

GAO

Testimony

Before the Committee on Armed Services,
U.S. House of Representatives

For Release on Delivery
Expected at 1:00 p.m., EST,
Thursday, February 28, 2002

EXPORT CONTROLS

Issues to Consider in Authorizing a New Export Administration Act

Statement of Joseph A. Christoff,
Director, International Affairs and Trade



Mr. Chairman and Members of the Committee,

I am pleased to be here today to discuss the proposed authorization of the Export Administration Act (EAA) and to highlight key provisions in the House and Senate bills. The law authorizing controls over exports of dual use goods and services—those having both commercial and military applications—terminated in 1994 and was extended through law and executive order.¹ Congress now has before it two different bills—H.R. 2581 and S. 149—that would enact a new legal basis for such controls.

We examined the two bills to determine how they would balance often competing economic, national security, and foreign policy interests at key decision points. We also identified issues drawn from our past work that demonstrate the need for continuous oversight to ensure that the executive branch implements the law as Congress intended.

Summary

A new Export Administration Act will need to balance stakeholder interests, assess the national security risks presented by end users, and balance the needs of exporters with foreign policy and national security interests. Both bills seek to balance these interests by involving the departments of Commerce, Defense, and State. In some cases, however, the lack of clear provisions raises questions about the balance of U.S. foreign policy and national security interests with economic interests.

Overall, in balancing these interests, the House bill places greater emphasis on protecting foreign policy and national security interests, while the Senate bill emphasizes economic interests. These differences are exemplified in the following key areas:

- The House bill requires the Secretary of Commerce to obtain the concurrence of the secretaries of State and Defense when adding or removing items from the list of controlled items. In contrast, the Senate bill only requires the concurrence of the Secretary of Defense. However, each bill gives the Secretary of Commerce sole authority to remove items from the list without the concurrence of either the secretaries of Defense

¹Under Executive Order 12924, issued August 19, 1994 (59 Fed. Reg. 43437), the president, to the extent permitted by law, extended the application of the act. Most recently, application of the act was extended by Executive Order 13222, August 17, 2001 (66 Fed. Reg. 44025).

or State, if the secretary determines that items are available from foreign sources or on a mass-market basis.

- The House bill includes a “presumption of denial” provision that directs the executive branch to presume that it should deny applications under specific conditions. The Senate bill does not contain similar language aimed at guiding U.S. licensing decisions.

Moreover, a series of reports we have issued on export controls indicates that new legislation alone will not ensure that regulations and practices are implemented as Congress intended. Congress will need to oversee executive branch compliance with the law. Our past work has identified several instances in which the executive branch has not followed congressional direction in implementing export controls or has implemented the controls in a confusing or inconsistent manner.

- The President’s January 2001 decision to raise the licensing thresholds for high performance computers was not adequately justified as required by law.
- The Department of Commerce’s regulations regarding U.S. licensing requirements for missile-related exports to Canada are inconsistent with the amended Export Administration Act.
- The Departments of Commerce, State, and Defense have had difficulty agreeing on licensing jurisdiction and clear procedures for protecting satellite-related technology, which has created confusion and other problems for the agencies and exporters.
- The Department of Commerce has had continuous difficulties in monitoring use of sensitive exports, especially in conducting post-shipment visits. Oversight of this function will continue to be necessary, especially when countries restrict U.S. access to facilities that receive sensitive U.S. exports.

Background

U.S. policy regarding exports of sensitive dual-use technologies—that is, items with military and civilian uses—seeks to balance economic, national security, and foreign policy interests. The Export Administration Act of 1979, as amended, terminated on August 20, 1994, and was extended through several executive orders and law. Under the act, the president has the authority to control and require licenses for the export of dual use items such as nuclear, chemical, biological, missile, or other technologies that may pose a national security risk or foreign policy concern. The

president also has the authority to revise or remove those controls as U.S. concerns and interests change. The Commerce Department licenses sensitive dual-use items under the Act.²

A new Export Administration Act must take into consideration several important economic and national security trends:

- increased globalization of markets and an increasing number of foreign competitors,
- rapid advances in technologies and products,
- a growing dependence by the U.S. military on commercially available dual-use items, and
- heightened threats of terrorism and the proliferation of weapons of mass destruction.

