



Trade Compliance Issues in the New Administration, Part I: Export/Sanctions Laws

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A change in administration will likely bring changes in export/sanctions laws and compliance obligations. This will include both last minute amendments by the outgoing administration and initiatives by the new President. Regardless of your politics, these will most likely affect your company and you should use care to stay abreast of these developments. Here are a number of issues to watch during this transition.

A. Outgoing Administration. It is unlikely that there will be any new policy initiatives involving export controls between now and January 20. However there may be a number of last minute final amendments to close out initiatives started earlier in the year. For example:

- ECR and Harmonization of EAR/ITAR. BIS has issued final regulations for most of the important changes to the Export Administration Regulations (“EAR”) under export control reform (“ECR”). However, the Directorate of Defense Trade Controls (“DDTC”) still has a number of proposed amendments waiting to be finalized under the International Traffic In Arms Regulations (“ITAR”). These include revisions to the definition of “defense services” under ITAR §120.9, amendment of the “by and for” license exemption under ITAR §126.4 and amendments to the definition of “export” involving end-to-end encryption and cloud computing. These will be significant amendments to ITAR.
- Two Year Reviews. Similarly, it is expected that both agencies will continue the two year reviews of items on the U.S. Munitions List (“USML”) started under ECR. In particular, following the recent reviews of Categories VIII and XIX, the next categories up for review include Categories VI^[1] VII, ^[2] XIII, ^[3] XV, ^[4] and others. This process will continue along during the rest of this year and throughout 2017.
- “Clean-Up” of Individual Country Laws. The Office of Foreign Assets Control (“OFAC”) has been amending miscellaneous sanctions programs in what appears to be a last minute clean-up of loose ends. This includes repeal of the Burma and Cote d’Ivoire sanctions and updates to the Belarus, Zimbabwe and other sanctions programs. DDTC has made similar “clean-up” amendments to the §126.1 countries, and BIS has made corresponding changes to the Vietnam, Liberia, Sri Lanka

and Cote d'Ivoire embargoes. It is possible that there could be a few more "clean-up" changes within the next nine weeks.

B. New Administration. While it is too early to predict with certainty regarding changes in law, here are a number of hot areas to watch:

- Russia/Ukraine. If there is an improvement in U.S. relations with Russia, look for possible roll-back of the Russia sanctions under the OFAC Ukraine/Russia-Related sanctions program, BIS's Russian Industry Section Sanctions and related Russia EAR restrictions and the ITAR policy of denial for Russia, as well as a possible repeal of the embargo involving Crimea.
- Iran. Candidate Trump has repeatedly threatened to re-negotiate the Iran agreement under the Joint Comprehensive Plan of Action ("JCPOA"). If things deteriorate with Iran, look for a possible "snap-back" of some or all of the recent JCPOA sanctions relief. This will mostly affect the secondary sanction on foreign companies and banks, but could also affect U.S. firms involving civil aircraft and parts, under General License H and importers of specialized Iranian products.
- USML Categories I, II and III. Export control practitioners are well aware of the difficult political issues surrounding the transfer of items in USML Categories I, II and III (firearms, ammunitions and accessories) to the Commerce Control List ("CCL") under ECR. This is due to the thorny issues involving gun control, first amendment and similar concerns. Following the recent election, the political dynamic around this issue has changed radically in light of Trump's strong vocal support for gun owners during the campaign. If the Trump administration is looking for a way to quickly and easily score points with campaign supporters, he can transfer jurisdiction of firearms from the USML to the CCL – this can happen within the first 100 days of the inauguration.
- Cuba. The Trump administration could decide to roll back certain of the recent Obama amendments involving Cuba, repealing recent amendments by OFAC and BIS. Alternatively such amendments could come from a reinvigorated Republican Congress over the course of the next year.
- N. Korea. N. Korea may be the first real foreign policy test for the new administration. If President Kim Jong-un provokes President Trump, look for expanded N. Korea sanctions – this will most likely affect secondary sanctions on foreign companies such as additional sanctions on Chinese banks and other Chinese firms. If China feels threatened by extraterritorial U.S. sanctions, this could result in retaliatory measures by China.
- Cyber-Related Sanctions Under 31 CFR Part 578. In light of recent increases in cyber-attacks by foreign governments on U.S. companies, political organizations and government agencies (including by N. Korea, China, Iran and Russia), the new administration could impose sanctions against any of these governments under the newly authorized Cyber-Related Sanctions at 31 CFR Part 578. In addition, the imposition of U.S. sanctions on China under Part 578 in response to China's ongoing cyber-attacks on U.S. firms could provide President Trump with significant leverage in dealing with China on other issues such as imports of Chinese products.
- Expanded Military Deployments. Candidate Trump repeatedly promised to beef up the U.S. military and be more assertive with foreign adversaries. It is possible that the U.S. could be embroiled in a major military initiative within the first year after the election, involving ISIL, Syria,

Libya, N. Korea, Iran or any of a number of other hot spots. Military build-up and deployments involve significant U.S. contractor support, and this triggers the usual increase of export compliance requirements including ITAR registrations, TAA's, export licenses, reexport/retransfer authorizations and related compliance activities. Following ECR, requirements will apply under the EAR as well. Companies should be ready if these requirements arise.

- Enforcement Climate. Will enforcement of the U.S. export laws increase or decrease under the Trump administration? Will the Yates policy of holding individuals personally liable for corporate violations continue or be rescinded? Candidate Trump espoused two separate, and possibly contradictory, themes during the campaign: first to get tough on crime and “drain the swamp” of criminal wrongdoing, and second to roll back regulation on businesses. The new administration could advance the traditional Republican view of limiting enforcement of regulatory violations, at least for corporate wrongdoing. Alternatively, it could take a strong law and order position for strict enforcement of U.S. laws, including export laws. (This could also extend to related areas including the Foreign Corrupt Practices Act, False Claims Act, Customs/import laws, etc.) At this point it is too early to tell. Much will depend on who is appointed as the new Attorney General and which Justice Department policies the new AG keeps or repeals (including the Yates policy). A lot can happen on this issue within the next few weeks, so pay particular attention to this one.

Whatever your politics, change will be coming, and possibly quickly. This will mean amendments to the law and changes in compliance procedures. Compliance professionals and corporate counsel should be vigilant in the coming months.

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[\[1\]](#) Surface Vessels.

[\[2\]](#) Ground Vehicles.

[\[3\]](#) Materials and Miscellaneous Articles.

[\[4\]](#) Submersible Vessels.

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