Calendar No. 26

107TH CONGRESS, *1st Session* | SENATE | REPORT 107–10

THE EXPORT ADMINISTRATION ACT OF 2001

REPORT

OF THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 149

together with

ADDITIONAL VIEWS

APRIL 2, 2001.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

89–010 WASHINGTON : 2001

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CONTENTS

	Page
Introduction	1
Purpose and Need for Legislation	1
History of the Legislation	2
Background and Key Provisions	5
Purpose and Scope of the Legislation	9
Title I. General Authority	9
Title II. National Security Export Controls	11
Title III. Foreign Policy Export Controls	16
Title IV. Procedures for Export Licenses and Interagency Dispute Resolution	18
Title V. International Arrangements: Foreign Boycotts; Sanctions; and Enforcement	20
Title VI. Export Control Authority and Regulations	24
Title VII. Miscellaneous Provisions	24
Section-by-Section Analysis of S. 149: "The Export Administration Act of 2001"	26
Regulatory Impact Statement	36
Cost of Legislation	36
Additional Views	40

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APRIL 2, 2001.—Ordered to be printed

Mr. GRAMM, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 149]

The Committee on Banking, Housing, and Urban Affairs, to which was referred the bill S. 149, the "Export Administration Act of 2001," a bill to provide authority to control exports, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill as amended do pass.

INTRODUCTION

On March 22, 2001, the Senate Committee on Banking, Housing, and Urban Affairs met in legislative session and marked up and ordered to be reported with an amendment in the nature of a substitute S. 149, a bill to establish an effective, modern framework for export controls, with a recommendation that the bill do pass.

PURPOSE AND NEED FOR LEGISLATION

The bill (S. 149) establishes an effective, modern framework for export controls by reforming and replacing the Export Administration Act of 1979, a statute that authorizes the President to control the export of dual-use items for national security, foreign policy, and short supply purposes. The bill recognizes and seeks to balance three important United States policy interests. First, the United States has a national security interest in controlling the export of dual-use goods, services, and technologies to (a) limit the military potential of countries that threaten the United States or its allies;

(b) impede the proliferation of weapons of mass destruction and the means to deliver them; and (c) deter international terrorism. Second, the United States has an economic and national security interest in promoting U.S. exports and maintaining U.S. leadership in the global economy. Third, the United States has strong foreign policy interests in promoting international peace, stability, and respect for fundamental human rights, and this legislation establishes the principles for effective use of economic sanctions, including foreign policy export controls, to promote such interests.

Since the Export Administration Act expired on August 20, 1994, the President has continued export controls pursuant to his authority under the International Emergency Economic Powers Act (IEEPA) (Executive Order 12924). However, IEEPA is a poor instrument for maintaining export controls indefinitely in place of the Export Administration Act. The IEEPA-based export control regime has lower penalties for violations, is structured in a manner detrimental to our commercial and national security interests, and has been subjected to judicial challenge (particularly with regard to confidential licensing information). Therefore, Congress last year enacted legislation providing for a short-term extension of the Export Administration Act (through August 20, 2001), allowing Congress the time to consider legislation to establish an effective control system on a more satisfactory footing.

HISTORY OF THE LEGISLATION

The current effort to establish an effective, modern statutory framework for export controls began during the 106th Congress. During the 106th Congress, the Banking Committee, and its Subcommittee on International Trade and Finance, held seven hearings on export controls.

At the first hearing, on January 20, 1999, the Subcommittee on International Trade and Finance heard testimony from the Honorable William Reinsch, Under Secretary of Commerce for Export Administration, on the reauthorization of the Export Administration Act.

At the second hearing, on March 16, 1999, the Subcommittee heard testimony focusing on multilateral control regimes from Mr. John Barker, Deputy Assistant Secretary for Export Controls of the Department of State; the Honorable R. Roger Majak, Assistant Secretary for Export Administration of the Department of Commerce; Ms. Patricia Dedik, Nuclear Transfer and Suppliers Policy Division, Director of the Department of Energy; Mr. Dan Hoydysh on behalf of the Computer Coalition for Responsible Exports; Dr. Paul Freedenberg on behalf of the Association for Manufacturing Technology; Mr. John Douglass, President of the Aerospace Industries Association; and Dr. Stephen Bryen, former Deputy Under Secretary of Defense for Trade Security Policy.

At the third hearing, on April 14, 1999, the Subcommittee heard testimony relating to the export control process, once again from the Honorable R. Roger Majak, accompanied by Ms. Carol Kalinoski, Chairwoman of the Department of Commerce Operating Committee; Mr. Dave Tarbell, Director for Technology Security at the Defense Threat Reduction Agency, for the Department of Defense; Mr. James W. Jarrett, President, Intel China; Mr. Larry E. Christensen, Vice President, International Trade Content, Vastera,

Inc; and Dr. Gary Milhollin, Director of the Wisconsin Project on Nuclear Arms Control.

At the fourth hearing, on June 10, 1999, the Committee heard testimony from Representative Christopher Cox, Chairman of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China; and from Representative Norman D. Dicks, Ranking Member of the Select Committee.

At the fifth hearing, on June 17, 1999, the Committee heard testimony on export control issues relating to emerging technologies from Mr. Frank Carlucci, Chairman, Nortel Networks; Mr. Tom Arnold, Chief Technology Officer of Cybersource, Inc; Mr. Michael Maibach, Vice President, Intel Corp; Mr. Eric Hirschhorn, Executive Secretary for the Industry Coalition on Technology Transfer; and Mr. Rhett Dawson, President, Information Technology Industry Council.

At the sixth hearing, on June 23, 1999, the Committee heard comment from the Executive branch on the first discussion draft of the bill that was released on June 17, 1999. Testimony was received from the Honorable William Reinsch, Under Secretary of Commerce for Export Administration; the Honorable John Hamre, Deputy Secretary of Defense; the Honorable James Schroeder, Deputy Under Secretary of Agriculture for Farm and Foreign Agriculture Services; the Honorable Rose Gottemoeller, Assistant Secretary of Energy for Nonproliferation and National Security; and Mr. John Barker, Deputy Assistant Secretary of State for Nonproliferation Controls.

At the seventh hearing, on June 24, 1999, the Committee heard private sector views on the first discussion draft. Testimony was heard from Mr. John Douglass, President, Aerospace Industries Association; Mr. Kyle Seymour, President, Cincinnati Machine Co; Mr. Andrew Whisenhunt, President, Arkansas Farm Bureau; Ms. Karen Murphy, Director of Global Customs and Export Compliance, Applied Materials Corp; Dr. Richard T. Cupitt, Associate Director, Center for International Trade and Security, University of Georgia; Dr. Stephen Bryen, former Deputy Under Secretary of Defense for Trade Security Policy; and Mr. Craig Elwell of the Congressional Research Service.

In addition to the seven hearings, the Committee held frequent meetings with, and received written comments from, a variety of interested parties. Additional comments, suggestions, and assistance in considering and evaluating the legislation were received from the Departments of Commerce, Defense, State, Justice, Energy, and Agriculture, as well as the National Security Agency and National Security Council.

The Committee released two staff discussion drafts of the bill, the first on June 17, 1999, and the second on August 9, 1999. On September 23, 1999, the Committee voted 20–0 to report a reform bill (S. 1712), with one amendment, to the Senate for consideration. The bill was not taken up for consideration by the full Senate prior to the adjournment of the 106th Congress.

On January 23, 2001, during the first week of the 107th Congress, Senators Enzi, Gramm, Sarbanes, Johnson, Hagel, Roberts, and Stabenow introduced S. 149, the Export Administration Act of 2001. This legislation, based on S. 1712, included certain improve-

ments relating to enhanced controls, maintenance of the National Security Control List, and finality in foreign availability and mass-market determinations. The Committee held two hearings on S. 149.

At the first hearing, on February 7, 2001, the Committee heard private sector and academic views on S. 149. Testimony was received from Mr. Dan Hoydysh, on behalf of the Computer Coalition for Responsible Exports; Dr. Paul Freedenberg, on behalf of the Association for Manufacturing Technology; Mr. Larry E. Christensen, Vastera, Inc., on behalf of AeA (formerly known as the American Electronics Association); and Dr. Richard T. Cupitt, Associate Director, Center for International Trade and Security, University of Georgia.

At the second hearing, on February 14, 2001, the Committee heard views from defense and national security experts. Testimony was received from the Honorable John J. Hamre, President and Chief Executive Officer, Center for Strategic & International Studies, and former Deputy Secretary of Defense; and the Honorable Donald A. Hicks, Chairman, Hicks & Associates, and former Under Secretary of Defense for Research and Engineering, and chairman, Defense Science Board Task Force on Globalization and Security.

In addition to the two hearings, the Committee held frequent meetings with, and received written comments from, a variety of interested parties. The Committee also conferred closely with Administration officials. In March, prior to Committee action on S. 149, the Administration renewed its support for the bill in general and sought several refinements to the legislation.

These improvements, along with certain technical and conforming amendments, were incorporated into a managers' amendment approved unanimously by the Committee on March 22, 2001. In addition, the Committee unanimously adopted two second-degree amendments to the managers' amendment. The first, offered by Senator Enzi with the support of the Administration, proposed to terminate the authority granted under S. 149 on September 30, 2004, unless the President provides Congress with a report on the implementation and operation of S. 149 and the operation of U.S. export controls in general, and either provides to Congress legislative reform proposals in connection with that report or certifies to Congress that no such legislative reforms are necessary. The second, offered by Senator Bennett, also with the support of the Administration, proposed to repeal civilian export control provisions relating to performance levels of computers, as incorporated in Subtitle B of Title XII of Division A of the National Defense Authorization Act for fiscal year 1998.

With the adoption of these changes, the Administration extended its formal support to S. 149. In a letter to Chairman Gramm dated March 21, 2001, National Security Advisor Condoleezza Rice stated:

> The Administration has carefully reviewed the current version of S. 149, the Export Administration Act of 2001, which provides authority for controlling exports of dual-use goods and technologies. As a result of its review, the Administration has proposed a number of changes to S. 149. The Secretary of State, Secretary of Defense, Secretary of Commerce, and I agree that these changes will strengthen

> the President's national security and foreign policy authorities to control dual-use exports in a balanced manner, which will permit U.S. companies to compete more effectively in the global market place. With these changes, S. 149 represents a positive step towards the reform of the U.S. export control system supported by the President. If the Committee incorporates these changes into S. 149, the Administration will support the bill. We will continue to work with the Congress to ensure that our national security needs are incorporated into a rational export control regime.[1]

On March 22, 2001, the Committee voted 19–1 (Senators Gramm, Bennett, Allard, Enzi, Hagel, Santorum, Bunning, Crapo, Ensign, Sarbanes, Dodd, Johnson, Reed, Schumer, Bayh, Miller, Carper, Stabenow, Corzine voting aye; Senator Shelby voting no) to report the bill, with an amendment in the nature of a substitute, to the Senate for consideration.

On March 28, 2001, President Bush called the Committee's action "good news," saying that "after a lot of work with industry leaders and the administration and members of the Senate, the Export Administration Act, a good bill, passed the Banking Committee 19 to 1 * * * And I urge the Senate to pass it quickly."

BACKGROUND AND KEY PROVISIONS

The United States faces a different world since the last major revision of the Export Administration Act in 1985. The bill updates that Act to reflect the changes that have occurred since the end of the Cold War and the emergence of new threats, as well as the increasingly rapid expansion of the global marketplace for goods, services, and technology. The bill seeks to restore an appropriate balance between national security interests and our interest in a strong, growing and innovative economy that forms the basic infrastructure of our security.

Under the Export Administration Act of 1979, national security export controls sought to prevent exports of dual-use goods, services, and technologies to the Soviet bloc from the United States or its allies, in cooperation with the Coordinating Committee on Multilateral Export Controls (CoCom). In the intervening years, however, the Soviet Union was dissolved and the Warsaw Pact disbanded. In 1994, CoCom, a system under which the United States or any other country could exercise a unilateral veto over dual-use exports, expired. The less stringent Wassenaar Arrangement, which requires only post-export notification of sales of controlled items by participating countries, subsequently was formed in 1996.

