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Commerce Takes Steps to Ease Export License Requirements

In late 1989, Secretary of Commerce Robert Mosbacher proposed a comprehensive plan to relax export controls to the Soviet Bloc, particularly to Poland and Hungary, in light of the revolutionary political changes in those countries. This step was the most dramatic in a series of steps taken by the Commerce Department to relax the export controls imposed on U.S. companies that sell their products in the international marketplace.

In addition to the Mosbacher plan, in the late fall of 1989 Commerce relaxed U.S. export controls on U.S.-origin parts and components incorporated in foreign-made products, thus reducing the licensing requirements that would apply to foreign products containing U.S.-origin parts and components. The Department also clarified its guidelines for use of General License GTDA, which concerns the export of technical data available to all destinations. Finally, Commerce proposed a rule that would redesignate General License GTE as General License G-TEMP, establish guidelines for use of the new license, and remove the registration requirement formerly required for export of commodities for temporary use abroad.

Each of these developments is discussed briefly below.

I. Mosbacher's Plan for Phased Decontrol to Eastern Europe

In reaction to the revolutionary events in Eastern Europe that have moved those countries away from totalitarian communism and toward democracy, Secretary Mosbacher proposed a comprehensive program to relax controls of exports to the Soviet Bloc, especially Poland and Hungary. The plan has three components: (1) More favorable review of specific U.S. export license applica-

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tions (and cases submitted to COCOM by other COCOM governments) for Poland and Hungary; (2) relaxation of controls to benefit specific civilian sectors in these countries based on assurances by the governments of these countries that U.S. technology would not be diverted to domestic or Soviet military use; and (3) creation of a "Green Zone" of approved commodities and technologies for these countries.¹

Although the details of the Mosbacher proposal remain to be worked out over a period of months, it is significant that there now appears to be a consensus within the United States government that export controls on Eastern Europe should be relaxed. Officials at the Commerce Department have confirmed that liberalization efforts are underway at Commerce as well as at the State and Defense Departments, two other agencies with export control jurisdiction. One driving force was the government of Hungary, which approached the State Department with a specific proposal to provide end-use assurances in exchange for U.S. and COCOM approvals of higher levels of technology exports to that country.

The Bush Administration is on record as supporting improvement in the economic infrastructure of the liberalizing countries of Eastern Europe.² These sectors include banking, food processing, medical facilities, petrochemicals, telecommunications, trade, transportation, and tourism. Telecommunications equipment in particular has been identified as a commodity under consideration for relaxed U.S. controls to support civilian infrastructure development. Commerce has recommended that exporters begin sending in applications for licenses to export items to Eastern Europe to improve the commercial infrastructure.

Although the Mosbacher plan presents new opportunities for U.S. exporters, whether it will result in a "new" U.S. export control policy remains to be seen. Clearly Commerce and Defense are not routinely approving all export license applications for Eastern Europe. Important national security issues are involved even for exports to support commercial infrastructure, particularly with regard to the so-called dual-use items. To take advantage of whatever new opportunities develop as a result of the changes in Eastern Europe, U.S. exporters will have to continue to be patient, consult with U.S. export licensing officials, submit license applications, and fight for their approval.

II. Relaxed Controls on U.S.-Origin Parts and Components

Earlier in 1989, Commerce published an interim rule that revises section 776.12 of the Export Administration Regulations (EAR)³ to reduce U.S. export controls on U.S.-origin parts and components incorporated in foreign-made

1. See, e.g., 6 Int'l Trade Rep. (BNA) 1620 (Dec. 13, 1989).

2. See, e.g., 6 Int'l Trade Rep. (BNA) 1650 (Dec. 20, 1989).

3. The EARs are codified at 15 C.F.R. subch. C, pts. 768-799 (1989).

products.⁴ Reduction of these controls is required by amendments to the Export Administration Act of 1979 that were enacted in 1988 as part of the Omnibus Trade and Competitiveness Act.⁵

Under the interim rule, Commerce expanded the exemptions to the requirement that prior written approval of the Office of Export Licensing be obtained for export of a foreign-made product incorporating U.S.-origin parts and components. Such written approval is no longer required when the U.S. content value⁶ is 10 percent or less (without a dollar value limitation) of the foreign-made product value,⁷ or when the U.S. content value is 25 percent or less of the foreign-made product value and the ultimate destination of the foreign-made product is not located in Country Group S (Libya) or Z (Cambodia, Cuba, North Korea, or Vietnam) or in Iran, Syria, or the People's Democratic Republic of Yemen.

