Behind The Curtain At Commerce's Operating Committee

By Mi-Yong Kim | Bass, Berry & Sims

Recently, during the U.S. House of Representatives' consideration of the National Defense Authorization Act for fiscal year 2022[1] and the Ensuring American Global Leadership and Engagement, or EAGLE, Act,[2] an amendment was introduced that could have politicized the decision-making process of the Export Administration Operating Committee, or OC.

The OC is an obscure interagency body within the U.S. Department of Commerce Bureau of Industry and Security that can make or break an international transaction worth billions of dollars.

The proposed amendment would allow the viewpoint of any one agency to dominate the process for interpreting how national security and foreign policy should be applied to transactions involving the export, reexport and transfers of U.S. technology.[3] This would have upset the carefully balanced process that has worked well for decades. The proposal was based on an erroneous belief that the U.S. Department of Defense's positions are routinely ignored and licenses issued. That is not true.

Indeed, in recent years, the vast majority of the OC chair's decisions reflected unanimous recommendations by agencies. Cases where the OC chair's decision diverged from the Defense Department's recommendation were those cases where the recommendation was not supported by facts or did not meet regulatory requirements for a denial.

The amendment did not pass. It is possible other attempts could be made in the future to upend the current process, but giving due consideration to each agency's perspective on the facts of a case and the application of regulations, as well as written policy formed through interagency agreement cannot be overstated.

In addition to the OC, the second body within Commerce that is central to the process is the Advisory Committee on Export Policy, or ACEP, the body that reviews cases where an agency does not agree with the OC chair's decision. The OC and the ACEP have outsize roles in interpreting how national security and foreign policy should be applied to transactions involving the export, reexport and transfers of U.S. technology.

The decisions of these bodies are where the rubber meets the road in export control implementation. Export control is a key feature in determining whether the U.S. will continue to maintain its technological supremacy, or China or another country will catch up or surpass the U.S.

However, even most seasoned export control practitioners are mystified by what happens behind the closed doors of the OC and the ACEP, which can contribute to misconceptions that lead to amendments that harm the process like the attempted update to the EAGLE Act and the NDAA.

The lack of understanding with respect to the specific operations of the OC and the ACEP is fully understandable. Details of interagency discussions at the OC and the ACEP generally are not disclosed except to those in the U.S. government with a need to know.

As such, a company would be informed of the decision on its application, but not given specific details behind the decision. The company therefore would not be privy to the details of concerns or issues raised by the respective agencies, or of additional information submitted by the agencies during discussions.

While the legal authority, makeup of the escalation bodies and decision-making process — whether a decision is made by a chair or by vote — are outlined in executive orders and in the Export Administration Regulations, the lack of insight into the details can be frustrating.

The closed-door process certainly does not aid companies in discerning which transactions to pursue, even when the transactions involve the same parties or similar end uses. As the Operating Committee chair and ACEP executive secretary from 2015 until just recently, I hope this article will demystify the process a bit.

What is the dispute resolution process?

The OC and the ACEP were established by former President Bill Clinton's December 1995 Executive Order No. 12981 on the administration of export controls,[4] as amended. The regulations implementing this executive order are in Section 750.4(f) of the EAR.[5]

The OC is chaired by a civil servant, an employee of Commerce. Despite being a Commerce employee, the OC chair is charged to be a neutral and independent decision maker. The OC chair also serves as the executive secretary of the ACEP. The ACEP is chaired by the assistant secretary of commerce of export administration, which is a politically appointed position.[6]

As designated in the executive order, representatives from Commerce, the Department of Defense, the U.S. Department of Energy and the U.S. Department of State sit on the OC and the ACEP.

In addition, other agencies such as NASA and the National Institute of Standards and Technology are invited to participate, depending on the issue, but do not vote or make formal recommendations on the disposition of cases.

Members of the intelligence community can attend meetings but do not vote or make recommendations on cases. The decision on a case is made by majority vote at the ACEP. If there is a tie at the ACEP, then the OC chair's decision governs.

The decision at the OC level, however, is made by the OC chair based on recommendations of the four agencies and the facts of the case. The only exception to the OC chair's decision-making authority outlined in the executive order was for cases involving commercial communication satellites and hot-section commercial engine technology; these cases are decided by majority vote.

The Export Control Reform Act of 2018 introduced new exceptions with cases involving emerging and foundational technologies added to the mix of cases where decisions at the OC would be by vote.

