

Commerce Seeks Comments on Foundational Technologies, Potential Export Controls and CFIUS Impacts

August 28, 2020

On August 27, 2020, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) published an Advance Notice of Proposed Rulemaking (ANPRM) seeking comments on the definition of and criteria for identifying "foundational technologies" under Section 1758 of the Export Control Reform Act of 2018 (ECRA). **Comments are due by October 26, 2020.** BIS previously solicited comments on criteria for identifying "emerging technologies," but has yet to issue a related rule. BIS's identification of foundational technologies may affect a number of U.S. industries, including semiconductor manufacturers and other technology companies, opening the door to stricter export controls and mandatory reporting to the Committee on Foreign Investment in the United States (CFIUS).

As background, BIS controls the export of commercial, dual-use, and less sensitive military and satellite items through the Export Administration Regulations (EAR). As part of the National Defense Authorization Act (NDAA) for Fiscal Year 2019, Congress enacted ECRA and the Foreign Investment Risk Review Modernization Act (FIRRMA). ECRA 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).

Under ECRA, emerging and foundational technologies are essential to U.S. national security and "may warrant stricter controls if a present or potential application or capability of that technology poses a national security threat to the United States." After BIS, through an

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Practice Areas

Committee on Foreign Investment in the United States (CFIUS)
Export Controls and Economic Sanctions
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interagency process, identifies an emerging or foundational technology, 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 China and other countries subject to arms embargoes, unless a statutory exception applies. In other words, BIS will impose new, more restrictive license requirements on these emerging and foundational technologies, which could have major impacts on U.S. exporters as well as non-U.S. companies that rely on U.S. parts, software, or technology.

Per the ANPRM, foundational technologies ultimately may include hardware, software, or technology currently classified as EAR99 or controlled for export only for anti-terrorism (AT) reasons—both of which are low-level export controls—that can be utilized in developing conventional weapons, enabling foreign intelligence collection activities, or furthering activities related to weapons of mass destruction. The ANPRM provides, as an example, that foundational technologies could include items that are currently controlled when exported for a military end use or to a military end user in China, Russia, or Venezuela. Back in April, BIS published a new rule tightening these military end use/end user controls to cover, among other things, low-level electronics and mass market encryption hardware and software. In the ANPRM, BIS also specifically mentions the potential to impose higher level controls on semiconductor manufacturing equipment and associated software tools, lasers, sensors, and underwater systems.

BIS is seeking comment on the following topics:

- how to further define foundational technology;
- sources to identify such items;
- criteria to determine whether controlled items identified in the AT level Export Control Classification Numbers (ECCNs), in whole or in part, or covered by an EAR99 designation, for which a license is not required to countries subject to a U.S. arms embargo, are essential to U.S. national security;
- the status of development of foundational technologies in the United States and other countries;
- the impact specific foundational technology controls may have on the development of technologies in the United States;
- examples of implementing controls based on end use and/or end user rather than, or in addition to, technology-based controls;
- any enabling technologies, including tooling, testing, and certification equipment that should be included within the scope of a foundational technology; and
- any other approaches to the issue of identifying foundational technologies, including the stage of development or maturity level of a foundational technology that would warrant consideration for an export control.

BIS's identification of foundational technologies also will broaden the scope of companies subject to CFIUS's reporting requirements. CFIUS filings are now mandatory for controlling, and even some non-controlling, non-passive foreign investments in U.S. critical technology companies. Because "critical technologies" include

foundational technologies BIS identifies under ECRA, the designation of such foundational technologies will broaden the scope of companies subject to this mandatory reporting requirement.

The ANPRM is the first step in the U.S. government's foundational technologies rulemaking process and provides industry a critical opportunity in the early stages to try and shape any proposed rule. 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.

Nicole Hager, a Law Clerk at Wiley Rein LLP, contributed to this alert.