
Administration Unveils Proposal for Export Control Reform

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The Obama Administration has announced its long-awaited proposal to overhaul the U.S. export control system. As outlined in an April 20 speech,¹ Defense Secretary Robert Gates emphasized the importance of "four singles" in achieving needed change: a single export control list; a single export licensing agency; a single export enforcement coordination agency; and a single coordinated information technology infrastructure. If implemented, this proposal would fundamentally restructure the existing regulatory regime for U.S. export controls. The Administration wants such reforms to be put into place in three phases over the course of the next year, and some proposed changes will require Congressional action. For further information about the Administration's efforts to seek U.S. export control reform, see WilmerHale's February 22, 2010 [alert](#).

Current System a "Byzantine Amalgam" of Outdated, Ineffective Rules

In his April 20 speech, Secretary Gates recognized that "America's decades-old, bureaucratically labyrinthine system does not serve our 21st-century security needs or our economic interests." The current regime is a web of overlapping domestic and international requirements administered and enforced by a number of different U.S. government agencies. The Department of Commerce's Bureau of Industry and Security ("BIS") is responsible for the Export Administration Regulations ("EAR"), which govern exports and reexports of "dual use items" (goods, technology, and software) that have both civilian and military applications. The International Traffic in Arms Regulations ("ITAR") control exports, transfers, and temporary imports of defense articles and services. These regulations are administered by the State Department's Directorate of Defense Trade Controls ("DDTC"). The Department of the Treasury's Office of Foreign Assets Control ("OFAC") separately administers U.S. economic sanctions that prohibit U.S. persons from engaging in numerous types of transactions (both trade-related and financial) with designated countries, entities, and individuals.

The Administration's proposed reforms follow an interagency review process that was initiated in August 2009. The aim of the proposed reforms is to reframe the structure and scope of existing controls so as to "build a system where higher walls are placed around fewer, more critical items."²

Objective I: Single Export Control List

As part of the proposed reform, the Administration seeks to consolidate EAR and ITAR controls into a single export control list. The proposed list would provide greater clarity about licensing requirements and create a "dynamic, tiered" system under which an item or technology would be "cascaded" from a higher to a lower level of control as the sensitivity of the item decreases over time.

The proposed consolidation raises many questions. For example, a new single control list may present challenges under the Wassenaar Arrangement, a multilateral regime under which member countries, including the United States, establish export control systems that include both dual use and munitions control lists. In addition, the parameters for selecting items for a single list and for decontrolling other items remain undefined, as are the processes for setting up and amending the consolidated control list.

Objective II: Single Licensing Agency

The Administration's proposed reforms also call for the establishment of a single licensing agency that would cover all listed items, including those currently subject to BIS jurisdiction under the EAR and DDTC jurisdiction under the ITAR. A single licensing agency would streamline the license review process, ensure greater consistency in licensing decisions, ease exporter confusion about licensing authority, and eliminate interagency disputes on commodity jurisdiction matters.

The Administration is currently reviewing options in deciding where the proposed single licensing agency should be located: the Department of Commerce, the Department of State, or a newly-created body. Congressman Brad Sherman (D-CA), Chairman of the House Committee on Foreign Affairs' Subcommittee on Terrorism, Non-Proliferation, and Trade, has proposed locating the agency within the Department of State, because the latter is "thought to be in between Defense and Commerce in the balance. Defense says no more often, Commerce says yes too often." Any decision as to the location and effective operation of the single licensing agency will need to overcome bureaucratic turf struggles and entrenched attachments to current licensing procedures.

Objective III: Single Enforcement Agency

The Administration seeks to create a single agency to coordinate enforcement actions for violations of U.S. export controls. Currently, enforcement matters are spread across numerous agencies, including Immigration and Customs Enforcement, DDTC, the BIS Office of Export Enforcement, and the FBI. While the Administration's proposal stops short of calling for a single law-enforcement entity for export controls, the new agency would oversee the Government's domestic and international export control enforcement actions to ensure better coordination and closer links with the intelligence community. As part of enforcement reform, the Administration also intends to press Congress to strengthen penalties for export control violations.