Not only have the threats to national security changed in the last two decades, but the U.S. economy has been transformed, as well. As Dr. Donald A. Hicks, former Under Secretary of Defense for Research & Engineering and chairman of the Defense Science Board Task Force on Globalization and Security, testified on February 14, 2001, "Today, the 'U.S. defense industrial base' no longer exists in its Cold War form * * * DoD is relying increasingly on the U.S.

[1] Letter from the Honorable Condoleezza Rice, Assistant to the President for National Security Affairs, to the Honorable Phil Gramm, Chairman, Senate Committee on Banking, Housing, and Urban Affairs, March 21, 2001.

commercial advanced technology sector to push the technological envelope and enable the Department to 'run faster' than its competitors. DoD is not a large enough customer, however, to keep the U.S. high-tech sector vibrant. Exports are now the key to growth and good health * * * If U.S. high-tech exports are restricted in any significant manner, it could well have a stifling effect on the U.S. military's rate of technological advancement."[2]

Hence, S. 149 seeks to update national security export controls to reflect the current world situation by recognizing the changed nature of the threat as well as the importance of exports to U.S. economic and national security interests.

The Cox Committee and WMD Commission

In 1999, the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China ("Cox Committee") released its report.[3] The Cox Committee's bipartisan recommendations included several relating to the U.S. dual-use export control system. The Cox Committee's key recommendations have been incorporated into S. 149. For example, Section 401 (export license procedures), Section 501 (multilateral efforts), Section 503 (criminal and civil penalties), and Sections 504 and 505 (sanctions for multilateral regime violations) specifically address key Cox Committee recommendations.[4] Moreover, a critical recommendation of the Cox Committee was reenactment of the Export Administration Act.[5]

In the same year, the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction ("WMD Commission") submitted its report.[6] Its key recommendations also have been incorporated into S. 149. For example, Section 201 (national security export controls), Section 401 (export license procedures), Section 402 (interagency dispute resolution process), and Section 501 (multilateral efforts) address key WMD Commission recommendations.[7] Here, too, a core recommendation of the WMD Commission was enactment of a new Export Administration Act.[8]

Enhanced enforcement

Enhanced enforcement, a central theme of the recommendations of the Cox Committee,[9] is a key aspect of S. 149. Penalties under

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[2] Hearing on the establishment of an effective, modern framework for export controls before the Senate Committee on Banking, Housing, and Urban Affairs, February 14, 2001, testimony of the Honorable Donald A. Hicks, Chairman, Hicks & Associates, and former Under Secretary of Defense for Research and Engineering, and chairman, Defense Science Board Task Force on Globalization and Security.

[3] Report of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China, May 25, 1999.

[4] See, e.g., Recommendations 10, 11, 29, and 32 of the Report of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China, May 25, 1999.

[5] See Recommendation 29 of the Report of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China, May 25, 1999.

[6] Report of the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction, July 14, 1999.

[7] See Recommendations 4.1, 4.2, and 4.3 of the Report of the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction, July 14, 1999.

[8] See Recommendation 5.18 of the Report of the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction, July 14, 1999.

[9] See, e.g., Recommendations 10 and 29 of the Report of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China, May 25, 1999.

both IEEPA and the current Export Administration Act are grossly inadequate to deter and punish those who would violate U.S. export control law and place at risk U.S. national security and foreign policy interests. Therefore, S. 149 substantially increases criminal and civil penalties for export control violations. Moreover, it strengthens post-shipment verification procedures by targeting resources to exports involving the greatest risk to national security, and by providing increased resources for additional post-shipment investigators. In addition, S. 149 includes funding for the hiring and training of license review officers, fulfilling an important recommendation of the WMD Commission.[10]

Strengthening and enforcing multilateral regimes

Because the U.S. is not the sole supplier of most dual-use technologies, the need for multilateral agreement among supplier nations is critical to the success of export control mechanisms. Improving multilateral export control regimes also requires a firm commitment on the part of the U.S. to engage with other nations. In his testimony to the Committee on June 14, 2001, Dr. John J. Hamre, President and Chief Executive Officer, Center for Strategic & International Studies, and former Deputy Secretary of Defense, stated that "[i]f we want to encourage American partnering with trusted friends and allies in order to foster closer collaboration for national security reasons, we must extend closer working collaboration government-to-government."[11] The bill emphasizes the importance of multilateral initiatives by encouraging the President to undertake international efforts to improve the effectiveness of existing regimes and promote the creation of new regimes through such features as full membership, a common list of items and countries of concern, harmonization of license procedures and standards, a "no undercut" policy, and a common standard of enforcement.

Risk-focused approach

The bill adopts a risk-focused approach to export controls by targeting national security export controls on those items and destinations that the U.S. determines to be the greatest risk to national security, while removing ineffective controls that serve as unnecessary barriers to trade. Among the risk management processes established by this legislation are the conduct of risk analyses of items under consideration for control; continuous review of the list of items subject to national security controls for potential addition, removal, or update; establishment of a country tier system that assigns items and countries to tiers according to their potential threat to U.S. national security; establishment of an Office of Technical Evaluation to assess, evaluate, and monitor technological and other developments; and targeting of post-shipment verification resources to exports posing the greatest risk to U.S. national security.

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[10] See Recommendation 5.22 of the Report of the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction, July 14, 1999.

[11] Hearing on the establishment of an effective, modern framework for export controls before the Senate Committee on Banking, Housing, and Urban Affairs, February 14, 2001, testimony of the Honorable John J. Hamre, President and Chief Executive Officer, Center for Strategic & International Studies, and former Deputy Secretary of Defense.

National security protections

Because the President requires the flexibility to impose controls in those circumstances where national security so warrants, S. 149 ensures the President's ability to impose controls in certain critical circumstances. Thus, the bill grants the President special control authorities for cases involving national security, international obligations, and international terrorism.[12]

Foreign policy disciplines

The bill authorizes the President to control exports for the purpose of promoting the U.S. foreign policy objectives; promoting peace, stability, and respect for human rights; and deterring and punishing acts of international terrorism. While the bill does not forbid all foreign policy export controls, it places emphasis on the use of such controls in order to increase their effectiveness. By instituting new disciplines on foreign policy export controls, it ensures that such controls maximize the general welfare of the United States.

Foreign availability

Trade and investment liberalization under the North American Free Trade Agreement, the Uruguay Round Agreements, and other international agreements have accelerated the fundamental changes in production locations and processes that have been occurring in recent decades. Today, many goods, services, and technologies originate only in part from places within the United States. Increasingly, dual-use goods, services, and technologies can be obtained through firms outside of the United States. Firms in newly industrialized countries that did not participate in CoCom now supply many dual-use goods, services, and technology. Moreover, national discretion in application of national security export controls among the Wassenaar members makes uniform application of controls problematic.

These changes can place American firms at unfair competitive disadvantage with their foreign rivals. The current Export Administration Act does not address the issue of foreign availability in a manner that meets the challenges of the world today. It is based on the anachronistic assumption that the United States can effectively control the export of dual-use goods, services, or technologies either because the United States is the sole supplier, or that all significant suppliers are in (now former) CoCom countries. Acknowledging the "futility of the U.S. attempting to control unilaterally technologies, products and services that even its closest allies are releasing onto the world market,"[13] S. 149 updates the current Export Administration Act by making changes that will strengthen

[12] For national security, see Section 201(c) (end-use and end-user controls); Section 201(d) (enhanced controls); Section 212 (presidential set-aside of foreign availability status determination); Section 213 (presidential set-aside of mass-market status determination). For international obligations, see Section 309 (compliance with international obligations). For international terrorism, see Section 310 (designation of countries supporting international terrorism).

[13] Hearing on the establishment of an effective, modern framework for export controls before the Senate Committee on Banking, Housing, and Urban Affairs, February 14, 2001, testimony of the Honorable Donald A. Hicks, Chairman, Hicks & Associates, and former Under Secretary of Defense for Research and Engineering, and chairman, Defense Science Board Task Force on Globalization and Security.

foreign availability recognition in connection with national security export controls.

Mass-market

The nature of dual-use technology has also changed in recent years, primarily because of the computer revolution. In 1979, many dual-use goods were produced in small numbers. Today, many dual-use items are marketed to a mass audience. Even though such mass-market goods may have military applications, they are produced in the millions and sold through a variety of retail outlets.

Imposing export controls on such items is ineffective. As Representative Christopher Cox, Chairman of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China, noted during his June 10, 1999, testimony before the Committee, "We ought not to have export controls to pretend to make ourselves safe as a country. We ought to have export controls that work. And you have to assume that if the Ministry of State Security in the People's Republic of China can gain access to the computers at Los Alamos, they can probably gain access to a Radio Shack in Europe." Recognizing these technological changes that have given rise to mass-market goods, S. 149 creates a new requirement for mass-market recognition in connection with national security controls.

PURPOSE AND SCOPE OF THE LEGISLATION

The bill consists of two sections (short title, table of contents; definitions) and seven titles, as follows: general authority; national security export controls; foreign policy export controls; procedures for export licenses and interagency dispute resolution; international arrangements, foreign boycotts, sanctions, and enforcement; export control authority and regulations; and miscellaneous provisions.

Section 2 defines the terms used in the bill. With regard to the term "export," the bill's definition allows the Secretary of Commerce the flexibility to define further, via regulation, the term export to deem the disclosure of an item to a foreign person to be an export to the country of which the foreign person is a national. This definition, being virtually the same as the definition of export in the current Export Administration Act, as amended, is not intended to require a change to the Export Administration regulations in effect upon enactment of this bill. It is the Committee's understanding that the Administration will be reviewing the deemed export control process with a view to clarifying its application.

Title I—General authority

Title I provides general authorities for the conduct of United States export control policy. As has been the practice under previous versions of the Export Administration Act, the power to establish and conduct export control policy, under the statutory direction and restrictions imposed by the bill, is vested in the President.

Unless otherwise limited, the President may delegate the authority granted under S. 149 to Federal departments, agencies, and officials he considers appropriate. However, the President may only delegate this authority to officials of departments or agencies, the heads of which are appointed by the President and confirmed by the Senate. The Committee notes that this is intended to include

officials serving in such a post under a recess appointment by the President.

As a basis for the conduct of export control policy, Title I directs the Secretary of Commerce to establish and maintain a Commerce Control List (Control List), consisting of items that if exported to certain end-users or for certain end-uses could jeopardize U.S. national security.

Under Title I, the Secretary may require a license, other authorization, or other requirement for the export of any item on the Control List. The bill establishes several forms of licensing and other authorizations. The list of types of licenses or other authorizations is not exclusive. The Secretary may establish conditions, including reporting and recordkeeping requirements, for the use of any license or other authorization to ensure proper use of the license or other authorization.

The Committee intends that exporters be able to provide replacement parts for their exports unless the Secretary determines that there is a reason not to do so. Toward that end, Title I provides that a license or other authorization will not be required for after-market service or replacement parts provided on a one-for-one basis for a lawfully exported item. Exceptions to this provision are authorized when the Secretary of Commerce determines that a license or other authorization is necessary, or when the after-market or replacement part or service would enhance the capabilities of an item that gave rise to control of that item in the first place.

The Committee also intends that exporters be able to export technologies incidental to an exported item, as long as such technologies relate to the installation and operation of the item, and do not enhance any capability that led to the item's inclusion on the Control List. The bill therefore provides that a license for an export of an item includes the export of incidental technology, but only so long as that technology does not exceed the minimum necessary to install, maintain, repair, inspect, operate, or use the item.

The Committee believes that export control processes and procedures should be transparent. The Committee also recognizes the value in allowing exporters to make their case about what items should and should not be controlled. Toward that end, Section 103 directs the Secretary to consult with a broad array of interested parties, particularly when it comes to decisions on the mass-market or foreign availability status of items on the Control List, and to inform the public about changes in export policy, procedures, and regulations. Additionally, Section 105 authorizes the Secretary to establish, on the Secretary's own initiative or at the request of industry representatives, Export Control Advisory Committees consisting of experts from industry and government. Furthermore, the President may establish a President's Technology Export Council (PTEC) to advise him on the implementation, operation, and effectiveness of our export control system, including key trends and issues related to the export of high-tech items.

The bill provides that the Secretary may create regulations to implement the bill's provisions regarding the Control List, export licenses, and other authorizations and requirements, and any other provisions of S. 149, and states specifically that no fees may be charged in connection with an export license application.

