which may lead to the transfer of such U.S. goods or technology to China. However, neither of these provisions were contained in the conference report (H.Rept. 108-767) signed by the President on October 28, 2004.

## **109<sup>th</sup> Congress**

In the 109<sup>th</sup> Congress, a bill to revise and extend the Export Administration Act was introduced by Representative Henry Hyde on December 16, 2005, and was referred to House International Relations Committee. It was not a comprehensive overhaul of 1979 EAA, but rather one that addressed penalties, enforcement, and the relation of the United States to multilateral control regimes. According to an administration official, the legislation reflected “targeted changes ... that all sides can be supportive of.”<sup>5</sup> The bill also would have extended the expired EAA for two years from the date of enactment, and provided authorization of appropriations for export control activities. This bill did not receive consideration in the 109<sup>th</sup> Congress.

## **110<sup>th</sup> Congress**

On August 3, 2007, Senator Dodd introduced the Export Enforcement Act of 2007 (S. 2000), which was referred to the Senate Banking Committee. This bill reflects the draft legislation that the Administration submitted to Congress on April 24, 2007. The draft bill would reauthorize the Export Administration Act for five years and amend the penalty and enforcement provisions of the act.

### ***Penalties***

The proposed legislation would revise the penalty structure and increase penalties for export control violations. The bill would raise criminal penalties for individuals up to \$1 million and raise the term of potential imprisonment to ten years for each violation. For firms, it would raise penalties to the greater of \$5 million or 10 times the value of the export. Under the 1979 EAA, the base penalty was the greater of \$50,000 or 5 times the value of the export, or five years imprisonment. Certain violations, such as those for exports controlled for foreign policy purposes could have received higher penalties. The bill would also raise civil penalties from \$10,000 (or \$100,000 for national security controls violations) under the old Act to \$500,000. It would expand the list of statutory violations that could result in a denial of export privileges, and it extends the term of such denial from not more than 10 years to not more than 25 years.

### ***Enforcement***

The draft legislation would expand the authority of the Department of Commerce, Office of Export Enforcement, to investigate potential violations of EAA overseas. It would expand enforcement authority to other places at home and abroad with the concurrence of the Department of Homeland Security. The proposed draft legislation would restate the enforcement provisions of the EAA to account for the current structure of Customs and Border Security and the Immigration and Customs Enforcement in the Department of Homeland Security. It would also direct the Secretary of Commerce to publish and update best practices guidelines for effective export control compliance programs. It also would expand the confidentiality provisions beyond licenses and licensing activity to include classification requests, enforcement activities, or information obtained or supplied concerning

U.S. multilateral commitments. The bill includes new language governing the use of funds for undercover investigations and operations and would establish audit and reporting requirements for such investigations. It would also authorize wiretaps in enforcement of the act.

## ANALYSIS OF PROVISIONS IN EAA LEGISLATION

Several principles and concepts have been common to the EAA and to efforts to renew and reauthorize the legislation. Generally, these provisions set out the types of export controls authorized (including national security, foreign policy and short supply controls), licensing procedures, the license review process, and penalty and enforcement procedures, the latter currently subject to IEEPA authority.

### Types of Control Authority

Since the 1949 Act, U.S. dual-use export controls have restricted certain items based on national security, foreign policy, or for the effect of domestic exports on the national economy. These three categories form the basis by which items on the Commerce Control List (CCL) (see below, p. 7) and items subject to the Export Administration Regulations are controlled. In practice, the preponderance of items on the CCL are controlled for both national security and foreign policy reasons with different control standards determining the licensing policy of an item to a particular country.

#### *National Security Controls*

The 1979 Act restricted the export of goods or technology that could make a significant contribution to the military capabilities of any other country or groups of countries that would prove detrimental to the national security of the United States. National security control items fall under the National Security licensing requirement of the EAR. The list "Country Group D-1" presently serves as the list of controlled countries.<sup>6</sup> Licenses for items controlled for national security purposes are reviewed on a case-by-case basis and are approved if it is determined the item is destined for civilian use or would not make a significant contribution to the military potential of the country of destination.<sup>7</sup>

Pursuant to EAA, the goods and technology to be controlled for national security purposes are identified by the Secretary of Defense and other appropriate agencies. The Secretary of Defense and the Secretary of Commerce (the Secretary) are obligated by the act to periodically review and revise the list. For this purpose, the Secretary of Defense maintains the Military Critical Technology List (MCTL).<sup>8</sup> The national security based control list is also consistent with the control list of the Wassenaar Arrangement. U.S. national security controls, however, do not cover items that are covered under nuclear, chemical, biological or missile proliferation regimes, or to countries covered by anti-terrorism controls. These items and destinations are controlled for foreign policy purposes.

