Introduction .................................................... 204
I. U.S. Government Regulation Of Exports .................... 205
   A. Principal U.S. Export Control Laws .................... 205
   B. Military Exports Under the Arms Export Control Act .... 205
   C. Commercial Exports Under the Export Administration Act .................................................... 206
II. The Enforcement Regimes Of U.S. Export Control Laws ..... 208
   A. The Arms Export Control Act ...................... 208
      1. General System of Penalties ..................... 208
      2. Criteria for Denial of Export Privileges .......... 209
      3. Enforcement Procedures .......................... 215
      4. New Certification Requirements Under the AECA: Another Way to Trip Up .................. 217
   B. The Export Administration Act .................... 220
      1. General System of Penalties ..................... 220
      2. Enforcement Procedures .......................... 223
III. Judicial Review Of Agency Action Restricting Export Privileges .................................................. 229
   A. Existing Judicial Review Procedures .................. 229
      1. The Export Administration Act ................... 229
      2. The Arms Export Control Act .................... 230
   B. Recent Developments Expanding Judicial Review of Export Privilege Denials .................. 231
      1. Under the EAA ................................... 231
      2. Under the AECA .................................. 232
IV. New Developments Involving Suspension And Debarment Sanctions .................................................. 233
A. Unilateral Sanctions Against Toshiba and Kongsberg .......... 233
B. Mandatory Sanctions For Future Violations of Multilateral
   Controls .......................................................... 235
V. Conclusion .......................................................... 236
Recent Developments In U.S. Export Licensing And Civil Enforcement Procedures: What They Mean To Exporters

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INTRODUCTION

U.S. export control laws and regulations apply to exports of virtually all U.S.-origin goods, technical data, and technology transmitted abroad, whether commercial or military-related. As such, these controls have far-reaching consequences beyond U.S. territorial boundaries. They affect not only U.S. manufacturers and exporters (including U.S. defense contractors transacting business abroad), but also foreign subsidiaries of U.S. companies, foreign purchasers of U.S. products and technology, foreign manufacturers whose products either contain U.S.-origin components or are manufactured using U.S. technology, and foreign firms affiliated with U.S. manufacturers through licensing or distribution agreements.

Exports of so-called "defense articles," "defense services" and "defense technical data" usually involve intense review by U.S. government regulators. As might be expected, U.S. export control laws also apply to the sale or transfer of processes related to the manufacture of such items to foreign persons or foreign governments.

U.S. export control laws are broad, complicated, and rigorously administered. As discussed below, the penalties for inadvertent or willful violations of these laws can be substantial. For a number of reasons, much of the practical workings of U.S. export controls occur in relative obscurity, and it is not uncommon for even sophisticated businesses to make mistakes. Thus, until recently, the organic statutes governing the export of commercial or military

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goods and technology provided little, if any, judicial review of license denial or contractor debarment decisions. At present, the Export Administration Act (EAA)\(^1\) provides additional but limited judicial review of certain enforcement decisions by the Department of Commerce, the extent of which is yet to be tested. Consequently, there is a lack of publicly available information regarding the nuances and intricacies behind actual enforcement measures for either commercial or military exports.

Given these practical constraints, this article attempts to clarify and categorize the U.S. export control laws for present and prospective exporters. Where there is a perceived need or a particularly pressing shortcoming in the export control regime, the article proposes some possible changes. Part I contains an introduction to the primary U.S. export control regimes. Part II explains the systems of penalties and enforcement of these laws. Part III describes the limited judicial review available. Part IV examines some of the new provisions for the enforcement of multilateral export controls. Part V concludes with a few general observations on the recent changes to these regimes.

I. U.S. Government Regulation of Exports
   
   A. Principal U.S. Export Control Laws

   The key statutes regulating exports of commodities, technology, and technical data are: (1) the Arms Export Control Act (AECA),\(^2\) administered by the U.S. Department of State; and (2) the EAA,\(^3\) administered by the U.S. Department of Commerce.\(^4\) Each of these statutes is accompanied by an elaborate set of regulations which set forth, in some detail, the specific legal obligations, procedures, and penalties applicable to U.S. exporters and others involved in various capacities in export transactions.

   B. Military Exports Under the Arms Export Control Act

   The AECA and the International Traffic in Arms Regulations (ITAR)\(^5\) apply to exports of defense articles, services, and technical data. These laws are designed to apply to items, services and technologies that are "inherently military" in character (e.g., weapons, munitions, sophisticated military electronic equipment).\(^6\)

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6. Id. §§ 120.1-.3.
The ostensible purpose of the AECA regulatory regime is to avoid contributing to an arms race, increasing the possibility of armed conflicts, or prejudicing the achievement of arms control arrangements. In practice, however, export license applications are reviewed to determine whether the proposed export is consistent with prevailing U.S. national security or foreign policy interests. The United States Munitions List, comprised of twenty-one broad categories, enumerates those items and technologies controlled by the AECA. The ITAR also contains a set of interpretations to assist in identifying items controlled by the Munitions List. Unfortunately, the Munitions List is worded quite broadly and provides little guidance for items that are not obviously weapons.

The Office of Munitions Control (OMC) is an office of the Bureau of Politico-Military Affairs within the Department of State. It is responsible for administering and enforcing AECA export controls. In reviewing arms export license applications, the OMC often receives information and recommendations from the Defense Technology Security Agency (DTSA) and other offices within the Department of Defense. The OMC often relies on agents of the U.S. Customs Service to assist in the enforcement of AECA export controls.

C. Commercial Exports Under the Export Administration Act

The EAA and the Export Administration Regulations (EAR), apply to commodities, technologies and technical data that are not exclusively controlled for export by any other agency or department. These items are generally commercial in nature, but some may possess a potential for military or defense applications. However, it should be emphasized that even the most innocuous items and technical data can be controlled under the EAA and accompanying regulations. The EAR regulatory regime controls these items and technical data for reasons of national security, foreign policy, short

9. Id. §§ 121.2-.15.
10. Id. § 120.15.
11. Id. § 120.1(a).
13. 22 C.F.R. § 127.4 (1989). The U.S. Customs Service has independent authority to impose civil penalties or to seize (and seek forfeiture) of goods that are exported in violation of U.S. export control laws. For example, the Secretary of the Treasury acting through the U.S. Customs Service can seize and forfeit arms, munitions or other articles when there is: (1) an attempt to export such items in violation of law, (2) probable cause to believe that one intended to export items in violation of law; or (3) a past exportation in violation of law. 22 U.S.C. § 401(a) (Supp. V 1987).
16. These items include, for example, commercial computers and machine tools; 15 C.F.R. § 799.1, Entry 1091A.7 (1989).
supply, nuclear non-proliferation or crime control. 18 Most of the items that 
are controlled under the EAA can be found in the Commodity Control 
List, 19 a nearly two hundred page compilation of products and components 
containing technical specifications and product descriptions intended to identify each controlled item. Technologies or technical data associated with 
these products also may be controlled. 20 Further, unlike the AECA regime, 
there are separate regulations for computer software. 21

A number of "validated" and "general" licenses exist under the EAR 
that authorize exports of controlled items, technologies or technical data. 22 
"General licenses" exist as a matter of law under the EAR; exports under 
such licenses do not require specific government authorization. 23 If a pro-
aposed export does not fit under a general license, an exporter must apply for 
and obtain a specific "validated license" in order to transmit commodities, 
technology and technical data abroad. 24

The EAR also identify a number of countries and products for which 
specific controls apply. 25 These controls are applied above and beyond the 
more general export control regulations. 26 These controls also must be con-
sulted when applying for an export license. 27 Suffice it to say that the regula-
tory and documentary requirements for obtaining export licenses under the 
EAR can be challenging.

The Bureau of Export Administration ("Bureau") within the Commerce 
Department is responsible for the administration and enforcement of EAA 
export controls. 28 In addition, the Bureau is responsible for consulting with 
other U.S. government agencies that may have expertise with regard to par-
ticular types of products. 29 For example, under the EAA, the Department of 
Defense is authorized to review the proposed exportation of controlled items 
to certain countries. 30

18. Id. §§ 770.1, 799.1(i).
19. Id. § 799.1 Supp.I.
20. See id.
21. Id. § 776.11.
22. Id. pts. 771-72.
23. Id. §§ 771.1, 771.2.
24. Id. § 772.1(b).
25. Id. pt. 785.
26. Id. For instance, provisions relating to the export of certain chemicals to various Mid-

dle East nations have recently received attention and are treated as a special case. Id. § 785.4(e).
27. Id. § 785.1(a).
28. Id. § 768.1(a)(2)(i).
29. Id. § 768.1(a)(2)(i). It should be noted that exports, as well as imports, of certain com-

mercial products and technologies are regulated by other agencies of the U.S. government. For 

example, exports of commercial nuclear utilization and production facilities, and certain types of 
nuclear material, are the primary responsibility of the U.S. Nuclear Regulatory Commission, 
The Bureau also interacts with the Coordinating Committee on Multilateral Export Controls (also known as COCOM or the Coordinating Committee). 31 This informal international organization coordinates the export controls imposed by its members 32 on exports to Soviet bloc countries and (to a lesser extent) the People's Republic of China. 33 Finally, it should be noted that the Bureau, like the OMC, often also relies on agents of the U.S. Customs Service in enforcing the EAA export controls. 34

II. THE ENFORCEMENT REGIMES OF U.S. EXPORT CONTROL LAWS

A. The Arms Export Control Act

1. General System of Penalties

The AECA provides for criminal penalties for willful violations of U.S. arms export laws, 35 as well as for civil and administrative sanctions by incorporating by reference the powers conferred under subsections (c), (d), (e) and (g) of section 11 of the EAA. 36 Thus, the system of sanctions for enforcing military and commercial export controls is somewhat integrated. Companies or individuals should refer to the EAA when faced with potential AECA civil or administrative enforcement action, even though the commodities or technology exports involved are controlled under the AECA and its accompanying regulations.

