

International Trade & Regulatory ADVISORY

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U.S. Export Controls: 2010 Reform Effort

This advisory provides an overview of the U.S. export control reform proposals announced by President Obama in 2009. Specifically, this advisory describes the President's proposals for reform, the progress made to date and concerns and questions surrounding the reform proposals. In addition, this advisory summarizes export promotion strategies also announced in 2010 by the President under the National Export Initiative.

Goals of Export Reform

In August 2009, the White House announced a full-scale review of dual-use export controls (administered by the Bureau of Industry & Security (BIS) under the authority of the Export Administration Regulations (EAR)) and defense trade export controls (administered by the Directorate of Defense Trade Controls (DDTC) under the authority of the International Traffic in Arms Regulations (ITAR)). The comprehensive review, led by the National Security Council and conducted by an interagency task force, was to identify problems and possible reforms to the system. Upon completion of the review, the task force found what most U.S. exporters and non-U.S. re-exporters of U.S. goods already knew: the current U.S. export control system is overly complicated, contains too many redundancies and does not sufficiently reduce national security risks. Thus, the administration determined that fundamental reform of the U.S. export control system was needed and has announced a proposal focused on achieving four singularities:

- (1) transformation to a single commodity control list;
- (2) creation of a single licensing agency;
- (3) creation of a single enforcement-coordination agency; and
- (4) creation of a single information technology (IT) system for use by both exporters and the government regulators.

Single Control List:

The current two lists of controlled items—the Commerce Control List (CCL) for dual use items controlled by the EAR and the United States Munitions List (USML) for items controlled by the ITAR—would be consolidated into a single list of controlled items. The administration envisions a “tiered control system,” where items would be moved from higher to lower levels of control over time as the national security sensitivity decreases during the lifespan of the item.

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A key aspect of this transition to a single list is to make the USML more like the CCL. In this respect, the CCL is considered to be a “positive list” that clearly identifies items controlled, while the USML merely offers general descriptions of items subject to its control. The transition to a single list will likely include the conversion of the USML to a “positive list” that more specifically identifies the items subject to the ITAR.

Single Licensing Agency

The current system, where separate export-control lists are maintained by different agencies with licensing jurisdiction for items on their respective lists, results in jurisdictional confusion and overlapping approval processes. Thus, the administration plans to consolidate export control licensing jurisdiction in a single licensing agency. It is believed that a single agency will ensure a consistent licensing and review process. It will likely be a new agency created by executive action (i.e., the administration believes this can be accomplished without legislation from the U.S. Congress).

Furthermore, the creation of a new single licensing agency will be accompanied by the creation of a single export license application. Exporters can use this single application to apply for licenses for both dual use and defense items (as well as licenses to engage in trade with sanctioned countries issued by the Treasury Department’s Office of Foreign Assets Control).

Primary Enforcement Coordination Agency

The current system disperses enforcement responsibility to multiple agencies. The administration’s proposal is to create a single enforcement coordination agency to strengthen enforcement and coordination with the intelligence community. The administration is referring to this single enforcement agency as the “Fusion Center.” The intent behind this single enforcement agency is to better coordinate investigations of export violators and synchronize compliance outreach programs now offered by multiple agencies. As with the single control list, much of this work can be accomplished through executive action. This can be done by creating a new agency that merely coordinates the activities of present enforcement agencies, including BIS, U.S. Immigration and Customs Enforcement and the Federal Bureau of Investigation. However, ultimate realization of this goal—i.e., the full unification of enforcement agencies—will require legislation from the U.S. Congress.

Single IT System

The current system lacks a central IT system for tracking export control licensing and other activity within the U.S. government. Therefore, the administration’s proposal is for a single online resource to receive, process and screen new license applications and end-users. The goal of a single, unified informational technology infrastructure is to reduce systematic incompatibilities and use agency resources more efficiently. A key benefit is the ability for the government to have a holistic picture of what technologies are going to which users in which countries; this can more effectively reveal national security threats that might arise from the export of discrete U.S. origin technologies.

Implementation

To implement the proposed export control reforms, the administration envisions a three-phase approach: Phase I focuses on developing criteria-based control lists; Phase II focuses on consolidating licensing procedures; and Phase III focuses on congressional approval to complete the overhaul of U.S. export controls. The administration plans Phases I and II to involve reforms through regulatory changes, and progress against these goals is well underway, as described below. Phase III will require legislation to fully consolidate the control lists, the licensing agencies and the enforcement agencies. The current aim of the administration is to have “as much done as possible” on Phases I and II of the export control reform initiative by August 2010. The reported progress out of the administration is significant.

Phase I

The administration’s goal through Phase I is to make “significant and immediate improvements to the existing system” and to prepare necessary legislative proposals for Phase III. The administration plans to refine and harmonize “control list” definitions to eliminate confusion surrounding licensing jurisdiction. An additional goal regarding a single control list is to establish independent criteria to be used to screen items for a tiered control list. Moreover, the administration hopes to implement regulatory-based improvements to licensing to streamline the licensing process and to standardize policy to increase efficiencies. Finally, the administration hopes to synchronize enforcement by creating an initial integrated enforcement center and identifying IT needs to facilitate the creation of a single U.S. government point of contact for exporters to access licensing systems.