Balancing Multiple Economic, National Security, and Foreign Policy Interests

A new Export Administration Act will need to balance stakeholder interests, assess the national security risks presented by end users, and balance the needs of exporters with foreign policy and national security interests. Both bills seek to balance these interests by involving the departments of Commerce, Defense, and State. In some cases, however, the lack of clear provisions raises questions about the balance of U.S. foreign policy and national security interests with economic interests.

Balancing the Needs of Stakeholders

Both bills would establish a National Security Control List of controlled items that the Department of Commerce would review on a continuing basis (section 202). This list serves to control dual-use items that countries of concern could use to proliferate weapons of mass destruction and promote terrorism. The Senate bill would require the Secretary of Commerce to obtain the concurrence of the Secretary of Defense before adding or removing items from this list. However, it would only require the Secretary of Commerce to consult with the heads of other agencies that the secretary deems appropriate. State's potential exclusion from this process raises the possibility that U.S. foreign policy or national security interests may not be properly considered. In contrast, the House bill requires the concurrence of the secretaries of State and Defense to modify the list.

²The State Department licenses munitions items under the Arms Export Control Act (P.L. 90-629).

However, Section 211 of each bill gives the Secretary of Commerce sole authority to remove items from the list without the concurrence of either the secretaries of Defense or State, if the secretary determines that items are available from foreign sources or on a mass-market basis.³ Only the president would be able to reverse the Secretary of Commerce’s decision.

In addition, State’s role in reviewing where items fall on the control list differs in each bill. Where an item falls on the list is important because its placement determines what reasons for control apply and whether a license is required. The House bill requires the Secretary of Commerce to notify the secretaries of State and Defense about exporter requests for assistance in determining where an item is placed on the list or whether a license is required (subsection 401(h)(1)). The Senate bill, however, does not include the Secretary of State, raising the possibility that Commerce might determine that an item is not subject to export licensing requirements without State’s input. Only the House bill provides a mechanism for resolving disputes among the three agencies on this issue.

Moreover, neither bill provides for a role for the Department of Defense in executive branch assessments of the impact of a potential export on the military capabilities of a country supporting terrorism. Section 310 of both bills would require only the secretaries of State and Commerce to conduct such assessments and to notify Congress before approving an export license. Without the Department of Defense’s input into these important military assessments, Congress might receive notifications that do not fully reflect the potential military impact of these exports.

Assessing National Security Risks Presented by End Users

Section 201 of the House bill places greater emphasis on national security interests than on economic interests by establishing an additional standard for export applications for certain end users. The House bill includes a “presumption of denial” provision that directs the executive branch to presume that it should deny applications under specific conditions. Applications should be denied to (1) end users located in countries not adhering to export control regimes that are involved in developing weapons of mass destruction or (2) when the export would contribute to a country’s military capabilities in a manner detrimental to the national

³Section 211(b) establishes a petition process by which the Secretary of Commerce evaluates an item’s foreign availability or mass-market status in consultation with the departments of Defense and State, other appropriate agencies, and the Office of Technology Evaluation.

security interests of the United States or its allies. The Senate bill does not contain similar language aimed at guiding U.S. policy, which is to encourage exports unless U.S. national security and foreign policy objectives are at risk.

Balancing the Needs of Exporters with Foreign Policy and National Security Interests

The EAA seeks to balance exporters' need for timely review of export license applications with the government's need to thoroughly review these applications. Section 401 of the Senate bill places greater relative emphasis on exporters' needs, while the House bill shifts the balance in favor of the government's need for thorough review. Both bills contain provisions establishing timeframes for the government to review export license applications and criteria for extending the timeframes. Under export administration regulations and executive order, agencies have 30 days to review license applications, and the entire process must be completed in 90 days. Under the timeframes established in both bills, the executive branch has 30 days to decide whether to approve or deny an export license application. Section 401(g) of the House bill contains criteria for extending the export licensing review timeframes by up to 60 days based on the complexity of the analysis or potential national security or foreign policy impact of the export. The House bill also allows for delays of unspecified duration necessary to obtain information or assessments from intelligence agencies. The Senate bill does not contain these provisions.

Providing for Congressional Oversight of Long-standing Implementation Issues

A series of reports we have issued on export controls indicates that new legislation alone will not ensure that regulations and practices are implemented as Congress intended. Our work has shown that agencies do not always comply with the law and that the executive branch has not always implemented policies and procedures clearly and consistently.