As expected, the principal civil sanction under the AECA is the imposition of a monetary fine. 37 Additional administrative penalties can include denial orders (i.e., debarment or interim suspension) as discussed at length

32. COCOM is comprised of the following member nations: Australia, Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom, and the United States. 135 CONG. REC. E1205 n.1 (daily ed. Apr. 13, 1989); see U.S. Official Presses European Community to 'Respect' COCOM Process as 1992 Nears, Int'l Trade Rep. (BNA) 1296 (Oct. 11, 1989).
33. Id. § 770.2.
35. 22 U.S.C. § 2778(c) (Supp. V 1987). Penalties include a fine up to $1,000,000 or imprisonment for not more than 10 years, or both.
36. Id. § 2778(e); 50 U.S.C.A. app. § 2410(c)-(e),(g) (West Supp. 1989).

The statute of limitations for any administrative action seeking to impose civil penalties under the AECA or the EAA is five years from the date of the alleged violation. 28 U.S.C. § 2462 (Supp. V 1987); United States v. Meyer, 808 F.2d 912, 914 (1st Cir. 1987). There presently is a split in authority regarding whether section 2462 affords an additional five year period following final administrative assessment of a civil penalty during which the government may sue to enforce this sanction. See United States v. Meyer, 808 F.2d at 914 (finding a second five year period beginning to run from the date of final administrative penalty imposition); United States v. Core Laboratories, Inc., 759 F.2d 480 (5th Cir. 1985) (holding that a single five year period under section 2462 begins to run from the date of the underlying violation).
The Statutory Scheme

(i) Discretionary Denials under the AECA Amendments

In 1987, the AECA was amended to permit the denial of export license privileges based on substantially expanded criteria, beyond those national security and foreign policy concerns traditionally associated with the AECA. According to these amendments, the President may disapprove a request for

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39. Id. § 121.1.
40. Id. § 126.7.
41. As discussed below, the use of the word "suspended" or "debarred" in some instances is ambiguous and may arguably have a more limited meaning than Office of Munitions Control [hereinafter OMC] officials might assert.
42. 22 C.F.R. §§ 126.7, 127.6 (1989).
a specific AECA export license, if he determines that an applicant is the subject of an indictment under certain enumerated statutes, or that there is reasonable cause to believe that an applicant has violated one of these statutes. In addition, the President may deny a license application if an applicant is "ineligible" to contract with any agency of the U.S. government, or is not authorized to import defense articles or services into the United States. The OMC has been delegated the principal responsibility for discharging these licensing and enforcement criteria.

(ii) Mandatory Denials Under the AECA Amendments

The AECA imposes an automatic bar on export privileges for any person convicted of violations of the AECA or any of the statutes enumerated above. This export license "debarment" also applies to any person who is ineligible to receive an export license from any U.S. agency since June 30, 1976, the effective date of the AECA. Although the statute imposes a

44. 22 U.S.C. § 2778(g) (Supp. V 1987), as amended includes the following statutes:
   (i) this section [the AECA itself],
   (ii) section 11 of the Export Administration Act of 1979 (50 U.S.C. App. § 2410) [imposing civil and criminal penalties for violations of U.S. commercial export control laws],
   (iii) section 793, 794, or 798 of title 18, United States Code . . . [prohibiting anyone from gathering, transmitting, losing, or delivering to a foreign government U.S. defense information, or otherwise disclosing classified information],
   (iv) section 16 of the Trading with the Enemy Act (50 U.S.C. App. § 16) [imposing criminal penalties for willful violations of the Act or regulations thereunder],
   (v) section 206 of the International Emergency Economic Powers Act (50 U.S.C. § 1705) [imposing criminal penalties for violating any foreign asset, blocking regulation, or order issued under the Act],
   (vii) chapter 105 of title 18, United States Code (relating to sabotage [trespassing, and production of defective war materials in time of emergency]),
   (viii) section 4(b) of the Internal Security Act of 1950 (50 U.S.C. § 783(b)) [restricting the communication of classified information by government officers or employees],
   (ix) sections 57, 92, 101, 104, 222, 224, 225, or 226 of the Atomic Energy Act of 1954 (42 U.S.C. §§ 2077, 2122, 2131, 2134, 2272, 2274, 2275, and 2276) [restricting transactions involving special nuclear materials, atomic weapons, utilization or production facilities, nuclear medical facilities, or restricted data],
   (x) section 601 of the National Security Act of 1947 (50 U.S.C. § 421) [protecting the identity of U.S. undercover agents, informants or intelligence officers], or
   (xi) section 603 (b) or (c) of the Comprehensive Anti-Apartheid Act of 1986 (922 U.S.C. § 5113(b) and (c)) [imposing civil and criminal penalties for violations of the Act or regulations thereunder].
45. Id. § 2778(g)(3).
46. Id.
47. 22 C.F.R. § 120.1 (1989).
49. Id.
mandatory bar on its face, it also provides for case-by-case exceptions granted by the President in consultation with the Secretary of the Treasury.50

b. The Regulatory Scheme

To implement these statutory changes, the Department of State amended the ITAR on April 7, 1988, to provide for new "statutory" and "administrative" debarment sanctions.51 In addition, the new ITAR amendments establish certain legal presumptions concerning individual license applications, as well as new procedures for interim suspensions associated with debarment. Thus, the new ITAR establishes a hierarchy of sanctions ranging from statutory debarment, to interim suspension, to a presumption of ineligibility for individual licenses.

(i) Statutory Debarment Under the ITAR

Under the ITAR, the Assistant Secretary of State for Politico-Military Affairs may prohibit any person from participating directly or indirectly in the export of defense articles, services or technical data.52 This blanket prohibition on applying for a license is a debarment.53 The new ITAR amendments create a category of "statutory debarment," which is based upon a conviction for violating the AECA or for a conspiracy to violate the AECA.54

Although section 38(g)(4) of the AECA provides for discretionary authority to issue licenses to those convicted of violating one of the enumerated statutes (including the AECA),55 under the new ITAR it will be the State Department’s policy not to consider applications from individuals who have been convicted of violating the AECA during a three-year period preceding the license application.56 All those so debarred will be notified in writing and will have their names published periodically in the Federal Register.57 Such debarments are based solely on criminal convictions in a court of law, and the procedures of 22 C.F.R. Part 128 (providing for administrative notice and hearing) are inapplicable.58

50. Id.
51. 53 Fed. Reg. 11,494 (1988). At the time of this writing, additional regulatory changes in the ITAR are being considered by OMC.
52. 22 C.F.R. § 127.6 (1989).
53. Id.
54. Id. § 127.6(c).
56. 22 C.F.R. § 127.6(c) (1989).
57. Id. The OMC has published a list of debarred exporters in 53 Fed. Reg. 27,097 (1988).
58. See infra note 59 and accompanying text.
(ii) Administrative Debarment Under the ITAR

The second level of sanctions available is "administrative debarment."\(^{59}\) This process includes the issuance of a charging letter,\(^{60}\) an opportunity to obtain and present evidence,\(^{61}\) a hearing,\(^{62}\) and an appeal.\(^{63}\) The basis for an administrative debarment is any violation of the AECA or any rule or regulation thereunder (i.e., a criminal conviction is not required), when "such a violation . . . provides a reasonable basis for the [OMC] to believe that the violator cannot be relied upon to comply with the [AECA or the ITAR] in the future."\(^{64}\)

(iii) Interim Suspension

As in the prior ITAR, the OMC retains the authority to order interim suspension of export privileges when it believes that grounds for statutory or administrative debarment exist and that the interim suspension is "necessary to protect world peace or the security or foreign policy of the United States."\(^{65}\) In essence, the Director of the OMC may issue an interim suspension order whenever faced with grounds justifying a belief that debarment is appropriate.

An interim suspension is provided in writing, with no prior notice required, and prohibits the named person from participating directly or indirectly in any AECA export transaction.\(^{66}\) Such an order may not exceed 60 days unless the aggrieved party initiates administrative debarment proceedings or criminal proceedings.\(^{67}\)

(iv) Presumption of Denial for Future License Applications and Revocation or Suspension of Existing Licenses

A general presumption of individual license ineligibility, based upon fairly broad criteria, is perhaps the most potent "sanction" that arises from the new AECA and ITAR amendments. Depending on how this new "sanction" is administered, the ITAR appears to provide the OMC with the authority to impose a quasi-debarment on individuals for reasons that may go beyond the traditional notion of export reliability, national security, or corporate integrity.

