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## President Obama Announces Sweeping Changes in Export Control Regulation

2010-09-02

On August 31, 2010, the White House previewed a set of sweeping changes in U.S. export control policies, following a year-long interagency review that found the current system to be overly complicated and inefficient. The revised approach will set new standards for determining which items and technologies should be controlled, streamline export licensing requirements, and consolidate export control agencies' enforcement operations.

### Interagency Review Highlighted Long-Standing Problems with U.S. Export Controls

In announcing the regulatory reform initiative, the White House noted:<sup>1</sup>

- The current export control system implements two different control lists with fundamentally different approaches to defining whether items are controlled, administered by unrelated agencies. This has caused significant ambiguity, confusion and jurisdictional disputes, and delayed clear license determinations for months and, in some cases, years;
- The different licensing agencies apply different licensing policies and operate under unique procedures and definitions, leading to gaps in the system and disparate licensing requirements for nearly identical products;
- A multitude of agencies with overlapping and duplicative authorities currently enforce export controls, creating redundancies and jeopardizing one another's investigations; and
- The agencies operate on separate information systems, none of which is accessible to other licensing or enforcement agencies or compatible with the other systems, resulting in a lack of comprehensive information about items approved for export and, more significantly, items for which export authorization is denied.

This review led the Administration to recommend new export control criteria for exported items and universal guidelines for determining the need for an export license. The new regulatory initiative follows a broad outline issued earlier this year and a push for new export control legislation that has

progressed slowly in Congress. This new announcement reflects the Administration's intent to move forward with regulatory changes that can be made without Congressional action. It will likely take months to roll out the new regulations. For further information about the Administration's efforts to reform the U.S. export control system, see WilmerHale's [February 22, 2010](#) and [May 12, 2010](#) alerts.

### **New Export Control Criteria**

Under the revised regulations, agencies will apply new criteria, based on more objective and transparent rules, to determine which items and technologies should be controlled. These criteria will be used to revise both the State Department's U.S. Munitions List (USML) and the Commerce Department's Commerce Control List (CCL), so that they will both feature "tiers" that distinguish sensitive items requiring stricter controls from items raising less significant national security concerns. Further, the often blurred jurisdictional boundary between the State Department and the Commerce Department will be clarified to reduce uncertainty about which agency has jurisdiction over a particular item. Finally, both the USML and CCL will be structurally aligned using objective criteria to facilitate a future consolidation into a single list of controlled items.

Each list will be divided into three "tiers," delineated as follows:

- Highest-Tier – items that provide a critical military or intelligence advantage to the U.S. and are available almost exclusively from the U.S., or items for weapons of mass destruction;
- Middle-Tier – items that provide a substantial military or intelligence advantage to the U.S. and are available almost exclusively from the U.S. or multilateral partners and allies; and
- Lowest-Tier – items that provide a significant military or intelligence advantage but are available more broadly outside of the U.S.

### **Universal Guidelines for Imposing Export Licensing Requirements**

Once an item is placed into a tier, licensing requirements will be based upon a standardized policy and will be followed by all of the agencies with export control authority. This standardization is intended to provide more clarity to both industry and government personnel regarding the proper application of the export control specifications. These guidelines will be as follows:

- For highest-tier items, a license will generally be required for all destinations;
- For middle-tier items, many will be authorized for export to multilateral partners and allies under license exemptions or general authorizations;
- For lowest-tier items, a license will generally not be required;
- For items authorized to be exported without licenses, new measures will be imposed to

prevent unauthorized re-exports to unauthorized destinations; and

- The U.S. Government will continue its sanctions programs directed toward specific countries, such as the heightened export restrictions in place against Cuba, Iran, North Korea, Sudan, and Syria.

### **Improved Enforcement and Interagency Coordination**

To protect against unauthorized exports of sensitive items, the revised system will include additional end-use assurances against diversion by foreign consignees and will increase outreach and on-site visits both domestically and abroad. Additionally, an Export Enforcement Coordination Center will coordinate these enforcement efforts across all export agencies.

The export control agencies will transition to a single export control information system for reviewing applications, issuing licensing decisions, and ensuring improved interagency information sharing. The consolidation of enforcement operations and information systems is a preliminary step toward a possible future merger of the Treasury, State, and Commerce Departments' export functions into a new agency.

### **Businesses and Institutions Face an Extended Period of Regulatory Change**

The current export control framework is complex and highly technical, and the upcoming regulatory changes are intended to improve predictability for businesses and institutions by more clearly identifying sensitive items. This transition will require substantial changes in the regulations and practices of the export control agencies, and corresponding changes to the internal policies and procedures of every affected business and institution. Moreover, these changes will come amidst significantly increased enforcement activity, enhanced penalties, and continued movement by the European Union and other countries toward a multilateral regulatory structure, based on the system of controls that the U.S. is now changing.

These changes to the U.S. export control system will alter long-standing practices and expectations among businesses and institutions concerning agency jurisdiction, product and technology classifications, licensing requirements, processing of license applications, assurances sought from foreign customers, and assessments of enforcement risk. Thus, the price of a rationalized export control system will include a period of uncertainty for businesses and institutions, as unfamiliar new standards and policies are implemented.

WilmerHale's [Export Control Group](#) advises exporters on all aspects of export regulation, including public policy advice, jurisdictional determinations, product and technology classification, licensing, compliance practices, internal investigations, and enforcement.

<sup>1</sup>See White House Press Release, *President Obama Lays the Foundation for a New Export Control System To Strengthen National Security and the Competitiveness of Key U.S. Manufacturing and Technology Sectors* (August 30, 2010), available at [www.whitehouse.gov/the-press-office/2010/08/30/president-obama-lays-foundation-a-new-export-control-system-strengthen-n](http://www.whitehouse.gov/the-press-office/2010/08/30/president-obama-lays-foundation-a-new-export-control-system-strengthen-n).

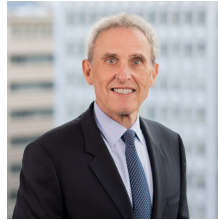
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