PRESIDENT SIGNS LEGISLATION IMPLEMENTING DEFENSE TRADE COOPERATION TREATIES WITH UNITED KINGDOM AND AUSTRALIA

On October 8th, President Obama signed legislation implementing two related and long-awaited defense cooperation treaties—one with the United Kingdom ("U.K.") and one with Australia. The treaties, which were ratified by the Senate on September 29th and are substantively identical, allow for license-free trade of certain defense articles between the United States, Australia, and the U.K. provided that the exports are among members of "Approved Communities" in the three countries.

The treaties respond to persistent complaints from the defense industry and U. S. allies that restrictions imposed by the International Traffic in Arms Regulations ("ITAR") make defense trade with the United States burdensome at best and impossible at worst. Some foreign defense contractors reportedly seek technology from suppliers located anywhere but the United States—solely because of barriers imposed by the ITAR's tedious licensing process. Adding insult to injury, in any given year over 99% of ITAR license applications for export to the U.K. are approved, which suggests that ITAR licensing is little more than a perfunctory administrative step when exports are destined for the U.K.

Senate ratification, which was three years in the making, may represent a cautious willingness on the part of Congress to move the export control regime to a risk-based system, a key Administration initiative. Nonetheless, the scope of the treaties is narrow, and the treaties themselves offer only incremental change. First, as noted, export of defense articles without a license may only take place between designated "Approved Communities" within the three signatory countries. The U.K. and Australian Communities generally consist of identified government facilities, certain government personnel with "need-to-know," private entities that meet certain requirements and are designated by their respective governments, and certain employees of the approved private entities with "need-to-know." The nongovernmental members of the U.K. and Australian Communities are to be selected based on several historical and predictive risk-assessment factors. Similarly, the United States Community consists of U.S. government agencies and agency personnel with appropriate credentials and "need-to-know," as well as ITAR-registered private entities and their appropriately credentialed employees with "need-to-know," provided that such entities are eligible to export defense articles.

Second, even when otherwise authorized, the treaties limit eligible exports to those required for joint U.S.-U.K. or U.S.-Australian military or counter-terrorism operations, joint research and development, end-use for specifically identified programs of the U.K. or Australian governments, and exports for U.S. government end-use. Further, the U.K., U.S., or Australian governments, as the case may be, must maintain lists of eligible programs for which unlicensed exports are authorized. Each treaty lists defense articles specifically exempted from its scope, including certain articles and technology related to chemical, biological, and nuclear weaponry, low-observable technology, communications security (COMSEC), and satellites.

The fact that it took three years for Congress to approve even this limited relaxation of trade rules for three of America's strongest allies is evidence of the uphill battle faced by any reform effort. Taken by themselves, the defense trade cooperation treaties are hardly "game changing." Nevertheless, they are a significant step toward a risk-based approach to defense trade controls, and may ease the

way for the Administration's broadscale reform efforts, first announced in 2009 by Defense Secretary Robert Gates and recently detailed by President Obama in an address to a Bureau of Industry and Security conference. (See "Administration Plans Significant Overhaul of Export Control Laws," Kaye Scholer Client Alert, September 30, 2010.)

Kaye Scholer attorneys advise clients on all aspects of export control compliance as well as matters concerning foreign acquisitions of U.S. defense and national security contractors and firms in the "critical infrastructure" sector. For additional information on the defense trade cooperation treaties, please contact any member of Kaye Scholer's National Security Practice Group:

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