
Emerging Consensus Favors Major U.S. Export Control Reform, But Odds for Legislation Remain Unclear

2010-02-22

The United States currently imposes export controls and economic sanctions that impact a wide range of commercial and financial transactions, including exports, re-exports, technology transfers, and technical services. Many U.S. businesses and exporters have long criticized the current regulatory regime as being unduly complicated, inflexible, outdated, and ineffective in the modern global marketplace. They believe reform is necessary to ensure that U.S. companies can remain competitive in increasingly difficult economic times. Others have different priorities: They believe that U.S. export controls should not be eased in the face of pressing U.S. national security concerns and foreign policy challenges. Past efforts to overhaul the U.S. export control system have failed due to the clash of these opposing viewpoints.

During the first year of the Obama Administration, however, the White House, Congress, and relevant cabinet agencies have moved toward a consensus to implement significant regulatory reform. President Obama specified U.S. export control reform as a part of the National Export Initiative announced in the recent State of the Union Address. Measures to promote exports via such reform could emerge as an important part of the Administration's job creation agenda.

The following summary provides an overview of proposed reforms and suggests ways for the business and exporter communities to participate in such reform.

The Current System: A Regulatory Patchwork of Overlapping Compliance Requirements

The current export control system is a web of overlapping domestic and international regimes governed by a number of U.S. government agencies and rooted in Cold War-era political and economic structures. The Department of Commerce's Bureau of Industry and Security ("BIS") administers the Export Administration Regulations ("EAR") governing exports and domestic transfers of "dual use items" (goods, technology and software) that have both civilian and military applications. International transactions involving defense articles and services are governed by the International Traffic in Arms Regulations ("ITAR"), which 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") administers regulations to implement 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. This system is subject to jurisdictional confusion and inconsistency among the regulatory authorities.

Broad Review by the Interagency Task Force on Export Control Reform

The Obama Administration intends to implement comprehensive reform of the U.S. export control system. On August 13, 2009, the Administration took a first step in the reform process with the creation of an interagency task force to review the system of U.S. export regulation. The task force is chaired by members of the National Security Council and includes the Departments of Commerce, State, Defense, and Energy. The President requested the task force conduct a broad review of current export rules and recommend changes to create a more open and sensible export control system, including:

- An effective, open, and understandable methodology for determining whether a dual-use product should be controlled;
- A set of logical and accessible criteria to be used to decide whether a foreign country or entity is ineligible for U.S. exports;
- An interagency structure in which policy advice is efficiently provided on export license applications; and
- An enforcement mechanism to ensure corporate compliance with license restrictions and other export controls.

On January 29, 2010, the task force reported to the President and reportedly offered a list of options to reform the U.S. export control process, but did not recommend which options the Administration should implement.

In support of the task force's report, high-ranking Administration officials have met with leadership from both political parties and members of the House and Senate Armed Services Committees, the House Foreign Affairs Committee, and the Senate Banking Committee, where the Administration stressed the importance of U.S. export control reform as a national priority and bipartisan issue.

In coming weeks, the President will submit the report to cabinet agencies for further review and comment. It is expected that the public will have an opportunity to provide comments for the reform process early this year through a request for public comments issued by the Department of Commerce. Members of the business and exporter communities may use this comment period to provide input on the U.S. export control reform process.

Establishment of the National Export Initiative

The Administration has further expressed its intent to reform the U.S. export control process through its launch of the National Export Initiative ("NEI"), announced in the President's State of the Union Address on January 27, 2010. Under the NEI, the White House seeks to double the value of U.S. exports within five years. While many details of the NEI remain unclear, the President noted that U.S. export reform will be a part of this export promotion program.

Through the NEI, the White House has created the Export Promotion Cabinet ("EPC"). The EPC will include the Departments of State, Commerce, and Agriculture, U.S. Trade Representative, and Export-Import Bank. Each agency within the EPC must report to the President by early August on how that agency can implement steps to expand U.S. exports. While it is still unclear what role the EPC will play in the regulatory reform process, businesses and exporters should watch for each agency's report and what effect that such actions may have on proposed reforms.

Proposed BIS Initiatives

In addition to its leading role within the NEI and EPC, BIS is planning its own initiatives to further export control reform.

BIS plans to act on at least two significant new rules during spring 2010. The first rule would implement an October 2009 proposal to create a high technology, license-free zone in which companies could freely export some technologies to close allies within NATO and the EU. This rule would greatly facilitate cooperation among businesses and institutions within the license-free zone. The second rule would make final the proposed intra-company transfer license ("ICT") exception, which has been pending as a proposed rule since October 10, 2008. The proposed ICT exception would permit the license-free export of technology by U.S. companies to their overseas subsidiaries. This rule would allow U.S. businesses to avoid the cumbersome pre-existing licensing process and to facilitate intra-company projects involving the transfer of items subject to the EAR controls. Commerce projects the final rule to be promulgated in April 2010.

BIS and DDTC have also acknowledged longstanding complaints about their respective classification and commodity jurisdiction processes and are continuing work through interagency channels to streamline determinations in this area.

