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FEATURE COMMENT: We Finally Have An Export Control Statute—What Does it Mean For Industry?

The Export Control Reform Act of 2018 (ECRA) became law on Aug. 13, 2018, as §§ 1741–1768 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019. The NDAA also included the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) (which reforms the Committee on Foreign Investment in the United States (CFI-US)), the Anti-Boycott Act of 2018 (which codifies U.S. anti-boycott laws), and many other provisions. This Feature Comment provides an overview of ECRA, with a focus on the provisions most likely to have a lasting impact on U.S. industry.

Most of ECRA is not intended to change the pre-existing regulatory framework for U.S. export controls. Instead, ECRA provides a permanent statutory authority for the Commerce Department's Export Administration Regulations (EAR), which have been in place for decades. Prior to the enactment of ECRA, the Export Administration Act of 1979 as amended (EAA) served as the most recent statutory authorization for the EAR. After the EAA lapsed in 2001, presidents Bush, Obama and Trump used presidential emergency authorities to keep the EAR in place, beginning with Executive Order 13222 on Aug. 17, 2001. ECRA repealed and replaced the EAA, while maintaining in effect certain provisions of the EAA explicitly or by reference. ECRA is now the primary statutory authorization for the Commerce Department's export controls program, although other statutory provisions relevant to export controls remain in place in specific areas such as non-proliferation.

ECRA continues in effect the EAR and all licenses, guidance, orders and other administrative actions that were taken under the EAR. Over the coming months, however, some of the new features of ECRA should result in changes to the EAR. This Feature Comment previews the key features of ECRA that are most likely to result in changes to the EAR and the administration of U.S. export controls by the Commerce Department's Bureau of Industry and Security (BIS).

Review of Export Controls for China and Other Countries—Section 1759 of ECRA requires the departments of Commerce, Defense, State and Energy, and potentially other agencies, to review the export control licensing requirements under the EAR for countries subject to a U.S. arms embargo, including China. This review is to cover the scope of EAR controls “for military end uses and military end users” in such countries and the types of goods, software and technology that currently are not controlled for such countries. ECRA requires this review to be completed and any necessary regulatory changes to be implemented within 270 days after enactment (i.e., by May 10, 2019).

China, one of 21 countries currently subject to a U.S. arms embargo (see Country Group D:5 in Supplement No. 1 to pt. 740 of the EAR), is not subject to some of the most restrictive U.S. export controls that apply to other countries. In light of the current U.S. regulatory and policy focus on trade and other economic activity between the U.S. and China, the review may result in additional export controls on China. Such changes could take the form of broad new licensing requirements for items destined for China—for example, items controlled for less-sensitive nonproliferation reasons (i.e. “NP Column 2” under the Commerce Country Chart)—although such changes would not be directed specifically at military end uses and military end users, and therefore may not be as responsive to the mandate in § 1759.

Alternatively, BIS could expand the scope of the current EAR § 744.21 restriction on exports for

military end uses in China. That restriction is narrow, applicable only to a short list of items at Supplement No. 2 to pt. 744 of the EAR, and based on a technical definition of “military end use” in § 744.21(f) (essentially applying only to “incorporation” of the item into other military products or technologies or when the item is for the “use,” “development” or “production” of other military products or technologies, along with the deployment of certain aircraft and gas turbine engines). It does not include most direct uses by the Chinese military.

To address that gap, BIS may expand this restriction to apply to any “military end user” in China (a restriction that currently applies only to a few countries, including Russia and Venezuela, and in a somewhat different form to Iraq). BIS may also expand these end-use and end-user restrictions to a broader list of items. In light of the Chinese military’s presence, official and unofficial, in many industrial and academic sectors, changes to this provision would result in significant new restrictions on trade and technology transfers with China or otherwise involving Chinese persons.

Establishing Controls on “Emerging and Foundational Technologies”—Section 1758 of ECRA requires the executive branch to establish an interagency process to identify and impose controls on “emerging and foundational technologies” that are both “essential to the national security of the United States” and not otherwise covered by the definition of “critical technologies” in FIRRMA (i.e., not already subject to the International Traffic in Arms Regulations (ITAR), certain long-standing controls under the EAR, or pre-existing U.S. export control regimes covering certain agents and toxins and nuclear-related equipment, technology and services).