Phase II

The administration’s stated goal during Phase II is to develop a “fundamentally new U.S. export control system.” Phase II is designed to “complete deployment of specific Phase I reforms and initiate new actions contingent upon completion of Phase I items.” Phase II involves restructuring the lists of export controlled items into identical tiered control lists, thus moving closer toward a single control list. Additionally, the administration hopes to implement licensing harmonization to allow export authorizations within each control tier.

Phase II is designed to harmonize enforcement outreach, license compliance and inspection programs, as well as administrative enforcement procedures and self-disclosure processes. By the end of Phase II, the administration hopes to have a harmonized government-wide export enforcement program and to see a complete transition to standardized licensing systems based on the two mirrored control lists that will result in more timely, transparent and predictable processes.

Phase III

Phase III, as envisioned by the administration, will require congressional approval to modify existing laws. With such approval, the administration may complete the transition to the new U.S. export control system during Phase III. Specifically, this phase would move beyond what can be achieved through executive branch action alone and would completely merge the two control lists into a single list and establish a single licensing agency and a single enforcement coordination agency, all through legislative action in the U.S. Congress.

Progress to Date

The administration is reportedly close to interagency agreement or has achieved agreement on key regulatory steps that will (1) pare down U.S. export controls lists; and (2) create a single application form for export licenses for the Departments of State and Commerce. Moreover, agencies are approaching an agreement on how certain items should be tiered on a single control list. Indeed, as of this writing, the progress in Phase I has been significant. The interagency process has resulted in agreement over the new scope and structure of the consolidated control list. While this list is not yet public, agency staff has been testing its implementation, and some positive reports have surfaced.

Although most progress to date has occurred in Phase I, Phase II efforts are also underway. The interagency process has yielded an agreed vision on the structure of the single licensing agency and single licensing form. Furthermore, the move to a single IT infrastructure within the government is well underway, and the specific platform for this unified IT system has been chosen. The single IT system will allow licensing officers at Commerce and State to view all licensing application data for all U.S. export controls. We understand these new systems are being tested and adjusted by the interagency staffers, and we expect further progress to be announced later in 2010.

As for progress on Phase III, the administration acknowledges the difficulty of passing legislation in 2010. That aside, the goal remains to have “as much done as possible” on Phases I and II by the start of fall.

Skepticism

Experts universally acknowledge the existence of problems in the current U.S. export control system. However, the history of export reform has been, for the most part, unproductive, leading some to question the likelihood that the current effort will succeed. Though the administration is putting forth a stronger effort than previous attempts, skeptics believe that Phase III efforts will face challenges in both the House and the Senate. Skeptics also predict that if the opponents of reform (or opponents of the president) portray the effort as weakening national security, any proposed legislation will face strong challenges. Nonetheless, the Department of Defense, a historic obstacle to meaningful change, is now fully supportive of dramatic reform, which should help counteract some of the skeptics on Capitol Hill. In short, the unification of executive branch thinking on export control reform increases the probability of success.

There is also some skepticism over the actual impact of export reform in key strategic areas. For example, one of the administration's goals is to ensure a level playing field for U.S. exporters and to create jobs, but some fear that policymakers will seek to maintain strong controls on exports to China, thus minimizing the economic benefits of reform.

The National Export Initiative

In his 2010 State of the Union address, President Obama called for a National Export Initiative (NEI) with its goal to double U.S. exports and to create two million jobs. In March 2010, President Obama announced five steps the administration is currently taking through NEI to help U.S. firms expand sales of their goods and services abroad: (1) creating a new Cabinet-level focus on U.S. exports, (2) expanding export financing, (3) prioritizing government advocacy on behalf of U.S. exporters, (4) providing new resources to U.S. businesses seeking to export and (5) ensuring a level playing field for U.S. exporters in global markets.

To help accomplish these initiatives, President Obama increased the Commerce Department's International Trade Administration (ITA) FY2011 budget by 20 percent. This budget increase will allow the ITA (1) to bring on as many as 328 trade experts to serve as advocates for U.S. companies to assist more than 23,000 companies to begin or to grow export sales in 2011; (2) to increase the number of small and medium-sized businesses exporting to more than one market by 50 percent over the next five years; (3) to increase U.S. presence in emerging high-growth markets like China, India and Brazil; and (4) to develop a comprehensive strategy to identify market opportunities in fast-growing sectors like environmental goods and services, renewable energy, healthcare and biotechnology. Additionally, the NEI budget allocates \$54 million to enhance the U.S. Department of Agriculture's export promotion activities. Moreover, an Export Promotion Cabinet was created to ensure export promotion remains a top-level priority to all relevant Cabinet agencies.

As for achieving fair market access for U.S. exports, the NEI directs the government to focus efforts on removing barriers that prevent U.S. companies from getting open and fair access to foreign markets. Such efforts include combating unfair tariff and non-tariff barriers and addressing practices that blatantly harm U.S. companies. To help ensure the administration's trade promotion efforts, the Department of Commerce will help operationalize the NEI's various elements.

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