Under the recent ITAR amendments, the State Department has reserved the right to deny, revoke, suspend, or amend a license whenever:

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60. 22 C.F.R. § 128.3 (1989).
61. Id. §§ 128.6-.7.
62. Id. § 128.8.
63. Id. § 128.13.
64. Id. § 127.6(b)(2).
65. Id. § 127.7. See infra text accompanying note 94.
66. Id.
67. Id.
(1) it deems such action to be in furtherance of world peace;

(2) it believes that 22 U.S.C. § 2278, any regulation contained in the ITAR, or the terms of any export authorization have been violated by any party to the export or other person having a significant interest in the transaction;

(3) the export license applicant is the subject of an indictment under one of the enumerated statutes; 68

(4) the export license applicant, or any party to the export (as defined), has been convicted of violating one of the enumerated statutes; 69

(5) the export license applicant is ineligible to contract with, or to import defense articles or defense services from any U.S. government agency;

(6) the export license applicant, any party to the transaction, or any person with a significant interest in the transaction "has been debarred, suspended, or otherwise is ineligible to receive an export license or other authorization from any agency of the U.S. government;" or

(7) an applicant has failed to include the required documentation and information for an application. 70

Second, the ITAR amendments create a general policy of export license denial to future applicants that extends beyond those who are convicted of AECA violations. Arms export licenses or other types of approval generally are not to be granted to applicants who have been convicted of violating any of the statutes enumerated in section 38 of the AECA, 71 or who have been found to be ineligible for an export license from any other agency of the U.S. government (e.g., a commercial export license from the Commerce Department). 72 Moreover, the ITAR amendments establish a legal presumption of denial for any person who has been so convicted or deemed ineligible since June 30, 1976, the effective date of the AECA. 73

In addition, it appears that this presumption of denial will be extended to applicants who are found to be ineligible to contract with the U.S. government (i.e., have been suspended or debarred from the domestic procurement market by a U.S. government agency). 74 However, at least for this category of applicants who are ineligible to contract with the U.S. government, it appears that the State Department informally has taken the position that the presumption of denial will operate prospectively, to bar only future licenses and not those already issued. This presumption apparently applies only to those corporate entities actually found ineligible to contract with the U.S.

68. The "enumerated statutes" are those contained in 22 U.S.C. § 2778(g) (Supp. V 1987). See supra note 44.
69. See supra note 68.
70. 22 C.F.R. § 126.7 (1989).
73. Id.
government and not to any and all affiliated entities. For example, if a subsidiary of a major defense contractor is suspended or debarred by the Defense Logistics Agency for violations of the Truth in Negotiation Act, the parent corporation will not have its export license applications denied in the future; rather, only those of the suspended entity will be denied. Of course, this informal position of the OMC is subject to case-by-case determinations, and the law seemingly provides the OMC with the authority to go further in denying export privileges.\footnote{75}{22 C.F.R. 126.7 (1989). While the OMC has not formally declared that denials will only operate prospectively and will not apply to affiliates of debarred or suspended contractors, several OMC officials have put forth this position in their informal contacts with the authors.}

In an attempt to provide limited due process, the State Department has established a two-part exception for overcoming this presumption of denial.\footnote{76}{22 C.F.R. § 127.10(b) (1989).} This test appears to be quite rigorous, although its administration remains to be seen. Under this test, an applicant who is otherwise disqualified from exporting under the AECA first must show that there were “extraordinary circumstances” (undefined in the ITAR) surrounding the underlying conviction or export ineligibility determination.\footnote{77}{Id.} The applicant then must demonstrate to the OMC and the State Department’s Office of the Legal Advisor that it has taken appropriate steps to mitigate the U.S. government’s concerns arising from any prior wrongdoing, and to address the causes of the underlying conviction or export ineligibility.\footnote{78}{Id.} The applicant could offer proof of monetary restitution, internal corporate compliance programs, internal discipline, or internal audits of export control programs. In addition, an applicant should attempt to show that the proposed export is essential to the national security of the United States (or that of an allied nation) or otherwise serves important U.S. foreign policy interests.\footnote{79}{Id.}

The applicant’s request and accompanying proof apparently then will be subject to an interagency review and consultation process.\footnote{80}{Id. § 127.10(b) (1989).} Arguably, the review procedures contained in section 126.10(b) should include an opportunity to appeal a denial of a license application under section 126.7 to the Under Secretary of State for Security Assistance, Science and Technology.\footnote{81}{Id. § 127.10(c) (1989).} However, no such appeal seems to be contemplated at this time. Moreover, the “mitigation presentation” described in section 127.10(b) is, as a matter of practice, limited to a written presentation by the applicant. OMC practice or
policy does not envision a right to a verbal presentation or even a face-to-face meeting to discuss a written submission.

Reconsideration by the OMC appears to be the only review available for individual license denials under section 126.7. More extensive appeal procedures are available only in cases of a denial of export privileges through debarment. Yet, the application of a legal presumption of denial to an applicant who is ineligible to contract seems to approximate the effect of a debarment. Certainly repeated refusals to issue licenses under these circumstances may rise to the level of a de facto debarment and ought to be subjected to some expanded internal review. The amended ITAR license denial provisions confer powers significantly broader than any previously considered and are, in some respects, akin to those applicable to license denials issued by the Department of Commerce. Such an expansion of authority may justify commensurate review procedures. The opportunity to export products and services represents an important aspect of any business' economic health. The denial of export license applications can adversely affect a company's financial position, damage customer relations, create questions as to the reliability of the exporter, and even have negative policy implications for the U.S. government. In such circumstances, it would appear that due process and plain prudence dictate a need for some type of appeal procedure. Review of denial decisions would be one way to ensure the fair enforcement of section 126.7.

3. Enforcement Procedures

As noted above, "statutory debarment" does not trigger administrative proceedings. A determination of criminal liability in a court of law is the extent of due process accorded license applicants. Moreover, for purposes of denying individual license applications, the procedures set forth in the ITAR provide only for a request for reconsideration within thirty days of the denial.

The Director of the OMC, with the concurrence of the Office of Legal Advisor of the State Department, initiates administrative debarment proceedings by means of a charging letter. The investigations conducted by these agencies often result in a consent agreement between the State Department

82. Id. pt. 128.
83. These review procedures could be fashioned to reflect the procedures available for commercial license denials under Part 788 of the EAR. These procedures would include provisions for requests for an informal hearing, in writing at the time of filing the appeal, which the Under Secretary of State for Security Assistance, Science and Technology would be able to grant or deny. If a hearing is granted, the Under Secretary of State for Security Assistance, Science and Technology should be free to adopt whatever procedures deemed necessary and reasonable. The decision of the Under Secretary then would be final.
84. Id. § 126.7(c).
85. Id. § 128.3.
and the individual violator. Where the parties do not reach a settlement, further procedures are provided in part 128.

If the evidence gathered in an investigation is not sufficient to support the charges, the Director of the OMC may dismiss the action. Where the Director finds that a violation has been committed, he issues a denial recommendation which is, according to regulation, considered "advisory." The Assistant Secretary for Politico-Military Affairs then reviews the record, taking into consideration the Director's view, and makes "an appropriate disposition of the case." Should the Assistant Secretary agree with the Director's conclusion, and absent a consent agreement, the regulations authorize debarment.

In return for the payment of a civil fine and the waiver of charging letter procedures by the accused, the State Department may allow the charged party to avoid an admission of any violation of the law and the resulting debarment or suspension. The charged party, however, must be prepared to demonstrate both the sufficiency of its subsequent remedial measures and that it has initiated new practices to ensure future compliance. As in any settlement of this kind, which rests upon the assumption of future compliance with the law, the voluntary nature of the charged party's cooperation is an important factor. In the rare instance that these new procedures do result in debarment, the regulations state that the debarred party may not participate in the export of defense articles, technical data or defense services.

An exporter also may find its privileges denied by operation of an interim suspension pending the final disposition of debarment proceedings. Like a temporary denial order under the EAR, an interim suspension may be made immediately effective on an ex parte basis. The regulations also provide for the imposition of a civil penalty, but do not set forth procedures for such action.

86. These agreements are specifically authorized in 22 C.F.R. § 128.11 (1989).
88. Id. § 128.10.
89. Id.
90. Id.
91. Id.
94. 22 C.F.R. § 127.6(a) (1989). The Assistant Secretary is empowered to determine the appropriate period of time for debarment but the regulations provide that generally the period should be three years. Id.
95. Id. § 127.7. See supra text accompanying note 65.
96. Id. § 127.7(a); see also the discussion of Temporary Denial Orders, infra pp. 42-44.
97. Under the new ITAR, the Director of OMC may order an interim suspension. 22 C.F.R. § 127.7 (1989). A motion to vacate or modify such an order is filed with the Hearing Commissioner. After a final decision is reached, the Director issues an order disposing of either the motion or the suspension. Id.
In an administrative debarment proceeding, the regulations permit hearings and limited discovery. The regulations also permit hearings to review relevant and material evidence not known or obtainable at the time of the original hearing. In addition, the regulations establish an appeal process. Such appeal from a final order denying export privileges or imposing a fine must be filed with the Under Secretary of State for Security Assistance, Science and Technology, within thirty days of receipt of the order. Appeals are then granted or denied in whole or in part, or dismissed at the request of the appellant. Once the decision of the Under Secretary is reached, it is final.

The OMC has initiated only a few such debarments since 1979. This paucity of civil enforcement is due in part to the OMC's focus on pursuing, through the U.S. Department of Justice, criminal actions against violators. Although another administration might be disposed to proceed with more debarment actions, budgetary constraints likely will mean that the OMC must continue to choose between either criminal or civil enforcement.

