

Ten-year view: Export controls in 2031



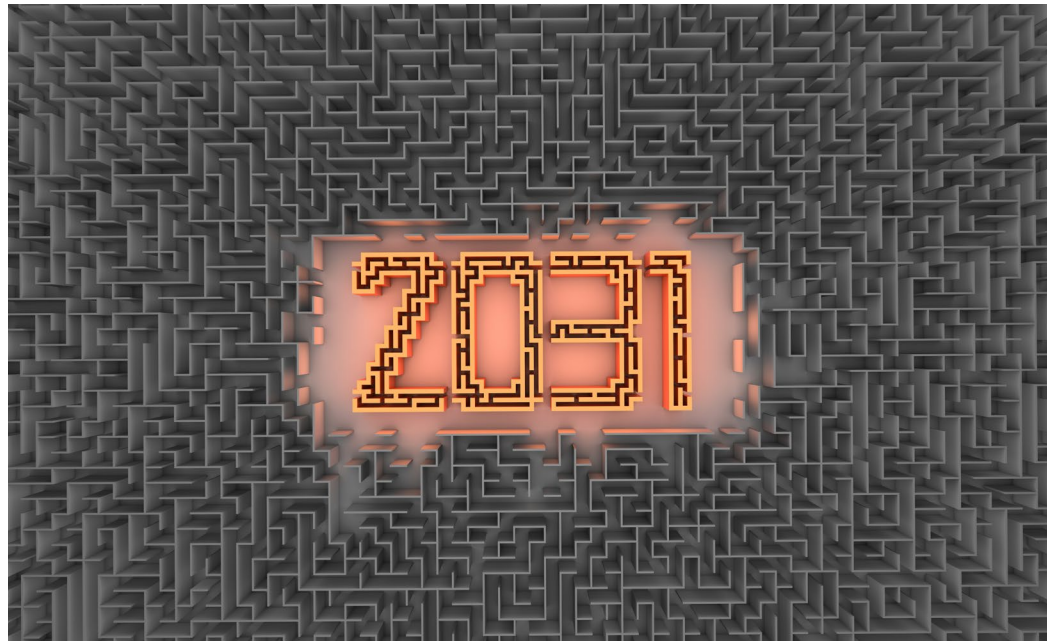
Prior to becoming a partner in the law firm Akin Gump, Kevin Wolf served, between 2010 and 2017, as Assistant Secretary for Export Administration with the US Department of Commerce's Bureau of Industry and Security, where he oversaw the process that saw some items removed from the US Military List and placed on the Commerce Control List – answering the call to put 'a higher fence around a smaller yard'. We asked the 'Architect of Export Control Reform': What will the export control system look like, when Issue 200 of *WorldECR* goes to press?

The most likely answer is that the system and the controls will be very similar to those that exist today. This is so because significant changes to complex systems involving serious issues where reasonable people can disagree are hard to accomplish. But for the fundamental changes to the rules governing less sensitive military items and commercial space items that occurred as a result of the Obama administration's export control reform effort, the system now is basically the same as it was ten, 20, and 30 years ago.

There will, for example, still be a Directorate of Defense Trade Controls working under the authority of a reorganised and occasionally modified International Traffic in Arms Regulations ('ITAR') that identifies items of significant military or intelligence utility. There will still be a Bureau of Industry and Security ('BIS') implementing the more frequently updated Export Administration Regulations ('EAR') to control most other items, end-uses, and end-users for national security or foreign policy reasons.

Given the trends and the pace of change in this area, the following are my optimistic predictions for what will be relatively incremental, but still important changes in place by 2031:

- BIS will still be implementing a lightly amended Export Control Reform Act of 2018. In particular, the identification and control of emerging and foundational technologies that do not have a direct relationship to military or weapons of mass destruction ('WMD')



applications, but that nonetheless warrant control for broader-than-traditional national security reasons, will be a normal part of the system.

- The definition of 'national security' in this context will more clearly factor in economic security issues to respond to commercial technology acquisition efforts motivated by Chinese, Russian, and governments' state policies to achieve strategic dominance in key commercial sectors and also their civil-military fusion policies. Although the precise policy definition for such controls will still be somewhat fuzzy and subject to constant debate, the focus of such new economic security controls will be on the types of items that enable technological parity in critical technologies

with competitors in allied countries.