### **Foreign Availability**

Items controlled for national security purposes are subject to a foreign availability determination. Foreign availability exists when a good is available to controlled countries from sources outside the United States in “sufficient quantity and comparable quality” so that control of the item would be ineffective.(Sec. 5(f)(1)(a)) The 1979 Act charges the Secretary, in conjunction with the Secretary of Defense and other appropriate agencies, with determining on a continuing basis whether any item currently subject to export control for reasons of national security meets foreign availability status. Under EAA, a request to make a foreign availability determination can be made by a license applicant or through the initiative of the Secretary. If the Secretary makes a foreign availability determination, the item must be decontrolled, although the President can overturn that decision with a determination that decontrolling such items would be detrimental to the national security of the United States. In such case, the President is directed to enter negotiations with multilateral control partners to eliminate the availability in question.

The 1979 EAA provided for the decontrol of items on the CCL determined to have foreign availability, and it set guidance for the Secretary to make such determinations. It gave the Secretary the ability to initiate such determinations and it provided that license applicants could petition the Secretary to begin the determination. The Secretary’s determination of foreign availability does not need the concurrence of other agencies, but he must submit determinations to other agencies as the Secretary considers appropriate. The bill also created the Office of Foreign Availability to gather data for the Secretary to make foreign availability determinations and to report to Congress on operations and improvements on the ability to assess foreign availability. This office no longer exists. According to one commentator, “this is, no doubt, largely because substantial activity in the 1980s and early 1990s produced only meager results.”<sup>9</sup>

### **Mass Market**

The concept of mass market status was proposed in EAA legislation introduced in the 106<sup>th</sup> and 107<sup>th</sup> Congress. Neither the 1979 EAA nor current regulations provides for decontrol of items based on mass market criterion. Mass market status was defined to apply to items produced or made available for sale in large volume or to multiple buyers. Under legislation introduced in the 106<sup>th</sup> and 107<sup>th</sup> Congress, the item’s manner of distribution; its conduciveness to commercial shipping; or its usefulness for intended purposes without modification or service were also criteria considered when determining mass market status. This feature proved to have been a controversial part of the legislation, and was cited as a stumbling block in negotiations over the bill in the 107<sup>th</sup> Congress with some Members arguing that its existence would provide for wholesale decontrol of sensitive items.

### **Foreign Policy Controls**

The EAA authorizes the President to control exports for the purpose of promoting foreign policy objectives, complying with international obligations, or deterring and punishing terrorism. Currently, foreign policy controls are in place for anti-terrorism, regional stability, crime control, United Nations sanctions purposes, unilateral embargoes and sanctions, and nonproliferation objectives. This latter category includes adherence to multilateral non-

proliferation agreements in the areas of chemical and biological weapons, nuclear proliferation, and missile technology.

The EAA attaches limitations on the use of foreign policy controls. Foreign policy controls must be renewed on a yearly basis.<sup>10</sup> It requires the President to clearly state objectives and criteria for controls to be reported to Congress. It directs the President to engage in negotiations to remove the foreign availability of items controlled for foreign policy purposes, and it requires the President to impose controls to comply with international obligations or treaties. Furthermore, it requires a license for the export of certain items to countries that support international terrorism. Additionally, foreign policy controls are not authorized for sales of medicine or medical supplies, donations of food, medicines, seeds, and water resource equipment intended to meet basic human needs, or for sales of food if the controls would cause malnutrition or hardship. Controls on sales of agricultural products and medicines have been further amended by the Trade Sanctions Reform and Export Enhancement Act of 2000 (Title IX, P.L. 106-387).<sup>11</sup>

### **Enhanced Proliferation Control Initiative**

Controls based on the end-use or end-user of an item (also known as catch-all controls) are also administered as foreign policy controls. They were introduced under the Enhanced Proliferation Control Initiative (EPCI) of 1991, and they are contained in Part 744 of the EAR. Catch-all controls require a license for export or reexport of any item, not just specifically controlled items, if the applicant knows or is informed by BIS that item will be used for nuclear, missile, chemical or biological proliferation activities. The Bureau of Industry and Security (BIS) maintains an end-user list of entities requiring licenses subject to EPCI.<sup>12</sup> Current regulations prescribe a presumption of denial for licenses to certain entities in Russia, China, Pakistan, India, and Israel and to foreign terrorist organizations as designated by the Secretary of State.