Currently, the vast majority of cases at the OC do not involve commercial satellites or hot-section engine technology. Until the U.S. government makes further progress on identifying emerging and foundational technologies that would be controlled under the EAR, it is hard to predict how many such cases would be escalated to the OC or the ACEP.

The executive order does not explain the rationale behind the decision-making authority given to the OC chair. My understanding, however, is that, at the OC level, the interagency participants are civil servants who would review cases based on existing regulations and written interagency policy.

The apparent goal of the structure was to divorce civil service decision making from politics. That is, decisions at the OC level to resolve disagreements should be based on the application of a common understanding of the facts to the applicable regulatory or license policy standards — most like a neutral judge making a ruling based on facts and the law as opposed to personal views.

Another goal of this balanced interagency structure was to prevent a single agency from dominating the process, thus recognizing the value of giving equal weight to all agency views, expertise and equities. For decades, the mantra of the OC chair and other export control officials has been that if an agency did not think the outcome on a particular application was the right policy, then it should follow the established process to have the regulations changed rather than to make a particular decision inconsistent with the regulatory standards.

Although the ACEP is supposed to be chaired by and attended by political officials, the same basic approach has been applied over the years. The ACEP, however, focuses on resolving situations where the regulatory standards and policy are not clear or where reasonable minds at the OC level can disagree. The goal of the ACEP process is thus not only to resolve disputes that could not be resolved at the OC level, but also to give policy guidance for the OC members to apply on similar applications going forward.

What are the agencies' viewpoints?

Each agency brings a different perspective and expertise to reviewing cases based on its primary executive mission and specialty.

As a general matter, the role of Commerce is to administer the licensing system required by the EAR and to implement a whole-of-government perspective into the regulatory and licensing decisions.[7] Commerce's role is not to advocate for U.S. industry at the expense of national security.

Without a doubt, when a particular requested license would result in harm to the war fighter, in the proliferation of items for use in weapons of mass destruction or otherwise harm clear national security or foreign policy interests, including human rights, Commerce votes with the other agencies to deny the application regardless of the economic implication.

In cases where the proliferation-related or other applications of concern are not as direct, Commerce can play a key role in providing its expertise on what the economic security implications would be of a denial.

For example, if there is a commercial item that is widely available as a substitute for the commercial item at issue in an application, a denial would harm the U.S. exporter to the benefit of a foreign competitor without limiting the foreign party's ability to receive the item. Such perspectives are critical to ensuring that the U.S. has a healthy industrial base.

Department of Defense expertise and equities are primarily concerned with whether and how the export could contribute to the recipient country's military enhancement or improve, where applicable, interoperability.[8]

The Department of Energy, due to its technical expertise in nuclear issues, generally focuses on how the item could be used for nuclear weapons activities by the importing country.[9]

Lastly, the Department of State would be most interested in the foreign policy perspective of the transaction, and whether the export would augment the relationship with the recipient country and meet relevant U.S. objectives with respect to that country.[10]

Regardless of the differing expertise and perspectives, the common goal of the agencies is, fundamentally, that the export not harm U.S. national security or foreign policy objectives. Of course, in some cases, the term national security is nuanced.

In situations not involving obvious military or proliferation-related activities, different agencies will define the term differently based on their mission, the facts of the case, and to an extent, the existing political climate.

This aspect of the review process is the most challenging part for exporters and reexporters. It is like reading tea leaves to speculate what recommendations agencies will make and how they will vote at all levels.

What types of cases are escalated?

Traditionally, only about 1% of all license applications filed are escalated to the OC, and then 5% to 10% of OC decisions are further escalated to the ACEP. Cases are rarely escalated to Commerce's Export Administration Review Board.

Most often, cases escalated to the OC present novel issues, concerns with parties to the transaction, differing interpretation of the regulations or inconsistent decisions on prior similar cases. For example, there might be additional information on the end user that was previously not reviewed or available, differing standards on what fact patterns meet regulatory thresholds for approval or denial, or an end user that has a mixed licensing history, to name a few.

In the last two years, there were multiple changes to the EAR that added layers of complexity to evaluating transactions, particularly with respect to the rules pertaining to the BIS Entity List and the items covered by the military end user, or MEU, rules.

Prior to these changes, there were just a few cases at the OC or the ACEP involving MEUs or companies on the Entity List. With the recent regulatory changes, however, the caseload at the OC involving MEUs and the Entity List increased substantially.