- A significant number of such controls will have been implemented during the first Biden administration as a result of plurilateral agreements with close allies that are producer nations in the information and communication technologies ('ICT') of concern, primarily those associated with or dependent upon semiconductors. This will reduce, but not eliminate, the need for novel extraterritorial controls over foreign-made commercial items. Although the controls will be more effective and less unilateral, multinational compliance obligations will be more complex because they are not limited just to the regime controls and exports to end-users and uses of WMD or conventional military application concerns.
- The four primary multilateral regimes will still focus their efforts on regulating items pertaining to WMDs and conventional military items. Although not required, close allies will be much more willing to share information about particular licensing decisions and align licensing policies on similar items with respect to China and other destinations of concern. There will also be much more regular sharing of information to help coordinate multilateral enforcement efforts associated with regime-controlled items, although the allies will still lag behind the US efforts in this regard.
- The EAR will control significantly more commercial ICT items for human rights-related reasons. In addition, there will be more controls over exports

- of unlisted items if there is knowledge that they will be for end-uses or end-users of human rights-related concerns. Such controls will be adopted unilaterally at first, but will eventually gain acceptance by our close allies as well. They will not completely align though, which will create calls for the creation of a new export control regime or other arrangement to align human rights-related export controls among allies. The knowledge-based end-use and end-user controls will require more due diligence of exporters with respect to the activities of their customers.
- BIS and the other agencies will have hired significantly more technical and economic experts in the emerging and foundational technology areas. As a result, the pace of proposed changes to the controls will improve, but will still lag somewhat behind the speed of technology evolution in industry. This is inherent in any technology control system. Another benefit of the increased expertise in both the commercial technologies and supply chains will be that the export control agencies will

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have more effective systems for determining whether controls imposed for national security reasons are effective and thus do not do more harm than good.

- The export control system will be used to regulate the export of sensitive personal data similar to the way such data is regulated when involved in a foreign direct investment subject to the jurisdiction of the Committee on Foreign Investment in the United States ('CFIUS').
- The agencies will continue to have strong leaders who understand that the key to an effective system without unnecessary collateral harm to US industry is that exporters are able to abide by and rely upon the words actually written in the regulations. If a policy issue warrants a change in controls, it will be done through a regular order process of proposed amendments and publication in the regulations rather than through a series of individual jurisdictional and classification determinations inconsistent with the words in the regulations.
- The ITAR and the EAR will more aggressively regulate services by US persons in support of foreign intelligence agencies regardless of the underlying items used in connection with such services.
- The rules governing exports under foreign military sales programmes to close allies will align with those of direct commercial sales to the same allies. Defence trade in the parts and components supply chain with close allies will become even more streamlined.
- The demand for qualified export control and sanctions compliance personnel within companies will be higher than ever.
- Huawei will still be on the Entity List.

Finally, I will still be advocating for a single, independent export control agency operating under a single set of regulations that govern all US export controls. There will be a single licensing portal for industry to use that feeds directly into a single, secure government IT system.

The purpose of the EAR, the ITAR, and other export controls is the same, which is to regulate the export, reexport, and transfer of commodities, software, technology, and some types of services to specific destinations, end-uses, and end-users to accomplish national security and foreign policy, including human rights, purposes. The policy differences between sensitive commercial technologies and sensitive military technologies are nothing like what they were when the current system was created decades ago. A

technology of concern is a technology of concern.

There should be one agency expert in administering such a licensing system that makes transparent and quick decisions based on the systematic input under clear standards from the national security, foreign

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policy, and economic security experts in the respective agencies. Moreover, the current variation in systems, regulations, forms, definitions, policies, and approaches of the US government agencies that implement these objectives just impose unnecessary administrative burdens on exporters with no gain to national security or foreign policy objectives of the controls.

With all the likely additions of novel controls described above, complexity is certain to increase. Thus, the government should look for every opportunity to simplify and streamline the system itself in order to enhance effectiveness and compliance, particularly for small- and medium-sized exporters.

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