Agencies Do Not Always Comply with the Law

Our past reviews of export controls have highlighted instances when the executive branch has not implemented policies and procedures as Congress intended. In March 2001, we testified that the president's

decision to raise the licensing thresholds for high performance computers was not adequately justified.⁴ While the president's report recognized that high performance computing capabilities will become increasingly available to other countries through computer clustering, the report failed both to address all militarily significant uses for computers at the new thresholds and to assess the national security impact of such uses, as required by law. The inadequacies of the president's report were further compounded by continued use of a flawed measure for assessing computer performance.

In May 2001, we reported that Commerce's regulations regarding U.S. licensing requirements for missile-related exports are inconsistent in one instance with the amended Export Administration Act.⁵ Specifically, this act requires an individual license for any export of dual-use missile equipment and technology to any country. However, Commerce regulations exempt from the licensing regime missile equipment and technology to be exported to Canada. Commerce officials did not cite any statutory justification for this exemption, which predated the amendment. Rather, Commerce officials assumed that Congress did not intend to end the licensing exemption. Congressional oversight is needed to ensure that Commerce's proposed changes in its regulation comply with the law.

Executive Branch Has Not Always Implemented Policies and Procedures Clearly and Consistently

Continued congressional monitoring is also needed in examining how the executive branch uses the analytical tools available to justify export licensing. In February 2002, we reported that the executive branch does not have a sound analytical basis for justifying the current export controls on semiconductor manufacturing equipment to China.⁶ Specifically, we found that U.S. agencies have not assessed the foreign availability of this technology or the cumulative effects of such exports on U.S. national security interests. To remedy these shortcomings, we recommended that the Departments of Commerce, Defense, and State complete this analysis,

⁴U.S. General Accounting Office, *Export Controls: System for Controlling Exports of High Performance Computers Is Ineffective*, [GAO-01-10](#) (Washington, D.C.: December 20, 2000).

⁵U.S. General Accounting Office, *Export Controls: Regulatory Change Needed to Comply with Missile Technology Licensing Requirements*, [GAO-01-530](#) (Washington, D.C.: May 31, 2001).

⁶U.S. General Accounting Office, *Export Controls: Rapid Advances in China's Semiconductor Industry Underscore Need for Fundamental U.S. Policy Review*, [GAO-02-151](#) (Washington, D.C.: February 19, 2002 FOUO)

which would provide a sound basis for an updated policy and the development of new controls, if appropriate, for protecting U.S. security interests.

Jurisdictional disputes and lack of interagency coordination have also surrounded the export of satellites and related items for the past 10 years. In September 1999, we reported that shared licensing jurisdiction and unclear roles and responsibilities of each agency in licensing and monitoring these exports have created confusion and other problems.⁷ We also found that Commerce, State, and Defense have had difficulty agreeing on clear procedures for safeguards to protect satellite-related technology to ensure compliance by U.S. exporters with U.S. satellite export regulations. The House bill (Title VII) would transfer the licensing of satellites and related items from State to Commerce but leaves jurisdiction over certain defense-related services to State. Regardless of whether a change is made in satellite jurisdiction, clear lines of responsibility for each agency and clear jurisdiction over components, technical data, and services related to satellite exports would be beneficial.

In March 2001, we reported that the end-use monitoring process continues to be a weakness of the U.S. export control system.⁸ We have also reported several times since 1995 that the U.S. government has had difficulties in confirming the appropriate use of exported technologies.⁹ Access problems are often the issue, particularly with countries of concern such as China that continue to restrict U.S. officials' visits to recipient facilities. For example, China has long restricted U.S. officials' access to facilities that received U.S. high performance computers. According to a Commerce official, these restrictions have resulted in a backlog of about 700 post-

⁷U.S. General Accounting Office, *Export Controls: Better Interagency Coordination Needed on Satellite Exports*, [GAO/NSIAD-99-182](#) (Washington, D.C.: September 17, 1999).

⁸U.S. General Accounting Office, *Export Controls: Inadequate Justification for Relaxation of Computer Controls Demonstrates Need for Comprehensive Study*, [GAO-01-534T](#) (Washington, D.C.: March 15, 2001).