4. New Certification Requirements Under the AECA: Another Way to Trip Up

A significant change to the system of arms export controls is the requirement that applicants provide additional certifications regarding the ability of all those involved in the export chain to "validly participate" in the transaction. These requirements further expose those making such a certification to liability under the AECA's enforcement provisions as well as perhaps the federal criminal false statement provision. Moreover, given the augmented procedures for denying export privileges, the certification requirement creates

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98. Id. §§ 128.6, 128.8.
99. Id. § 128.12.
100. Id. § 128.13. It should be noted, however, that the normal hearing and discovery procedures of part 128 do not apply in cases of statutory debarment.
101. Id. § 128.13(a). The grounds, conditions and subject matter of appeals are further elaborated in section 128.13.
102. Id. § 128.13(f).
103. Id. See also discussion of judicial review, infra pp. 53-56, for the scope of this finality clause.
104. As of July 18, 1988 the Assistant Secretary for Politico-Military Affairs had statutorily debarred only twenty-six persons. Statutory Debarment under the ITAR, 53 Fed. Reg. 27,097 (1988). Each of these debarments was as a result of convictions for violating or conspiring to violate the AECA.
an additional pitfall whereby an applicant’s export privileges under both the AECA and the EAA can be denied or revoked.

a. Registration Certification

Under the April 7, 1988 changes, the certification requirement applies at two separate stages. Initially, any individual or company that intends to seek export approvals must “register” with the OMC. Registrants now will be required to state whether the chief executive officer, president, vice president or other senior official, or member of the board of directors has ever been: (1) indicted or convicted of violating any of the statutes enumerated in section 120.24 of the subchapter, (2) ineligible to contract with any agency of the U.S. Government, (3) ineligible to receive a license or approval to import defense articles, or (4) ineligible to receive an export license or approval to export. Moreover, the letter must state whether the registrant is “owned or controlled” by foreign persons.

b. License Application Certification

At the time that a specific export application is filed with the OMC, the applicant for the license or other approval must provide certain specific information and certifications in a cover letter or addendum to each application. The required information includes: (1) the same certification regarding corporate officers, and the license applicant itself, as required by section 122, (2) an identification of all consignees and freight forwarders, and (3) a statement as to whether any “party to the export” has been convicted of violating the criminal statutes enumerated in the AECA, is ineligible to contract with any U.S. government agency, or is ineligible to obtain licenses or approvals for imports of defense articles or any type of exports in general.

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109. The OMC has indicated that the certification requirements pertaining to knowledge of “indictments” extends to any past indictment even if it did not result in a conviction. U.S. Dept. of State, Notice to Registrants and Applicants, attachment 8 (November 1988).
111. Id. § 122.2(b).
112. Id.
113. Id. § 126.13.
114. See supra notes 106-09 and accompanying text.
115. “Party to the export” is defined to mean “(1) the chief executive officer, president, vice-presidents, other senior officers and officials (e.g. comptroller, treasurer, general counsel), and any member of the board of directors of the applicant; (2) the freight forwarders or designated exporting agent of the applicant; and (3) any consignee or end-user of any item to be exported.” 22 C.F.R. § 126.7(e)(1989).
c. General Certification Requirements

(i) Who is a Covered Corporate Officer?

Either at the time of registration or the time of license application, the certification must include information regarding the past behavior of various corporate officers.\(^{118}\) The breadth of this requirement resulted in the OMC issuing a draft "clarification."\(^{119}\) According to this clarification, the corporate officers covered by the certification requirements include those U.S. and foreign natural persons who hold offices:

1. with responsibility for the overall policy or management of the registrant/applicant; or
2. with direct policy or management responsibility for any divisions or subsidiaries of the registrant/applicant in the United States or abroad involved in the manufacture or export of defense articles or the furnishing of defense services.\(^{120}\)

Whether this clarification actually provides any comfort to registrants or applicants remains to be seen. Presumably, mid-level managers or individuals who do not actually direct the overall operations of a separate juridical entity or division thereof are not included for purposes of the certification duty.

(ii) What is the Requisite Knowledge Requirement?

The certification requirement also imposes a substantial obligation on applicants and registrants by requiring that information must be provided about not only a party's current status, but also its status since June, 1976.\(^{121}\) In an effort to limit the burden associated with such a certification, the new ITAR amendments require such certifications to be "to the best of the applicant's knowledge."\(^{122}\) On its face, this language provides little guidance. The State Department has issued a clarification indicating that the certification need only be based on the applicant's "actual knowledge at the time of application. The applicant need not make a direct inquiry to another party to the export to ascertain such information, but must disclose any such information in its possession."\(^{123}\)

This guidance does not directly address several difficult questions. First, "actual knowledge of the applicant" is not defined. Presumably, "actual knowledge" means knowledge in fact, as opposed to any notion of constructive knowledge or conscious disregard. Another question is whether the person submitting the certification must survey top management officials of the company to ascertain their personal knowledge. Arguably, personal knowledge of top corporate executives would be deemed to be knowledge of the

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118. Id. § 122.3(b)(1).
120. Id.
company. If this interpretation is accurate, where does one draw the line for such a duty of inquiry within the company? To further complicate this question, the OMC has imposed a duty of inquiry vis-a-vis an applicant's or registrant's subsidiaries, branches and divisions (presumably even those located abroad).\textsuperscript{124} Without further guidance, these unanswered questions will create substantial uncertainty among U.S. exporters and arguably impose vague standards that could result in the unfair debarment or denial of export licenses.

Moreover, certifications made by an export license applicant should not have to include a statement as to the eligibility of a party to the export\textsuperscript{125} to be able to contract with the government. Section 38(g)(4) of the AECA states that an arms export license cannot be granted to an applicant if the applicant, or any party to the export, is convicted of violating one of the enumerated statutes or is "ineligible to receive export licenses (or other forms of authorization to export) from any agency of the United States Government."\textsuperscript{126} The AECA amendments do not mandate license denials when a "party to the export" is ineligible to contract with the U.S. Government. Likewise, the relevant ITAR amendments do not mandate license denials if a party to the export has been suspended or debarred from government contracting.\textsuperscript{127} Therefore, the certification requirement regarding the status of parties to the export arguably should be limited to the statutory requirements concerning conviction and ineligibility to receive export authorization.

\section*{B. The Export Administration Act}

\subsection*{1. General System of Penalties}

The EAA contains provisions imposing criminal penalties for "knowing violations"\textsuperscript{128} and "willful violations."\textsuperscript{129} Section 11(c)(1) of the EAA provides general authority for the imposition of civil penalties\textsuperscript{130} and administrative sanctions\textsuperscript{131} for violations similar to those contained in the AECA. Administrative sanctions include the suspension or revocation of commercial

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{124} Id.
\item \textsuperscript{125} That is, parties other than the senior officers or officials, or a member of the board of directors, of the license applicant.
\item \textsuperscript{126} 22 U.S.C. § 2778(g)(4)(B) (Supp. V 1987).
\item \textsuperscript{127} 22 C.F.R. §§ 126.7(a)(5), (6) (1989).
\item \textsuperscript{128} 50 U.S.C.A. app. § 2410(a) (West Supp. 1989) permits fines of $50,000 or five times the value of the exports, whichever is greater and/or imprisonment for up to five years for each offense.
\item \textsuperscript{129} Such violations are defined to require knowledge of the illicit end-use and provisions impose fines up to $250,000 or imprisonment for up to ten years, or both, or, for corporations and associations, a $1,000,000 fine or up to five times the value of the exported article, whichever is greater. \textit{Id.} § 2410(b).
\item \textsuperscript{130} The civil penalties appear at \textit{Id.} § 2410(c)(1). Civil penalties include fines of $10,000 for each violation. A violation involving a breach of national security controls or controls on defense articles and services, however, can result in a fine of $100,000.
\item \textsuperscript{131} 15 C.F.R. § 787.1(b)(1) (1989) contains the particular suspension and denial sanctions.
\end{itemize}
\end{footnotesize}
export privileges. In addition, any violator may be excluded from practice before the International Trade Administration.\textsuperscript{132}

In 1985, Congress amended section 11(h) of the EAA and authorized the denial of export privileges to any person convicted of certain offenses, including section 38 of the AECA.\textsuperscript{133} A denial issued under this provision can be effective for up to ten years after the underlying conviction.\textsuperscript{134} In addition, existing export privileges can be revoked for any individual or entity so convicted.\textsuperscript{135} The EAR gives the Directors of the Office of Export Licensing and the Office of Export Enforcement, acting in concert, the discretion to deny permission to apply for an export license under these circumstances.\textsuperscript{136} The regulations require publication of the names of those so denied in regulatory supplements following 15 C.F.R. Part 788.\textsuperscript{137}

Following this pattern, several provisions of the Omnibus Trade and Competitiveness Act of 1988 ("Trade Act") strengthen the enforcement measures available for violations of U.S. export control laws. One such section now authorizes the Secretary of Commerce to bar persons "affiliated" with those convicted of violations of the EAA or other export control laws from receiving licenses.\textsuperscript{138} In addition, under section 11(b) of the 1985 EAA amendments, "conspiracy" or an "attempt" to violate one of the enumerated statutes is now a separate statutory offense.\textsuperscript{139} Such violations also provide a basis for the denial of export privileges.\textsuperscript{140} The new section 11(h)(2) certainly contains the potential to expand the scope of export privilege denials to parties who should remain eligible to export.\textsuperscript{141} Without further clarification of the terms "affiliation" or "position of responsibility," for instance, the statute could authorize the Bureau to bring third parties under its coverage simply because they are in some now undefined manner associated with a convicted party.

