



Export Controls Updates

September 2010

Slow Road to Export Reform

It has been widely recognized for decades that U.S. export controls are in disrepair. Congress' failure to reauthorize the law underpinning the Export Administration Regulations ("EAR") has resulted in frail, disjointed authority to regulate dual-use items. Poor coordination between the U.S. State and Commerce Departments has created confusion over which agency has jurisdiction over what products; and overly stringent regulation of commercial items has stunted business and has arguably distracted from effective regulation of key military technologies. Yet, despite several past attempts at reform, including legislative initiatives beginning in the early '80s and President Clinton's efforts to overhaul the system in the mid-'90s, we have made only marginal improvements. The repeated failure to successfully implement broad based reform has placed U.S. exporters at an increasing disadvantage in a world where cutting edge technologies are no longer the exclusive province of U.S. industry, and many traditional foreign customers are turning to non-U.S. sources to avoid stifling export regulation issues.

In August 2009, President Obama directed a broad-based review of the export control system. The overarching goal of this initiative was to place "higher walls around fewer, more critical items." Specifically, the goal was to streamline the current system through the creation of a single export-controlled items list, a single licensing agency, a single enforcement agency, and a single information technology system. The Secretary of Defense's and the National Security Advisor's robust statements promising change, coupled with the formation of an interagency task force to push President Obama's agenda, raised hopes that perhaps the time had finally arrived for reform.

In March 2010, President Obama signed an Executive Order implementing the National Export Initiative, under which the Export Promotion Cabinet was charged with creating a comprehensive plan to implement export reform within 180 days, or by September 2010. Efforts to implement reforms, not surprisingly, have been met with congressional resistance. A general lack of knowledge about the current system has necessitated basic education on export controls, which has slowed the reform process. As a result, many observers are skeptical of the interagency task force's push to pass legislation this year.

Recent draft legislation to reauthorize the Export Administration Act – the statutory foundation for controls on dual-use technology – has been criticized as failing to draw clear lines of agency responsibility, failing to concentrate government resources on the export of the most critical technologies, and failing to address the importance of multilateral controls. The legislation has also been criticized as overly broad. For example, the draft bill controls transfers of any item, whether or not of U.S. origin, by U.S. persons and foreign persons subject to the jurisdiction of the U.S., thereby subjecting foreign subsidiaries of U.S. companies to controls on transfers of foreign-origin items, even if those items do not include any U.S. content and are not the product of U.S.-source technology. The draft bill also expands controls to services such as banking, insurance, and transportation, giving the President authority to impose sanctions in a broad range of circumstances.

On the other hand, the draft legislation has been criticized for narrowing current export control law too much. The draft bill changes the definition of "dual use" items to include only those items that have a civilian use and a use that would threaten national security. This change would significantly narrow the number of items defined as "dual-use," as the current definition (all items that have both a civilian and military application) encompasses almost any item.

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The above examples are illustrative of only a few of the controversial aspects of any new legislation to implement export reform. Moving through the three phases of the proposed reform, including passing legislation to implement those reforms, will certainly take more time than originally anticipated. The draft legislation has been withdrawn and is undergoing revision by committee staff. It is yet to be seen whether President Obama's proposed export reform has sufficient momentum to overcome the major political hurdles that have frustrated past reform efforts.

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