

United States Export Controls

FOURTH EDITION

William A. Root
John R. Liebman



ASPEN LAW & BUSINESS

UNITED STATES EXPORT CONTROLS

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This work is dedicated to the memory of Rauer H. Meyer, who inspired this book and to the memory of Marilyn Liebman, who patiently endured its many updates and revisions.

PREFACE

We hope that the readers of this work will continue to share their observations and criticisms with us, so that we in turn can respond to the ever-changing needs of the exporter.

We wish to acknowledge the many contributions of our colleagues: Ira Rubinstein, a senior corporate attorney for Microsoft Corporation; Edward W. Lew, an associate attorney at McKenna & Cuneo's Los Angeles office; Johnny Traboulsi, a 1999 summer associate at the same office; Niki Demirbilek, a German lawyer who interned at McKenna & Cuneo during the summer of 1999; and Susanne Nonn, a German lawyer who interned at McKenna & Cuneo during the fall and winter of 2000.

Although both authors participate in advisory committees to the Commerce Department, the views expressed herein do not necessarily reflect the views of those committees or the views of that Department.

January 2001

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INTRODUCTION

The authors have had two objectives: (1) to explain export controls in terms that the uninitiated can easily understand and (2) to assist exporters to comply with the mind-boggling complexities of the regulations. Unfortunately it is impossible to further both objectives in the same text. Accordingly, plain text designed to be easily (or, at least, relatively easily!) understood is followed by detailed regulatory analyses amplified by tables, appendices, and indices.

On a typical working morning in Los Angeles, a manufacturer of sophisticated laser devices is preparing to receive a delegation of engineers from a foreign country. Across town, the president of a small company that manufactures a technologically advanced medical testing device has just received an e-mail from a French customer reporting the failure of a critical component of the device, a printed circuit board with sophisticated integrated circuits. Immediate shipment of a replacement is demanded. Although involved in different business activities, these two enterprises have more in common than they realize.

The marketing vice president of the laser company, at that moment, concludes a meeting with his counterpart in the engineering department, and returns to his office to receive the delegation of foreign engineers. A slide projector and charts have been readied in the conference room and department heads from the plant have been thoroughly prepared to conduct the visitors on “walking tours” through their respective areas. Plant areas containing proprietary “trade secrets” have been cordoned off, following procedures instituted in consultation with corporate counsel. Satisfied that all “trade secrets” have been winnowed from the presentation he is about to make, and that his guests will receive up-to-date technical data in use throughout his industry, the executive greets his visitors and begins his presentation.

The president of the medical device company calls the chief of his international division and instructs him to airship the replacement circuit board to the French customer by the earliest available flight.

Since the medical device itself had not required an export license for many years, it does not occur to the company officials that an export license might be necessary for the component. The shipment is made and by nightfall a telephone call from the satisfied customer reports that the component was received and the testing device is back in service.

In these hypothetical cases, two U.S. firms — probably totally unintentionally — have ventured into transactions regulated by the Federal Government. Both firms probably have violated the Export Administration Regulations (EAR), administered by the U.S. Department of Commerce.

Export controls are not new, nor are they peculiar to the United States. Furthermore, they are treated by the government with the utmost seriousness.

The first body of U.S. peacetime regulatory controls on exports of non-military commodities and technical data was formulated in 1949 following the enactment by Congress of the Export Control Act of 1949. Authority for the administration of this statute was delegated by the President to the Secretary of Commerce. This Act, as supplemented and amended over the ensuing years, was superseded by the Export Administration Act of 1969.

The 1969 Act encouraged trade in peaceful goods with the Soviet Union and the communist countries of Eastern Europe within the framework of export controls and, together with its administrative regulations, set the scene for U.S. export controls during the 1970s. Led by the *detente* between the superpowers and the deterioration of U.S. export performance, the economic and political developments of the 1970s brought about pressures from both Congress and the business community to reduce some export controls and to expedite the licensing process.

Congressional concern with reducing the impact of controls on trade was reflected in the next major amendment to this legislation, the Export Administration Act (EAA) of 1979, in two principal ways: first, the policy directive to the Secretary of Commerce that he provide for a periodic review of the list of commodities under control; and, second, the imposition of rigorous deadlines on the processing of export license applications by the Department of Commerce and other participating agencies. The U.S. business community advocated the adoption of these two amendments to ameliorate the most serious perceived disincentives to effective

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export marketing. An Executive Order sets detailed deadlines for case processing, but, somewhat inconsistently, it also gives other participating agencies the right to review any case. The Export Administration Regulations (EAR) (15 C.F.R. §§ 710-774), which are issued by the Department of Commerce to implement these particular controls, are the focus of much of this book.