Objective IV: Unified Information Technology Structure

The Administration's proposed reforms include the establishment of a single, unified IT infrastructure to "reduce the redundancies, incompatibilities, and waste of taxpayer money that our current system of multiple databases produces." This new IT infrastructure would include a single online database through which license applications could be received, reviewed, and processed. It would also integrate and consolidate lists of restricted end-users into a single database that would be accessible to both exporters and regulators. According to James Hursch, Director of the Defense Technology Security Administration, the Defense Department's new license-related IT system will likely be the basis of the new IT infrastructure.

Reform to be Implemented in Three Phases

The Administration wants the proposed reforms to be implemented in three phases over the course of the next year.³ The first two phases would not require legislative action.

In the first phase, the Administration would make improvements to the existing system and establish the structural and legislative framework necessary to create the new system. Specific proposals include:

- Control Lists: Refine, understand, and harmonize definitions to end jurisdiction confusion between the two lists and establish new independent control criteria to be used to screen items for control into a new tiered control list structure;
- Licensing: Implement regulatory improvements to streamline export control licensing processes and standardize policy and processes to increase efficiencies;
- Enforcement: Synchronize enforcement by creation of an Enforcement Fusion Center; and
- Information Technology: Determine enterprise-wide needs and begin the process to reduce confusion by creating a single Government point of entry for exporters.

In the second phase, the Administration would move towards implementation of the reformed export control system. Specific proposals include:

- 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 a mirrored control list system and fully implement licensing harmonization to allow export authorizations within each control tier to achieve a significant reduction in licensing requirements, consistent with national security considerations. Congressional notification, but not approval, will be required to remove munitions list controls or transfer items from the munitions list to the dual-use list;

- Enforcement: Expand compliance outreach and request additional Congressional appropriations for enhanced enforcement; and
- Information Technology: Transition toward a single electronic licensing system and request additional Congressional appropriations for enhanced IT infrastructure.

In the third phase, the Administration would complete the transition from the current export control system to the reformed system. Legislation will be required for this phase of the reforms. Specific proposals include:

- Control List: Merge the two lists into a single list and implement systematic process to keep the new list current;
- Licensing: Implement a single export control licensing agency;
- Enforcement: Consolidate certain enforcement activities into a Primary Enforcement Coordination Agency; and
- Information Technology: Implement a single, enterprise-wide IT system for both licensing and enforcement.

The Administration has made export control reforms a high legislative priority and has stated its desire to enact needed legislation by the end of 2010. However, prospects for achieving Congressional action before the 2010 midterm elections remain unclear. Impediments include multiple committee jurisdiction over proposed reforms (which means multiple committees undertaking reviews and action at various points in the legislative process), as well as a lingering view among many members of Congress that export control reforms, if they relax existing licensing requirements, may undermine U.S. national security. For example, Congressman Howard McKeon (R-CA), ranking member of the House Armed Services Committee, expressed concern about the Administration's proposals, stating that any needed change must yield "greater protection and monitoring of key defense items and technologies." Moreover, export control reform legislation could be delayed by the Administration's other legislative initiatives, such as Congressional action in the areas of financial regulation, climate change, and immigration reform, all of which are likely to be taken up and deliberated in the coming months.

For more information about the continuing Administration effort to reform the U.S. export control system, please contact [Ronald Meltzer](#) or [Barry Hurewitz](#) of WilmerHale's Export Control Group.

¹ Secretary of Defense Robert Gates, Remarks to Business Executives for National Security on Export Control Reform (April 20, 2010), *available at* www.bens.org/mis_support/Gates%20Export%20Speech%204-20-10.pdf.

² In addition to these proposed reforms, the Administration reiterated its longstanding call for the Senate to ratify defense cooperation treaties with the United Kingdom and Australia. *See, e.g.*, Deputy Secretary of Defense William J. Lynn, III, Remarks at the House of Commons All-Party

Parliamentary Group on Transatlantic Security (Jan. 25, 2010), *available at* www.defense.gov/speeches/speech.aspx?speechid=1412.

³ See White House Fact Sheet on the President's Export Control Reform Initiative (April 20, 2010), *available at* <https://obamawhitehouse.archives.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative>.

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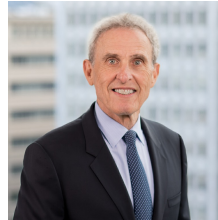


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