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U.S. export control reform: a view from across the pond



Are the planned U.S. export control reforms truly on track? Jason Poblete examines the 'four singularities', the key planks of the reform, and turns an eye to the likelihood of change against a background of some congressional scepticism.

Being a stranger in a foreign land can be exciting, exhilarating, and, yes, at times even dangerous. This is how an owner-client of a non-U.S. company once described compliance with U.S. trade security laws to me. He was not joking. He thought he would be dragged out in shackles by one of his senior employees for alleged violations of U.S. export control laws. That was many years ago. Since that time, enforcement has increased and the laws have changed, something that will continue to happen for some time as both technology and threats change and evolve.

As things stands today, there is nothing to fear from the U.S. legal and regulatory system. For as tough as it is – with jail time and fines – it is also a forgiving process if companies are diligent about setting up fulsome compliance and training programmes as well as systems throughout the company to identify issues before they arise. And, when problems do occur, and they will, a forward-looking trade security policy will focus on fixing the problem and, if necessary, voluntarily disclosing violations to the government in order to avail yourself of mitigating clauses in our laws.

A little context

Trade controls in some form or another have been a staple of U.S. foreign policy since before the founding of the Republic in 1776. We Americans like to protect our technological crown jewels, financial system, and know-how. The current U.S. trade security system is a by-product of policies, laws, and regulations dating back many years, some prior to World War II. Economic sanctions, customs, export controls, tariffs, and many other statutory and regulatory processes embody certain values and policy ideas that advance the national interest.

The more advanced the civilian and military technological know-how, the more likely we'll go about keeping it away from bad actors or competitors. It is so ingrained in our national psyche that, even though most moviegoers do not realize it, export controls are part of action thriller movie plots in many Hollywood blockbusters – the recently released *Mission Impossible 4: Ghost Protocol*, starring Tom Cruise, is chock full of export control and other trade security sub-plots.

During the last few years, the current export control laws and regulations regime in the United States has been undergoing a thorough review by both the private sector and the government. The previous Bush administration tried to initiate a reform



Prior to 2001, critics of U.S. export control laws argued that the system was mired in a Cold War-era mindset and that change was needed.

process but was sidetracked by the terrorist attacks of September 11, 2001. These attacks have ushered in a new era in U.S. national security law and policy. Yet it is only now, a decade later, that we are seriously grappling the daunting task of updating a facet of our trade security system, export controls.

Prior to 2001, critics of U.S. export control laws, including some foreign governments, argued that the system was mired in a Cold War-era mindset and that change was needed. Those on the opposite side of the debate argued that the ones advocating relaxing export controls were only concerned with opening foreign markets to U.S.

technology and, consequently, this could lead to our 'crown jewels' falling into the hands of our economic and military adversaries and, consequently, endangering U.S. national security. In a certain sense, the post 9-11 world has made updating these rules a national imperative so that we can successfully confront the challenges we face alongside our European and other allies.

Three phases, four singularities

If you spend enough time in Washington, DC, you'll learn that all ambitious policy reform efforts begin with a good speech. In our case, several, with the most important delivered on 20 April 2010 by then-Defense Secretary Robert Gates. The 'Four Singularities' speech outlined the Obama administration's four principle export control reform goals: (1) the creation of a single control list; (2) the creation of single licensing agency; (3) the creation of a single information technology ('IT') system; and (4) robust export control enforcement. Later that

summer, President Barack Obama weighed and urged stakeholders to engage in the process.

The process has three distinct phases: phases I and II will update and reform the current system within the existing agency structure – most of which can be completed via existing executive authorities. Phase III involves the reorganization of government and requires legislative action by the Congress. If the Congress agrees to do so, the new law would bring the 'four singularities' under one roof, with the creation of a new federal agency to oversee and enforce all of our export control laws and regulations.

Starting in August 2009, more than a dozen federal agencies and departments, including the departments of State, Defense, Commerce, Energy, Treasury, Justice and Homeland Security, among others, engaged in an inter-agency review of the export control system. This review process included a fulsome analysis of the legal and policy equities at play including: U.S. foreign policy, national security, human rights, regional stability, non-proliferation concerns, among others. They had a lot to work with so far as background materials are concerned: for example, the Government Accountability Office ("GAO") alone has completed more than 20 reports analyzing different facets of our export control system.

