



EXPORT ADMINISTRATION ACT OF 1996

I. INTRODUCTION

Foreign trade is one of the most significant factors driving California's economic recovery. In 1994, almost 10 percent of the Gross State Product was attributable to foreign trade. From 1993 to 1995, California's exports rose from \$68 billion to \$92 billion, an increase of 25 percent. The export of computer, industrial, electric and electrical equipment products alone accounts for \$47.1 billion, over half of all of California's exports by value.

These statistics evidence the importance of trade to California. Equally important, then, is federal legislative policy affecting foreign trade. Currently, the House of Representatives is considering H.R. 361, the Export Administration Act of 1996. For the information of the California congressional delegation and other interested parties, this paper analyzes key sections of the bill.

II. BACKGROUND

On March 29, 1996, the House International Relations Committee favorably reported H.R. 361, the Export Administration Act of 1996. The bill replaces the Export Administration Act of 1979, which expired in August of 1994, and which was the statutory basis for the control of exports of dual-use commodities and technologies. Dual-use commodities and technologies are non-munitions, civilian items that have potential military applications. Since the expiration of the EAA in 1994, the federal government's authority to control exports of dual-use commodities has derived from the President's emergency powers under the International Emergency Economic Powers Act.¹

¹ Several unsuccessful attempts have been made over the last several years to reauthorize the EAA. This year, Rep. Toby Roth, the Chairman of the International Relations' International Economic Policy and Trade Subcommittee and chief sponsor of the legislation, has accommodated the National Security Committee and other relevant committees by making changes in several of the bill's provisions.

The purposes of H.R. 361 are twofold: one, to strengthen the effective use of U.S. export controls to prevent international terrorism and the proliferation of weapons of mass destruction; and two, to improve U.S. export competitiveness by streamlining the U.S. export license process to eliminate unnecessary governmental regulations.

The export of dual-use commodities under the Export Administration Act of 1979 has been controlled for national security and foreign policy purposes, and to avert potential "short supply" problems in the United States should excess exports occur. The federal government controls exports under this system by requiring the issuance of an export license for dual-use commodities and technologies that have been placed on the Commodity Control List (CCL). The Department of Commerce has the primary role in approving or disapproving applications; however, many applications are also referred to the Departments of Defense and State, and other relevant agencies for comments and recommendations.

Under the current procedures, these referrals have caused significant delays in the issuance of an export license. One of the major objectives of H.R. 361 has been to streamline the licensing process for U.S. exporters, in order not to hinder their competitiveness in the global marketplace.

III. ANALYSIS OF KEY PROVISIONS OF THE EXPORT ADMINISTRATION ACT OF 1996

A. GENERAL FRAMEWORK

Like its predecessor, the new Export Administration Act would require the Secretary of Commerce to establish a Commodity Control List in consultation with the Secretary of Defense and other relevant agencies. The CCL will include the items subject to either "multilateral," "emergency," or "short supply" export controls under the Act. The CCL is to be cross-referenced with the specific countries and, if appropriate, end-users or end-uses of the commodities, for which the export of the commodity is controlled. The Act establishes an interagency process for determining what commodities should be added or deleted from the CCL. In addition, the President is required to update at least semi-annually the parties and/or countries that are denied or debarred export privileges or are sanctioned under the Act or on the basis of other federal law.

Under the proposed Act, if a U.S. exporter wishes to export a CCL-listed commodity to a controlled country or end-user, an export license application must be filed with the Secretary of Commerce. H.R. 361, unlike the expired law, provides for specific deadlines by which the Commerce Department must act in processing an export license. In the case of non-controversial applications, Commerce will have nine days after receipt of the application to grant the license or notify the applicant of its intent to deny, with specific reasons enumerated. The applicant will then have 20 days to respond to the notification of intent to deny.

As for less clear-cut cases, Commerce is required to refer applications to the Department of Defense and other designated agencies that have a substantial interest in U.S. export policy *vis-à-vis* national security. In these more complex cases, the timeframe can then be extended for several months. If Commerce decides that the application must be referred, there is no specific time limit placed on the referral; only that the Secretary must refer the application, with all necessary documentation, "promptly." Once the referral has been made, the referral agency has 30 days to respond with its recommendation to issue or deny the license. However, if the referral agency

requests further information from the applicant, the clock is stopped until that information is received.

Additionally, a pre-license check can be requested by an agency to establish the identity and reliability of the intended recipient of the items. If such a check is needed, the length of time required to do one is exempted from all statutory time periods. The only requirement is that the request for the check must be made by the Secretary of Commerce within five days of the determination that it is required, and the analysis of the result of the check must be completed within five days after the check is completed. However, no time limit is imposed on how long the pre-license check may take.

The bill also requires the establishment of an interagency committee to resolve any disagreements between the reviewing agencies on whether to issue or deny the application. If the application is referred to this committee, the chair, as designated by the Secretary of Commerce, may determine whether to issue or deny the application, or may refer the application for a further review process established under the Act. The further review process allows for the application to ultimately be referred to the President, if the agencies involved cannot reach agreement. The time period for the entire process, however, from date of receipt of the initial application to resolution or referral to the President cannot exceed 90 days.

