

International Trade & Regulatory ADVISORY

August 31, 2009

White House Launches Comprehensive Review of U.S. Export Control Laws

The United States' complex system of export control laws and regulations may undergo a substantial makeover during the Obama administration's first term in office. On August 13, 2009, White House Press Secretary Robert Gibbs issued a statement that President Obama has launched "a broad-based interagency process for reviewing the overall U.S. export control system, including both the dual-use and defense trade processes." The review is significant in that it would be the first official effort to reassess the structure and content of U.S. export controls on an across-the-board basis that addresses separate regimes under differing statutory authorities administered by the Department of Commerce's Bureau of Industry and Security (BIS), and the Department of State's Directorate of Defense Trade Control (DDTC). The White House characterized the current system of export controls as "rooted in the Cold War era of over 50 years ago," and stressed that it "must be updated to address the threats we face today and the changing economic and technological landscape." This statement accompanied President Obama's order re-authorizing the current dual-use goods export control regime under the International Emergency Economic Powers Act for one year.

National Economic Council (NEC) Chairman Larry Summers and National Security Advisor Jim Jones will orchestrate the White House review. Defense Secretary Robert Gates, who previously worked on a National Academy of Sciences study that recommended relaxing export control restrictions, will play a significant role in the review, as will other officials from the Pentagon and the State Department. The review will likely be conducted by professional staff from the NEC (Mike Furman) and National Security Council (NSC) (Brian Nilsson).

While the timeline and contours of this executive branch review remain unclear, it appears that both the White House and Congress are ready to attempt a simultaneous reform of U.S. export controls. Soon after the White House publicized its export control review, House Foreign Affairs Committee Chairman Rep. Howard L. Berman (D-CA) issued a statement targeting early 2010 for the introduction of a new Export Administration Act (EAA) that will "overhaul the dual-use export control system." Rep. Berman has launched a congressional review of the nation's dual-use export control system that parallels, and will coordinate with, the White House's broader interagency review, in order to guide the development of the new EAA. The congressional review will be directed by Edmund B. Rice, who has served as staff director of the House International Relations Subcommittee on International Economic Policy and Trade, and as the president of the business group Coalition for Employment through Exports (CEE).

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

In Congress, the House therefore is taking the lead on export control reform, with some, perhaps optimistic, observers predicting passage of the Berman bill as soon as next spring. Early action by the Senate is less likely. In the past, there have been numerous failed attempts to reauthorize and reform the EAA, which lapsed in 2001. However, this time, with the White House driving the effort and a Democrat-controlled Congress, the prospects may be somewhat better. In particular, the absence of certain leading national security hawks, such as former House Armed Services Committee Chair Rep. Duncan Hunter (R-CA), who in the past derailed efforts to reform and liberalize export controls, may make for a smoother process this time.

The White House review and news of a prospective new EAA have elicited a positive reaction from the U.S. exporting industry. The National Foreign Trade Council, for example, issued a statement applauding the review and stating that “export control reform is long overdue.” There appears to be a consensus in the industry that an overhaul of America’s export control system is needed and should focus on predictability, transparency and efficiency. In particular, exporters have complained to Congress about long waits for license processing and unclear guidance with regard to the likelihood that certain transactions would obtain government approval.

However, industry representatives have not yet reached consensus on how best to direct their efforts at achieving export control reform. Given the record of prior failed attempts at reform by Congress, some exporters and trade groups, for example, see the White House review as an opportunity to push for near-term improvements, which could be accomplished administratively. Examples include streamlining the licensing process for pre-approved exporters, approving the Intra-Company Transfer (ICT) rule proposed but never finalized by the Bush administration and increasing foreign availability reviews and similar measures. Under this scenario, industry would lobby Congress separately and perhaps later for broader, more comprehensive systemic reforms. Expansion of the Validated End-User (VEU) Program, which allows pre-screening of certain end-users so that they can receive exports without a license, is expected to be a point of contention between reformers and national security advocates. Congress also is reportedly considering expanded law enforcement powers for BIS and possibly raising penalties even further than the 25-fold increase that they have undergone in the last three years.

It is important that members of the trade community closely monitor the progress of the White House’s review of export controls, as well as the development of a new EAA. While it is impossible to tell whether either the administration or Congress will succeed in their respective efforts at export control reform in the coming year, it appears increasingly likely that the current system of laws and regulations—the dual-use regime in particular—could soon be subject to revision. If there are specific issues that industry wants to support or oppose, it is important to engage in the process early on.

If you would like to receive future *International Trade and Regulatory Advisories* electronically, please forward your contact information including e-mail address to trade.advisory@alston.com. Be sure to put “**subscribe**” in the subject line.

Please direct any questions concerning the issues discussed in this International Trade and Regulatory advisory to any of the following Alston & Bird attorneys:

Thomas E. Crocker
202.756.3318
thomas.crocker@alston.com

Elizabeth Hein
202.756.3478
elizabeth.hein@alston.com

Kenneth G. Weigel
202.756.3431
ken.weigel@alston.com

Naotaka Matsukata
202.756.5591
nao.matsukata@alston.com

Paul F. Brinkman
202.756.3404
paul.brinkman@alston.com

Jeffrey Schwartz
202.756.3486
jeff.schwartz@alston.com

Patrick A. Fitch
202.239.3930
patrick.fitch@alston.com

Eric Shimp
202.756.3409
eric.shimp@alston.com

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

Chase Tower
Suite 3601
2200 Ross Avenue
Dallas, TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

Suite 600
3201 Beechleaf Court
Raleigh, NC 27604-1062
919.862.2200

SILICON VALLEY

Two Palo Alto Square
Suite 400
3000 El Camino Real
Palo Alto, CA 94306-2112
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.756.3300

www.alston.com

© Alston & Bird LLP 2009