

Executive Order Creates Export Enforcement Coordination Center

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On November 9, President Obama signed Executive Order 13558 requiring the Secretary of Homeland Security to create an interagency “Federal Export Enforcement Coordination Center” (Center). As its name implies, the Center will coordinate export enforcement activities currently administered by various federal agencies. Once the Center is in place, the days of FBI agents, Treasury agents, and Immigration and Customs Enforcement agents separately showing up on a company’s doorstep to investigate the same export incident will be a thing of the past. More important, creation of the Center is the Obama administration’s first transparent step toward fundamental reform of the export control system.

Noting that export controls are critical to achieving national security and foreign policy goals, the president used the Executive Order to declare that executive departments and agencies must coordinate their efforts to enforce U.S. export control laws. The Center will serve as the primary forum through which executive departments and agencies will coordinate and enhance their export control enforcement efforts and identify and resolve conflicts; this will include the activities of the U.S. Departments of State, Defense, Commerce, Energy, and Homeland Security.

In advance of the Executive Order, the White House announced there would be changes in “what we [the United States] control, how we control it, how we enforce those controls, and how we manage our controls.” In a August 30, 2010 press release, the administration introduced the creation of the Center as part of the foundation for a new export control system. The new system, according to the White House, will strengthen national security and the competitiveness of key U.S. manufacturing and technology sectors. In the release, the White House admitted the current export control system is overly complicated, contains many redundancies, and, because it tries to protect too much, challenges the country’s ability to focus efforts on its most critical security priorities.

The press release identified three reasons for the gaps in the current system: (1) the different licensing agencies each apply their own policies separate from one another; (2) the many agencies that enforce export control have overlapping and duplicate authority, creating redundancies and jeopardizing each other’s cases; and (3) all of the enforcement agencies use separate information technology (IT) systems, creating a barrier to the efficient sharing of information. Many of these issues were documented in a 2006 GAO report (Export Controls—Challenges Exist in Enforcement of an Inherently Complex System, GAO-07-265), which emphasized the need to improve coordination and cooperation among export enforcement agencies.

Businesses engaged in exporting products and technologies are likely to be affected by the export

control reforms. The approach outlined by the president will apply new criteria and a common set of policies for agencies to use when determining whether an export license is required. The lists of munitions and dual-use items that are controlled for export by the State Department and the Commerce Department, respectively, will be revised to create a “bright line” clarification of jurisdiction. Then, a tiered approach will be established to distinguish between the types of items that will be subject to stricter or more permissive levels of control, depending on the destination, end use, and end user.

While it is anticipated that a single list of items that are controlled for export will eventually be created, for now, the two lists (munitions and commerce control) will remain, each being divided into three tiers. The highest tier will be reserved for those items that provide a critical military or intelligence advantage to the United States, are available almost exclusively from the United States, or are weapons of mass destruction. The second tier will be items of substantial military advantage to the United States that are available almost exclusively from our allies and multilateral partners. The lowest tier will be for items that provide a significant military or intelligence advantage but are available more broadly.

The reformed licensing policies, aligned with the tiered classifications, will result in a broader class of items that can be exported without a license. While a license will generally be required for an item in the highest tier, regardless of its destination, an item in the second tier exported to an ally or multilateral partner may be exempt or subject to a general authorization. The administration estimates that about 74% of the 12,000 items licensed in 2009 in the munitions list will either be moved to the commerce control list or will be decontrolled altogether. However, while group of items that require no license will be broader, additional end-use agreements will be required to better protect against the retransfer to unauthorized users.

At the same time, the Center will enable agencies to focus on and strengthen enforcement efforts, including placing greater barriers around the export of the most sensitive items.

The administration announced that its goal is to begin issuing proposed revisions to the control lists and licensing policies in early December 2010. The administration also stated it intends to work with Congress and the export control community to consolidate export control activities under a single licensing agency and single export enforcement coordination agency, but offered no time line for these more sweeping changes.

For further information about export enforcement, or export or import regulations, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.

Alex S. Polonsky	202.739.5830	apolonsky@morganlewis.com
Mark N. Bravin	202.739.5231	mbravin@morganlewis.com
John E. Matthews	202.739.5524	jmatthews@morganlewis.com
Ronald J. Tenpas	202.739.5435	rtenpas@morganlewis.com

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