

Next Steps for Export Control Reform: Options for the Trump Administration

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The United States has a complex system of export control laws that regulates the trade of goods, services, and technology. This system is mainly comprised of the International Traffic in Arms Regulations (including the U.S. Munitions List) and the Export Administration Regulations (including the Commerce Control List). Together, these regulatory schemes control the export of anything from pencils to stealth fighter aircraft.

The last two administrations undertook specific measures to reform these controls. For instance, President Bush took more practical steps to reform the system by improving license processing times and moving to an electronic filing system. By contrast, President Obama took a more invasive approach that – although nominally undertaken to simplify the system – has substantially increased its complexity by spawning more regulations and with conflicting guidance. In particular, those reforms were to drastically revise the two main control lists but has instead effectively resulted in creating a third complicated control list: “the 600 series.” The Obama reforms have been so substantial that they remain incomplete even though they have been underway since 2010, and officials admit they will continue indefinitely.

With reform incomplete and the regulatory schemes now even more complex than before, the new Trump administration will have to deal with repairing this broken system. This is especially important because exporting is vital to the economy and is a major engine of growth and job creation. It is also an area where the government does not even has a tendency to deny export licenses. Indeed, the government approves the vast majority (usually around 95%) of export requests. Yet, despite this overwhelming approval, the U.S. has a bifurcated export control system with overly complicated regulations that rivals the complexity of tax laws.

In addressing the incomplete efforts of the Obama administration, it presents an opportunity for the new Trump administration to take a different approach to realistically create a better and less complicated system. Some of these possible approaches are discussed below.

Move the U.S. Munitions List to the Commerce Department by Executive Order

One of the key pillars of President Obama’s Export Control Reform initiative was to create a single licensing agency. However, it took the position that this step would require legislation. This is incorrect. The President can create a single licensing agency simply through an Executive Order by delegating its authority under the Arms Export Control Act to the Commerce Department. More precisely, the President would only have to amend paragraph (n) in Executive Order 11958.

In so doing, the Commerce Department would then regulate both the U.S. Munitions List and Commerce Control List under the Export Administration Regulations. While items on the U.S. Munitions List would still be subject to certain special requirements imposed by the Arms Export Control Act – such as registration, brokering, and Congressional notification – it does not require any separate regulatory regime like the International Traffic in Arms Regulations. Thus, the current highly contentious effort to harmonize definitions and terms between State and Commerce would be moot.

By moving to a single licensing agency, it removes agency turf wars over jurisdictional matters and increasingly conflicting regulatory interpretations, significantly reduces the number of regulations, and promotes trade through a more simplified and predictable system overseen by one federal agency rather than two.

Remove Firearms and Ammunition from the U.S. Munitions List

Another incomplete reform effort under President Obama has been to remove firearms and ammunition – the types that are commonly available to the public – from the U.S. Munitions List. The Obama administration cited domestic gun violence for the continuous delay in removing these items for export purposes, even though they were the first items that were readied for removal back in 2011.

While the Obama administration was concerned over the optics of removing firearms from the U.S. Munitions List – where they would still remain highly controlled for export by the Commerce Department – it is unlikely this concern is real since the change in law does not have any effect on domestic gun ownership or transfers. Growing tired of the delay, Congress has also recently proposed legislation that would force a transfer.

Rather than have Congress implement the change, the Trump administration should complete the process that was already undertaken in 2011 and is thus ready for a proposed rule that could be finalized by the end of 2017. It would also mean, seven years into these efforts, that all twenty-one categories on the U.S. Munitions List have at least went through the initial revisions under Export Control Reform.

Improve License Processing Times

Finally, the Trump administration should focus its efforts on more practical elements, such as the licensing process times that were initially reviewed by President Bush in NSPD-56. Given that the vast majority of licenses are approved, reforms should be made with an eye on shortening the duration to obtain a license. The current processing time is around 45 days – which in the world of international business transactions can be a death sentence, and is a discouraging timeframe to both potential exporters and their overseas customers.

The government certainly has an interest in ensuring that certain transactions do not affect foreign policy or national security interests. But not every transaction, even ones that involve items on the U.S. Munitions List, raises these concerns. This is because there are many situations where the country of destination, end-use, or end-user (or a combination thereof) has already been vetted by the government and can thus receive approval in a more timely fashion. This is especially the case where the transaction involves an export to an allied military for use in operations that support the U.S. military. But today even those transactions can be (and have been) needlessly delayed indefinitely.

Any real effort to reform the system needs to incorporate the practical elements of license approval times, and focus the government’s review on transactions that are of actual concern.

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