Also incorporated in the 1979 Act are detailed prohibitions against the participation of "U.S. persons" in any boycott imposed by a foreign country against a country friendly to the United States which is not itself the object of any form of boycott imposed under U.S. law. While the so-called antiboycott legislation was first enacted in 1965 as an amendment to the Export Control Act of 1949, the original version was a simplified prohibition without specifics. Subsequently, the statute and the corollary Department of Commerce regulations were revised to identify in detail the various forms of compliance with foreign boycotts which were prohibited. The anti-boycott regulations, which appear as 15 CFR 760, are analyzed in depth in this volume. The implications of boycott-related activities under the Securities Act of 1933 and the Sherman Antitrust Act are beyond the scope of this volume, however, and are not included in the discussion.

In formulating the Export Control Act of 1949, the United States government recognized that such controls could be effective only if parallel restrictions were adopted by other Western industrialized nations. Accordingly, discussions were initiated with Marshall Plan aid recipients, and an informal agreement was reached in 1950 to control the export of strategic products and related technical data from member countries. A multilateral organization was formed with a policy body, called the Consultative Group, to coordinate the respective national controls. A working body, the Coordinating Committee (COCOM), was assigned the responsibility for the day-to-day operations. The membership of this multilateral organization eventually included all the NATO countries (with the exception of Iceland) plus Japan and Australia. COCOM coordinated the determination of strategic items to be controlled, the review of specific export transactions proposed by member governments for exceptions from the agreed international embargo, and the compliance activities of member states. The organization was disbanded March 31, 1994. A successor organization, called Wassenaar, continues to control most of the same

items that had appeared on the COCOM list of strategic items. Wassenaar members include not only the old COCOM members but also Argentina, Austria, Bulgaria, Czech Republic, Finland, Hungary, Ireland, Poland, Romania, Russia, Slovakia, South Korea, Sweden, Switzerland, and Ukraine. Meanwhile, other multilateral organizations to deter the proliferation of nuclear, missile, and chemical and biological weapons have agreed on lists of items the export of which should be controlled for these reasons.

International export control regimes embrace not only commodities, software, and technologies having both civil and military uses (so-called “dual-use” items, controlled in the U.S. largely by the Department of Commerce), but also military equipment, software, and technologies. In the United States, exports of the latter—arms, ammunition, and implements of war—are regulated by the Office of Defense Trade Controls, U.S. Department of State. The International Traffic in Arms Regulations (ITAR) are promulgated pursuant to the authority granted to the Secretary of State by the Arms Export Control Act. These regulations—the controls themselves and the procedures for obtaining export licenses for commodities and technical data on the Munitions List—are dealt with in this volume.

Also discussed in this volume are the export controls administered by the Treasury Department and by several other agencies.

There should be no question in the mind of any exporter about the government’s intention to enforce applicable legislation and regulations. The penalties provided by these laws and regulations are severe. Violations often lead to heavy fines and, in serious cases, to imprisonment as well. Additionally, the privilege of exporting can be withdrawn from firms or individuals who have violated the regulations for specified periods or indefinitely. Ample resources are devoted by the government to the detection and prosecution of violators. The Department of Commerce, the Bureau of Customs, the Department of Justice, and the several intelligence agencies cooperate in this endeavor. Knowing and willful violations receive, of course, the heaviest sanctions, but unintentional violations are by no means overlooked. Parties to an export transaction are expected to know and comply with the regulations.

With this background in mind, the arcane world of export regulations can now be visited. The purpose of this book is fundamental: to provide a reference to which exporters and those who work closely with them can refer in their daily business operations in order to

INTRODUCTION

comply with the myriad of export rules and regulations in as simple a manner as possible. Knowledge of the regulations can serve in the practical solution of export licensing problems related to specific transactions, in the formulation of export marketing plans designed to minimize the impact of controls, and in the organization of company resources to deal correctly and efficiently with both the legal requirements and the day-to-day operational demands of the export control regulations.

The authors do not, of course, intend this book as a substitute for the statutes or regulations themselves. While every effort has been made in this edition to reflect all amendments to the relevant statutes and regulations through January 2000, in the final analysis, the authoritative, binding rules are the statutes, the regulations, and interpretations of the regulations by the agencies and officials responsible for administering the laws.

This Supplement to the Fourth Edition revises substantially the 2000 Fourth Edition.

However, affected parties must keep themselves currently informed of changes, especially those becoming effective subsequent to the January 2000 cutoff date for this Supplement. The exporter is responsible for understanding the laws and regulations and determining how they affect his proposed transaction.

Additional Note Concerning the Revised Editions and Supplements

The original title of the book was *Export Controls in the United States*. It was changed to *United States Export Controls* for the Second Edition and remains as it was in the Second Edition.

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