

Commerce Calls for Comments on U.S.-EU Export Control Cooperation

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On November 30, 2021, the Department of Commerce's Bureau of Industry and Security (BIS) published a notice of inquiry and request for comments on how U.S. and European Union dual-use export controls and practices may be improved. The comments will inform priorities for the U.S.-EU Trade and Technology Council (TTC), which was established in June 2021, Export Control Working Group. Comments are due on January 14, 2022.

The TTC met for the first time in September 2021, where they agreed on a set of priorities for export control cooperation, such as technical cooperation on regulatory developments and compliance and enforcement. The priorities and "areas of cooperation" favor a multilateral approach over a unilateral one. For example, the group agreed to engage in technical consultations prior to the introduction of controls outside multilateral regimes, such as the Wassenaar Arrangement. The group also aims to promote the convergence of control approaches.

BIS specifically seeks comments on how U.S. and/or EU dual-use export control policies and practices may be more transparent, efficient and effective, and convergent, and better address emerging technologies. It requests concrete examples where convergence could improve international security and the protection of human rights and support a global level playing field and joint technology development. The coordination of licensing policies among countries would be an example of more effective multilateral coordination.

The formation of the working group and call for comments come as BIS is implementing the Export Control Reform Act of 2018 (ECRA), which formalized and prioritized identifying and establishing

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Practice Areas

Export Controls and Economic Sanctions
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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 Export Administration Regulations’ (EAR) Commerce Control List (CCL). While BIS has published broad advance notices of proposed rulemaking for both emerging technologies and foundational technologies, thus far it has taken a measured, targeted approach to identifying and controlling emerging technologies and has yet to issue any proposed or final rules on foundational technologies. This request for comments gives industry and other relevant stakeholders an additional opportunity to weigh in on how BIS should define and control emerging and foundational technologies so that such controls protect U.S. national security in a manner that is not overreaching and harmful to U.S. industry.

The comments BIS receives also could impact controls on products that are not made in the United States. Generally, U.S. controls can apply to foreign-manufactured products under two circumstances. First, under the foreign direct product rule, certain foreign-manufactured products can be subject to U.S. dual-use export controls if the foreign-manufactured items are the direct products of U.S. technology or software, or a complete plant or any major component of a plant made from U.S. technology. While historically the foreign direct product rule has been limited in scope, requiring that both the U.S. technology or software as well as the final foreign-manufactured product be controlled for “national security” reasons, in May 2020 and then again in August 2020, BIS amended its foreign direct product rule in an effort to crack down on Huawei’s access to U.S. technology. Second, non-U.S.-made products that incorporate controlled U.S. parts, components, or software that exceed the “*de minimis*” value threshold (which typically is 25% for non-sanctioned countries) are controlled by U.S. export controls. European stakeholders have raised issues with the regulatory burdens associated with the extraterritorial application of U.S. export controls, and industry members affected by such controls may want to comment on ways to clarify or tailor such controls to promote U.S. competitiveness.

The areas of cooperation the group has identified also suggest that the United States and EU intend to communicate and potentially cooperate with respect to their treatment of China, as they agreed to share information with respect to the “export of sensitive technologies to destinations and entities of concern,” and “technology transfers and dual-use research of concern and exchange of best practices.” Given the significant export restrictions the United States has imposed on China, certain U.S. stakeholders may want to address any unintended consequences of such restrictions and ways to modify or harmonize U.S. and EU controls to level the playing field, particularly where the EU has not yet adopted similar prohibitions.

Wiley has unparalleled experience assisting clients to navigate BIS’s export controls and to weigh in to help shape these controls going forward. Should you have any questions, please do not hesitate to contact one of the attorneys listed on this alert.