\begin{itemize}
\item 132. Id. § 787.1(b)(2).
\item 133. Section 11(h) states in pertinent part:
No person convicted of a violation of section 793, 794, or 798 of title 18, United States Code, . . . section 4(b) of the Internal Security Act of 1950 or section 38 of the Arms Export Control Act . . . shall be eligible, at the discretion of the Secretary, to apply for or use any export license under this Act . . . for a period of up to 10 years from the date of conviction. The Secretary may revoke any export license under this Act . . . in which such person has an interest at the time of conviction.
\item 134. Id.
\item 135. Id.
\item 139. 50 U.S.C.A. app. § 2410(b) (West Supp. 1989).
\item 140. Section 233 of the amendments imposed certain restrictions on the import privileges for those who violate certain national security related provisions of the EAA or specified controls under multilateral arrangements to which the United States is a party. Id. § 2410a(b).
\end{itemize}
On January 27, 1989, the Bureau of Export Administration issued interim rules implementing the Trade Act amendments to the EAA. Most of these regulations simply restate the statute’s language. However, the Bureau attempted to clarify the Commerce Department’s intended application of the statute’s broad mandate in its proposed rules primarily in two areas: the implementing procedures for denying export privilege to those related to convicted parties, and the rules concerning the criteria for denials based on past violations. In determining whether to deny export privileges to a party convicted under one of the enumerated statutes, the Commerce Department has authorized the Director of the Office of Export Licensing to “take into consideration any relevant information, including, but not limited to, the seriousness of the offense involved in the criminal prosecution, the nature and duration of the criminal sanctions imposed, and whether the person has undertaken any corrective measures.”

By authorizing consideration of these potentially mitigating elements, the Commerce Department has attempted to ensure that EAA enforcement through the debarment function accurately reflects the EAA’s objectives.

The regulations also seek to elaborate on the Trade Act’s “related party” provisions. The Directors of the Office of Export Licensing and the Office of Export Enforcement, through the Chief Counsel for Export Administration, may notify any party considered to be related to a convicted party of their intention to deny that party export privileges. The related party then may request a hearing, the procedures for which are governed by Part 788 of the EAR. At this hearing, the “related party” may challenge only the Commerce Department’s conclusion regarding the relationship to the convicted party. Challenges to the scope or duration of the underlying denial are expressly excluded from any such hearing.

One wonders what further types of relationships Congress and the Bureau believe come within the scope of the language of this provision. What relationships other than ownership, control or position of responsibility, which were already covered in standard denial orders, could pose a threat to the effective enforcement of the EAA? If Congress sought to address circumvention of the EAA’s controls by ensuring that violators do not establish “straw persons” or shell companies in an attempt to evade export controls,

142. Bureau of Export Administration: Revision of Enforcement and Administrative Proceedings, 54 Fed. Reg. 4004 (1989) (amending 15 C.F.R. §§ 770, 772, 778). Although not required to solicit public participation, Commerce issued these regulations in an interim form. As such, although they were effective immediately, Commerce accepted comments regarding the relative usefulness and shortcomings of the interim regulations.

143. See, e.g., id. at 4005-06 (restating authority to deny privileges based on conviction and appealability of Under Secretary’s final order).

144. 15 C.F.R. § 770.15(c) (1989).

145. Id. § 770.15(h).

146. Id.

147. Id.

148. Id.
then it seems the specific provisions of previously issued denial orders would suffice. By broadening this language and thereby making it more vague, the government appears to be giving itself greater latitude in EAA enforcement. In so doing, it may bring unintended third parties within the EAA's coverage and forbid them to export based on some attenuated affiliation.

For example, if the "affiliated" party's proposed export would itself violate the EAA, existing law would suffice to prevent an export and any related threat to the policies underlying the EAA. However, if the affiliated party could otherwise independently export goods but for its affiliation with a convicted party, the related party provision appears to impose export restrictions that deny a convicted party any indirect benefit of an otherwise legal transaction. Since the transaction presumably would not have implicated any of the EAA's national security or foreign policy concerns, the broad sweep of the related party provision appears nothing more than an additional punishment inflicted on an already convicted party, and more importantly, upon a party who may be fully qualified to export.

Furthermore, the appeal procedure for challenging the related party determination seems an inadequate safeguard against an unjustified denial. While the regulations ensure that an exporter should be given timely notice of any potential debarment,\textsuperscript{149} they fail to specify what affiliation or relationship justifies such a potential debarment, and therefore requires notice. As such, it appears that, unlike cases involving previously-issued denial orders, the related party now faced with a potential debarment cannot challenge the denial on the basis that the export will in no way benefit a convicted party. Of course, the Bureau can continue to enforce the related party provision in the same carefully tailored manner as before. Now, however, an exporter is without the legal basis to challenge an apparently overly broad enforcement of the related party provision.

2. Enforcement Procedures

Apart from the criteria discussed above, the EAA also contains a general provision authorizing the denial of export privileges for any violation of the EAA, the EAR, "or any order, license or other authorization issued under the EAA."\textsuperscript{150}

To implement this authority, the Assistant Secretary for Export Enforcement may issue a temporary denial order (TDO). TDOs are orders denying some or, more typically, all of the export privileges of a company or individual in order to prevent an imminent export control violation.\textsuperscript{151} A violation may be "imminent" either in time or in degree of likelihood.\textsuperscript{152} A TDO can cut off not only the right to export from the United States, but also the right

\textsuperscript{149} Id.
\textsuperscript{150} 15 C.F.R. § 788.3(a) (1989).
\textsuperscript{152} 15 C.F.R. § 788.19(b)(3) (1989).
to receive or participate in exports from the United States.\textsuperscript{153} Moreover, a TDO is not necessarily limited to exports requiring a validated license, but can be extended to preclude exports pursuant to general licenses that exist as a matter of law.\textsuperscript{154} Under amendments to the EAA effected by the Omnibus Trade and Competitiveness Act of 1988, an initial TDO is not to exceed 180 days, but can be renewed for additional 180-day periods.\textsuperscript{155}

TDOs are published in the Federal Register\textsuperscript{156} to ensure compliance by all who are obliged to follow the U.S. export control laws.\textsuperscript{157} Persons affected by a TDO can include one or more named respondents and other related parties.\textsuperscript{158} In an attempt to prevent evasion or circumvention, a TDO can name and deny export privileges to any person related to a respondent by "ownership, control, position of responsibility, affiliation or other connection in the conduct of trade or business."\textsuperscript{159} By the terms of the denial order itself, the denial extends to agents, employees and successors of the respondent.\textsuperscript{160}

\subsection*{a. General Charging Procedures}

Both the Office of Export Enforcement (OEE) and the Office of Anti-boycott Compliance (OAC) may begin administrative proceedings for violations of the EAA.\textsuperscript{161} Where the particular office recommends that charges be brought, it files administrative charges by issuing a charging letter. When appropriate, it forwards the case to the Department of Justice for consideration of possible criminal charges. As is the case under the AECA, parties often reach a settlement, thereby obviating further prosecution.

Section 12(a) of the EAA contains the general authorization for the Commerce Department to conduct these investigations.\textsuperscript{162} Usually, the subject or third parties will offer their cooperation once the investigation begins.

\begin{itemize}
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} \textit{Id.} § 788.19.
  \item \textsuperscript{155} \textit{Id.} § 788.19(c).
  \item \textsuperscript{156} \textit{Id.} § 788.19(f).
  \item \textsuperscript{157} For example, distribution license holders are required to make timely distribution of TDO updates to their approved consignees. \textit{Id.} § 773.3(e)(1)(iii).
  \item \textsuperscript{158} \textit{Id.} § 788.19(a)(2).
  \item \textsuperscript{159} \textit{Id.}
  \item \textsuperscript{160} \textit{Id.} §§ 788.19(a)(1), 788.3(a).
  \item \textsuperscript{161} \textit{Id.} § 788.4. The Office of Export Enforcement [hereinafter OEE] is responsible for the enforcement of export licensing laws which will be the principal focus of the following analysis. OAC administers the anti-boycott regulations which prohibit U.S. persons from participating or furthering an unsanctioned foreign boycott of a country friendly to the United States. See 15 C.F.R. pt. 769 (1989). Although infractions of these regulations typically occur in connection with the export of goods from the United States, the following discussion does not attempt to explore the intricacies of these regulations.
  \item \textsuperscript{162} 50 U.S.C.A. app. § 2411(a) (West Supp. 1989).
\end{itemize}
When the situation warrants, OEE will resort to judicial search warrants or administrative or judicial subpoenas.\(^{163}\)

Where a violation appears to have occurred or, as is more likely, is admitted, the OEE may send a warning letter when it determines that administrative sanctions might not be warranted.\(^{164}\) In deciding to issue a warning letter, OEE will consider the significance of the violation in terms of the regulatory objectives, the presence of voluntary disclosures,\(^{165}\) and indications that the violation was an aberration from a generally sound compliance program.\(^{166}\) Therefore, exporters should seriously consider contacting the Commerce Department as soon as a violation is discovered. Furthermore, mitigation may be more likely if it is possible to retrieve or safeguard goods or data before they are shipped abroad to third parties. Exporters sometimes decide to make a preliminary disclosure while their internal investigation still

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163. *Id.* In addition to this, 15 C.F.R. § 787.8 provides for denial of export privileges to persons failing to respond to interrogatories or other discovery requests. 15 C.F.R. § 787.8 (1989).

164. *Id.* at 9235.

