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## WHITE PAPER

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### Proposed Rulemaking Under ECRA Signals Tightening of Export Control Restrictions

Signed into law in August 2018, the Export Control Reform Act (“ECRA”) significantly alters U.S. export policy by placing new emphasis and potential controls on critical technologies essential to the nation’s security. As part of an effort to identify those technologies, the U.S. Department of Commerce has published an advance notice of proposed rulemaking (“NPRM”), initiating a 30-day public comment process.

This *White Paper* explains some of the ECRA’s key components and offers guidance to companies involved with the affected technologies and industries.

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On November 19, 2018, the U.S. government took a new step in implementing tighter controls over certain technologies in what appears to be efforts to keep what it considers critical technology out of the hands of rivals. Recently, the U.S. Department of Commerce, Bureau of Industry and Security (“BIS”) published an [advance notice of proposed rulemaking](#) (“ANPRM”) under the Export Control Reform Act of 2018 (“ECRA”) initiating a 30-day public comment process for defining and identifying emerging technologies that are essential to U.S. national security. The ANPRM, as noted above, represents a preliminary step in the process of establishing new export control restrictions under the ECRA that will also affect the scope of the Committee on Foreign Investment of the United States’ (“CFIUS”) jurisdiction.

The ECRA, which was signed on August 13, 2018, creates a permanent statutory authority for the Export Administration Regulations (“EAR”), which governs export controls concerning commercial and dual-use items (i.e., items that have civil and less-sensitive military applications) and the anti-boycott regulations, both of which are administered by BIS. The EAR was originally implemented under the Export Administration Act (“EAA”), which lapsed in 1994 and has since been maintained in effect through executive orders under the International Emergency Economic Powers Act.

Aside from codifying existing practice, as further discussed below, the ECRA significantly changes U.S. export controls by placing a new emphasis and potential controls on, among other things, “emerging and foundational technologies” and by amending the export licensing process to require weighing whether exports will have a “significantly negative impact on the United States defense industrial base.”

## **REQUIREMENTS TO IDENTIFY EMERGING AND FOUNDATIONAL TECHNOLOGIES**

Section 1758 of the ECRA calls for the U.S. Departments of Commerce, Defense, Energy, State, and other agencies to coordinate a regular, ongoing process to identify “emerging and foundational technologies” that are essential to the national security of the United States. The law requires BIS to establish controls under the EAR to protect these technologies. While BIS has discretion in setting the level of export controls, at a minimum, these controls must include a license

requirement for export to countries subject to an embargo, including an arms embargo, imposed by the United States (e.g., China and Venezuela). Also, in the context of reviewing license applications submitted by or on behalf of a joint venture or joint development agreement, BIS may require the applicant to identify any foreign person with a significant ownership interest in a foreign person participating in the agreement.

### **Review Process**

The review process will be informed by: (i) publicly available information; (ii) classified information; (iii) information relating to reviews and investigations of transactions by CFIUS; and (iv) certain advisory committees (e.g., the Emerging Technology and Research Advisory Committee). Consequently, the ECRA will likely lead to an increase in information-sharing among national security agencies. The ECRA requires that the proposed technologies (and the export controls on such technologies) be introduced through a notice and comment period, which will consider the following: (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.

### **“Emerging and Foundational Technologies”**

The terms “emerging technologies,” “foundational technologies,” and “essential to national security” are not defined in the ECRA. However, as mentioned above, BIS published an ANPRM initiating a 30-day public comment process for defining and identifying emerging technologies that are essential to U.S. national security. The ANPRM includes 14 representative technology categories from which BIS seeks to determine whether there are specific emerging technologies: (1) biotechnology; (2) artificial intelligence and machine learning technology; (3) position, navigation, and timing technology; (4) microprocessor technology; (5) advanced computing technology; (6) data analytics technology; (7) quantum information and sensing technology; (8) logistics technology; (9) additive manufacturing (e.g., 3D printing); (10) robotics; (11) brain-computer interfaces; (12) hypersonics; (13) advanced materials; and (14) advanced surveillance technologies. Notably, these categories cover only “emerging” technologies, and the ANPRM indicates that BIS will issue a separate ANPRM regarding identification of foundational technologies.