At the heart of this review, and of ongoing reform efforts, are the two principle export control lists: the United States Munitions List ("USML") that has 21 categories of defence articles and services; and the Commerce Control List ("CCL") with 10 categories of dual-use items. These two lists are administered by the two principal agencies dealing with export controls: the USML by the State Department, and the CCL by the Commerce Department.

So where are we?

With regards to the first singularity, a single export control list, during the past few months the Obama administration, especially officials at the Department of Defense, the Bureau of Industry and Security ("BIS") and Directorate of Defense Trade Controls ("DDTC") has done yeoman's work with this, the most technically challenging part of the reform process. Updating and consolidating the USML and the CCL is no easy task. As at the time of writing, the methodology has been published as to how they propose to go about doing this and the government has requested input from anyone interested in contributing to the process. I'll discuss this facet of reform in more detail.

With regards to the enforcement singularity, on 9 November 2010, pursuant to executive order 13558, President Obama announced the creation of the Export Enforcement Coordination Center ("E2C2") that is housed at the Department of Homeland Security where our Customs services are located. E2C2 brought together officials from the following

departments: State, Treasury, Defense, Justice, Commerce, Energy, and Homeland Security as well as elements of the Intelligence Community. Its creation was lauded as an important first step before 'moving to harmonizing business practices and processes across the export enforcement agencies' and the creation of a single licensing agency that will include a single IT system. Opening its doors four months ago, it was billed as a key element of implementing 'higher walls' and better enforcement.

The creation of a single licensing agency requires statutory authorization from our Congress. This is not likely anytime soon. Budgetary considerations as well as ideological disagreement between the Republicans and Democrats about growing the size of the federal government will likely mire this singularity in Potomac River muck for some time.

Creating a single controls list

In his pivotal April 2010 speech, Secretary Gates focused on strengthening national security with an export control system that allows for (1) more interoperability with NATO and close allies; (2) an enhanced industrial base by reducing incentives on foreign companies to avoid or design-out U.S. original content; and (3) national resources more focused on controlling or prohibiting, depending on the case, the items that provide at least a significant military or



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intelligence advantage to our country (e.g., 'higher [regulatory] walls' for the most important items that need controlling).

Frankly, even if nothing else gets done, work to date on updating the USML and CCL has been positive. Without it, the concept of 'higher walls' throughout the export control regime would be a wall in name only. To date, the administration has reviewed all of the 21 USML categories and their corresponding CCL cousins. You can

License exception STA

License exception STA would be available for the export of 600 series end items for ultimate government end use in of the STA-36 countries. Export of such items to an STA-36 country would be permitted to government and non-government entities as long as the item at issue at the time of export, re-export, or in-country transfer is ultimately destined for end use by a specified government agency (including armed forces and police).

review each proposed revision that has been released at <http://export.gov/ecr/index.asp>. This exercise has forced stakeholders on all sides of this issue to seriously think about trade security system in a new world order.

For practitioners, an important development is the proposed rule of a single definition of 'specially designed' that, if approved, would be used in both the EAR (Export Administration Regulations) and the ITAR (International Traffic in Arms Regulations). The goal is to avoid using design-intent-based controls for generic items, among other things. This will not be possible for all items on the USML, but it will be possible to create a positive list of thousands of parts, components, accessories, and attachments that warrant some degree of control, without it. If they succeed, 'specially designed' will not be

completely eliminated but should be used much more sparingly.

Other significant reforms include a revised encryption rule that was published in the summer of 2010, as well as a new Strategic Trade Authorization ("STA") licence exception under the EAR, published as a final rule on 16 June 2011. The STA exception facilitates the export, re-export, and in-country transfer of specified items to our allies and other partners – destinations that pose relatively low

Further reading

'Beyond reach? How to develop ITAR-free systems' by Steven Brotherton, *WorldECR* issue 1.

'Early steps toward a streamlined export control system' by Curt Dombek, Thad McBride and Reid Whitten, *WorldECR* issue 8.

risk. This exception is only relevant for transactions for which a licence is required.

While the STA and other reform accomplishments are important, the 'guts' of the export control reform process remains the effort underway to move an unprecedented number of items from the USML to the CCL. If they succeed, it will result in the largest delisting of items from the USML in modern times. In order for the long-term vision laid out in the singularities speech to really take hold and for our allies see a real and tangible benefit from it, this review process needs to be completed and implemented.