⁹U.S. General Accounting Office, *Export Controls: Some Controls Over Missile-Related Technology Exports to China Are Weak*, [GAO/NSIAD-95-82](#) (Washington, D.C.: April 17, 1995); *Export Controls: Information on the Decision to Revise High Performance Computer Controls*, [GAO/NSIAD-98-196](#) (Washington, D.C.: September 16, 1998); *Hong Kong's Reversion to China: Effective Monitoring Critical to Assess U.S. Nonproliferation Risks*, [GAO/NSIAD-97-149](#) (Washington, D.C.: May 22, 1997); *Export Controls: Challenges and Changes For Controls on Computer Exports*, T-NSIAD-00-187 (Washington, D.C.: May 26, 2000).

shipment visits. In addition, the U.S. government makes limited efforts to monitor exporters' and users' compliance with the conditions set forth in export licenses for high performance computers. In an effort to ensure that sensitive U.S. exports are used only for intended purposes, section 506 of the bills provide for strengthened post-shipment monitoring and clear consequences for countries refusing to allow such monitoring. The bill also authorizes appropriations of \$4.5 million for end-use verifications and increased funding to hire 10 additional overseas investigators. Nonetheless, our work suggests that there will be a need for continued oversight of this issue.

Reports we have issued since 1995 indicate that limitations of both government and private industry screening of proposed end users of sensitive American exports has long been an issue.¹⁰ For example, the Commerce Department does not have complete intelligence information on license applicants that may serve as fronts for proliferators or terrorists engaged in illicit activities.¹¹ Also, the U.S. government increasingly relies on industry to determine whether an export needs to be licensed, even though industry has raised questions about its capability and willingness to make this assessment without government support.

Conclusion

In conclusion, I would like to stress that export controls are just one of several policy instruments that the United States relies upon to combat the proliferation of weapons of mass destruction, address the threat of terrorism, and secure U.S. national security interests. Other U.S. non-proliferation policy instruments include international treaties (such as the Nuclear Non-Proliferation Treaty), multilateral export control regimes, and programs aimed at helping former Soviet states control and eliminate their weapons of mass destruction. Each instrument is important, but each has limitations. The challenge now facing Congress is to develop an export control process that will reinforce and complement these instruments, while balancing broader U.S. security, foreign policy, and economic interests.

¹⁰U.S. General Accounting Office, *Export Controls: Some Controls Over Missile-Related Technology Exports to China Are Weak*, GAO/NSIAD-95-82 (Washington, D.C.: April 17, 1995); *Export Controls: Information on the Decision to Revise High Performance Computer Controls*, GAO/NSIAD-98-196 (Washington, D.C.: September 16, 1998).

¹¹U.S. General Accounting Office, *Weapons of Mass Destruction: Assessing U.S. Policy Tools for Combating Proliferation*, GAO-02-226T (Washington, D.C.: November 7, 2001).

Mr. Chairman and Members of the Subcommittee, this concludes my prepared statement. I will be happy to answer any questions you may have.

Contact and Acknowledgements

For future contacts regarding this testimony, please contact Joseph Christoff at (202) 512-8979. Stephen M. Lord, Lynn Cothorn, Jeffrey D. Phillips, Pierre R. Toureille, Anne Marie Lasowski, and Mark Speight made key contributions to this testimony.

Related GAO Products

Export Controls: Reengineering Business Processes Can Improve Efficiency of State Department License Reviews. [GAO-02-203](#). December 31, 2001.

Weapons of Mass Destruction: Assessing U.S. Policy Tools for Combating Proliferation, [GAO-02-226T](#). November 7, 2001.

Export Controls: Clarification of Jurisdiction for Missile Technology Items Needed. [GAO-02-120](#). October 9, 2001.

Defense Trade: Information on U.S. Weapons Deliveries to the Middle East. [GAO-01-1078](#). September 21, 2001.

Export Controls: State and Commerce Department License Review Times Are Similar. [GAO-01-528](#). June 1, 2001.

Export Controls: Regulatory Change Needed to Comply with Missile Technology Licensing Requirements. [GAO-01-530](#). May 31, 2001.

Export Controls: System for Controlling Exports of High Performance Computers Is Ineffective. [GAO-01-10](#). December 20, 2000.