Deputy Assistant Secretary of Commerce Matthew Borman has testified that BIS is currently discussing possible ways to simplify the commodity jurisdiction process with DDTC and the Department of Defense. Similarly, Kevin Wolf, the newly-confirmed Assistant Secretary of Commerce for Export Administration, stated that a BIS priority will be to modernize and make more transparent its export licensing process.

Defense Department Support for Reform

The Department of Defense, historically an opponent of U.S. export control reform, has expressed

its support for reforming the current regulatory regime. Defense Secretary Robert Gates, a longtime supporter of U.S. export control reform, has indicated his desire to reformulate the system from "page one." Moreover, in its February 1, 2010 Quadrennial Defense Review ("QDR"), the Defense Department acknowledged that the current system poses a potential national security risk by degrading the competitiveness of key technological industries. The QDR noted that the Defense Department desires to work with others in the Administration and with Congress to implement needed change in U.S. export controls, thereby making the prospects for successful reform better today than in any other time in recent years.

Congressional Efforts Toward Reform

Congress's last significant legislative initiative in this area occurred in 1979, with passage of the Export Administration Act ("EAA").¹ Congress allowed the EAA to lapse in 2001, and the President has continued the EAA's export control system through an emergency power pursuant to the International Emergency Economic Powers Act.² Both the House Foreign Affairs Committee ("HFAC") and Senate Committee on Banking, Housing, and Urban Affairs have signaled plans to reintroduce U.S. export control reform legislation by early spring 2010.

The HFAC, chaired by Congressman Howard Berman (D-CA), has taken the lead in drafting a new EAA. In doing so, HFAC's Subcommittee on Terrorism, Non-Proliferation, and Trade held a December 9, 2009 hearing on export reform within the aerospace industry. On January 15, 2010, the HFAC also held a hearing in Palo Alto, CA on the impact of U.S. export controls within the business community, and it plans to hold at least two more hearings, in Washington, DC, on needed reforms.

By March 2010, the HFAC expects to introduce draft U.S. export control reform legislation. Such legislation is expected to create a broad, flexible charter for change, in line with the Administration's goal of comprehensive U.S. export control reform.

Although Republicans have indicated a willingness to work in a bipartisan manner to support such reform, it is unclear in the current political environment whether any substantive legislation will move before the midterm elections in November 2010. While support for reform is likely in the House, prospects for similar legislation are much less certain in the Senate.

Administration, Industry Groups Outline Models for Reform

To structure the proposed U.S. export control reform process, the Obama Administration is reportedly favoring a 2009 National Academy of Sciences panel report, *Beyond Fortress America*,³ as a template. Among the report's recommendations:

- Restructure the export control process to better balance national security and economic interests;
- Apply a one-year sunset provision to all items on export control lists, absent a

determination that exports of the item pose a continuing substantial risk to national security;

- Create an independent administrative agency to coordinate the licensing process; and
- Establish an independent export license appeals panel to adjudicate license request-related disputes.

Two industry associations, the Coalition for Security and Competitiveness ("CSC"), which is comprised of leading high-technology associations representing a broad cross-section of U.S. industry, and the Export Control Practitioners Group, also comprised of diverse industry associations, have submitted detailed recommendations to the White House. Their recommendations call for better communication among agencies involved in the licensing process, significant review of the Commerce Control List, and stronger relationships between those in industry and the government. These proposed reforms would not change the current system so much as address key regulatory impediments now in place (e.g., delayed licensing decisions and unnecessary controls). For these groups, effective change can occur more quickly within the current structure, and they do not want to wait until the overall system is reformed to obtain relief from burdensome regulations. The CSC recommendations also include reform of encryption exports, which remain subject to a special set of administrative review, reporting, and licensing requirements. These recommendations include further reducing review requirements for the export of products in which cryptography is not a central function of the item, mass marketed products, and technologies widely produced by foreign entities.

Other, narrowly focused proposals for reform are also under consideration. For example, Congress is considering the Strengthening America's Satellite Industry Act.⁴ This Act would grant to the President authority to determine whether satellite-related technology is controlled under the ITAR or the EAR. Another industry recommendation would focus on limited bilateral agreements with close allies to permit license-free exports to specific foreign end-users, significantly expanding BIS's use of Validated End User programs beyond their limited application to China and India.

WilmerHale Has Extensive Expertise on U.S. Export Control and Economic Sanctions Matters, Including Emerging Reform Proposals

Please contact [Barry Hurewitz](#) or [Ronald Meltzer](#) if you would like to discuss these developments further. For more information on WilmerHale's export control practice, please click [here](#).

¹ P.L. 96-72 (1979).

² P.L. 95-223 (1977), 50 U.S.C. § 1701 et seq. (2009).

³ NATIONAL ACADEMY OF SCIENCES, BEYOND FORTRESS AMERICA: NATIONAL SECURITY CONTROLS ON SCIENCE AND TECHNOLOGY IN A GLOBALIZED WORLD (2009), *available* [here](#).

Panel Co-Chair and former National Security Advisor Brent Scowcroft has met with members of Congress about U.S. export control reform on the Administration's behalf.

⁴ H.R. 3840, 111th Cong. (2009).

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