On Nov. 19, 2018, BIS published an advanced notice of proposed rulemaking (ANPRM) to seek comments on how to structure controls on “emerging technologies” and identifying several broad categories of potentially emerging technologies. See 83 Fed. Reg. 58201 (Nov. 19, 2018). In the coming months BIS is expected to publish for public comment a proposed rule setting out a more narrow and specific set of proposed controls on emerging technologies.

BIS has indicated that it intends to issue a similar ANPRM for comment on “foundational technologies.” This topic has also been a topic of discussion because of its impact on CFIUS’ jurisdiction—in essence, CFIUS now has jurisdiction to review additional foreign in-

vestments in U.S. companies involved with critical technologies—which would include any emerging or foundational technologies that are identified by the executive branch under § 1758 of ECRA. We will focus on two key points here.

First, § 1758(b) of ECRA requires BIS to impose licensing requirements for emerging and foundational technologies in most, but not all, circumstances. For example, emerging and foundational technologies in finished items, services and associated technology generally made available to customers need not be controlled. The same is true with respect to technology needed to operate equipment that cannot produce export-controlled items.

Second, ECRA envisions that emerging and foundational technology controls will be dynamic and subject to regular review and change. For example, if the Wassenaar Arrangement or other multilateral export control regimes do not adopt similar controls within three years after being proposed by the U.S. Government (which ECRA requires the secretary of state to do), the U.S. Government may decide not to continue unilateral U.S. controls on those technologies (i.e., “may determine whether national security concerns warrant the continuation of unilateral export controls with respect to that technology”).

This is consistent with the statement of policy in § 1752 of ECRA that “export controls applied unilaterally to items widely available from foreign sources generally are less effective ... [and] unilateral export controls should be limited for purposes of protecting specific United States national security and foreign policy interests.” Multilateral controls will have particular importance for technologies developed by global companies or research institutions—unilateral U.S. controls over these technologies would be ineffective if other countries and multilateral bodies decline to follow the U.S. lead. Moreover, once technologies are no longer “emerging” or “foundational” (i.e., once they become more widely adopted), they presumably should be de-controlled, or controlled for other (more traditional) reasons if necessary.

Expanded Denial Order Authority—Section 1760(e) of ECRA expands BIS’ authority to impose denial orders, which are one of the most powerful tools in BIS’ enforcement arsenal. A denial order prohibits the denied party (and potentially other related parties) from receiving any exports, reexports or transfers (in-country) of items “subject to the EAR” (including EAR99 items) as well as, among other things, “benefiting in any way

from any transaction involving any” item or activity “subject to the EAR.”

The authority to impose denial orders was previously limited to persons convicted of violating export controls or similar laws, but now includes convictions under broader conspiracy, smuggling, and false statement laws (18 USCA §§ 371, 554 and 1001, respectively). BIS retains the additional authority to impose temporary denial orders (which can be renewed every 180 days) under § 764.6 of the EAR when “necessary in the public interest to prevent the occurrence of an imminent violation.”

But this expanded statutory authority based on conspiracy, smuggling and false statement crimes could lead to a broader use of indefinite denial orders—and could provide BIS with more leverage in settling enforcement cases. If a criminal false statement to the U.S. Government can lead to a denial order cutting off essentially all trade with any link to U.S. exports, companies may exercise additional caution when interacting with the Government.

New Restriction on Activity Related to Foreign Military Intelligence Services—Under § 1753 of ECRA, BIS is required to impose new controls on activities of U.S. persons “relating to specific ... foreign military intelligence services.” No such controls currently exist under the EAR, unless this is a reference to the BIS Entity List designations of the Russian Federal Security Service (FSB) and Main Intelligence Directorate (GRU), which are also listed by the Treasury Department as Specially Designated Nationals (SDNs). It remains to be seen how BIS will respond to this new statutory mandate.