Defense Trade: Observations on Issues Concerning Offsets. [GAO-01-278T](#). December 15, 2000.

Defense Trade: Data Collection and Coordination on Offsets. [GAO-01-83R](#). October 26, 2000.

Defense Trade: Contractors engage in Varied International Alliances. [GAO/NSIAD-00-213](#). September 7, 2000.

Defense Trade: Analysis of Support for Recent Initiatives. [GAO/NSIAD-00-191](#). August 31, 2000.

Foreign Military Sales: Changes Needed to Correct Weaknesses in End-Use Monitoring Program. [GAO/NSIAD-00-208](#). August 24, 2000.

Defense Trade: Status of the Department of Defense's Initiatives on Defense Cooperation. [GAO/NSIAD-00-190R](#). July 19, 2000.

Defense Trade: Identifying Foreign Acquisitions Affecting National Security Can Be Improved. [GAO/NSIAD-00-144](#). June 29, 2000.

Export Controls: Challenges and Changes For Controls on Computer Exports. T-NSIAD-00-187. May 26, 2000.

Export Controls: National Security Risks and Revisions to Controls on Computer Systems. T-NSIAD-00-139. March 23, 2000.

Export Controls: National Security Risks and Revisions To Controls on Computers. T-NSIAD-00-104. February 28, 2000.

Foreign Military Sales: Efforts to Improve Administration Hampered by Insufficient Information. [GAO/NSIAD-00-37](#). November 22, 1999.

Export Controls: Statutory Reporting Requirements for Computers Not Fully Addressed. NSIAD-00-45. November 5, 1999.

Export Controls: Implementation of the 1998 Legislative Mandate for High Performance Computers. T-NSIAD-00-53. October 28, 1999.

Foreign Military Sales: Review Process for Controlled Missile Technology Needs Improvement. [GAO/NSIAD-99-231](#). September 29, 1999.

Export Controls: 1998 Legislative Mandate for High Performance Computers. NSIAD-99-208. September 24, 1999.

Export Controls: Better Interagency Coordination Needed on Satellite Exports. NSIAD-99-182. September 17, 1999.

Defense Trade: Department of Defense Savings From Export Sales Are Difficult to Capture. [GAO/NSIAD-99-191](#). September 17, 1999.

Defense Trade: Status of the Defense Export Loan Guarantee Program. [GAO/NSIAD-99-30](#). December 21, 1998.

Defense Trade: U.S. Contractors Employ Diverse Activities to Meet Offset Obligations. [GAO/NSIAD-99-35](#). December 18, 1998.

Defense Trade: Weaknesses Exist in DOD Foreign Subcontract Data. [GAO/NSIAD-99-8](#). November 13, 1998.

Export Controls: Information on the Decision to Revise High Performance Computer Controls. NSIAD-98-196. September 16, 1998.

Export Controls: Changes in Controls Applied to the Export of High Performance Computers. T-NSIAD-98-250. September 16, 1998.

Export Controls: National Security Issues and Foreign Availability for High Performance Computer Exports. NSIAD-98-200. September 16, 1998.

China: Military Imports From the United States and the European Union Since the 1989 Embargoes. NSIAD-98-176. June 16, 1998.

China: U.S. and European Union Arms Sales Since the 1989 Embargoes. T-NSIAD-98-171. April 28, 1998.

Hong Kong's Reversion to China: Effective Monitoring Critical to Assess U.S. Nonproliferation Risks. NSIAD-97-149. May 22, 1997.

Export Controls: Sales of High Performance Computers to Russia's Nuclear Weapons Laboratories. T-NSIAD-97-128. April 15, 1997.

Export Controls: Change in Export Licensing Jurisdiction for Two Sensitive Dual-Use Items. [GAO/NSIAD-97-24](#). January 14, 1997.

Export Controls: Sensitive Machine Tool Exports to China. [GAO/NSIAD-97-4](#). November 19, 1996.

Defense Conversion. NSIAD-96-230R. September 30, 1996.

Nuclear Weapons: Russia's Request for the Export of U.S. Computers for Stockpile Maintenance. T-NSIAD-96-245. September 30, 1996.

Export Controls: Some Controls Over Missile-Related Technology Exports to China Are Weak. [GAO/NSIAD-95-82](#). April 17, 1995.