ADMINISTRATION PLANS SIGNIFICANT OVERHAUL OF EXPORT CONTROL LAWS

Recently, President Obama announced significant and important developments regarding the Administration's Export Control Reform Initiative. The Initiative, which began with a 2009 interagency review of the U.S. export control system, would substantially overhaul the U.S. export control regime. Currently, items and technical data are controlled based on their original design intent, with the strictest controls reserved for goods that were designed or modified for defense applications. The policy can produce anomalous results, with tires, plumbing fixtures and similar products controlled under the International Traffic in Arms Regulations ("ITAR") because they were designed or modified to be used with military vehicles or warships. The proposal would replace the current program with a risk-based scheme that regulates products based on the risk they would present to the national security if diverted to foreign enemies, regardless of original design intent. Many products are expected to drop off the control lists altogether.

Structure of New Export Control System

The Administration's initial review identified a number of shortcomings with the current export control system, including:

- the two different control lists —Commerce Control List ("CCL") and United States Munitions List ("USML") — have "fundamentally different approaches to defining controlled products." This has created a number of problems, including delay of license determinations;

- each of the three principal export regulatory agencies (BIS[1], DDTC[2], and OFAC[3]) applies its own policies and operate under its own procedures and definitions, creating unnecessary confusion and contradictory policies;

- a multitude of agencies enforce export controls, "creating redundancies and jeopardizing each other's cases;" and

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[1] The U. S. Commerce Department's Bureau of Industry and Security oversees the Export Administration Regulations ("EAR"), which control goods that were designed for commercial use, but have sensitive applications, including military applications These products are often referred to as "dual use" products.

[2] The Directorate of Defense Trade Controls, U.S. Department of State, oversees the ITAR, which controls goods and technical data designed for military applications.

[3] The Office of Foreign Assets Control at the U.S. Department of the Treasury, which (among other things) oversees exports with countries and persons subject to U.S. trade sanctions.

- each agency has its own IT system, which is not accessible to or compatible with other agency systems. As a consequence, the U.S. Government often does not know what it has approved for export and what it has denied.

The Administration also previewed the criteria and policies for export control that it plans to put in place. The stated goal of the reform is to build "higher walls around the export of our most sensitive items while allowing the export of less critical ones under less restrictive conditions." Proposed policies and changes include:

- items will be "tiered" based on the sensitivity of the item, the destination, the end use, and end users;

- the Commerce Department's Commerce Control List ("CCL") of dual use items and the ITAR's U. S. Munitions List ("USML") will be divided by a "bright line" to reduce uncertainty about when items are under DDTC's control and when they are under BIS's control;

- the CCL and USML will be structurally aligned so that they can potentially be combined into a single list of controlled items.

In order to accomplish these changes, the Administration plans to restructure both the USML and the CCL using objective technical parameters to categorize controlled items. As noted, the Administration wants to move away from subjective or design intent-based criteria, and believes that doing so will reduce jurisdictional disputes and ambiguities. Both the USML and CCL will be split into three tiers:

Tier 1.   Items of a _critical_ military or intelligence advantage to the United States and available almost exclusively from the United States, or items that are weapons of mass destruction. A license will generally be required for all destinations for items in this category.

Tier 2.   Items that provide a _substantial_ military or intelligence advantage to the United States and are available almost exclusively from the U.S.'s multilateral partners and Allies. Many of these items (and related technology) will be eligible for export to multilateral partners and Allies under license exemptions or exceptions.

Tier 3.   Items that provide a _significant_ military or intelligence advantage but are available more broadly. These items will have even broader license exemptions or exceptions.

Items authorized to be exported without licenses will be subject to new controls on re-export to prevent their diversion to unauthorized destinations. Sanction programs against specific countries (_e.g.,_ Cuba, Sudan) will continue. Of course, items that historically been exempt from licensing (_e.g.,_ the non-sensitive EAR 99 items) for exports to non-sanctioned countries will continue to be exempt.

In order to test the outcome of this tiered classification policy, the Administration has analyzed a single category on the USML — Category VII (Tanks and Military Vehicles) and the corresponding items on the Commerce Control List. Preliminary analysis indicated that, of the 12,000 items that were licensed in this category in 2009, 74% should be moved to the CCL or decontrolled altogether. Of the 26% that would remain on the USML, 18% were in the middle tier of control and 8% were in the lowest level. *None of the items were in the highest tier*.

The Administration's goal is to begin issuing proposed revisions to the control lists and licensing policies later in 2010.

Export Enforcement

The Administration also announced that it will strengthen its efforts to ensure that claimed end uses are in fact the end uses for which those products are exported and deployed. Those efforts will include increased outreach and site visits, increased compliance audits and additional enforcement actions. In addition, the Administration announced that it intends to create a Export Enforcement Coordination Center, which will coordinate the U.S. Government's enforcement efforts in and among the various departments and agencies.

Information Technology Systems

The Administration announced that it is transitioning to a single IT system to administer export controls. All departments and agencies involved in export control will have access to the system. This integration will allow agencies to see each others' licenses and applications and will also harmonize systems for exporters seeking licenses.

Kaye Scholer attorneys advise clients on all aspects of export control compliance, as well as matters concerning foreign acquisitions of U.S. defense and national security contractors and firms in the "critical infrastructure" sector. For additional information on the Export Control Initiative, please contact any member of Kaye Scholer's National Security practice group:

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