Finally, the bill reaffirms the basic right of U.S. companies and individuals to export.

Title II—National security export controls

Title II authorizes the President to impose export controls for national security purposes. Subtitle A details the authorities and procedures necessary to implement national security export controls. Subtitle B outlines the foreign availability and mass-market determination and set-aside procedures.

Subtitle A: Authority for national security export controls

Under S. 149, the authority to impose national security controls is vested in the President and exercised by the Secretary of Commerce, in consultation with the Secretary of Defense, the intelligence agencies, and other appropriate departments and agencies. The bill's grant of authority is identical to that of the current Export Administration Act, with one exception: a specific reference to the role of intelligence agencies is included. This change reflects the Committee's belief that the intelligence community plays an important role in providing information that could be useful for the development and implementation of export control policy.

The bill retains the purpose set forth in the current Export Administration Act for imposing controls for reasons of national security: to restrict the export of items that would contribute to the military potential of countries so as to prove detrimental to the national security of the United States. However, S. 149 expands this purpose in two important areas. First, the Committee authorizes national security export controls to stem the proliferation of weapons of mass destruction and the means to deliver them. Second, national security export controls are authorized to deter acts of international terrorism.

The bill authorizes export controls based on the end-use or end-user of an item if that item could contribute to the proliferation of weapons of mass destruction or the means to deliver them. The Committee intends this provision to permit the control of items that may not be listed on the Control List, but that should be controlled due to the intended recipient or anticipated use of the item.

Section 201(d) authorizes the President to impose enhanced controls on an item controlled for national security purposes, notwithstanding its status as an incorporated part or component or as foreign available or mass-market item, if the President determines that removing controls would constitute a significant threat to the national security of the United States. The Committee intends for this authority to be used only in extraordinary circumstances, thus ensuring that the export control system maintains maximum transparency and predictability, with minimum regulatory burden, for the exporter. If enhanced control authority is exercised, the President must report the determination, along with the specific reason for the determination, to the congressional committees of jurisdiction. These review and reporting requirements are intended to promote accountability, discipline, and transparency in the decision-making process.

Section 202 authorizes the Secretary of Commerce to establish and maintain a National Security Control List. The Secretary, with the concurrence of the Secretary of Defense and in consultation

with other appropriate agencies, is to identify and place items on the list. The Secretary is required to review the list continually and, with the concurrence of the Secretary of Defense and in consultation with other appropriate agencies, add items that require control and remove items that no longer warrant control, a process similar to that outlined in the current Export Administration Act. Since the Committee expects continuity in the initial identification of items controlled for national security purposes, the bill requires that all items that are included on the Control List on the day prior to the date of enactment of the bill and controlled for national security purposes be included on the National Security Control List. The National Security Control List subsequently would be modified in accordance with this section. The Committee also provides guidance, in the form of risk factors, for determining those items to be placed on the National Security Control List.

The Committee seeks to increase the transparency and predictability of the export control system by creating a country tiering mechanism to be used in the determination of license requirements or other authorizations. Section 203 requires the President to establish a tiering system consisting of no less than three tiers. Each country is to be assigned to a tier for each controlled item or group of controlled items. The lowest risks of diversion or misuse are to be assigned to the lowest tier, while the highest risks are to be assigned to the highest tier. Within this framework, the Committee intends that the President have a great deal of flexibility in assigning countries and items to the appropriate tiers, taking into consideration the factors set forth in Section 203(c). As a result of the assessments, and in order to achieve the purposes enumerated in Section 201(b), any given country may be placed in different tiers for different groups of items (e.g., computers, chemicals) and may even be placed in different tiers for individual items within a group of items. Being placed at a certain tier level with respect to one item or group of items does not create a presumption that the country will be placed at that level for any other item or group of items.

The Committee intends for the tiering system to provide license applicants with greater knowledge of the likelihood of their license applications being approved. Furthermore, the Committee expects that the tiering system will provide an incentive for countries to improve their export control systems and to reduce the incidents of misuse or diversion of controlled items, and thereby be assigned to a lower tier.

The bill recodifies Section 5(m) of the existing Export Administration Act by setting certain limitations on controlling the export of items containing controlled parts or components and the reexport of foreign-made items incorporating controlled parts or components. Under Section 204(a), controls may not be placed on an item solely because the item contains parts or components subject to controls if the parts or components are essential to the functioning to the item, are customarily included in the sales of the item, and comprise 25 percent or less of the total value of the item. Likewise, Section 204(b) codifies current regulatory practice by providing that no authority or permission may be required to reexport to a country (other than one designated under section 310) an item produced in a foreign country that contains controlled U.S. parts or components, if the value of the parts or components comprise 25 percent

or less of the total value of the item. For reexport to those countries designated as countries supporting international terrorism pursuant to Section 310 the value threshold is reduced to 10 percent.

Section 205 requires the Secretary of Commerce to establish a process for interested persons to petition to change the status of an item on the Control List. The Committee believes that persons outside of the government may have information relevant to whether an item should remain on the Control List, and this section is intended to ensure that such information is transmitted to and considered by the Secretary.

Subtitle B: Foreign availability and mass-market status

The Committee has concluded that the effectiveness of U.S. export controls is increased if targeted on those items that can, in fact, be controlled. It does little to promote U.S. interests if items that are available from foreign sources or on a mass-market basis are controlled. Instead, it directs scarce control resources into unproductive avenues. Unilateral controls on U.S. exports, unlike multilateral controls, rarely achieve their intended results. While controls on foreign-available or mass-market items are ineffective in promoting national security, they effectively decrease the competitiveness of U.S. exporters.

The Committee believes that the U.S. export control regime should focus on controlling those items that pose the greatest risk to national security. Dr. Hicks testified that the U.S. "must put up higher walls around a much smaller group of capabilities and technologies." [14] The Committee believes there is little national security benefit derived from controlling U.S. items if substantially identical items can be acquired through another source or if such items are produced and available for sale in large volume to multiple purchasers. Therefore, the U.S. export control system must include effective mechanisms whereby controls on items which have foreign availability or mass-market status would be removed.[15]

Because unilateral controls on foreign-available items are ineffective given their availability from foreign sources, S. 149 recognizes the need to continue and strengthen the existing foreign availability exemption from export controls. Mr. John Douglass, President of the Aerospace Industries Association, testified that "[e]xcept for very unusual circumstances, mostly related to lethal military equipment, U.S. companies should be allowed to sell products that are, or are expected to be, available from other sources. Shifting the source of supply does not punish the importer; it punishes the exporter."[16] Additionally, Dr. Hicks noted:

> DoD should attempt to protect for the purposes of maintaining military advantage only those capabilities and

[14] Hearing on the establishment of an effective, modern framework for export controls before the Senate Committee on Banking, Housing, and Urban Affairs, February 14, 2001, testimony of the Honorable Donald A. Hicks, Chairman, Hicks & Associates, and former Under Secretary of Defense for Research and Engineering, and chairman, Defense Science Board Task Force on Globalization and Security.

[15] Under S. 149, foreign availability and mass-market status would apply only to items controlled for national security purposes; items that are foreign-available or mass-market would remain subject to foreign policy controls.

[16] Hearing on the reauthorization of the Export Administration Act before the Senate Subcommittee on International Trade and Finance of the Senate Committee on Banking, Housing, and Urban Affairs, June 24, 1999, testimony of Mr. John Douglass, President and Chief Executive Officer, Aerospace Industries Association.

> technologies of which the U.S. is the sole possessor and whose protection is deemed necessary to preserve an essential military capability. Protection of capabilities and technologies readily available on the world market is, at best, unhelpful to the maintenance of military dominance and, at worst, counterproductive (e.g., by undermining the industry upon which U.S. military-technological supremacy depends).[17]

The bill states that an item has foreign availability status if it is available: (a) from sources outside the U.S., including countries that participate with the U.S. in multilateral export controls; (b) at a price that is not excessive when compared to the price at which a controlled country could acquire such item; and (c) in sufficient quantity that renders control ineffective. This foreign availability definition modifies that contained in the current Export Administration Act in order to address problems with the operation of the existing definition.

Likewise, because mass-market items are virtually uncontrollable by the nature of their wide distribution channels, large volumes, and general purposes, S. 149 recognizes the necessity of a mass-market exemption from export controls. Mr. James W. Jarrett, President of Intel China, summed up the reasoning for a mass-market exemption from controls as follows:

> A major step in achieving a refocusing of export controls is the removal of restrictions on mass market products. Mass market products, by their very nature, are not susceptible to effective control and can contribute to strategic military capability in only the most generalized way. They are sold in very high volumes through a multitude of distribution channels and are not uniquely designed for individual applications.[18]

In determining whether an item has mass-market status, the Secretary is to consider the following criteria with respect to the item or a substantially identical or directly competitive item: (a) the production and availability for sale in a large volume to multiple potential purchasers; (b) the widespread distribution through normal commercial channels; (c) the conduciveness to shipment and delivery by generally accepted commercial means; and (d) the use for the item's normal intended purpose without substantial and specialized service.

The Committee expects the Secretary's mass-market determination to be consistent with past practice in connection with, for example, the establishment of new export control thresholds for microprocessors and computers. Under Section 211, a determination of mass-market status is to apply to all items that are substantially identical or directly competitive in order to avoid dis-

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[17] Hearing on the establishment of an effective, modern framework for export controls before the Senate Committee on Banking, Housing, and Urban Affairs, February 14, 2001, testimony of the Honorable Donald A. Hicks, Chairman, Hicks & Associates, and former Under Secretary of Defense for Research and Engineering, and chairman, Defense Science Board Task Force on Globalization and Security.

[18] Hearing on the reauthorization of the Export Administration Act before the Senate Subcommittee on International Trade and Finance of the Senate Committee on Banking, Housing, and Urban Affairs, April 14, 1999, testimony of Mr. James W. Jarrett, President, Intel China.

criminatory treatment and disruption of the competitive balance among products or technology.

While individual or particular items are eligible for mass-market status, the initial determination should, whenever possible, be made for the generic class or category of items, following the current practice with respect to the Commerce Control List. Thus, mass-market calculations should include production or sales of all items that are either substantially identical or directly competitive to the item under assessment. These generally equivalent items should qualify for mass-market status even though as individual products they may not otherwise meet the production or sales volumes required for mass-market status.

The Committee expects foreign availability and mass-market status reviews of items to occur on a continuing basis, including reviews initiated at the request of the Office of Technology Evaluation (established pursuant to Section 214) or upon the receipt of a request from an interested party. To promote maximum responsiveness to the exporter, and consistent with the current Export Administration Act, S. 149 requires the Secretary to respond within a specified period of time (here, six months) with regard to requested guidance on the foreign availability or mass-market status of an item.

In order to keep pace with changing technology and markets, the Secretary's determination should take into consideration developing technological and market trends. As Dr. Hicks noted:

> What is new [today] is the dramatic acceleration of global integration and the resulting political, economic, and technological change the world has seen over the last decade. Goods and services, materials, capital, technology (know-how and equipment), information, customs, people, and energy all flow across national borders, not always freely but most often successfully * * * At the core of accelerated global integration—indeed, its principal cause and consequence—is the information revolution. Driven by quantum leaps in telecommunications and computing efficiency and effectiveness, the information revolution is knocking down barriers of physical distance, blurring national boundaries and creating cross-border communities of all types.[19]

Thus, the Secretary's assessments should take account of changes brought about by the globalization of business and trade flows. As Dr. Hamre stated, "export controls must recognize and complement modern business practices."[20]

The Committee notes that there may be occasions—albeit rare—when an item that is available from foreign sources or is mass-market should be controlled because the item nonetheless would pose a threat to U.S. national security. Therefore, the bill allows the

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[19] Hearing on the establishment of an effective, modern framework for export controls before the Senate Committee on Banking, Housing, and Urban Affairs, February 14, 2001, testimony of the Honorable Donald A. Hicks, Chairman, Hicks & Associates, and former Under Secretary of Defense for Research and Engineering, U.S. Department of Defense, and chairman, Defense Science Board Task Force on Globalization and Security.

[20] Hearing on the establishment of an effective, modern framework for export controls before the Senate Committee on Banking, Housing, and Urban Affairs, February 14, 2001, testimony of the Honorable John J. Hamre, President and Chief Executive Officer, Center for Strategic & International Studies, and former Deputy Secretary of Defense.