Changes to the BIS Licensing Process—ECRA makes a few noteworthy changes to existing licensing procedures.

Economic/Defense Industrial Base Impact Assessments: For the first time, applicants for licenses under the EAR will be required, under licensing procedures BIS is required to promulgate under § 1756(d) of ECRA, to provide information necessary for BIS to assess

the impact of a proposed export of an item on the United States defense industrial base and the denial of an application for a license or a request for an authorization of any export that would have a significant negative impact on such defense industrial base ... including whether the purpose or effect of the export is to allow for the significant production of items relevant for the defense industrial base outside the United States.

Although that provision calls for an assessment of the impact of either a grant or a denial of the request, the focus appears to be on concerns about facilitating off-shore production via exports of products or technology.

ECRA defines “a significant negative impact” on the U.S. defense industrial base to mean:

- (a) a reduction in availability of items produced in the U.S. that are likely to be acquired by DOD or other federal agencies, or for the production of items in the U.S. for DOD or other federal agencies, “for the advancement of [U.S.] national security”;
- (b) a reduction in U.S. production of items that are the result of research and development carried out or funded by DOD or other federal agencies “to advance [U.S.] national security,” or a federally funded R&D center; and
- (c) a reduction in employment of U.S. persons “whose knowledge and skills are necessary” for continued U.S. production of items that are likely to be acquired by DOD or other federal agencies “for the advancement of [U.S.] national security.”

The passing reference to potential negative impacts of not granting an export license seems overshadowed by the extensive provisions expressing concern about the impact of granting export license requests. In any case, companies will have to assess these broader economic and security impacts of their proposed license requests—an assessment that many companies may not be well-positioned to make. It remains to be seen how flexible BIS will be in crafting these regulations.

30-Day Licensing Timeline and Required Reasons for Denial: Section 1756(b) of ECRA puts additional pressure on the U.S. Government to respond promptly to license requests by expressing “the sense of Congress” that BIS “should make best efforts to ensure that an accurate, consistent, and timely evaluation and processing” of license requests “is generally accomplished within 30 days from the date of such license request.” This is not a drastic change for most BIS licenses, which tend to be issued within three to six weeks, but more sensitive or complex requests often take considerably longer. Although not a strict mandate, this provision is something for license applicants to bear in mind when following up with BIS regarding long-pending applications.

In addition, § 1756(a)(2) requires BIS to establish procedures to “ensure that ... licensing decisions are

made in an expeditious manner, with transparency to applicants on the status of license and other authorization processing and the reason for denying any license or request for authorization.” The requirement for BIS to specify the reasons for a denial may be helpful for applicants to consider whether to resubmit an application or take another approach, assuming, that is, that BIS provides useful feedback.

Mandated Disclosure of Foreign Ownership Information: A noteworthy change to the licensing process for requests relating to “emerging and foundational technologies” is that ECRA authorizes BIS to require disclosure of foreign ownership information of the party that would receive the exports. Specifically, in response to license requests “by or on behalf of a joint venture, joint development agreement, or similar collaborative arrangement,” BIS can require the applicant to identify, “in addition to any foreign person participating in the arrangement, any foreign person with [sic] significant ownership interest in a foreign person participating in the arrangement.” This could create a significant new licensing procedural requirement, depending on how BIS implements it.

Enhanced Law Enforcement Powers—Section 1761 of ECRA provides BIS with additional law

enforcement authorities, such as for establishing a wiretap based on a violation of export controls or anti-boycott regulations, and authorizing BIS to lease space, establish business entities and take other steps needed to conduct effective undercover operations. It also authorizes BIS to conduct investigations “outside the United States consistent with applicable law,” which typically also require the consent of the host state. These authorities will add to BIS’ existing in-house law enforcement capabilities.

Conclusion—ECRA establishes an enduring statutory basis for the Commerce Department’s existing export control program, and expands many of the key authorities, including for emerging and foundational technologies and denial orders. How BIS implements those changes, along with the review of controls on trade with China and other countries subject to a U.S. arms embargo, will be important for industry to follow closely.



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