The timeframe in the proposed law for resolution of an export licensing application is a significant improvement over the current process, where requests for further information and agency disagreements often lead to substantial delays. Nevertheless, critics of the bill remain concerned that a 90 day wait for an export license, as well as any additional time needed for a pre-license check, could jeopardize the competitiveness of U.S. exports in today's highly competitive global marketplace.

B. UNFAIR IMPACT ON U.S. EXPORTERS

In an effort to protect U.S. commercial interests, the Act establishes the policy that no American exporter should be affected unfairly by export control policies, unless relief from such controls would create a significant risk to the foreign policy, nonproliferation, or national security interests of the United States. Given that policy, a U.S. exporter may petition the government for relief, or Commerce on its own initiative may consider granting relief. Relief, however, can be granted only on the basis that the controlled commodity is available for purchase from foreign competitors -- the "foreign availability" rule -- and thus its control by the U. S. would be ineffectual.

Under the bill as originally drafted, a company negatively affected by export controls could petition for relief if it could show any one of the following: 1) foreign availability of the controlled products are, or soon would be, adversely affecting the U.S. market share; 2) the controls are ineffective at meeting the stated objective; or 3) the controls are causing significant adverse economic impact on the U.S. exporter. The House National Security Committee objected to the breadth of this provision. In order to prevent sequential referral of the bill to that committee, the International Relations Committee during mark-up deleted the second and third criteria, and removed the prospective factor from clause one on foreign availability

Deleting the prospective foreign availability exception does not preclude its use, but rather leaves it to the discretion of the Commerce Department, which has used it in the past to justify

export control exceptions. Critics of the bill, however, especially those in the computer electronics industry, believe that the three changes taken together have made the unfair impact provision essentially meaningless.

C. ENCRYPTION

The bill does not address the export of encryption devices, manufactured by U.S. computer electronics companies to ensure the security of financial and other transactions conducted electronically. Currently, the U.S. strictly limits the export of these items because of the potential that terrorists and other criminal groups may use them to cover up their activities. This is an important issue for U.S. electronics companies, because foreign competitors are manufacturing and selling encryption devices abroad. The companies have been negotiating with the administration in an effort to develop a suitable compromise on the export of these devices.

During the committee mark-up of H.R. 361, Chairman Toby Roth (Wis.) allowed during a colloquy with Rep. Tom Campbell (Stanford) that the current system of controls on encryption devices was cumbersome and jeopardized the competitiveness of U.S. manufacturers. Although he pledged to work with the administration and interested companies to reach a satisfactory regulatory solution, he also pointed out that this issue is very sensitive because it deals with national security aspects that must remain classified.

D. UNILATERAL EXPORT CONTROLS

Another significant issue in the bill is the President's authority to impose unilateral sanctions against a foreign country.

The act gives the President the authority to impose, on his own initiative, "emergency controls," if certain findings are made. Emergency controls are export controls imposed unilaterally by the United States. In order to prohibit or curtail exports on a unilateral basis, the President must make the following six findings:

1. that the controls are necessary to further significantly the nonproliferation, national security, or foreign policies of the United States, the objective of the controls is in the national interest, and reasonable alternatives are unavailable;
2. that the controls are likely to make substantial progress toward:
 - a. changing the undesirable conduct of the controlled country;
 - b. denying the controlled country access to the controlled items from all sources;
 - c. establishing multilateral cooperation to deny the controlled country access to the controlled items; *or*
 - d. denying exports or assistance that significantly contribute to the proliferation of military capabilities, terrorism, or human rights abuses;
3. the controls are compatible with the foreign policy objectives of the United States and with U.S. policy toward the controlled country;
4. the reaction of other countries to the controls is not likely to render them ineffective;
5. the effect of the controls on the United States' export performance or competitive position, or on the economic well-being of individual U. S. companies and their

employees and communities does not exceed the benefit to U.S. foreign policy, nonproliferation, or national security interests; *and*

6. the United States has the ability to enforce the controls effectively.

Controls that are imposed once these findings have been made will expire 12 months after they are imposed unless the President terminates them earlier, or extends them for a further one year period after redetermining that the six conditions above still pertain. The controls can at any time be adopted as multilateral controls by the United States and its trading partners.

The 1974 Export Administration Act allowed the imposition of unilateral controls for foreign policy reasons. H.R. 361 expands their imposition to include nonproliferation and national security as well. On the other hand, the second condition required by the bill was not contained in the prior law. The authors of the bill intend that the stringent conditions placed on the use of unilateral controls will limit their use. Nevertheless, some U. S. exporters are concerned that, in fact, it has expanded the President's authority to impose unilateral sanctions. American exporters oppose their use because foreign competitors are not restricted by them and may be able to increase their global marketshare at the expense of U.S. companies.

IV. CONCLUSION

As Congress considers H. R. 361, the California congressional delegation should continue to bear in mind the ramifications of this bill on California's important trade position. The current bill attempts to streamline the export licensing process while protecting U.S. national security and foreign policy interests. But to improve its chances for action this year several compromises had to be made that may have tipped the scales away from protecting U.S. commercial interests. The ultimate legislation should ensure that U.S. exports are encouraged and expedited in order to enhance the global competitiveness of U.S. exporters.

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