President to "set-aside" mass-market or foreign availability determinations in certain circumstances. Any presidential set-aside determination is to be reviewed every six months, with a report sent to the congressional committees of jurisdiction for each set-aside. These review and reporting requirements are intended to promote accountability, discipline, and transparency in the decision-making process. It also must be emphasized that the set-aside authority cannot be delegated by the President.

Consistent with the foreign availability provisions contained in Section 5(f) of the current Export Administration Act, the set-aside of such determination is to expire no later than 18 months after such determination, unless the President has been able to achieve an agreement to eliminate the foreign availability of that item. The Committee believes that if the President cannot convince other suppliers of that item to impose export controls on that item within an 18-month period, multilateral controls for that item are not likely to occur. Moreover, the increasingly truncated production cycle of high-tech goods is likely to result in pervasive availability or obsolescence of the item on the world market within the 18-month time frame.

Unlike a foreign availability determination set-aside, a mass-market determination does not automatically expire. The President, however, still must review the mass-market set-aside every six months. The Committee intends for the six-month review to impose accountability and discipline in the President's decision-making process.

Given the rapid changes in technology and its importance to the U.S. economy, the Committee believes a specifically dedicated office is necessary to track worldwide technological developments in industry sectors critical to U.S. national security interests. Therefore, Section 214 establishes an Office of Technology Evaluation (OTE) within the Department of Commerce to facilitate technical studies of foreign availability and mass-market conditions, as well as evaluations of multilateral export control regimes, other governments' export control policies, and U.S. industrial sectors critical to the U.S. defense industrial base. As Dr. Richard T. Cupitt, Associate Director, Center for International Trade and Security, University of Georgia, noted, "the Office of Technology Evaluation will need to apply considerable resources to this task."[21]

Toward that end, the Committee expects OTE personnel to have training and expertise in economic analysis, the defense industrial base, technological developments, and national security and foreign policy export controls. The bill permits the Secretary to accept, on nonreimbursable detail to the Office, employees of other appropriate departments and agencies, thus allowing the Commerce Department to draw upon the unique skills and competencies of employees of other departments or agencies.

Title III—Foreign policy export controls

Title III authorizes the imposition of export controls for foreign policy purposes. Since most foreign policy controls often are unilat-

[21] Hearing on the establishment of an effective, modern framework for export controls before the Senate Committee on Banking, Housing, and Urban Affairs, February 7, 2001, testimony of Dr. Richard T. Cupitt, Associate Director, Center for International Trade and Security, University of Georgia.

eral in practice, and because it is clear that multilateral controls are preferable to unilateral controls, Title III imposes certain disciplines on the imposition of foreign policy controls to ensure that they principally affect the target of the controls rather than American suppliers.

The disciplines detailed in Title III track, in most respects, those set forth in Section 6 of the current Export Administration Act. However, there is at least one significant difference: the bill narrows the scope of purposes for which foreign policy controls can be imposed, most notably by moving to Title II the authorization to impose export controls to stem the proliferation of weapons of mass destruction, chemical and biological weapons, and the means to deliver them. These goals have such clear national security implications that they are more appropriately comprehended within Title II.

Title III specifically authorizes export controls to be imposed to promote the foreign policy objectives of the United States; to promote international peace, stability, and respect for fundamental human rights; and to deter and punish acts of international terrorism.

Section 301(c) codifies current regulatory practice that prohibits controlling reexports from a foreign country of items containing parts or components produced in the United States, unless such reexport is destined to go to a country supporting international terrorism and the value of the parts and components originating in the United States is more than 10 percent of the total value of the item. Section 301(d) recodifies to a large extent Section 6(p) of the current Export Administration Act relating to contract sanctity.

In order to impose foreign policy controls, the President must follow the procedures outlined in Title III. Both the current Export Administration Act and Title III of S. 149 require the President to consult with the congressional committees of jurisdiction and negotiate with the government of the country against which the control is proposed prior to imposing a foreign policy export control. Title III, however, imposes an additional requirement. Section 302 provides that the President must publish notice in the Federal Register at least 45 days, and solicit public comment at least 30 days, prior to imposition of a control. The Committee believes this requirement will increase transparency in the process of imposing foreign policy controls and allow all interested parties to provide information relating to any potential impact the control may have. Title III also allows the President to defer compliance with this requirement, as well as the reporting requirement of Section 304, if deferral is in the national interest and the President satisfies these requirements within 60 days of the imposition of the control.

Section 303 provides criteria to guide the President in imposing export controls for foreign policy purposes, which build on the criteria set forth in Section 6(b) of the current Export Administration Act. An export control imposed under this title must (a) have a specific objective; (b) have an objective standard for evaluating its success; (c) include an assessment by the President that the control is likely to achieve its objective and that the achievement of the objective outweighs any potential cost to other U.S. interests; (d) be targeted narrowly; and (e) seek to minimize the impact on humani-

tarian activities of the United States in the country subject to the control.

Section 307 requires the President to review all existing controls by February 1, 2002, and every two years thereafter (the "renewal year"). Any control not specifically renewed pursuant to the required report to the congressional committees of jurisdiction is to expire on March 31 of the renewal year. While the current Export Administration Act terminates foreign policy controls one year after imposition unless extended by the President, the Committee believes the additional requirement imposed on the President in Title III justify extending the review and renewal period to two years.

Section 309 authorizes the President to impose controls on exports in order to comply with international obligations and multilateral export control regime commitments, notwithstanding any other provision of S. 149. This section, derived from Section 6(i) of the current Export Administration Act, is intended to apply to those items that could be controlled for national security purposes pursuant to Title II or foreign policy purposes pursuant to Title III. Section 310 recodifies Section 6(j) of the current Export Administration Act relating to the designation of countries determined to be supporters of international terrorism and the requirement that exports to such countries be licensed. Finally, Section 311 preserves authority contained in Section 6(n) of the current Export Administration Act to ensure that crime control and detection instruments and equipment may be exported only subject to an export license.

Title IV—Procedures for export licenses and interagency dispute resolution

The Committee strongly believes that transparency and accountability are necessary components of the export license process. Government must avoid unreasonable delays in processing license applications. This will ensure both that U.S. exporters are not disadvantaged in the global marketplace and that national security or foreign policy concerns are promptly addressed. Sharing information between the departments or agencies that have an export control mandate is vital to making well-informed license decisions.

To ensure that export license decisions are consistent with U.S. national security and foreign policy goals, the bill establishes a risk management framework. Criteria for the evaluation of export license applications include the characteristics of the item, the threat to U.S. national security or foreign policy, the risk of diversion or misuse, the end-user or end-use, and various risk mitigating factors. The analytic product of the intelligence community is to be fully considered with regard to license applications.

Under Section 401, the Department of Commerce will have nine days to ensure an application for export license is complete, verify that a license is required for the item, and make the appropriate referrals to other departments and agencies (the "referral agencies"). The referral agencies will have 30 days to consider the application and forward a recommendation to Commerce. If any department or agency fails to respond within the 30 days, it is to be deemed to have no objection to the issuance of the license. These time limits for interagency review comport with the deadlines under current practice as established by Executive Order 12981.

To ensure compliance with the time limits, Section 401(f) allows an applicant to file a petition with the Secretary. In response, the Secretary is directed to act immediately to correct the situation causing the delay, and so notify the applicant. If 20 days after submission of the petition the processing of the application still is not in conformance with the time limits set forth in this section, the applicant is authorized to pursue action in U.S. district court to compel compliance with the time limits.

The Committee believes, however, that without some exceptions to these mandatory time limits for processing license applications, there could be an increased occurrence of unnecessary license denial. Therefore, Section 401(g) includes certain specific exceptions to the mandatory time periods to allow for "stopping the clock." These exceptions include situations in which (a) the license applicant and Secretary of Commerce mutually agree that more time is necessary to process the application; (b) more time is needed to verify the identity and reliability of the end-user; (c) additional time is necessary to secure government-to-government assurances regarding item end-use; (d) more time is required for multilateral review, when applicable; (e) additional time is needed to allow for congressional notification, when required; or (f) more time is necessary to permit consultation with foreign governments.

At the end of 30 days (excluding the aforementioned exceptions), the Secretary of Commerce is directed to issue the license, notify the applicant of the intent to deny the license, or notify the applicant that the application is being referred to the interagency dispute resolution process. If an export license application is to be denied, the Secretary is to inform the applicant of the determination to deny, the specific basis for the denial, and any modifications to the proposed export that might permit the export to be approved. The applicant is permitted 20 days in which to respond to a proposed denial, thus allowing an opportunity to address or correct the concerns prompting the denial. If an applicant wishes to withdraw an application at any time, the withdrawal must be submitted in writing.

In any case in which the Secretary of Commerce receives a written request for classification of a proposed export, Section 401(h) directs the Secretary to notify the Secretary of Defense and other appropriate departments or agencies to ensure that other agencies have appropriate input. The Secretary must inform the requestor of the proper classification within 14 days. Currently, interagency review of commodity classification requests are subject to a set of administrative guidelines issued in 1996 to improve interagency coordination and transparency with regard to such requests.[22] The Committee intends for S. 149 to leave intact the 1996 guidelines until they are modified or replaced by the Administration. Toward that end, Section 401(h) neither codifies the commodity classification procedures detailed in the current guidelines nor restricts the Administration's ability to modify or replace them.

The Committee believes that effective interagency dispute resolution is important to ensure that (a) a wide range of facts and opinions are brought to bear on each case; (b) the system encourages decision rather than indecision; and (c) agencies are allowed when

[22] Memorandum from the National Security Council, April 15, 1996.

necessary to escalate disputed cases to the highest levels of government. Section 402 of bill therefore establishes an improved, statutory interagency dispute resolution process.

Under Section 402, if the agencies do not agree on an export license application, the application is to be referred to the initial level of review within the interagency dispute resolution process. The Secretary of Commerce is directed to establish an interagency committee for this review and designate a committee chair. The chair is to consider the reviewing agencies' positions and make a decision on the license application. The chair's decision may be appealed by the representative of a dissenting agency, and additional levels of review must provide for decision-making based on a majority vote (rather than the current practice of unanimity). Any appeal of an approval or denial of a license application at the higher level of review may only be escalated by an official appointed by the President, by and with the advice and consent of the Senate, or an officer properly acting in such capacity. Section 402 also requires that the interagency committee keep minutes of all meetings, permitting agencies to go "on the record" with their votes and promoting accountability.

The entire interagency process is to be completed or referred to the President not later than 90 days after the date of initial referral for interagency review, consistent with current practice under Executive Order 12981. Once a final decision is made under the interagency dispute resolution process, the Secretary of Commerce is directed to issue the license or notify the applicant of the intention to deny the application.

Title V—International arrangements; foreign boycotts; sanctions; and enforcement

The Committee believes that the United States should continue to exercise its leadership in export controls by increased emphasis on active participation in multilateral export control efforts. The Committee strongly encourages strengthening adherence to these regimes, as well as participation in new export control regimes that serve the national security and foreign policy interests of the United States.

The Committee notes that certain multilateral export control regimes work more effectively than others. The Wassenaar Arrangement arguably is the least effective, largely because it does not contain a "no undercut" policy to prevent one regime member from exporting an item previously denied by another member to the same destination. In addition, non-regime members do not respect Wassenaar regime guidelines, further weakening its effectiveness. For example, China is making great inroads in the computer and semiconductor field, and India is producing high-quality encryption software; yet neither are members of the Wassenaar regime. Current controls on these items could become ineffective if these non-members continue to produce and freely export items that exceed the control criteria of the Wassenaar regime.

Section 501 of the bill encourages U.S. participation in multilateral export control regimes that support U.S. national security objectives. Section 501(b) requires the President to submit to the congressional committees of jurisdiction an annual report in which the President evaluates the effectiveness of the multilateral export con-

trol regimes and makes an assessment of the steps taken by the U.S. to strengthen the regimes.