Where is the single list you ask? In theory, we are en-route to it. In the meantime, there will be arguably three lists: the USML, the CCL, and a new '600 series' under the CCL, a.k.a. Commerce Munitions List, or 'CML' for short. How is that for alphabet soup? It is not all that complicated really. The CML approach is an important step toward creating a single list that uses objective parameters rather than design-intent, other open-ended standards, or the dreaded 'catch-all' approach. The Defense Department has taken the lead in determining what items should or should not be controlled in this fashion, with significant input from other key federal agencies.

The proposed CML is not really a new list at all but a set of export control classification numbers ('ECCNs') on the CCL. It will include the USML items as well as other Wassenaar Arrangement Munitions List ('WAML') items that have been subject to the CCL for close to two decades. Using the CCL in this way is not revolutionary, either. It dusts off a part of the CCL that allows for control of commodities, technology, software, and some services that require some sort of global control, even if these things happen to be military in nature.

The Obama administration argues that moving these 'militarily less'

significant items to the CCL should solve some of the more pressing goals of the reform effort including: (1) Immediate relief from USML controls on non-military end items and militarily less significant parts and components; (2) the collateral ITAR-specific consequences of these controls such as the need for registration and related ITAR requirements; (3) the process to accomplish the already agreed upon transfer of these items to the CCL to allow for more flexible controls; and (4) the collateral consequences of the 'see-through' rule and the 'ITAR-free' issues that create incentives for foreign companies to purchase ITAR-controlled U.S. origin items. (See 'Further reading'.)

One possible wrinkle

To date, the Obama administration has been working on changes based on executive or discretionary authority granted to it under various laws including the Arms Export Control Act ('AECA'), the International Economic Emergency Powers Act ('IEEPA') and the EAR, but soon, it will need to secure congressional support for matters such as moving items from the USML to a CML, among others.

Under existing laws, the President can decontrol items that 'no longer warrant export controls under [the Arms Export Control Act],' however, the Congress needs 30 days to review these changes. The key congressional committees and members of Congress can say nothing, and the process continues. However, in theory, if the Congress disagrees, it could create legislative roadblocks and try to derail work to date. What will happen? To early too tell. However, in a recent speech in Washington, DC before defence industry representatives, one very senior Democratic staffer said the single agency would 'never see the light of day' and expressed serious concerns about the moving of so many items from the USML to the CCL/CML.

In a 22 December 2011 letter to the Obama administration from the chairman of the House Committee on Foreign Affairs, Rep. Ileana Ros-Lehtinen (R-Fla.) and the Democratic ranking member, Rep. Howard Berman (D-Calif.), the congressmen said that they 'remain committed' to reforms of the export controls systems, but expressed scepticism about the proposed CML process and asked that the Obama team work with them to

arrive at a legislative agreement as a basis for further reform. Over in the Senate, they are open to reform but there appears to be even less support for some of these recently announced efforts.

While the Obama team has been briefing congressional offices for some time, it is now beginning to deal with the Congress in a more robust manner. It has also reportedly made progress in other, less-publicized, areas of this effort, such as the development of a single form for all export control-related transactions with the U.S. government as well as the development of a technology platform to process the single application. Efforts continue in earnest to complete work on a tiered CCL as well as addressing compliance burdens unrelated to the lists and end-use controls. Finally, work is also ongoing for completing a simplification of the EAR and the ITAR by the end of 2012 to set the stage for a final harmonization of the lists.

How will this all turn out? A great deal hinges on whether Congress and the Obama team can reach agreement on key items such as the CML process and balancing the reporting requirements as well as Congress's role in arms sales and controls with those of the executive. Then there is that pesky little detail no one in this town will talk about, the 2012 elections. This latter matter tends to create political pressures for acts that may or may not lend themselves to moving product during the first half of the year. Stay tuned. There is much more to come.

Jason Ian Poblete is a lawyer and political commentator in Washington, DC. His firm, Poblete Tamargo LLP, specializes in federal regulatory and public policy counsel in various disciplines of national security law. He was selected several times by the editors of Roll Call newspaper as one of the '50 Most Influential Staffers on Capitol Hill and is currently serving as Vice-Chair to the National Security Committee of the American Bar Association Section of International Law.

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