

Commerce Solicits Comments on Emerging Technologies—Impacts for Export Controls and Mandatory CFIUS Reporting

November 19, 2018

On November 19, 2018, the U.S. Department of Commerce’s Bureau of Industry and Security (BIS) published an Advanced Notice of Proposed Rulemaking (ANPRM) seeking comments on criteria for identifying emerging technologies under Section 1758 of the Export Control Reform Act of 2018 (ECRA). **Comments are due December 19, 2018.** The ANPRM marks the first step BIS has taken to implement its new export control regime for “emerging and foundational technologies.” This will be particularly relevant to U.S. exporters as well as technology companies impacted by the Committee on Foreign Investment in the United States’ (CFIUS) recently launched critical technology pilot program.

The identification of emerging and foundational technologies is expected to impact a wide range of U.S. industries, subjecting what are now lightly controlled technologies to potentially strict export controls and mandatory foreign investment reporting to CFIUS.

As background, BIS controls the export of commercial, dual-use, and less sensitive military items through the Export Administration Regulations (EAR). As part of the National Defense Authorization Act (NDAA) for Fiscal Year 2019, Congress enacted the ECRA and the Foreign Investment Risk Review Modernization Act (FIRRMA). The ECRA, among other things, formalized and prioritized identifying, and establishing appropriate controls during the early development stages on the export of, “emerging and foundational technologies” that are essential to the national security of the United States but are not yet listed on the EAR’s Commerce Control List (CCL).

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BIS's ANPRM seeks public comment on criteria for identifying emerging technologies. BIS plans to issue a separate ANPRM regarding identification of foundational technologies but is also seeking comment on treating emerging and foundational technologies as separate types of technology. The ANPRM lists the following general categories of technology that BIS currently is evaluating to determine if they include specific emerging technologies essential to the national security of the United States:

- Biotechnology;
- Artificial intelligence (AI) and machine learning technology;
- Position, Navigation, and Timing (PNT) technology;
- Microprocessor technology;
- Advanced computing technology;
- Data analytics technology;
- Quantum information and sensing technology;
- Logistics technology;
- Additive manufacturing;
- Robotics;
- Brain-computer interfaces;
- Hypersonics;
- Advanced materials; and
- Advanced surveillance technologies.

The ANPRM seeks comments on (1) how to define emerging technology to assist in identification of such technology in the future; (2) criteria to apply to determine whether there are specific technologies within the general categories above that are important to U.S. national security; (3) sources to identify such technologies; (4) other general technology categories that warrant review; (5) the status of development of these technologies in the United States and other countries; (6) the impact specific emerging technology controls would have on U.S. technological leadership; and (7) any other approaches to the issue of identifying emerging technologies important to U.S. national security that would warrant consideration for export control.

Once BIS, through an interagency process, identifies an emerging or foundational technology, the ECRA authorizes it to establish controls on the export, reexport, and in-country transfer of that technology. While BIS has discretion to set the level of export controls, it must, at a minimum, require a license for the export of emerging or foundational technologies to countries subject to a U.S. embargo, including countries subject to an arms embargo (such as China), unless a statutory exception applies. In other words, BIS will be imposing new, more stringent license requirements on these emerging and foundational technologies, which could have a significant impact on U.S. exporters, including U.S. companies with foreign person employees and contractors.

BIS's identification of emerging and foundational technologies also will broaden the scope of companies subject to CFIUS's recently established critical technology pilot program. Under the new pilot program, CFIUS filings are now mandatory for controlling, and even some non-controlling, non-passive foreign investments in U.S. critical technology companies. The failure to file either a short-form declaration or a formal notice for such "pilot program covered transactions" can result in civil monetary penalties up to the value of the transaction. Because "critical technologies" under CFIUS's pilot program include emerging and foundational technologies identified by BIS pursuant to the ECRA, the designation of such emerging and foundational technologies will broaden the scope of U.S. companies subject to this new mandatory reporting requirement.

Given the considerable impact that this BIS-led interagency process could have on U.S. industry, it is critical for companies in the sectors identified above to weigh in and help shape the government's efforts in identifying which emerging technologies do and do not warrant additional controls.

Please contact one of the authors listed on this alert if you would like additional information regarding this ANPRM, including the details of the proposals, or if you need assistance in monitoring or filing comments in this proceeding.

**Jonathan Babcock, a Law Clerk in Wiley Rein's International Trade practice, contributed to this alert.*