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If You Export, Proposed Sweeping Export Control Reforms Will Likely Affect Your Business

“Critically important.” “Controversial.” “Overdue.” Initial reactions to U.S. Defense Secretary Robert Gates’ detailed April 20, 2010 speech ^[1] outlining the Obama Administration’s long-awaited U.S. export controls reform agenda have run the spectrum. Whichever your reaction, these “key reforms” will fundamentally transform U.S. export controls, and will affect the export and reexport of U.S. goods, services and technology throughout the global marketplace.

In August 2009, Obama initiated a comprehensive review of the current U.S. export control system in the context of post-Cold War era realities. The result of this interagency task force assessment? A call to reform U.S. “regulations and procedures for exporting weapons and so called dual-use equipment and technology” to a more streamlined and less bureaucratic system. In short, the U.S. Government has proposed “a system where higher walls are placed around fewer, more critical items.” How might it look?

Key Recommendations. The plan relies on reforms, which would mandate a transformation of myriad authorities, roles, and missions currently scattered across the federal government into:

- A Single Export-Control List;
- A Single Licensing Agency;
- A Single Enforcement-Coordination Agency; and
- A Single Information-Technology (IT) System.

Tiered System Under a Single List. First, it is intended that a single export-control list would “make it clear to U.S. companies which items require licenses for export and which do not.” According to Gates, the single list would utilize a “tiered control system” where an item or technology would be “cascaded” from higher to lower levels of control as its sensitivity decreases. Notably, many license application reviews currently track readily-available technologies that can be easily bought at RadioShack. Of critical importance to the defense industry, the present system does not properly deal with the U.S. military’s transition to “off-the-shelf” procurement.

Consolidate to a Single Licensing Agency. A single licensing agency would have jurisdiction over the list, to include both defense articles and technical data, currently controlled under the International Traffic in Arm Regulations administered by the State Department, and dual-use items and technologies, controlled under the Export Administration Regulations administered by the Commerce Department. This consolidation would help to ensure that the review and licensing processes are consistent and made based on the “real capabilities of the technology.” The goal is to reduce exporters’ confusion about where and how to submit export license applications, and whether they would be approved.

Enforcement Coordination. While providing more transparency for exporters, coordination of enforcement resources into one agency is also intended to strengthen enforcement of U.S. national security. The present opaque system has created confusion for exporters and government officials alike, resulting in enforcement lapses and creative circumvention strategies, such as “forum shopping.”

Single IT Base. Finally, the proposed export controls system would rely on a single unified IT infrastructure to reduce “redundancies” and incompatibilities between different agencies’ systems. The single online location and database would receive, process and screen all new license applications and end-users. This would include the consolidation of all current U.S. Government lists to check for banned end-users into “one single, frequently-updated list” available to exporters.

How Implemented? In its April 20, 2010 [“Fact Sheet on the President’s Export Control Reform Initiative,”](#) the Administration outlined a “Three-Phase” approach to implementation of specific reforms over the next year.

Phase I: The executive branch begins the transition toward the single list and single licensing agency, including implementation of immediate improvements to the existing system and establishment of a “framework” necessary to create the new system, as well as specific reform actions already in process.

- **Control List** – Refine, understand, harmonize definitions to end jurisdictional confusion
- **Licensing** – Implement regulatory-based improvements to streamline licensing processes
- **Enforcement** – Synchronize through creation of an “Enforcement Fusion Center”
- **IT** – Create a single U.S. Government point of entry for exporters

Phase II: Goals include “a fundamentally new U.S. export control system based on the current structure” by later this year, with the completion of specific Phase I reforms. Congressional notification required to remove current Munitions List controls or transfer items from the Munitions List to the dual-use list. Funding for enhanced enforcement and IT infrastructure.

- **Control List** – Restructure the two lists into identical tiered structures, apply criteria, remove unilateral controls as appropriate, and submit proposals multilaterally to add or remove controls
- **Licensing** – Complete transition to mirrored control list system and fully implement licensing harmonization to allow export authorizations within each control tier to achieve a significant license requirement reduction compatible with national security equities
- **Enforcement** – Expand outreach and compliance
- **IT** – Transition toward a single electronic licensing system

Phase III: Intended to complete the transition to a new U.S. export control system, with legislation required for this phase implementation:

- **Control List** – Merge two lists into single list, and implement process to keep current
- **Licensing** – Implement single licensing agency
- **Enforcement** – Consolidate certain enforcement activities into “Primary Enforcement Coordination Agency”
- **IT** – Implement a single, enterprise-wide IT system (both licensing and enforcement)

Supporters see reforms as an opportunity to eliminate “governmental turf fights” that inevitably hamper export control decisions. Detractors fear that a new agency might be comprised only of enforcement agents without regard for economic consequences of overly stringent controls. Still others believe that a “single agency” system would likely be less strict. **Regardless, these reforms will not only drastically alter a U.S. exporters’ business model, but will also result in a new and different system of regulations, procedures and processes that will have to be followed.**

In this renewed era of regulatory change and heightened enforcement, whether you are a small or multinational business, keeping abreast of developments under the President’s U.S. Export Control Reform Initiative will be critical to your business in the weeks and months ahead.

For assistance navigating these reforms, enhancing and/or modernizing your company’s export compliance program or reviewing your current U.S. exports and reexports, please contact: Lindsay B. Meyer at lbmeyer@Venable.com or 202.344.4829, or Carrie A. Kroll at cakroll@Venable.com or 202.344.4574.

[1]

U.S. Defense Secretary Gates, Remarks at the Business Executives for National Security: “Export-Control Reform” (Apr. 20, 2010).

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