The interim rule also revises the U.S. content that is to be counted when calculating U.S. content value. Under the interim rule, parts, components, or materials that could be exported from the United States to the new country of destination under General Licenses G-DEST, G-COCOM, G-COM, or GFW may be excluded from the calculation of U.S. content value.⁸ Under the prior rule, only items eligible to use General License G-DEST were excluded from the calculation.

The interim rule clarifies that prior written approval of the Office of Export Licensing is required for the export from a foreign country of a foreign-made supercomputer containing U.S.-origin parts, components, or materials that would not be eligible for export to the new destination under General License G-DEST. Commerce will treat cases involving supercomputers on a case-by-case basis.

Finally, the interim rule limits the value of the U.S.-origin spare parts that may accompany a shipment to 10 percent of the value of the foreign-made product. Commerce made this change to limit spare parts shipped with the product to "a reasonable complement."⁹

Exporters should be aware that a foreign-made product that is the direct product of U.S.-origin technical data may require U.S. authorization regardless of the U.S. content under section 779.8 of the EAR.¹⁰ Further, under section 776.12 of the EAR, Commerce does not consider the phrase "incorporated components"

4. 54 Fed. Reg. 40,640 (1989).

5. See 50 U.S.C.A. app. §§ 2401-2433 (West Supp. 1989).

6. Under EAR "guidelines" the U.S. content value is calculated as the delivered cost to the foreign manufacturer of U.S.-origin parts, components, and materials, subject in some cases to certain deductions and adjustments. 54 Fed. Reg. at 40,642-43.

7. Under EAR "guidelines" the foreign-made product value is the normal export selling price f.o.b. factory, excluding value-added and excise taxes. *Id.*

8. *Id.*

9. *Id.* at 40,643.

10. See 15 C.F.R. § 779.8 (1989).

to include either U.S.-origin parts, components, and materials not incorporated abroad into products or other commodities that are U.S.-origin peripheral or accessory devices that are merely rack mounted with, or cable connected into, foreign equipment.¹¹ Commerce considers these other items subject to the re-export provisions of Part 774 of the EAR.

III. Clarification of General License GTDA

Commerce clarified its guidelines for use of General License GTDA contained in section 779.3 of the EAR,¹² which authorizes exports of technical data available to all destinations.¹³ The license is available in four specific instances in which technical data may be released. These are (1) technical data already “publicly available”; (2) technical data arising from “fundamental research”; (3) “educational” technical data; and (4) technical data connected with patent applications.¹⁴

Commerce also clarified each of the instances when General License GTDA may be used for the export of technical data. With respect to the meaning of “publicly available,” technical data are “publicly available” when generally accessible to the interested public in any form, including publication in periodicals, books, print, electronic, or any other media available for general distribution.¹⁵ Technical data are also “publicly available” when readily available at public and university libraries. Release of technical data at an “open” conference, meeting, seminar, trade show, or other gathering would also be covered by General License GTDA.¹⁶

“Fundamental research” is defined to be “basic and applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community.”¹⁷ Commerce has distinguished this type of research from “proprietary research” and from “industrial development, design, production, and product utilization” research, which ordinarily would not be available to all destinations for proprietary or specific national security reasons.¹⁸

Technical data in the “educational” context include data available “by instruction in catalog courses and associated teaching laboratories of academic institutions.”¹⁹

11. *Id.* § 776.12.

12. *Id.* § 779.3.

13. 54 Fed. Reg. 40,643 (1989).

14. *Id.* at 40,646–47.

15. *Id.*

16. *Id.*

17. *Id.* at 40,647.

18. *Id.*

19. *Id.* at 40,647–48.

Finally, use of General License GTDA is available for technical data contained in patent applications only in three instances. These are: (1) data contained in a patent application prepared wholly from foreign-origin technical data that are exchanged between the foreign inventor and a U.S. person in order to file with the U.S. Patent and Trademark Office; (2) data contained in a patent application or an amendment, modification, supplement, or division of an application and authorized for filing in a foreign country in accordance with the regulations of the Patent and Trademark Office; or (3) data contained in a patent application that is to be sent to a foreign country before or within six months after the filing of a U.S. patent application to obtain a signature of a foreign inventor or co-inventor.²⁰

Commerce provided specific guidelines (not covered here) to be used to identify when the export of technical data would qualify for General License GTDA, which should be consulted.²¹ Commerce also added Supplement No. 5 to Part 779 of the EAR to provide helpful questions and answers on General License GTDA.²²

Exporters who plan to use General License GTDA should bear in mind that compliance with the requirements for use of General License GTDA may not ensure compliance with all the export controls imposed by the research grant, contract, or other instrument under which the technical data were developed.