Section 501(c) directs the President to establish standards for any membership or future membership of the United States in a multilateral export control regime. The President also is to take steps to establish certain features in multilateral regimes, including (a) full membership and adherence to the policies and objectives of a regime; (b) enforcement and compliance with regime rules and guidelines; (c) enhancement of public understanding of the purpose of the regime; (d) consistent and uniform interpretation of export control policies; (e) enhanced cooperation and compliance of nonmembers with regime guidelines; (f) coordinated export control strategies among high level representatives of the governments of members of the regimes; (g) a common list of regime-controlled items; (h) regular updates of the list to reflect when new and sensitive items should be controlled or when items no longer warrant control or pose a risk to the national security of the regime's members; (i) agreement on preventing export or diversion of the most sensitive items to countries whose activities pose a threat to the U.S. or its allies; (j) harmonization of export license approval procedures, practices, and standards among regime members; and (k) limits on "undercutting" among regime members. The Committee places great emphasis on the importance of establishing a "no undercut" rule whereby members of regimes agree to limit exports of substantially similar or directly competitive items in cases where any member has denied an export license for such item, and to refrain from approving a license to an end-user to which a member has denied a license for a similar item.

Section 501(d) directs the President to take steps to establish standards for export control systems for members of each regime. These standards are to include enforcement authority sufficient to deter potential violations, a common license approval process, adequate training of enforcement officers to investigate and prevent illegal exports, and uniform recordkeeping, information sharing, and devotion of resources to administer an effective export control system.

With respect to foreign boycotts, Section 502 recodifies Section 8 of the current Export Administration Act. As a clear demonstration that the Congress places strong emphasis on the continued unacceptability of this boycott, enforcement of the antiboycott provisions is strengthened by raising penalties for antiboycott violations to the same level as those for export control violations.

For many potential violators, the monetary penalties associated with the current Export Administration Act pose no compelling deterrent. The Committee believes the success of export control efforts depends upon vigorous enforcement of the law with meaningful punishment of violators. A variety of experts have stressed the need for tougher penalties. As Dr. Cupitt noted, "sharply increasing the penalties for violations * * * helps implement the first element of a 'higher fences, fewer goods' strategy."[23] The WMD Commission also strongly supported enhanced penalties as a deterrent to would-be violators, stating that under current law, "an export control vio-

[23] Hearing on the reauthorization of the Export Administration Act before the Senate Committee on Banking, Housing, and Urban Affairs, June 24, 1999, testimony of Dr. Richard T. Cupitt, Associate Director, Center for International Trade and Security, University of Georgia.

lator could view the risk and burden of penalty for a violation as low enough to be merely a 'cost of doing business,' to be balanced against the revenue received from an illegal transaction."[24] The Cox Committee recommended particular attention in reauthorization legislation to re-establishing higher penalties for export control violations.[25]

Toward that end, S. 149 significantly enhances criminal and civil penalties for export control violations. Section 503 subjects individuals to a criminal fine of up to 10 times the value of the exports or $1 million for each violation, whichever is greater, for willfully violating or willfully conspiring to violate the provisions of S. 149 or any regulation issued thereunder. In addition, individuals may be imprisoned for a period of up to 10 years. Persons other than individuals (such as companies) are to be fined up to 10 times the value of the export or $5 million, whichever is greater, for each violation.

Under Section 503, the Secretary of Commerce may impose on a violator, in addition to or in lieu of criminal penalties, a maximum civil fine of $500,000 for each export control violation. The Committee intends that the Secretary exercise this authority to impose penalties commensurate with the offense. The Committee recognizes that the gravity of different violations may vary widely and the Secretary needs discretion to take into account the aggravating and mitigating factors that may be present in any given case.

The Secretary also may deny for up to 10 years the export privileges of any person convicted of violating export control law, or exclude the person from practice before the Department of Commerce. Moreover, to increase the effectiveness of overall U.S. export control efforts, those convicted of other criminal statutes which prohibit trafficking in weapons of mass destruction or lesser offenses in connection with export control violations also are subject to denial of export privileges. Furthermore, those convicted of export control violations will find the property they exported and the fruits and instrumentalities of their crime subject to forfeiture.

The bill establishes a statute of limitations of five years for violations, and sets forth time periods during which the statute of limitations is tolled. In a case where criminal prosecution is pursued, the statute of limitations for bringing an administrative proceeding is tolled from the date of indictment until 6 months after the date the criminal action is concluded, thus preserving the government's civil recourse against a violator without endangering the pursuit of a criminal prosecution.

With regard to sanctions, Sections 504 and 505 reauthorize both the current missile proliferation control sanctions and the current chemical and biological weapons control sanctions. The Committee believes that these sanctions serve as strong deterrents to U.S. or foreign persons who may knowingly transfer missile technology or lethal chemical or biological weapons to persons in violation of the Missile Technology Control regime guidelines, or to persons that the President has determined has directly engaged in the illegal use, transfer or preparation of chemical and biological weapons.

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[24] Report from the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction, July 14, 1999.

[25] See Recommendation 29 of the Report of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China, May 25, 1999.

The bill further strengthens the enforcement tools of the Office of Export Enforcement of the Bureau of Export Administration at the Department of Commerce. Section 506 authorizes the Office of Export Enforcement to conduct undercover investigations in furtherance of its enforcement responsibilities. It also establishes procedures for the use of funds to support such undercover investigations, and sets forth reporting requirements. Violations of the Export Administration Act are made predicate offenses for wiretap authority.

The bill also establishes procedures for administrative actions, including the imposition of Temporary Denial Orders (TDO). A TDO may be sought when there is reasonable cause to believe that a person is engaging in or is about to engage in activity which would constitute an export control violation. In cases where a criminal indictment for export control or related violations has been returned, there may be considerable concern on the part of the government that the person could continue to engage in illegal export activity. Therefore, criminal indictment is a condition considered as adequate grounds for the issuance of a TDO.

The Committee places strong emphasis on the use of post-shipment verifications (PSVs) as an important part of the enforcement effort. Such verifications will focus on exports involving the greatest risk to national security. To strengthen compliance with these PSVs, the bill authorizes the Secretary may take action against those who refuse to allow such checks. If an end-user refuses to allow a post-shipment verification, export licenses for controlled items to that end-user will be denied until such time as the post-shipment verification is conducted. If a country refuses to allow a post-shipment verification, the Secretary is authorized to deny the export of substantially identical or directly competitive items to all end-users in that country until such time as the country allows the post-shipment verification.

Section 506 includes an authorization for funding for the Bureau of Export Administration of the Department of Commerce for fiscal year 2002 through fiscal year 2005, with certain funds dedicated to enforcement and compliance activities.

Section 506(h) authorizes funding of $3.5 million for the Department of Commerce to hire additional staff to work with U.S. freight forwarders, who are important partners in exporting U.S. goods, to develop and implement a "best practices" program. This voluntary program is intended to help ensure that freight forwarders are facilitating exports in compliance with export control requirements.

Currently, the Office of Export Enforcement has few investigators posted in important areas such as the People's Republic of China. This is inadequate to meet the need for post-shipment verifications, a significant part of the Department of Commerce's compliance program. In support of this effort, Section 506(i) authorizes the sum of $4.5 million to hire and place 10 additional overseas investigators in China, Russia, Hong Kong, India, Singapore, Egypt, Taiwan or other appropriate posts. The section further requires the Department to report as part of its annual report to Congress, and no later than two years after the date of enactment and annually thereafter, on the effectiveness of its end-use verification activities. Finally, Section 506(i) authorizes $5 million

for the Department to enhance its program for verifying the end-use of items subject to controls.

To provide additional assistance to the Department of Commerce in the administration of its responsibilities in processing export licenses and maintaining records, Section 506(l) authorizes the sum of $5 million for the acquisition of a new computer system for export licensing and enforcement. Section 506(o) authorizes $2 million for the Department of Commerce to hire additional license review officers, and $2 million for the department to conduct professional training of its license review officers, auditors and investigators who conduct post-shipment verification checks.

Finally, Section 506(p) sets forth a limitation terminating the authority granted under S. 149 on September 30, 2004, unless the President provides to Congress a detailed report on the operation of the Export Administration Act of 2001 and of U.S. export controls in general, and either submits to Congress legislative reform proposals in connection with that report or certifies to Congress that reforms in connection with that report are not necessary. This is a one-time condition, which, once met, sets aside the effect of the sunset in the statute. Such report and legislative proposals are to be submitted to the Congress any time prior to October 1, 2004. If submitted after September 30, 2004, the provision would not have the effect of reviving the authority of the statute.

Title VI—Export control authority and regulations

Title VI authorizes certain officials to implement the authorities granted under this bill. Section 601 provides for the delegation of authority not otherwise reserved for the President to the Secretary of Commerce, and, subsequently, to the Under Secretary of Commerce for Export Administration. The title also authorizes the appointment of such an Under Secretary, as well as the appointment of two Assistant Secretaries to assist the Secretary and Under Secretary in carrying out the authorities under the bill. The Committee intends this grant of authority to reflect the organizational structure currently in place at the Department of Commerce. This section also authorizes the President and Secretary of Commerce to issue regulations as necessary to carry out S. 149, and requires notification to the congressional committees of jurisdiction for amendments to such regulations.

Section 602 recodifies Section 12(c) of the current Export Administration Act provisions relating to confidentiality of information and the availability of information to Congress and the General Accounting Office. The section also increases the penalties that can be imposed for disclosure of confidential information. If an officer or other employee of the U.S. government knowingly discloses confidential information, such person can be fined up to $50,000, and imprisoned not more than one year, for each violation. The bill also authorizes the Secretary to impose civil penalties of not more than $5,000 on persons who otherwise disclose information in violation of the provisions of the bill.

Title VII—Miscellaneous provisions

The Committee recognizes the importance of keeping Congress fully informed about the conduct of export control policy. Toward that end, Section 701 requires the Secretary to report annually to

Congress regarding export controls. The report is to include, among other items, (a) a description of the implementation of the law, including regulations issued, organizational changes, and delegations of presidential authority; (b) a status report regarding country tiering and the Commerce Control List; (c) a description of mass-market and foreign availability determinations, and foreign availability negotiations; (d) a description of any enhanced controls imposed pursuant to section 201(d); (e) descriptions of enforcement actions taken and sanctions imposed; (f) a detailed statistical summary of all applications, notifications, and processing times pursuant to the provisions of the law; (g) an assessment of the effectiveness of multilateral regime commitments and negotiations regarding export controls; (h) a description of differences between U.S. export control requirements and those of other multilateral regime members; (i) an assessment of the costs of export controls; and (j) a description of the progress of achieving goals set by the Department of Commerce under the Government Performance and Results Act.

Finally, Section 701 requires that any publication in the Federal Register required under the bill also is to be made available on the Department of Commerce or another appropriate government website.

Section 702 makes a number of technical and conforming amendments. Section 702(j) preserves authority contained in Section 17(c) of the current Export Administration Act to ensure that standard, integral civil aircraft products remain subject to the Export Administration Act. The Committee believes that commercial passenger safety is a top priority and that delays in the approval of licenses for standard aircraft equipment should be reduced in order to ensure the highest standard of flight safety.

Section 702(k) repeals certain provisions of the fiscal year 1998 National Defense Authorization Act (NDAA) relating to the measurement standard used for control of high performance computers. The Committee believes this repeal will allow the President the flexibility that is necessary to rely upon the most appropriate and effective measurement for the control of computer technologies as the current state of the art would indicate. In the early 1990s, the United States and its allies developed a computer performance measurement—millions of theoretical operations per second (MTOPS)—for export control purposes. Initial U.S. controls were set at 195 MTOPS. In 1997, Congress codified the MTOPS standard by requiring controls on any computer export of more than 2,000 MTOPS; adjustments to the MTOPS level were permitted only pursuant to presidential notification and a subsequent layover period. Today, due to rapid technological advances, and after several adjustments, the MTOPS control level stands at 85,000 MTOPS.

More and more experts agree, however, that the MTOPS standard does not adequately protect national security. In a January 2001 letter to Congress, former Secretary of Defense William Cohen stated that "[o]ver the last year, DoD has sought to identify an alternative to the MTOPS approach to controlling hardware that would permit effective export controls on high performance computers hardware. After intensive effort, DoD concluded that no alternative approach is feasible * * * [O]ur ability to control the

acquisition of computer hardware is largely ineffective and will be increasingly so within a very short time frame."[26] Likewise, the General Accounting Office recently concluded that "using MTOPS to establish export control thresholds is outdated and no longer a valid measure for controlling computing capabilities."[27] Finally, a Defense Department report released last month agreed that "license exception limits based on MTOPS do not restrict foreign access to high performance computing," and recommended abandoning MTOPS controls for high performance computers.[28] The Committee recognizes the difficulty of effectively controlling widely available commercial computer systems in today's rapidly changing world, and believes that the repeal of the MTOPS standard will allow the President the flexibility to address computer controls in an effective manner.