165. On March 6, 1989, the Bureau of Export Administration issued proposed rules amending the EAR to create procedures governing voluntary self-disclosure of violations of the EAA. Bureau of Export Administration, *Voluntary Disclosure*, 54 Fed. Reg. 9233 (1989) (proposed rule 15 C.F.R. § 787.15). The rule is intended largely to codify existing Bureau policy with respect to the potential mitigating effect of voluntary self-disclosure. The new section of the EAR would formally make such disclosure a mitigating factor in most cases.

There are significant limitations on this general provision. First, disclosure will mitigate the penalty only if the information was disclosed to the Office of Export Intelligence [hereinafter OEI] before that office, the OEE, "or another agency, bureau or department of the United States Government has learned of the same or substantially similar information from another source." *Id.* at 9235.

In order to qualify as "voluntarily disclosed information," the submission to OEI must include a detailed narrative account, supported by appropriate documentation, of all suspected violations. OEI suggests that such a review cover the five year period prior to the initial notification and include certain details concerning the identities of the parties and goods involved. The person making this submission must certify as to its truth and may request a hearing. The rule does not specify any guidelines regarding the scope of such a hearing.

The proposed rules commit the OEI and the OEE to acknowledge the disclosure in writing. These agencies, of course, remain free to pursue all avenues of enforcement generally available to them. The rules contain criteria to guide OEI and OEE in determining what enforcement action, if any, to take following voluntary disclosure. These criteria include, *inter alia*: (1) the strategic significance, quantity and value of the goods involved; (2) whether a license would have been granted; (3) whether the violation was inadvertent or involved some degree of intent; (4) whether disclosure prevents the goods or data from issuing to unauthorized individuals; and (5) the overall degree of cooperation in any issuing investigation. *Id.* at 9235-36.

The proposed rules raise certain questions regarding the timing and ultimate effect of disclosure. For instance, the provision requiring that disclosure precede substantially similar information given to any other U.S. government agency creates the possibility that any benefit from disclosure will be undermined by some undefined degree of prior institutional knowledge within the government. This danger could dissuade exporters who would otherwise be willing to disclose.

In addition, the extent of discretion maintained by OEE and OEI after voluntary disclosure may not encourage additional disclosures. In fact, by not obligating these agencies to abide by a definite, albeit very flexible, schedule of penalty reductions, the rules may create a disincentive to disclose all but the most minor violations.

166. *Id.* at 9235.
is under way. In this way, a Commerce Department or Customs Service inquiry would be less likely to nullify the voluntary nature of a subsequent disclosure.

To facilitate possible settlements prior to the issuance of a final charging letter, it is OEE policy to issue initial contact letters to notify addressees that it is considering formal charges.\textsuperscript{167} As under the AECA, there are strong incentives for those under investigation to settle.

Most export control enforcement settlements, when reached, entail admission of the truth of the allegations.\textsuperscript{168} However, settlements normally do not involve much publicity other than that provided by the required publication of denial orders and by the summary reporting of enforcement actions in the published report to Congress from the Secretary of Commerce. Settlement documents in both OEE and OAC cases are available to the public in the Bureau of Export Administration’s Freedom of Information facility.

\textit{b. Temporary Denial Orders}

The procedure for implementing a TDO begins with a request from the OEE to the Assistant Secretary for issuance of the TDO.\textsuperscript{169} This can be done on an \textit{ex parte} basis, with service of the order on the respondent.\textsuperscript{170} In a manner consistent with national security, foreign policy and investigative concerns, the TDO must define the imminent violation and state why it was issued without a hearing.\textsuperscript{171}

To renew a TDO, the government must submit a specific request to the Assistant Secretary not later than twenty days before expiration.\textsuperscript{172} A copy of the request must be delivered to the respondent, and the respondent can then oppose the request by a written submission accompanied by evidence not later than five to seven days before expiration.\textsuperscript{173} Discovery is limited and any request for the production of documents should be supported in the respondent’s submission.\textsuperscript{174} A respondent opposing renewal is entitled to a hearing (\textit{i.e.}, an oral argument or presentation) before the Assistant Secretary.\textsuperscript{175}

\textsuperscript{167.} 15 C.F.R. § 788.17(b) (1989).
\textsuperscript{168.} As is the case under the AECA, settlements may involve the temporary suspension of some portion of the civil penalty, which can be remitted upon satisfaction of such conditions as the installation of a satisfactory compliance program or the avoidance of further violations. \textit{Id.}
\textsuperscript{170.} \textit{Id.}
\textsuperscript{171.} \textit{Id.} § 788.19(b)(2).
\textsuperscript{172.} \textit{Id.} § 788.19(d)(2).
\textsuperscript{173.} \textit{Id.} § 788.19(d)(1).
\textsuperscript{174.} \textit{Id.}
\textsuperscript{175.} \textit{Id.}
The EAR prescribes expedited appeal procedures which allow a respondent to appeal the issuance or renewal of a TDO to a Commerce Department Administrative Law Judge (ALJ) at any time. The appellant may contend that the “imminent violation” finding cannot be supported. A “related party” may appeal a determination that finds a relationship between it and the principal, but cannot challenge the issuance or renewal of the TDO.

Section 13(d) of the EAA requires the ALJ to make his recommendation within ten working days after an appeal is filed. The statute gives the Under Secretary five working days in which to accept, reject or modify the ALJ’s recommendation. According to the statute, an appeal shall neither stay the effectiveness of a TDO nor bar the Deputy Assistant Secretary from considering or applying for its renewal.

The decision of the Secretary technically is final. However, the opportunity for limited judicial review has been recognized both by the courts and, more recently, by Congress.

c. In Lieu of Settlement Administrative Hearings Under the EAA

As stated earlier, EAA section 11(c)(1) provides authority for the imposition of civil penalties and administrative sanctions for violations. Section 13(c) of the EAA establishes certain procedures for the imposition of such penalties and sanctions and states that proceedings shall be conducted pursuant to 5 U.S.C. sections 556 and 557. Section 13(a) of the EAA provided a broad exemption from the Administrative Procedure Act (APA) requirements concerning agency adjudication and judicial review, with limited exceptions. A provision in the Trade Amendments Act of 1985 added

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176. Id. § 788.19(e)(3).
177. Id. § 788.19(e)(1).
178. Id. § 788.19(e)(2)(i).
179. Id. §§ 788.19(e)(2)(ii), 770.5(g).
184. See also Spawr Optical Research, Inc. v. Baldrige, 649 F. Supp. 1366 (D.D.C. 1986) (ruling that deprivation of export privileges prior to hearing constitutes a significant departure from important procedural rights and permitting judicial review of Secretary’s determination). See also 50 U.S.C.A. app. § 2412(c)(3) (West Supp. 1989) (providing for such limited review of TDOs).
186. Id. § 2412(c).
EAA subsections 13(c) through 13(e), prescribing procedures for the imposition of civil penalties and sanctions, and providing procedures for agency adjudication.  

Pursuant to EAA section 13(c), export control cases now are presented to an ALJ.  The ALJ may only issue a “recommended decision.” Section 13(c) of the EAA provides for automatic review of the ALJ’s decision by the Secretary, although in practice the Under Secretary may affirm, modify or vacate the ALJ’s recommended decision. Often, the decision of the ALJ is upheld unless the Under Secretary finds that the evidence is of such a nature as to indicate the ALJ was in error as a matter of law. 

This automatic review does curtail the role of the ALJ and tends to delay the timing of final adjudications. Somewhat paradoxically, however, export control administrative proceedings are supposed to be completed within one year after the complaint is “submitted,” unless the ALJ extends it for “good cause.” 

In John W. McKenzie, a recent investigation, the respondent was found to have exported electronic communication equipment with knowledge that the goods were destined for Libya. The ALJ’s denial order, effectively upheld by the Under Secretary, banned respondent from any conceivable form of participation in an export transaction. More importantly, the order stated that such a denial of privileges may be extended to any person, firm, corporation, or business association with which respondent is, or may be related by any “connection in the conduct of trade or related services.” It
appears from the face of this new type of order that the new related party provisions will have a broad application. The order fails to identify what "connection" will suffice or whether the trade or services provided must relate to the banned export. This language would seem to authorize the denial of privileges, for instance, to a firm which merely supplied the convicted party goods and services. That supplier conceivably could be denied the right to export its goods.

III.
JUDICIAL REVIEW OF AGENCY ACTION RESTRICTING EXPORT PRIVILEGES

Judicial review of U.S. government administrative decisions involving export license privilege denials traditionally has been constrained under both the EAA\(^{201}\) and AECA.\(^{202}\) Although recent developments appear to have allowed limited review, exporters who find their privileges revoked or denied will face difficult choices in seeking redress in the courts.

A. Existing Judicial Review Procedures

1. The Export Administration Act

Export control enforcement proceedings under the EAA were, until recently, exempt from judicial review pursuant to section 13(a) of the EAA,\(^{203}\) and an express statutory provision stating that the order of the Secretary "shall be final and is not subject to judicial review."\(^{204}\) However, in 1985, Congress amended the EAA and authorized "de novo" judicial review of administrative liability determinations, but only when the Government initiated the litigation to enforce and collect a civil fine.\(^{205}\) Thus, if the Commerce Department had imposed civil fines as well as administrative sanctions against an individual, the individual could refuse to pay the fine and obtain de novo review of the underlying liability determination once the U.S. government pursued judicial action to enforce the fine.

