

Client Alert

International Trade & Litigation Practice Group

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Commerce Seeks Comments on Effects of Foreign Policy-Based Export Controls

On September 1, 2011, the Bureau of Industry and Security (BIS) of the Department of Commerce requested public comments on the effect of existing foreign-policy based export controls in the Export Administration Regulations (EAR). BIS must consult with industry and report annually to Congress on the effectiveness of such export controls. Because the Secretary of Commerce must annually extend existing foreign policy-based export controls, this marks industry's chance to influence that process. Comments are due by October 3, 2011.

Background

Export controls maintained for foreign policy purposes require annual extension. In accordance with the EAR, the Department of Commerce annually reviews its foreign policy-based export controls, requests public comment on those controls, and prepares and submits a report to Congress on the effectiveness and continued need for those controls. In January 2011, the Secretary of Commerce, on the recommendation of the Secretary of State, extended for one year all foreign policy-based export controls. The foreign-policy based export controls can be found in the EAR (15 C.F.R. parts 730-774) and include, among other things, Commerce Control List (CCL) based controls (part 742), end-user and end-use based controls (part 744) and embargoes and other special controls (part 746). These controls apply to a broad range of industries, activities, countries, and items.

The current review of foreign policy-based export controls comes in the midst of the Administration's broader efforts to reform and simplify the Nation's export control regime, including the proposed shift of items from the United States Munitions List to the CCL. *See* 76 FR 41958 (July 15, 2011). As a result, there is an opportunity for industry to influence the foreign policy-based export controls in the context of the Administration's broader review and reform of U.S. export control policy.

Request for Comment

In a *Federal Register* notice published on August 16, 2011, BIS's requested comments principally on the "economic impact of proliferation controls." To that end, BIS seeks specific information on the following:

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- The effect of foreign policy based export controls on the sales of U.S. products to third countries, which are not targeted by U.S. sanctions, including the views of foreign purchasers
- The controls maintained by U.S. trade partners and the extent to which they have similar controls on goods and technology on a worldwide basis
- Licensing policies or practices by U.S. foreign trade partners that are similar to U.S. foreign policy-based controls whether they are license based, condition based, or subject to a verification regime
- Bringing U.S. foreign policy-based export controls into line with multilateral practice
- Making multilateral controls more effective
- The effect of foreign policy-based export controls on trade or acquisitions by the targets of those controls
- The effect of such controls on the overall trade at the level of individual sectors
- How to measure the effect of foreign policy-based export controls on trade
- The use of foreign policy-based export controls on targeted countries, entities, or individuals or information related to the extension or revision of existing foreign policy-based export controls

In drafting comments and providing the requested information to BIS, industry should take into account both the broader context of export control reform now being undertaken by the U.S. Government and the stated criteria that the Department of Commerce will consider in making its recommendations to Congress. Among the factors that will be considered are: (1) the likelihood that foreign policy-based controls will achieve their intended foreign policy purposes in light of the availability of technology or goods from other countries; (2) whether foreign policy objectives can be achieved through other means; (3) the compatibility of such controls with the foreign policy objectives of the United States and the overall policy of the U.S. toward a country subject to the controls; (4) whether the reaction of other countries to an extension of controls is not likely to render the controls ineffective in achieving the intended foreign policy objective or be counterproductive to U.S. foreign policy interests; (5) the comparative benefits to U.S. foreign policy objectives versus the effect of the controls on the export performance of the United States and its competitive position; and (6) the United States' ability to effectively enforce the controls.

If you have any questions regarding the Request for Comment, please contact Christine Savage at +1 202 626 5541 or Alexander Haas at +1 202 626 5502.

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