

Export control reform 2.0

With a focus on advanced technologies, U.S. Congress mandates permanent statutory basis for U.S. export control regime

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After nearly 20 years of promulgation by executive orders, bipartisan export control reform legislation has re-established a permanent statutory basis for the control of commercial and dual-use items licensed by the Department of Commerce (DOC). The Export Control Reform Act of 2018 (ECRA) is part of the Fiscal Year 2019 National Defense Authorization Act (NDAA), which was signed into law by the president on 13 August 2018. Senator John Cornyn, the bill's sponsor in the Senate, stated that the ECRA's language "maintains the changes to export control laws which address concerns about the transfer of technology through joint ventures . . . and . . . strengthens enforcement of export controls."

The ECRA repeals most of the Export Administration Act of 1979 (EAA), which lapsed in 2001, and provides a permanent statutory basis for the Export Administration Regulations (EAR). The EAR regulate the export, re-export, and in-country transfer of most commercial and dual-use items. Since the EAA lapsed, the EAR have been kept in effect through a series of executive orders under the International Emergency Economic Powers Act.

Specifically, the ECRA expands the ways in which items subject to export controls are identified, which will enable additional restrictions on emerging and foundational technologies essential to U.S. national security, such as potentially artificial intelligence, robotics, and other technology. The ECRA also requires a review of existing licensing requirements for countries subject to a comprehensive arms embargo and requires the DOC to consider the impacts of export licensing on the U.S. defense industrial base.

Establishment of interagency process to identify emerging and foundational technologies

In one of its most significant changes, the ECRA establishes a regular, ongoing interagency process intended to "identify emerging and foundational technologies" that: i) "are essential to the national security of the United States"; and ii) do not include critical technologies described in the Defense Production Act of 1950, as amended by section 1703 of the NDAA. These

“emerging and foundational” technologies are not defined in the text of the ECRA and must be identified by an interagency process.

Critically, the interagency process will review publicly available information, classified information, information from advisory committees, and information provided by the Committee on Foreign Investment in the United States (CFIUS), which reviews certain acquisitions of U.S. businesses by foreign investors for national security risks. Importantly, the CFIUS’s jurisdiction recently expanded to cover a broader range of transactions, including certain minority investments. For more information, please see our client alerts on the recent expansion of the CFIUS’s jurisdiction, available [here](#) and [here](#).

In its identification of these emerging and foundational technologies, the interagency process established by the ECRA must take into account: i) the development of emerging and foundational technologies in foreign countries; ii) the effect export controls may have on the development of such technologies in the United States; and iii) the effectiveness of export controls on limiting the proliferation of emerging and foundational technologies to foreign countries. The process includes a notice and comment period for input on the inclusion of the items as emerging and foundational technologies. We would be glad to assist interested parties in participating in the notice and comment period.

Relatedly, once the interagency process has identified these emerging and foundational technologies, the ECRA authorizes the Secretary of Commerce to establish controls (including interim controls) under the EAR on the export, re-export, or in-country transfer of such technologies, including informing a person that a license is required for export of such technology or by publishing additional regulations. Although the Secretary of Commerce has discretion as to the level of control applied to such technologies, the ECRA mandates that, at minimum, the Secretary of Commerce require a license for the export, re-export, or in-country transfer of emerging and foundational technology identified through the process described above or in a country subject to an embargo, including an arms embargo, imposed by the United States. Countries such as China and Venezuela, among others, are subject to arms embargoes by the United States.

This process is intended to enable the U.S. government to identify and control sensitive and innovative U.S. technologies, possibly restricting outbound transfers of certain technologies that the interagency process deems important for commercial and economic security. Given the discretion granted to the executive branch to define and control the transfer of “emerging and foundational technologies,” the legislation is also a leap into the unknown regarding new restrictions on the ability of U.S. companies to transfer key technologies to overseas joint ventures or through licensing agreements with foreign customers and business partners.

Mandated review of export controls on countries subject to arms embargoes

The ECRA also mandates a review by the Departments of Commerce, State, Defense, and Energy and other federal agencies of licensing requirements for exports, re-exports, and in-country transfers of items to countries subject to a comprehensive U.S. arms embargo, including of

- the scope of controls that apply to exports, re-exports, and in-country transfers for military end uses and military end users in countries subject to a comprehensive U.S. arms embargo and countries subject to a United Nations (U.N.) arms embargo; and

- entries on the Commerce Control List (CCL) that are not subject to a license requirement for the export, re-export, or in-country transfer of items to countries subject to a comprehensive U.S. arms embargo.

The Secretary of Commerce will have no more than 270 days after the enactment of the ECRA (13 August 2018) to implement the results of this review, and this process could result in more export control restrictions related to countries subject to arms embargoes.

Review of impacts of export licensing on U.S. defense industrial base

Additionally, the ECRA mandates that the Secretary of Commerce establish a procedure to license or otherwise authorize exports, re-exports, and in-country transfers. The procedure must ensure that license applications and requests for authorization are considered, appropriate federal agencies participate, and that licensing decisions are made in an expeditious manner, with transparency to applicants on the status of the application and the reason for denying any license or request for authorization.

Moreover, the Secretary of Commerce must assess the impact of a proposed export of an item on the U.S. defense industrial base and must deny any application for a license or a request for authorization of any export that would have a significant negative impact on such defense industrial base. The ECRA defines a significant negative impact on the U.S. defense industrial base as

- a reduction in the availability of an item produced in the United States that is likely to be acquired by the Department of Defense (DOD) or other federal department or agency for the advancement of U.S. national security or for the production of an item in the United States for the DOD or other agency for the advancement of U.S. national security;
- a reduction in the production in the United States of an item that is the result of research and development carried out, or funded by, the DOD or other federal department or agency to advance the national security of the United States, or a federally-funded research and development center; or
- a reduction in the employment of U.S. persons whose knowledge and skills are necessary for the continued production in the United States of an item that is likely to be acquired by the DOD or other federal department or agency for the advancement of U.S. national security.

Effective period and recommendations

The ECRA does not establish a blanket effective date for its various provisions. Rather, the ECRA extends export controls, licenses, authorizations, and other administrative actions in effect 13 August 2018 until they are modified, superseded, set aside, or revoked under the authority granted by the ECRA. Further, as noted above, the ECRA does not define “emerging and foundational technologies.” Instead, the identification by the interagency process will result in a notice and comment period.

As such, we recommend that companies: i) carefully monitor the items that are identified by the interagency process as “emerging and foundational,” (ii) consider participating in the comment process if any items dealt with by the company are identified as “emerging and foundational,” and (iii) monitor the implementation of undefined aspects of the ECRA. As this export licensing regime could hit certain industries harder than others, it will be important for companies to track

and submit comments on the administration's efforts to identify and control the export of these technologies. The administration and Congress have highlighted links between U.S. national security and emerging technologies, which include the semiconductor, robotics, artificial intelligence, nanotechnology, and biotechnology sectors, among others. In particular, startup companies that traditionally are not used to dealing with items subject to export controls and are interested in investments from foreign sources should especially pay close attention.

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