Section 703 includes a savings provision to preserve delegations, rules, regulations, and other actions made or issued under a number of statutes that have governed export control policy. It also makes clear that the prohibitions under S. 149 do not apply to transactions subject to certain requirements of the National Security Act, and that nothing shall affect the responsibilities of the Director of Central Intelligence under that Act. Finally, it directs the Secretary to make revisions to the Export Administration regulations, as required by S. 149, within 180 days.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title; table of contents

Section 1 provides that the bill may be cited as the "Export Administration Act of 2001," and provides a table of contents.

Section 2. Definitions

Section 2 defines the terms used in the Act.

Section 101. Commerce control list

Section 101(a) directs the Secretary of Commerce to establish and maintain a Commerce Control List consisting of items that require a license or other authorization prior to export. Section 101(b) specifies the types of licenses or other authorization that can be required. Section 101(c) provides that no license or other authorization is required to provide after-market service or replacement parts, to replace on a one-for-one basis parts that were in an item lawfully exported from the United States, unless the Secretary determines that a license is required or the after-market service or replacement parts would materially enhance the capability of the item. Section 101(d) provides that a license or other authorization to export an item includes authorization to export incidental technology related to the item. Section 101(e) authorizes the Secretary to prescribe regulations to carry out the Act.

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[26] Letter from the Honorable William Cohen, Secretary of Defense, to the Honorable Carl Levin, Chairman, Senate Committee on Armed Services, January 18, 2001.

[27] Report to the Chairman, Senate Committee on Armed Services, "Export Controls: System for Controlling Exports of High Performance Computing Is Ineffective," United States General Accounting Office, December 2000.

[28] Defense Science and Technology Technical Reports, "Export Control of High Performance Computing: Analysis and Alternative Strategies," Office of the Deputy Under Secretary of Defense (Science and Technology), Department of Defense, February 2, 2001.

Section 102. Delegation of authority

Section 102 allows the President to delegate the authority granted to him under this Act. Section 102(b)(1) limits this delegation to officials that are appointed by the President with the advice and consent of the Senate. Section 102(b)(2) states that the President may not delegate or transfer his authority to overrule or modify recommendations or decisions made by the Secretaries of Commerce, Defense, or State.

Section 103. Public information; consultation requirements

Section 103 requires the Secretary of Commerce to keep the public fully informed of changes in export control policies and procedures and to consult regularly with representatives from a broad spectrum of enterprises, labor organizations, and interested citizens.

Section 104. Right of export

Section 104 affirms that U.S. persons have the right to export, except as provided under this Act.

Section 105. Export control advisory committees

Section 105 authorizes the Secretary of Commerce to appoint export advisory committees, made up of industry representatives and government officials (including officials from the Departments of Commerce, Defense, and State, and other appropriate departments or agencies), to provide technical advice and assistance to the Secretary and other appropriate officials or departments regarding actions designed to carry out the Act.

Section 106. President's Technology Export Council

Section 106 authorizes the President to establish a President's Technology Export Council to advise the President on the implementation, operation, and effectiveness of the Act.

Section 107. Prohibition on charging fees

Section 107 provides that no fee may be charged to process an export license application under the Act.

Section 201. Authority for national security export controls

Section 201 authorizes the President to control exports for national security purposes to stem contributions to the military capability of potential adversaries; to stem the proliferation of weapons of mass destruction and the means to deliver them, and other significant military capabilities; and to deter acts of international terrorism. Section 201(c) authorizes export controls on items that, based on the end-use or end-user, could contribute to the proliferation of weapons of mass destruction or the means to deliver them. Section 201(d)(1) authorizes the President to impose enhanced controls on National Security Control List items, notwithstanding their status as incorporated parts or as mass-market or foreign-available items, if removing controls would constitute a significant threat to U.S. national security. Section 201(d)(2) requires the President to report any enhanced control determination, along with the specific reason for the determination, to the committees of jurisdiction.

Section 202. National security control list

Section 202 requires the Secretary of Commerce to establish and maintain a National Security Control List, composed of items controlled for national security purposes, as part of the Commerce Control List. Section 202(a)(3) directs the Secretary, with the concurrence of the Secretary of Defense and in consultation with other appropriate departments or agencies, to identify items for inclusion on the List, provided that the List shall include all of the items on the Commerce Control List on the day before the date of enactment of this Act. Section 202(a)(3) further requires the Secretary to review the List on a continuing basis, and, with the concurrence of the Secretary of Defense and in consultation with other appropriate departments or agencies, make adjustments to the List. Section 202(b)(1) requires the Secretary to consider certain risk factors, weighing national security concerns and economic costs, in establishing and maintaining the List. Section 202(b)(2) specifies the risk factors for the Secretary's consideration.

Section 203. Country tiers

Section 203 directs the President to establish a country tiering system of not less than 3 tiers, and assign each country to an appropriate tier for each controlled item or group of items. Section 203(b) requires that countries representing the lowest risk of diversion or misuse of an item be assigned to the lowest tier, while those representing the highest risk of diversion or misuse be assigned to the highest tier. Section 203(c) provides a number of risk factors to be used by the President in making assessments of countries for tier assignment purposes.

Section 204. Incorporated parts and components

Section 204(a) provides that controls may not be imposed on an item solely because the item incorporates parts or components that are controlled if the part or component is essential to the functioning of the item, is customarily included in sales of the item, and is valued at 25 percent or less of the total value of the item, unless the item itself would make a significant contribution to the military or proliferation potential of a country or end-user which would prove detrimental to U.S. national security, or unless failure to control the item would be contrary to controls imposed under section 201(c) or section 309. Section 204(b) provides that no authority may be required for the re-export of foreign-made items incorporating U.S.-controlled parts if the value of the U.S.-controlled parts is 25 percent or less of the total value of the item, except that controls may be imposed on reexports of items to countries designated as countries supporting international terrorism if the controlled U.S. content is greater than 10 percent of the total value of the item.

Section 205. Petition process for modifying export status

Section 205 directs the Secretary of Commerce to establish a process for interested persons to petition the Secretary to change the status of an item on the List.

Section 211. Determination of foreign availability and mass-market status

Section 211(a) directs the Secretary of Commerce to review and determine the foreign availability and mass-market status of an item on a continuing basis, upon a request from the Office of Technology Evaluation, or in response to a petition. Section 211(b) requires the Secretary to establish a process for interested parties to petition for a foreign availability or mass- market determination for an item. Section 211(c) provides that in any case in which the Secretary determines that an item has foreign availability or mass-market status, no license or other authorization shall be required for the export of such item, unless the President makes a set- aside determination under section 212 or 213. Section 211(d) establishes criteria for determining foreign availability and mass-market status.

Section 212. Presidential set-aside of foreign availability status determination

Section 212(a)(1) provides the President with non-delegable authority to set aside a foreign availability status determination if failing to control the item constitutes a threat to U.S. national security, if there is a high probability that the foreign availability will be eliminated through international negotiations, or if U.S. controls on the item have been imposed under section 309. Section 212(a)(2) requires the President to report any set-aside determination, along with the specific reason for the determination, to the committees of jurisdiction, and to publish the determination in the Federal Register. Section 212(b)(1) requires the President, if he has made a set-aside determination under section 212(a), to actively pursue negotiations with the governments of appropriate countries for the purposes of eliminating the foreign availability, and to notify the committees of jurisdiction of these negotiations. Section 212(b)(2) directs the President to review a set-aside determination under section 212(a) every six months. Section 212(b)(3) provides that except for a set-aside determination made under section 309, a set-aside determination shall cease to apply within 6 months if negotiations are never commenced, on the date that negotiations end without success, on the date the President determines there is not a high probability of eliminating foreign availability through negotiation, or within 18 months if the President has been unable to achieve agreement to eliminate foreign availability.

Section 213. Presidential set-aside of mass-market status determination

Section 213(a) provides the President with non-delegable authority to set aside a mass-market status determination if failing to control the item constitutes a serious threat to U.S. national security and controlling the item would advance U.S. national security interest, or if U.S. controls on the item have been imposed under section 309. Section 213(b)(1) requires the President to report any set-aside determination, along with the specific reason for the determination, to the committees of jurisdiction, and to publish the determination in the Federal Register. Section 213(b)(2) directs the President to review a set-aside determination under section 212(a) every six months.

Section 214. Office of technology evaluation

Section 214(a)(1) establishes within the Department of Commerce an Office of Technology Evaluation to gather, coordinate, and analyze all information necessary for the Secretary of Commerce to make foreign availability and mass-market status determinations under the Act. Section 214(a)(2) directs the Secretary to ensure that the Office includes persons with the training, expertise and experience in economic analysis, the defense industrial base, technological developments, national security, and foreign policy export controls to carry out the Office's responsibilities. Section 214(b) directs the Office to conduct a number of assessments, evaluations, and monitoring functions. Section 214(c) requires the Secretary to make available to the committees of jurisdiction information on the Office's operations and improvements in ability to assess foreign availability and mass-market status. Section 214(d) directs departments and agencies and their contractors to furnish to the Office information about foreign availability and mass-market status of items.

Section 301. Authority for foreign policy export controls

Section 301 authorizes the President to control exports for the purposes of promoting foreign policy objectives; promoting peace, stability and respect for human rights; and deterring and punishing acts of international terrorism. Section 301(c) prohibits controlling for foreign policy reasons the export from a foreign country of an item containing parts or components produced in the United States, unless the export is to a country designated as a country supporting international terrorism if the value of the controlled U.S. parts or components is greater than 10 percent of the total value of the item. Section 301(d) prohibits controlling the export of an item for foreign policy purposes if the export of such item is in performance of a binding contract or is under an already issued license, unless the export of such item would constitute a serious threat to a foreign policy interest of the United States and controls on that item will be instrumental in remedying the situation posing the threat.

Section 302. Procedures for imposing controls

Section 302 outlines procedures for the imposition of foreign policy export controls. Section 302(a) requires the President, not later than 45 days before imposing a foreign policy export control, to publish notice of intent to do so in the Federal Register and provide for a 30-day period for public comment. Section 302(b) authorizes the President to negotiate with the government of the foreign country against which the export control is imposed during the 45-day notice period. Section 302(c) directs the President to consult with the committees of jurisdiction regarding a proposed foreign policy control and efforts to achieve multilateral cooperation on the issues underlying the proposed control.

Section 303. Criteria for foreign policy export controls

Section 303 requires foreign policy export controls to have clearly stated and specific foreign policy objectives, to have objective standards for evaluation, to include certain assessments by the Presi-

dent, to be targeted narrowly, and to seek to minimize any adverse impact on humanitarian activities.

Section 304. Presidential report before imposition of controls

Section 304(a) directs the President to submit a report to the committees of jurisdiction prior to imposing a foreign policy export control. Section 304(b) details the contents of such report.

Section 305. Imposition of controls

Section 305 authorizes the President to impose a foreign policy export control after the submission of the report required under section 304 and notice of the imposition of the control is published in the Federal Register.

Section 306. Deferral authority

Section 306 authorizes the President to defer compliance with the requirements of sections 302(a), 304, or 305 if he determines that deferral is in the U.S. national interest and compliance occurs not later than 60 days after the foreign policy export control is imposed.

Section 307. Review, renewal, and termination

Section 307(a)(1) provides that foreign policy export controls shall terminate on March 31 of each renewal year, defined as 2003 and every two years thereafter, unless specifically renewed by the President. Section 307(a)(2) provides an exception for a foreign policy export control that is required by law, is targeted against a country designated as supporting international terrorism, or has been in effect for less than one year as of February 1 of a renewal year. Section 307(b) requires the President to review all foreign policy export controls in effect and, during the review period, consult with the committees of jurisdiction and provide for a period of public comment on the renewal of each export control. Section 307(c) requires the President to submit to the committees of jurisdiction a report on each export control he wishes to renew.