### **Short Supply Controls**

The 1979 EAA authorized restriction on the export of goods and technology to protect domestic industry from shortages of scarce materials and the potential inflationary impact of foreign demand. Few short-supply controls remain in force; they include restrictions on exports of crude oil, petroleum derivatives, unprocessed western red cedar, and the export of horses by sea.<sup>13</sup> The EAA legislation proposed in the 107<sup>th</sup> Congress did not provide for short-supply control authority.

## **The Control List and Licensing Procedures**

Within the Department of Commerce, the Bureau of Industry and Security administers the license application process. In FY2006, BIS reviewed 18,941 applications with a total value of approximately \$36 billion, which included \$12 billion in licenses for crude oil exports in return for refined petroleum. The value of dual-use technology licenses, approximately \$24 billion, represented 2.7% of total U.S. exports in FY2006. BIS approved 15,982 (84%), denied 189 (1.0%), and returned 2,763 (15%) license applications. Most applications for licenses are referred to other government agencies for evaluation, extending



the length of the review process. The average processing time for referred license applications was 33 days, up from 31 days in FY2005. China was the largest destination for controlled goods in FY2006 with 1,538 licenses approved with a value of \$2.4 billion, approximately 5% of the value of total exports to China in FY2006. The greatest number of approved license applications to all destinations was for thermal imaging and light intensive cameras, accounting for 2,664 applications with a value of \$129 million.<sup>14</sup>

### ***Commerce Control List***

The 1979 EAA directed the Secretary of Commerce (Secretary) to create a control list, known in the Export Administration Regulations as the Commerce Control List). The CCL includes items controlled for national security, foreign policy, and short- supply purposes. Under foreign policy controls, it incorporates the control lists of the multilateral non-proliferation regimes to which the U.S. adheres. The CCL currently provides detailed specifications for about 2,400 dual-use items including equipment, materials, software, and technology (including data and know-how) likely requiring some type of export license. The description of the item also enumerates the control(s) applicable to the item. In many cases, items on the CCL will only require a license if going to a particular country. In addition, items on the CCL often are eligible for license exceptions, a practice that, while not requiring prior approval for an export, vests exporters with certain due diligence and record-keeping requirements related to a given transaction. Yet some products, even if shipped to a friendly nation, will require a license due to the high risk of diversion to an unfriendly destination or because of the controversial nature of the product. The end-use and the end-user can also trigger a restriction. The CCL is periodically updated (with the benefit of significant input from other government agencies) to decontrol broadly available items and to focus controls on critical technologies and on key items in which the targeted countries are deficient.

### ***Commodity Classification***

The process by which an item is placed on the CCL is known as commodity classification. This process has engendered considerable controversy in the debate over the EAA. Under the commodity classification process, the exporter requests from BIS a classification for an export item if that item does not correspond to an existing CCL listing. BIS is required to refer these requests to State and Defense under certain referral criteria promulgated in 1996. Commerce was criticized by the General Accounting Office (GAO) for the low number of classifications the agency referred and the lack of criteria for referring classification requests to State and Defense.<sup>15</sup> In a follow-up report, GAO found that out of 5,370 commodity classification requests processed in 2005, only 10 were referred to State and Defense, and that the development of referral criteria with State and Defense had not been undertaken.<sup>16</sup> Because of the differing licensing requirements at State and Commerce, a classification decision that excludes input from State and Defense may contribute to the export of items that, if referred, may be found to fall under the jurisdiction of the State Department's International Traffic in Arms Regulations.

### ***License Review Procedures***

The EAA and the implementing Export Administration Regulations (EAR) establish policies and procedures for the review of license applications and the resolution of