IV. Proposed New General License G-TEMP

Finally, Commerce published a proposed rule to redesignate General License GTE as General License G-TEMP.²³ The proposed General License G-TEMP would be established to authorize export of commodities for temporary use abroad (as does General License GTE), but would not continue the registration requirement of General License GTE.²⁴ However, commodities exported under General License G-TEMP would be required to be returned to the country from which they were exported as soon as practicable, but, with certain exceptions, no later than one year from the date of export.²⁵

Commodities eligible for shipment under General License G-TEMP would include those eligible under existing General License GTE, with some clarification.²⁶ The exporter's "tools of trade," defined to be "the usual and reasonable kinds and quantities of commodities and software" used in the exporter's business, would continue to be eligible provided they were used in a

20. *Id.* at 40,648.

21. *Id.*

22. *Id.* at 40,648–51.

23. *Id.* at 40,681.

24. *Id.* at 40,682–83.

25. *Id.*

26. *Id.*

“lawful enterprise.”²⁷ However, the commodities and software would be required to remain under the effective control of the exporter or his employee.²⁸

Commodities and software eligible to be exported for exhibition and demonstration purposes under General License G-TEMP could not be exhibited or demonstrated at any one site for more than thirty days unless authorized by the Office of Export Licensing. In addition, the G-TEMP license would be unavailable for exhibitions and demonstrations in the People’s Republic of China.²⁹

The proposed rule would add two categories of commodities eligible for General License G-TEMP to those available under General License GTE. General License G-TEMP could be used for export of “news-gathering” commodities (including software) that accompany “accredited” news media personnel to Country Groups Q, S, W, Y, or Z or the People’s Republic of China provided: (1) the news-gathering firm maintained ownership of the commodities; (2) they remain in the physical possession of the news media personnel; and (3) they return with the news media personnel.³⁰ Further, exports that originate in the United States must be registered with the U.S. Customs Service at the time of both exit from and reentry into the United States.³¹

Kits containing replacement parts would also be eligible for General License G-TEMP provided that such parts would qualify for shipment under General License GLR if exported as one-for-one replacements.³² Such kits would be required to remain under the effective control of the exporter or the exporter’s employee, and all parts in the kit would be required to return except that one-for-one replacements could be made.³³

The proposed rule would add several special restrictions to use of General License G-TEMP, in addition to those that apply to General License GTE. Supercomputers would not be eligible for export to any destinations under General License G-TEMP.³⁴ With the exception of news media items, no commodities or software could be exported to Country Groups S or Z.³⁵ Further, no commodity or software could be exported under General License G-TEMP if an order to acquire the commodity has been received before shipment or if the

27. Under the proposed rule, personal computers that do not exceed the limits of Advisory Note 92 to ECCN 1565A on the Commodity Control List (Supplement No. 1 to section 799.1 of the EAR) may be taken as tools of trade to Country Groups Q, W, Y, and the People’s Republic of China. *Id.* at 40,683.

28. *Id.*

29. *Id.*

30. News media materials that accompany news media personnel to all the other destinations would be considered tools of trade for purposes of this license. *Id.*

31. *Id.* at 40,683–84.

32. *Id.* at 40,683.

33. *Id.*

34. *Id.* at 40,683–84.

35. *Id.*

exporter has prior knowledge that the commodity will stay abroad beyond the time limits of General License G-TEMP.³⁶

In using these new rules, an exporter must consider not only the product to be exported, but also the country to which the export is destined. For example, some countries (i.e., Cambodia, Cuba, North Korea, and Vietnam) are subject to virtual export embargoes. Further, the exporter must also check the identity of the proposed end-user to be sure that the end-user is not denied U.S. export privileges. Finally, the exporter must determine that proposed end use of the item does not violate any U.S. end-use restrictions. For example, items having nuclear, military, or law enforcement end uses are subject to special export controls.

As with all export control questions, the exporter determines the applicability of these new rules at its peril. Fines and other penalties, including the suspension of exporting privileges, may be imposed for the improper use of general licenses.

36. *Id.*