Section 308. Termination of controls under this title

Section 308(a) requires the President to terminate any foreign policy export control that has substantially achieved the objective for which it was imposed, and authorizes him to terminate at any time any foreign policy export control that is not required by law. Section 308(b) provides an exception for foreign policy export controls imposed against countries designated as supporting international terrorism.

Section 309. Compliance with international obligations

Section 309 authorizes the President to control exports of items listed on the control list of a multilateral export regime, or in order to comply with resolutions of the United Nations, treaties, or other international agreements and arrangements.

Section 310. Designation of countries supporting international terrorism

Section 310(a) requires a license for the export of an item to a country if the Secretary of State has determined that the govern-

ment of the country has repeatedly provided support for international terrorism, and the export of the item could make a significant contribution to the military potential of the country or its ability to support international terrorism. Section 310(b) requires the Secretaries of Commerce and State to notify the committees of jurisdiction at least 30 days before issuing a license under section 310(a). Section 310(c) requires the Secretary of State to publish each determination made under section 310(a) in the Federal Register. Section 310(d) provides that a designation made under section 310(a) shall not be rescinded unless the President submits to the Speaker of the House of Representatives, and the Chairmen of the Committees on Banking, Housing, and Urban Affairs and on Foreign Relations of the Senate a report making certain certifications about the government of the designated country.

Section 311. Crime control instruments

Section 311(a) requires that crime control and detection instruments be approved for export only pursuant to an individual export license, and that determinations to approve or deny an export license application be made by the Secretary of Commerce in concurrence with the Secretary of State. Section 311(b) provides an exception for exports to North Atlantic Treaty Organization member nations, Japan, Australia, or New Zealand, or other countries designated by the President.

Section 401. Export license procedures

Section 401 outlines the process by which export license applications are considered by the Secretary of Commerce and other departments and agencies. Section 401(a) describes the responsibilities of the Secretary with regard to export license procedures, and outlines the criteria for evaluating applications. Section 401(b) requires the Secretary, within 9 days, to review an application to ensure it is complete, verify that a license is required for the item, and refer it to the appropriate departments and agencies. Section 401(c) directs referral departments and agencies to respond with a recommendation on a referred application within 30 days of referral. Section 401(d) provides that within 30 days of referral, if the referral departments and agencies are in agreement, the Secretary must issue the license or notify the applicant of the intent to deny the license; if the referral departments and agencies are not in agreement, the Secretary must notify the applicant that the application is subject to interagency dispute resolution. Section 401(e) requires the Secretary to inform an applicant of a denial, the statutory and regulatory basis for the denial, the modifications (if any) that would permit approval, the considerations that led to the denial, and the availability of appeal procedures, with applicants permitted 20 days to cure the application's deficiencies. Section 401(f) directs the Secretary to establish an appeals process for application denials; and authorizes the filing of a petition with the Secretary or the filing of an action in United States District Court to enforce the time limits prescribed in this section. Section 401(g) details certain actions that are not to be included in the time periods prescribed in the section. Section 401(h) requires the Secretary to notify the Secretary of Defense and other appropriate departments or

agencies of classification requests, and to respond within 14 days to the person making the request.

Section 402. Interagency dispute resolution process

Section 402(a) provides that all license applications on which agreement cannot be reached shall be referred to the interagency dispute resolution process for decision. Section 402(b) directs the Secretary of Commerce to establish an interagency committee for review of license applications on which there is disagreement, and authorizes the chair of that committee to consider the positions of the referral departments and agencies and make decisions on applications. Section 402(b)(2) states that the analytic product of the intelligence community should be fully considered with regard to proposed licenses. Section 402(b) further directs the President to establish additional levels of appeal, at which decision-making is by majority vote, departments or agencies that fail to take a timely position are deemed to have no objection, and escalation to the next higher level of review may be made at the request of a Senate-confirmed official of a participating department or agency; and requires that all matters be resolved or referred to the President within 90 days of referral. Section 402(c) directs the Secretary, once a final decision is made, to promptly issue the license and ensure all appropriate Department personnel are notified, or notify the applicant of the intent to deny the application.

Section 501. International arrangements

Section 501(a) states the policy of the United States with regard to multilateral arrangements, and encourages the President to participate in multilateral export control regimes. Section 501(b) requires the President to submit to the committees of jurisdiction an annual report evaluating the effectiveness of each multilateral export control regime and detailing efforts to strengthen and harmonize the controls of such regimes. Section 501(c) directs the President to establish certain features in any multilateral export control regimes in which the United States is participating. Section 501(d) directs the President to seek the cooperation of regime members in establishing certain features in the members' national export control systems. Section 501(e) directs the President to seek to achieve certain objectives with regard to multilateral export control regimes. Section 501(f) requires the Secretary of Commerce, within 120 days of the date of enactment of the Act, to publish in the Federal Register and post on the Department of Commerce website information on multilateral export control regimes. Section 501(g) encourages the Secretary to participate in the training of foreign officials regarding implementation of effective export controls.

Section 502. Foreign boycotts

Section 502 directs the President to issue regulations prohibiting the participation of U.S. persons in boycotts imposed by a foreign country against a country that is friendly to the United States.

Section 503. Penalties

Section 503(a)(1) provides that an individual who willfully violates the Act shall, for each violation, be fined up to 10 times the value of the exports involved or $1 million, whichever is greater;

imprisoned for up to 10 years; or both. Section 503(a)(2) provides that an entity that willfully violates the Act shall, for each violation, be fined up to 10 times the value of the exports involved or $5 million, whichever is greater. Section 503(b) provides that those convicted of a willful violation of the Act also shall forfeit any property that was the subject of the violation or that was derived from the violation. Section 503(c) authorizes the Secretary of Commerce to impose civil penalties of up to $500,000 per violation, and to deny the export privileges of persons who violate the Act or its regulations. Section 503(f) provides that persons convicted of violations of certain laws may, at the discretion of the Secretary, be denied export privileges for up to 10 years.

Section 504. Missile proliferation control violations

Section 504 requires the President to impose sanctions on U.S. or foreign persons who knowingly export or trade in items on the Missile Technology Control Regime (MTCR) Annex, and provides waiver authority in limited circumstances.

Section 505. Chemical and biological weapons proliferation sanctions

Section 505 requires the President to impose sanctions on persons who have knowingly and materially contributed to efforts by certain countries to use, develop, or acquire chemical or biological weapons, and provides waiver authority in limited circumstances.

Section 506. Enforcement

Section 506(a) provides general enforcement authorities for enforcement of the Act. Section 506(b) authorizes forfeiture of items seized in enforcement of the Act. Section 506(c) provides that cases involving violations under this Act shall be referred to the Secretary of Commerce for civil action, or the Attorney General for criminal action, or to both. Section 506(d) authorizes the use of funds for undercover investigative operations. Section 506(e) authorizes the use of wiretaps for enforcement of the Act. Section 506(f) directs the Secretary to target post-shipment verifications to those exports involving the greatest risk to national security. Section 506(g) requires the Secretary to deny licenses to end-users who refuse to allow post-shipment verification of a controlled item. Section 506(h) authorizes $3.5 million to hire 20 additional employees to assist freight forwarders in developing a voluntary "best practices" program. Section 506(i) authorizes $4.5 million to hire 10 additional overseas investigators for post-shipment verification. Section 506(j) authorizes the Secretary, in cooperation with the U.S. Customs Service, to undertake necessary measures to detect unlawful exports and enforce violations of the Act. Section 506(l) authorizes $5 million for an export licensing and enforcement computer system. Section 506(o) authorizes $2 million to hire additional license review officers, and $2 million to conduct training for new license review officers, auditors, and post-shipment verification investigators. Section 506(p)(1) authorizes funding in the amount of $72 million for fiscal year 2002, $73 million for fiscal year 2003, $74 million for fiscal year 2004, and $76 million for fiscal year 2005, for the Department of Commerce to carry out the Act. Section 506(p)(2) terminates the authority granted by the Act unless the

President provides to Congress a detailed report on the implementation and operation of the Act and of export controls in general, and either provides to Congress legislative reform proposals in connection with such report or certifies to Congress that no such legislative reforms are necessary.

Section 507. Administrative procedures

Section 507 describes the administrative provisions for the execution of authorities under the Act.

Section 601. Export control authority and regulations

Section 601(a) authorizes the exercise of any function under the Act not otherwise reserved to the President or another department to the Secretary of Commerce, and authorizes the delegation of any function under the Act from the Secretary to the Under Secretary of Commerce for Export Administration or other Commerce official. Section 601(b) establishes within the Department of Commerce an Under Secretary for Export Administration, an Assistant Secretary for Export Administration, and an Assistant Secretary for Export Enforcement, to carry out functions under the Act. Section 601(c) authorizes the President and the Secretary to issue such regulations as are necessary to carry out the Act, and direct the Secretary to report to the committees of jurisdiction on proposed amendments to the regulations.

Section 602. Confidentiality of information

Section 602(a) exempts from disclosure proprietary information associated with the processing of license applications. Section 602(b) authorizes Congress and the General Accounting Office to obtain information from appropriate departments and agencies regarding activities conducted in the furtherance of the Act. Section 602(c) requires the Secretary of Commerce and the Commissioner of Customs to exchange licensing and enforcement information to facilitate enforcement efforts. Section 602(d) provides that any officer or employee who knowingly discloses exempt information shall, for each violation, be fined up to $50,000 in criminal penalties, imprisoned for up to 1 year, or both; or shall, for each violation, be fined up to $5,000 in civil penalties; or may be removed from office or employment.

Section 701. Annual report

Section 701(a) directs the Secretary of Commerce to submit to Congress, prior to February 1 of each year, a report on the administration of the Act. Section 701(b) details the specific items that are to be included in the report. Section 701(c) provides that whenever information under the Act is required to be published in the Federal Register, such information also shall be made available on the Department of Commerce or other appropriate government website.

Section 702. Technical and conforming amendments

Section 702 contains technical and conforming amendments, including repeal of the provisions relating to performance levels of computers in the National Defense Authorization Act for fiscal year 1998.

Section 703. Savings provisions

Section 703(a) provides that all delegations, rules, regulations, or other forms of administrative action effective under certain previous or other statutes and in effect on the date of enactment of this Act shall continue in effect unless superseded. Section 703(b) provides that the Act does not affect administrative or judicial proceedings commenced under the Export Administration Act of 1979 or Executive Order 12924. Section 703(c) ensures that determinations regarding support of international terrorism made under the Export Administration Act of 1979 or Executive Order 12924 shall be deemed to be made under section 310 of this Act. Section 703(d) provides that the prohibitions of the Act do not apply to transactions subject to the requirements of the National Security Act of 1947, and that nothing shall affect the responsibilities and authorities of the Director of Central Intelligence under Section 103 of the National Security Act of 1947. Section 703(e) requires the Secretary of Commerce to make any revisions to current regulations required under the Act no later than 180 days after the date of enactment of this Act.

CHANGE IN EXISTING LAW (CORDON RULE)

In the opinion of the Committee, it is necessary to dispense with the requirements of paragraph 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following statement regarding the regulatory impact of S. 149.

S. 149 reauthorizes the Export Administration Act of 1979. It retains the basic structure of that Act, and continues in most respects the current licensing process and requirements for exporters of dual-use items.

At the same time, however, S. 149 reduces certain burdens on exporters. The bill increases the transparency and certainty of the licensing process. It also strengthens the foreign availability provisions of the current Export Administration Act and adds a mass-market provision, which may result in the elimination of controls on some items. Finally, it streamlines the regulatory process by requiring coordination and information-sharing between the various Federal departments and agencies.

For these reasons, the Committee believes that this legislation will have a favorable regulatory impact.

COST OF THE LEGISLATION

Paragraph 11(a) of Senate rule XXVI of the Standing Rules of the Senate, and Section 403 of the Congressional Budget Impoundment and Control Act, require that each committee report on a bill contain a statement, prepared by the Congressional Budget Office, that estimates the cost of the proposed legislation. The Congressional Budget Office Cost Estimate and its Estimate of Costs of Private-Sector Mandates, both dated April 2, 2001, are hereby included in this report.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 2, 2001.

Hon. PHIL GRAMM,
Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 149, the Export Administration Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Ken Johnson (for Federal costs), Shelley Finlayson (for the State and local impact), and Paige Piper/Bach (for the private-sector impact).

Sincerely,

ROBERT A. SUNSHINE
(For Dan L. Crippen, Director).