Of course, there are problems with this approach. First, an individual or entity that has been denied export privileges may not wish, or be able, to await U.S. government action to enforce an accompanying civil fine. Absent the luxury of time and a decision to refuse payment, the exporter cannot obtain a de novo review. Second, this review procedure applies only to liability determinations that support a monetary penalty.\(^{206}\) Thus, judicial review under this procedure would not be available if the only penalty imposed was a denial of export privileges.

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206. Id.
Another infrequently successful approach has been to challenge the constitutional validity of such regulations or procedures through a suit for injunctive or declaratory relief that challenges specific EAA or EAR enforcement actions. Others have challenged the EAA’s exemption from judicial review, along with administrative sanctions, claiming that the exemption violated the separation of powers. In addition, criminal enforcement obviously provides an opportunity to seek judicial review of both the legal authority underlying the charges and the legality of the enforcement procedures.

2. The Arms Export Control Act

The AECA does not specifically address the issue of judicial review or the finality of administrative decisions denying export licenses or privileges under the Act. However, in describing the administrative appeal procedure, the ITAR state that the decisions of the Under Secretary for Security Assistance, Science and Technology are final. Moreover, the ITAR state that the functions conferred by section 38 of the AECA (i.e. export controls) are excluded from the procedures of sections 553 and 54 of the APA.

The AECA, however, does empower the President with the same enforcement powers contained in subsections 11(c)-(e), and (g) of the EAA. These include the power to impose civil penalties, the power to revoke, suspend, or deny export privileges, and the power to subject property to forfeiture. In conferring such powers in the administration of U.S. arms export controls, the AECA also states that these powers are to be exercised “subject to the same terms and conditions as are applicable [under the EAA].” Thus, any judicial review that may be available through the EAA in the context of enforcing civil penalties arguably may be applicable to enforcement actions under the AECA.


213. 50 U.S.C.A. app. 2410(c)-(e) & (g) (West Supp. 1989).

B. Recent Developments Expanding Judicial Review of Export Privilege Denials

1. Under the EAA

Two recent developments have expanded opportunity for judicial review of administrative sanctions imposed in the context of commercial (and perhaps arms) export controls. The first of these was the decision in Dart v. United States.\textsuperscript{215} There, the U.S. Court of Appeals for the D.C. Circuit overturned a district court’s decision declining review of a Commerce Department penalty order, which included a denial of export privileges.\textsuperscript{216} The court of appeals, considering the long history of due process concerns weighing in favor of judicial review, refused to accept a strict construction of the EAA’s “finality” clauses and found that the federal court had jurisdiction to determine whether the Secretary had exceeded his statutory authority in imposing sanctions.\textsuperscript{217}

The Dart decision, however, does not stand for the proposition that administrative orders imposing civil penalties or administrative sanctions are fully open to judicial review. The court of appeals noted that:

the exception for review of facial violations [of the EAA] should remain narrow. Congress’ finality clause must be given effect, and an agency action allegedly ‘in excess of authority’ must not simply involve a dispute over statutory interpretation or challenged findings of fact.\textsuperscript{218}

Thus, the Dart court’s decision to exercise judicial review power was limited to determining whether the Secretary had violated procedures specified in the EAA (i.e., to “affirm, modify or vacate” the ALJ decision). If the Secretary, instead of “reversing” the ALJ decision, had vacated the decision for further proceedings, arguably Dart would have had no right of review in federal court. Moreover, if the ALJ had found liability in the first instance, Dart might have been denied access to the courts.\textsuperscript{219}


\textsuperscript{216} Id. at 231. In Dart, an initial determination by the Commerce Department ALJ had found that Dart did not knowingly violate the EAA. Id. at 219. The charges against Dart were dismissed. Id. The ALJ’s decision came after five days of evidentiary hearings. Id.

The Department then appealed to the Secretary who overturned the ALJ, and found that Dart knowingly violated the EAA. Id. at 220. The Assistant Secretary then imposed a $150,000 fine and a 15 year denial of export privileges. Id.

Dart filed an action in federal district court challenging this decision on constitutional and statutory grounds (e.g., that the decision denied Dart due process, that it was not supported by substantial evidence, and that it exceeded statutory authority). Id. The district court dismissed the suit for lack of jurisdiction, relying on the EAA’s finality clauses precluding judicial review. Id. at 221.

\textsuperscript{217} Id. at 223.

\textsuperscript{218} Id. at 231 (emphasis added).

\textsuperscript{219} Interestingly, on remand, and after further hearings, the ALJ again ruled that the charges against Dart were unfounded. The Under Secretary, constrained by the Court of Appeals ruling, reluctantly adhered to ALJ’s decision. William C. Dart, 54 Fed. Reg. 7231 (Dep’t Comm. 1989).
The second development that expanded the opportunity for judicial review occurred soon after the *Dart* decision. Congress, in the Trade Act, extended limited judicial review to administratively imposed civil sanctions, including those affecting export privileges.\(^{220}\) Section 2428 of the Trade Act adds a new provision to section 13(c) of the EAA\(^ {221}\) regarding administrative and judicial review.\(^ {222}\) Parties that are charged with violating the EAA, and who face a civil penalty or an order suspending or revoking export privileges, now can appeal the Secretary's order within fifteen days to the U.S. Court of Appeals for the D.C. Circuit.\(^ {223}\) The court is authorized to stay the order pending review.\(^ {224}\) However, the court only can review those issues necessary to determine liability for the sanctions imposed.\(^ {225}\) In so doing, the court is authorized to set aside any finding of fact not supported by substantial evidence or any conclusion of law that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."\(^ {226}\)

The Trade Act added a similar review procedure for TDOs.\(^ {227}\) There are two significant differences, however. First, Congress did not authorize the court to stay the TDO while the appeal is pending.\(^ {228}\) Second, the standard of review appears to be more limited, there being no provision for overturning findings of fact.\(^ {229}\)

2. Under the AECA

There is some question whether the *Dart* decision, or the recent EAA amendments providing limited judicial review, will afford parties increased opportunities to review debarment or penalties imposed under the AECA. The *Dart* decision may be helpful to the extent a party subject to an export privilege denial can demonstrate a similar, substantial procedural error under the AECA. However, to the extent a court gives an OMC decision under the AECA substantial deference, or considers the decision to involve sensitive foreign policy or national security concerns, it may be reluctant to follow a *Dart*-type analysis.

A more interesting question arises under the new judicial review amendments to the EAA. As noted above, the new review procedures are included in section 13 of the EAA.\(^ {230}\) Moreover, the AECA incorporates, by specific

\(^{221}\) 50 U.S.C.A. app. § 2412(c) (West Supp. 1989).
\(^{222}\) Trade Act, Pub. L. No. 100-418 § 2428(a)(1), 102 Stat. 1361.
\(^{223}\) Id. Note that a denial of export privileges or a civil penalty imposed to enforce U.S. anti-boycott laws appears to be excluded from this review procedure.
\(^{224}\) Id.
\(^{225}\) Id.
\(^{226}\) Id.
\(^{228}\) Id.
\(^{229}\) Id.
statutory reference, the administrative sanctions of the EAA.231 In so doing, the AECA should reasonably be considered to adopt the "terms and conditions" applicable to the sanctions provided under the EAA. Arguably, the new EAA judicial review procedures may be considered to fall within these "terms and conditions." If so, Congress may have either unwittingly or deliberately provided an avenue for judicial review of sanctions imposed under the AECA and ITAR.

IV. NEW DEVELOPMENTS INVOLVING SUSPENSION AND DEBARMENT SANCTIONS

The Trade Act implemented a number of other export control changes to the EAA, including several that further affect export control enforcement and debarment remedies.232 Among these changes are several new provisions dealing with unilateral enforcement of multilateral export controls.233 Although these penalties appear to be aimed principally at "foreign persons,"234 U.S. exporters or companies that are affiliated with such persons or that otherwise rely on them for supply can be affected adversely by these new enforcement provisions.235

A. Unilateral Sanctions Against Toshiba and Kongsberg

Following the disclosure that Toshiba Machine Company of Japan and Kongsberg Trading Company of Norway had diverted sophisticated propeller milling equipment with important military applications to the Soviet Union, Congress considered imposing sanctions on these companies.236 Although the transfers of equipment violated Japanese237 and Norwegian238 laws, passed in accordance with guidelines established by the Coordinating Committee for Multilateral Export Controls (COCOM),239 no U.S. export

236. N.Y. Times, June 12, 1987, § A, at 1, col. 1 (city ed.).
control laws were broken\textsuperscript{240} nor was any U.S. technology or equipment involved.\textsuperscript{241} After a Japanese court imposed relatively lenient penalties on the Toshiba personnel involved,\textsuperscript{242} Congress decided to include more stringent sanctions in the Trade Act.\textsuperscript{243} By seeking retroactive sanctions against the Toshiba and Kongsberg corporate entities for violations of foreign regulations passed in accordance with the COCOM guidelines, Congress has demonstrated a new willingness to undertake unilateral action against foreign violators of the COCOM export control regime.

