
U.S. Congress Authorizes Satellite Export Control Reform

By Nancy A. Fischer and Aaron R. Hutman

The National Defense Authorization Act for Fiscal Year 2013 (“NDAA 2013”) clears the path for major revisions to U.S. satellite-export-control rules in the coming year. The Departments of State, Defense and Commerce have proposed and are poised to implement a transfer of the export control of a significant portion of U.S. commercial communications satellites, components, technology and services from the International Traffic in Arms Regulations (“ITAR”) to the Export Administration Regulations (“EAR”) overseen by the Commerce Department for dual-use items and technology. The move is expected to simplify the controls on satellite-related exports to our allies and enhance the competitiveness of the U.S. satellite and aerospace industries in this market segment.

Since 1999, statutory restrictions under Section 1513 of the Strom Thurmond National Defense Authorization Act have required all U.S. satellites and related items to be included on the U.S. Munitions List (“USML”) under ITAR control. This 1999 legislation followed certain controversial transfers of satellite launch-analysis technology to Chinese parties in the late 1990’s when U.S. commercial communications satellites were regulated under the EAR. Since that time commercial-satellite technology and services have become increasingly available from non-U.S. sources. Foreign producers, providers and customers have designed their own articles or decided not to buy satellites and related components from U.S. sources due at least in part to the regulatory requirements of the ITAR while other nations regulated commercial satellites as dual-use items.

The NDAA 2013 was passed on December 21, 2012 and, pending Presidential signature, takes several steps to facilitate satellite export control reform while maintaining certain limitations and reporting requirements –

- Repeals Section 1513 of the Strom Thurmond National Defense Authorization Act.

- Requests that the President make a determination as to whether removal of satellites and related items from the USML is in the national security interest of the United States.
- Provides that no satellite or related item transferred to EAR control may be exported to China, North Korea, a country designated as a state sponsor of terrorism, or any entity or person acting for or on behalf of such countries or nationals.
- Indicates a presumption of denial of authorization to export to any country subject to a comprehensive U.S. arms embargo.
- Requires the President to “provide for end-use monitoring of such satellites and related items” that become subject to the EAR and to make a report to Congress within 120 days.

The next step will be for the executive branch to implement satellite export control reform. In April 2012, the Departments of Defense and State (with the support of other key government stakeholders) made a report to Congress under Section 1248 of the 2010 NDAA recommending concrete steps to move certain satellites, related items and technology from the ITAR’s USML to the EAR’s Commerce Control List. This “Section 1248 Report” is expected to form the basis of reform and the NDAA 2013 requests that the President provide a report to Congress identifying the differences between the final proposed changes and the Section 1248 Report recommendations.

Key issues in the implementation process will include – (a) what satellites and related items will ultimately be transferred to EAR control; (b) how will Commerce control end-use and retransfer, as well as apply de-minimis rules; (c) what license exceptions will be available for commercial satellites; (d) what technical data and defense services will be covered under the definition of “technology” and what new classifications may be created to control such technology; (e) what will the transition from ITAR to EAR control require for companies who already have ITAR Technical Assistance Agreements and licenses; and (f) how nimble will the State and Commerce Departments be in continuing to adjust control going forward as technology evolves?

U.S. Satellite and aerospace industry members who may be affected by the prospective changes, as well as foreign market participants, should review the Section 1248 Report and actively follow the reform implementation process over the coming year. A summary and link to the Section 1248 Report is available at: <http://www.whitehouse.gov/the-press-office/2012/04/18/fact-sheet-release-national-security-report-revising-us-export-controls-> .

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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