Enclosure.

S. 149—Export Administration Act of 2001

Summary: The bill would replace the expired Export Administration Act of 1979 (EAA) and would update the system for applying export controls and penalties on American business for national security or foreign policy purposes. Since the expiration of the EAA in 1994, the President has extended export controls pursuant to his authority under the International Emergency Economic Powers Act. The Bureau of export Administration (BXA) in the Department of Commerce administers export controls.

CBO estimates that implementing S. 149 would cost about $377 million over the 2001–2006 period, assuming the appropriation of the necessary amounts. Because the bill would increase criminal and civil penalties for violations of export controls, CBO estimates governmental receipts would increase by $23 million over the 2002–2006 period. CBO estimates that the increase in criminal penalties would cause direct spending from the Crime Victims fund to rise by about $7 million over the 2002–2006 period. Because the bill would affect direct spending and receipts, pay-as-you-go procedures would apply.

S. 149 contain no intergovernmental or private sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. This bill would codify existing administrative policy and regulatory practice.

Estimated cost to the Federal Government: The estimated budgetary impact of the bill is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—					
	2001	2002	2003	2004	2005	2006
CHANGE IN REVENUES AND DIRECT SPENDING						
Estimated Revenues	0	0	2	5	8	8
Estimated Budget Authority	0	0	0	1	2	4
Estimated Outlays	0	0	0	1	2	4

	By fiscal year, in millions of dollars—					
	2001	2002	2003	2004	2005	2006
SPENDING SUBJECT TO APPROPRIATION						
EAA Spending by the Bureau of Export Administration Under Current Law:						
Budget Authority [1]	51	0	0	0	0	0
Estimated Outlays	52	9	3	0	0	0
Proposed Changes:						
Estimated Authorization Level	22	84	88	92	96	0
Estimated Outlays	6	86	85	91	95	14
EAA Spending by the Bureau of Export Administration Under S. 149:						
Estimated Authorization Level [1]	73	84	88	92	96	0
Estimated Outlays	58	95	88	91	95	14

[1] The 2001 level is the amount appropriated to the BXA for that year.

Basis of estimate: S. 149 would authorize the BXA to control the export of certain items from the United States for national security or foreign policy purposes. Generally, export controls would not apply to products that are mass-market items or available from foreign sources at a comparable price and quality. When fully phased in, CBO estimates that provisions of the Export Administration Act of 2001 would increase revenues by about $8 million a year beginning in fiscal year 2005 and direct spending by about $4 million a year beginning in 2006. In addition, we estimate that implementing the bill would cost $377 million over the 2001–2006 period, assuming appropriation of the necessary amounts.

Revenues

Since the 1994 expiration of the Export Administration Act of 1979, criminal and civil penalties for violating export control laws have been collected under the International Economic Emergency Powers Act. S. 149 would significantly raise the maximum criminal fines that could be imposed for violations of export controls. The bill would set the maximum criminal fines at 10 times the value of the exports involved, or $5 million for corporations and $1 million for individuals, whichever is greater. Under the bill, civil penalties of up to $500,000 could also be imposed for violations of the law. On average, about three years elapse between the initial investigation of export control law and the collection of a penalty. Because the amount of a fine is based on the law in force at the start of an investigation, CBO does not expect penalties under the new law to be collected until fiscal year 2003. Based on information from the Department of Commerce, CBO estimates that enacting the bill would increase receipts from civil penalties by $4 million a year and receipts from criminal penalties by another $4 million a year beginning in 2005.

Direct spending

Collections of criminal fines are recorded in the budget as governmental receipts (i.e., revenues), which are deposited in the Crime Victims Fund and spent in subsequent years. When fully phased in, the additional direct spending resulting from the increase in criminal penalties would be about $4 million a year beginning in 2006, because spending from the Crime Victims Fund lags behind the collection of criminal fines by about a year.

Spending subject to appropriation

BXA is responsible for implementing the EAA. Based on information from the Department of Commerce, CBO estimates that, with current funding, the BXA will spend about $52 million in 2001 on this effort. S. 149 would authorize the appropriation of between $72 million and $76 million a year for the Department of Commerce to implement the provisions of the bill during the 2002–2005 period. Also, the bill would authorize additional appropriations of at least $3.5 million annually to hire 20 employees to establish a best practices program for exporters, at least $4.5 million annually to hire 10 overseas investigators, $5 million to enhance the BXA's program to verify the end use of controlled exports, at least $5 million to procure a computer system for export licensing and enforcement, and $4 million annually to hire and train additional license review officers.

Based on information from the BXA, CBO estimates that implementing a best practices program for exporters would cost about $4 million a year, stationing overseas investigators would cost about $5 million a year, hiring and training license review officers would cost $4 million a year, and procuring the computer system would cost about $1 million in 2001 and $4 million in 2002. Any such spending would be subject to appropriation of the necessary amounts. Based on the agency's historical spending patterns, CBO estimates that implementing the bill would cost $377 million over the 2001–2006 period. This estimate assumes that funds are appropriated for the BXA through 2005, as provided in section 607 of the bill.

Pay-as-you-go considerations: The Balanced Budget and Emergency Deficit Control Act establishes pay-as-you-go procedures for legislation affecting direct spending or receipts. The net changes in outlays and governmental receipts that are subject as pay-as-you-go procedures are shown in the following table. For the purposes of enforcing pay-as-you-go procedures, only the effects in the current year, the budget year, and the succeeding four years are counted.

	By fiscal year, in millions of dollars—										
	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Changes in outlays	0	0	0	1	2	4	4	4	4	4	4
Changes in receipts	0	0	2	5	8	8	8	8	8	8	8

Intergovernmental and private sector impact: S. 149 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. This bill would codify existing administrative policy and regulatory practice.

Estimate prepared by: Federal costs: Ken Johnson; Federal receipts: Erin Whitaker; impact on State, local, and tribal governments: Shelley Finlayson; impact on the private sector: Paige Piper/Bach.

Estimate approved by: Robert A. Sunshine, Assistant Director for Budget Analysis; G. Thomas Woodward, Assistant Director for Tax Analysis.

ADDITIONAL VIEWS

During the 106th Congress I joined with the national security committee chairman and other senators—Senators Helms, Warner, Thompson, McCain, Smith, and Kyl—in opposing legislation to reauthorize the Export Administration Act. Similar legislation, S. 149—the Export Administration Act of 2001—has been introduced in the 107th Congress. Like last year's bill, S. 149 fails to strike the correct balance between commercial considerations and national security.

Just prior to the Banking Committee's consideration of S. 149, I and other senators met with Vice President Cheney and Dr. Rice, the President's National Security Advisor, to discuss the Administration's views on S. 149. The Vice President and the National Security Advisor agreed that there were significant national security concerns that would need to be addressed before the Administration could support this bill.

In an effort to address some of the Administration's concerns, the Committee adopted several amendments during mark-up of the bill. These amendments were designed to correct three broad deficiencies in the legislation, specifically by: (1) providing the Department of Defense with a greater role in export control decisions, and ensuring that the Secretary of Defense has full visibility into the Commerce Department export control processes and decisions; (2) giving affected agencies the ability to escalate issues to an appeals board made up of the Commerce and Defense Departments and the National Security Council; and (3) providing the President with sufficient flexibility to control products that he determines would have an impact on U.S. national security.

On March 21, 2001 Dr. Rice wrote to Chairman Gramm that she would support the bill with these amendments. She also wrote that the Administration would "continue to work with the Congress to ensure that our national security needs are incorporated into a rational export control regime." I look forward to working with the Administration, this Committee, the chairmen of the other national security committees, and other interested senators to develop an appropriately balanced and rational export control policy.

Process

During our meeting with the Vice President and Dr. Rice, they indicated that the incoming Administration had been given a limited time in which to study this long and extremely complex piece of legislation, and as a result, had been unable to undertake the necessary in-depth review. Although the Administration requested that the Banking Committee postpone consideration of S. 149 until it had an opportunity to place its personnel in the national security and export control positions with responsibility for these issues, the Committee did not accommodate this request. I regret that the Ad-

ministration was not given more time to consider the implications of this complex and critical legislation. Dr. Rice told us that the Administration is now commencing an in-depth review of U.S. nonproliferation policy, of which export control policy is a critical component.

To support the Administration in these efforts, I intend to work with Senators Helms, Warner, Thompson, McCain, and Kyl to amend S. 149 on the floor to add a provision creating a "blue ribbon" commission—similar to the Rumsfeld Commission on the ballistic missile threat—that would study our overall nonproliferation policy, including our export control regime. This Commission would be made up of national security experts. During our meeting at the White House, the Vice President, and the National Security Advisor told us that they would support the creation of such a commission, and I believe that this amendment must be included in any EAA legislation.

In addition, the Administration was not given time prior to mark-up to complete its proposed executive order to establish an interagency dispute resolution process to ensure that national security concerns receive adequate consideration. Senate review of the proposed or draft executive order will be essential before the Senate considers this legislation. We must be certain that the Executive order as drafted incorporates the high standards articulated by the Vice President, Secretary Rumsfield, and Dr. Rice.

National security problems

Even with the Administration's improvements to this legislation, there remain several overarching issues that require a more detailed review of the legislation than the Administration has had time to undertake. For an export control regime to function properly, it must provide for a balancing of the commercial benefits involved—which are generally obvious, easily-quantified, concentrated, and immediate—with the national security risks, which are often shrouded in secrecy, difficult to quantify, diffuse, and long-term in nature. I believe that the amendments adopted by the Committee during markup represent a useful start toward a balanced and rational export control policy. I am concerned, however, that despite these changes, the bill in its current form still favors commercial interests over national security equities.

Therefore, I believe that the Administration and the Senate should consider the following additional modifications:

1. *A Broad National Security Exemption.* S. 149 restricts the President's authority to regulate the export of products that could have serious implications for our national security. The President, as the official ultimately responsible for balancing commercial and national security policies, should have complete, unqualified discretion to override the mass market, foreign availability, overseas production, or incorporated parts provisions of the bill if the President determines that export of a product would threaten national security.

2. *Full Interagency Participation.* S. 149 provides overly broad or exclusive authority to the Secretary of Commerce on important procedural issues such as commodity classifications, license and dispute referrals, license exemptions, and development of export ad-

ministration regulations. In export controls, as in many other complex areas, procedure is policy. If national security concerns are to be given adequate consideration in export decisions, the Departments of State and Defense must be given greater authority and a larger role in the export licensing process.

As a general matter, S. 149 is permeated by a presumption that national security concerns have only equal or lesser weight than commercial concerns. Here are just a few examples: Section 202 (National Security Control List) establishes a risk assessment balancing test that gives equal value to national security concerns and economic costs. Elsewhere, despite the Administration's intent to ensure that the interagency dispute resolution process established under section 502 be comprised of national security experts, the legislation does not require that this appeals board be so constituted. Section 701(c) (issuance of regulations) gratuitously states that nothing "require[s] the concurrence or approval of any official, department, or agency to which such regulations are submitted." In other words, regulations may be promulgated without the concurrence of the national security agencies.

3. *Problematic Mass Market Provision.* S. 149 prohibits export controls on items otherwise controlled for national security reasons if they are widely available in the United States. Domestic availability should be considered along with other factors, but "mass market" should not be an independent exemption category.

4. *Incorporated Parts and Components Loophole.* S. 149 prohibits export controls on items otherwise controlled if they are incorporated into productsin which the controlled component comprises 25% or less of the total values, or if the controlled item is shipped overseas for final assembly. Automatic decontrol of an item otherwise appropriately controlled simply because it has been incorporated into a larger item, or because it is produced overseas using American parts or components, is counterintuitive—should the technology be exported or not?—and will undermine the effectiveness of our export control regimes.

5. *Foreign Availability is Inappropriate Measure for Decontrol.* S. 149 prohibits export controls on items available from foreign suppliers, codifying a presumption that when other countries sell sensitive technologies to countries of concern like China, the United States is obligated to follow suit. The degree to which an item is available from foreign sources is a factor that should be considered, but should not automatically result in the elimination of export controls on an item.

6. *Deemed Exports not Covered.* S. 149 does not cover the transfer of knowledge, information, or know-how of controlled goods or technologies, to foreign persons or entities, whether in the United States or abroad.

RICHARD SHELBY.

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