Section 2443 of the Trade Act imposes certain mandatory sanctions on Toshiba Machine Company, Kongsberg Trading Company, and their parent companies (Toshiba Corporation and Kongsberg Vaapenfabrik), as well as other foreign persons found to have "facilitated" the diversion of the milling equipment to the Soviet Union.\textsuperscript{244} Congress has imposed a three-year ban on all U.S. government procurement from these companies.\textsuperscript{245} In addition, any imports from Toshiba Machine Company and Kongsberg Trading Company are barred for three years.\textsuperscript{246}

Several exceptions exist to these sanctions. These sanctions do not apply to the procurement of defense articles or services: (1) under existing contracts or subcontracts, (2) if the President determines that the procurement involves "essential defense articles or services" and there exists no alternative supplier, or (3) the President determines that the articles or services are essential to the national security under defense co-production agreements.\textsuperscript{247} Moreover, these sanctions do not apply to any products or services provided under contracts entered into before June 30, 1987; or (apparently without any time limitation) to the supply of spare parts, component parts that are essential to U.S. products, routine servicing and maintenance of products, or information and technology.\textsuperscript{248}

On January 9, President Reagan issued Executive Order No. 12,661 implementing the import and procurement sanctions contained in the Trade Act

\textsuperscript{240} Since the entire incident took place outside of U.S. jurisdiction no U.S. export control laws were implicated.

\textsuperscript{241} N.Y. Times, June 12, 1987, § A, at 1, col. 1 (city ed.).

\textsuperscript{242} Wash. Post, Mar. 26, 1988, at D12, (final ed.).

\textsuperscript{243} Id.; Trade Act, Pub. L. No. 100-418 § 2443, 102 Stat. 1365.

\textsuperscript{244} Trade Act, Pub. L. No. 100-418 § 2443, 102 Stat. 1365.

\textsuperscript{245} Id.

\textsuperscript{246} Id.

\textsuperscript{247} Id.

\textsuperscript{248} Id.
against the Toshiba and Kongsberg corporate entities. The three-year period over which the sanctions run commenced December 28, 1988. Authority to make determinations to waive the procurement ban on the basis of exceptions set out in the statute rests with the heads of each federal agency or department. At the time of this writing, no agency of the federal government has issued specific regulations barring procurement from these corporations. However, since it is a matter under the jurisdiction of Customs Service, the Treasury Department formally issued regulations to implement the general prohibition on imports of Toshiba Machine Co. and Kongsberg Trading Co.

In November, 1988, a group of manufacturers' representatives engaged in the sale of Toshiba Machine's merchandise in the U.S. filed a complaint in the Court of International Trade, stating that the Toshiba provision constituted a bill of attainder or ex post facto law, and thus was an unconstitutional denial of due process. This litigation subsequently was dismissed.

B. Mandatory Sanctions for Future Violations of Multilateral Controls

Section 2444 of the Trade Act amends section 11A(a) of the EAA to require mandatory sanctions, similar to the Toshiba sanctions, for future serious violations of foreign regulations enacted pursuant to COCOM guidelines. The President must prohibit U.S. government procurement and bar U.S. imports for two to five years from any "foreign person" if he determines that: (1) a violation has been committed of any foreign export control regulation that is based on national security and issued pursuant to COCOM, and (2) the violation "resulted in substantial enhancement of Soviet and East Bloc

250. Id.
252. The Customs Service issued an interim rule on January 31, 1989 implementing the import ban on Toshiba Machine Co. and Kongsberg Trading Co. 54 Fed. Reg. 4780 (1989). While Customs noted the impracticability of applying the import embargo in the absence of specific regulations, it determined that delay of the effective date to January 31 is neither practical nor necessary, as the regulations involve a foreign affairs function. In adopting a final rule, Customs considered public comments submitted up until April 3, 1989. It is of some concern that the interim rule defines as "products produced by Toshiba or Kongsberg" items "manufactured or produced by Toshiba, Kongsberg, their successors or assigns, or any other entity directly or indirectly owned or controlled by any of the foregoing, provided that such products are not subsequently substantially transformed by another party." Neither the legislation nor Executive Order 12,661, 54 Fed. Reg. 779 (1989) (discussed supra p. 64) makes explicit extension of the embargo over subsidiaries or affiliates of the two companies. Some importers potentially affected by these regulations have claimed that their extension to cover subsidiaries is beyond the congressional mandate.

capabilities" that represents a "serious adverse impact on the strategic balance of forces." Significantly, these sanctions must be applied to any parent, affiliate, subsidiary, or successor entity unless the President determines the entity had no knowledge of the violation and the entity's government has an "effective" export control system. The same general exceptions and exclusions apply under these sanctions as those specified for the Toshiba/Kongsberg sanctions discussed above. The statute also provides for compensation to the United States in cases of serious violations. The President is to initiate discussions with both the foreign person responsible for the violation and the government with jurisdiction over that person, in order to obtain compensation for the damages caused to U.S. national security. In addition, the Attorney General is authorized to bring an action in a federal court seeking damages for the diversion of such military information, in an amount not to exceed the "net loss to the national security."

V.
CONCLUSION

In the area of arms export controls it will no doubt take the efforts of all affected parties to definitively establish the coverage and operation of the most recent AECA and ITAR amendments. Depending on budgetary constraints, the OMC may find itself limited primarily to acting on individual license applications. Any participation by the OMC in the enforcement of the ITAR probably will continue to be focused on the identification of those violations serious enough to warrant criminal prosecution. Ironically, the OMC's lack of attention to the civil aspects of the new ITAR amendments could delay a final resolution of the vagaries of this new law. In the meantime, those companies or individuals who are affected by the ITAR may be forced to operate with considerable uncertainty regarding potential liability.

A law as sweeping as the 1987 AECA amendments and the accompanying ITAR changes is bound to include ambiguities, some relatively innocuous, others central to important economic concerns. To the extent that this observation is true in the AECA, such ambiguities appear primarily in the debarment, denial, and new certification provisions. For a number of reasons, these areas are precisely those that deserve greatest scrutiny.

255. 50 U.S.C.A. § 2410a(a) (West Supp. 1989). It should be noted that the EAA vests the President with discretionary authority to impose sanctions where the violation has not resulted in a substantial enhancement of Soviet or East Bloc capabilities.
256. Id. § 2410a(d).
257. Id. § 2410a(e),(d).
258. Id. § 2410a(i).
259. Id.
260. Id. § 2410a(k).
261. The OMC continues to issue clarifications in an attempt to notify interested parties of its intended interpretation of key provisions in the new regulations.
For example, the OMC's ability to deny export licenses to those applicants generally debarred from contracting with the government arguably extends the law beyond the purpose of controlling exports for national security reasons. While *conviction* for violations of one of the enumerated statutes might reflect poorly on an exporter's reliability and trustworthiness in the arena of trade with controlled nations, the applicant's *debarment* from government contracting in general might have been the result of behavior unrelated to national security concerns. Thus, the expanded denial criteria effectively convert the denial into a further punitive measure imposed on those debarred from contracting with the government.

In addition, the fact that the law permits an administrative agency to deny a license based only on its "reasonable suspicion" that an applicant has violated an enumerated statute raises serious due process concerns. Had this provision been coupled with some opportunity for judicial review of the "reasonable suspicion" determination, the law might have accorded more respect to traditional notions of fairness. Absent review, this standard arguably places important economic privileges in jeopardy based solely upon the agency's belief that a violation has been committed.

The new ITAR's presumption of denial for those convicted under one of the enumerated statutes before the 1987 amendments is parallel to the procedural shortcomings of the new law. Often, the applicant will have long ago rectified the violation that resulted in a conviction. Depending on how the new regulatory scheme is implemented, these regulations may place a serious and unjustified burden on the applicant to demonstrate facts to justify overturning the denial presumption.

Finally, as pointed out earlier, the new certification procedures expose exporters to liability for actions often beyond their control or knowledge. That the new certification provisions are less clear makes them all the more potent. While the clarifications have further defined the requisite level of knowledge to be "actual" knowledge, we are without guidance as to how that term is to be applied internally, for instance, to large corporations.

The newest AECA and ITAR amendments appear to reflect a great deal of the U.S. government's frustration with export control violations and procurement fraud. Unfortunately, this frustration has vented itself in provisions of the AECA that are, in some areas, overbroad. The provisions identified above deserve the attention of those who created them as well as those charged with implementing them before they result in unjustified or mistaken denials of export privileges.

Regarding changes to the EAA regime, the provisions permitting the Bureau of Export Administration to deny export privileges to parties "related" to those convicted of violating the EAA are likely to be the most troublesome for exporters. The potentially broad scope of that language, especially as the Bureau currently intends to implement it, threatens to operate to deny privileges to parties who may not deserve to lose their export abilities.
The related party amendment was intended to quell evasion of the export controls. Congress was incensed because companies were establishing "straw" entities to perform exporting functions the "parent" company was unable to perform. The prior law, however, already had prohibited any transaction from which a denied party may, in any manner, benefit. Thus, with this broad mandate, evasion is strictly an enforcement problem that is unlikely to change with the new denial powers.

What will change, however, are the review procedures available to so-called related parties denied export privileges. Whereas under prior law these parties could appeal the Bureau's internal decision to deny third parties privileges, under current law the only issue for appeal is the existence of a relationship between the challenging party and the convicted party. Thus, the expanded judicial review that Congress created in the 1988 Amendments is, in effect, unavailable to those denied privileges based on the related party provision.

It also will be interesting to observe the manner in which the EAA's new judicial review procedures evolve. The availability of judicial review may impact not only on the type of judicial oversight involved in export regulation generally, but also may affect the entire enforcement process. Although the Bureau is not often swayed by the threat of litigation, the ability to expose certain internal practices to judicial scrutiny may result in a more open export control regime. Practices formerly imbued with a tremendous degree of "discretion" may necessitate formal Bureau justification. Given the shifting attitudes toward export controls as a result of the waning cold war atmosphere, this new, more open enforcement regime may be one more conducive to exporter input.