For example, no licenses were required to export lower-level technology to Huawei Technologies Co. Ltd.[11] or Semiconductor Manufacturing International Corp.[12] until 2019 and 2020, respectively. The rules did not clearly delineate what should be approved or denied, or the parameters for making decisions. This is true of exports to MEUs pursuant to the April and December 2020 rules that expanded the definition of MEUs[13] and then established the MEU List.[14]

Each one of these changes has many gray areas and nuances that led to disputes among the agencies regarding what the policy was or should be. The OC and the ACEP thus had to deal with a massive number of these cases.

Moreover, the Huawei-related cases increased dramatically because of the August 2020 Huawei-specific foreign produced direct product rule.[15] That rule expanded U.S. export control jurisdiction over tens of billions of dollars' worth of wholly foreign-made and otherwise uncontrolled commercial items outside the U.S. if they were produced using U.S.-origin production or software tools and destined for a Huawei-related end use.

Given that the approval policy for Huawei-related cases has always been somewhat difficult to apply, the OC and the ACEP were even more busy than usual. Certain escalated cases processed through the OC and the ACEP led to setting precedents, but there were other cases that were reviewed as a stand-alone.

At this point it is very difficult to guess the outcome of a number of cases involving MEUs, Semiconductor Manufacturing International or Huawei at the OC or the ACEP. The Biden administration has not announced whether it will change or clarify any of the policies pertaining to these novel licensing decisions.

What is in the future?

Given the recent history of fairly dramatic changes to the EAR, congressional intrusion into administrative processes, and the need to counter China's technology acquisition and use policies contrary to U.S. national security and foreign policy interests, compliance with export controls will become even more complex. The resulting complexity will almost certainly lead to greater number of cases being escalated to the OC and the ACEP.

One thing on the future of export controls is clear — additional regulations will be forthcoming. Hopefully the forthcoming regulatory changes will provide greater insight into how agencies should be reviewing the applications, and not just add requirements on companies.

In the meantime, Commerce could provide further guidance by issuing advisory opinions and answers to frequently asked questions. If and when Commerce takes such actions, it is important for other reviewing agencies to follow the guidance.

It is essential that the U.S. government make consistent, transparent and predictable decisions so that companies can better prepare for and take advantage of business opportunities that are not contrary to U.S. interests. After all, economic security is part of national security.

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Disclosure: The author oversaw matters discussed in this article while serving as OC chair between 2015 and June 2021.

[1] H.R. 4350; https://www.congress.gov/bill/117th-congress/house-bill/4350.

[2] HR. 3524, https://docs.house.gov/committee/calendar/byevent.aspx?eventid=112852.

[3] https://www.aip.org/sites/default/files/aipcorp/images/fyi/pdf/eagle-act-republican-substitute-version.pdf.

[4] https://www.govinfo.gov/content/pkg/WCPD-1995-12-11/pdf/WCPD-1995-12-11-Pg2127.pdf.

[5] https://www.bis.doc.gov/index.php/documents/regulation-docs/423-part-750-application-processing-issuance-and-or-denial/file.

[6] The Export Administration Review Board, which is chaired by the secretary of Commerce, is also involved in resolving disputes over license applications. Since cases are rarely escalated to the EARB, this paper is focused on the OC and the ACEP.

[7] https://www.bis.doc.gov/index.php/documents/pdfs/2711-2020-bis-annual-report-final/file.

[8] https://www.dtsa.mil/SitePages/default.aspx.

[9] https://www.energy.gov/nnsa/nonproliferation.

[10] https://www.state.gov/about-us-under-secretary-for-arms-control-and-international-security/.

[11] https://www.bis.doc.gov/index.php/documents/regulations-docs/2394-huawei-and-affiliates-entity-list-rule/file.

[12] https://www.federalregister.gov/documents/2020/12/22/2020-28031/addition-of-entities-to-the-entity-list-revision-of-entry-on-the-entity-list-and-removal-of-entities.

[13] https://www.federalregister.gov/documents/2020/04/28/2020-07241/expansion-of-export-reexport-and-transfer-in-country-controls-for-military-end-use-or-military-end.

[14] https://www.federalregister.gov/documents/2020/12/23/2020-28052/addition-of-military-end-user-meu-list-to-the-export-administration-regulations-and-addition-of.

[15] https://www.federalregister.gov/documents/2020/08/20/2020-18213/addition-of-huawei-non-us-affiliates-to-the-entity-list-the-removal-of-temporary-general-license-and.

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