After the comment period, BIS will issue another advance notice identifying specific “emerging and foundational” technologies and then issue controls on the export, re-export, or transfer of those technologies. As mentioned above, at a minimum, companies with “emerging and foundational” technologies will need a license to export those technologies to countries subject to a U.S. embargo, including an arms embargo (e.g., China and Venezuela). In addition, if a foreign person seeks to invest in a U.S. business that “produces, designs, tests, manufactures, fabricates, or develops” an “emerging or foundational” technology, the parties to that transaction may be required to file a mandatory declaration with CFIUS.

Companies operating in the representative technology categories above should consider submitting comments regarding whether their technologies should be deemed or not deemed “emerging and foundational.” In addition, those companies will want to consider, among other items, how unilateral export controls on such technologies could have significant, burdensome implications for deemed exports and technology transfer licensing requirements. For example, companies exporting, re-exporting, or transferring such “emerging” technologies to non-U.S. customers will likely require export licenses, which could result in delays or reductions in sales. Further, the changes could drastically affect supply chain operations and research and development being performed on such technologies by foreign persons overseas or in the United States.

### **Reports to CFIUS and Congress**

Under the ECRA, every 180 days, the agencies described above will be required to submit a report to CFIUS and Congress on the results of the review process.

## **ENHANCED LICENSING PROCESS TO INCLUDE ASSESSMENT OF IMPACT ON U.S. DEFENSE INDUSTRIAL BASE**

Section 1756(d)(1) of the ECRA modifies the export license review process to include a requirement that BIS assess the impact of a proposed export of an item on the U.S. defense industrial base and deny an application if the export would have a “significant negative impact” on the U.S. defense industrial base. Accordingly, license applications will be required to provide relevant information to this effect, including a statement on whether the purpose or effect of the export is to allow

for the significant production of items relevant to the defense industrial base outside of the United States.

### **Significant Negative Impact**

In assessing whether a given export may have a significant negative impact on the U.S. defense industrial base, among other things, BIS will consider whether the export will constitute a reduction in:

- The availability of a U.S. item that is likely to be acquired by the U.S. Department of Defense (“DoD”) or other departments or agencies for the advancement of U.S. national security;
- The production of a U.S. item that resulted from research and development carried out or funded by the DoD or other departments or agencies for the advancement of U.S. national security; and
- The employment of U.S. persons with the knowledge and skills necessary for the continued production in the United States of an item that is likely to be acquired by the DoD or other departments or agencies for the advancement of U.S. national security.

## **EXPANDED CONTROLS ON CERTAIN ACTIVITIES OF U.S. PERSONS**

The EAR currently controls items subject to U.S. jurisdiction and U.S. persons, wherever located, with regard to certain activities, including activities related to nuclear explosive devices, foreign military nuclear projects, missiles, and chemical or biological weapons. Section 1753 of the EAR expands controls over activities of U.S. persons, wherever located, to include activities related to “foreign military intelligence services.” At this time, it is unclear how BIS will implement such controls.

## **REVIEW RELATING TO COUNTRIES SUBJECT TO A COMPREHENSIVE U.S. ARMS EMBARGO**

Section 1759(a) of the ECRA requires BIS, in coordination with other agencies, to conduct a review of license requirements for exports, reexports, or in-country transfers of items to countries subject to a comprehensive U.S. arms embargo. This includes a review of items controlled for anti-terrorism reasons to determine if licensing restrictions should be expanded to

countries subject to an arms embargo. Although countries are not specifically referenced, this provision would impact items destined for countries subject to an arms embargo, such as China and Venezuela. The ECRA calls for BIS to implement the results of such review by May 9, 2019.

### **INCREASED CIVIL PENALTIES, ENFORCEMENT, AND COMPLIANCE COUNSELING**

Section 1760 of the ECRA increases civil penalties for violations of the EAR from \$295,141 to up to \$300,000 per violation or an amount that is twice the value of the transaction, whichever is greater. Civil penalties still include the ability to impose denial of export privileges. Criminal penalties for willful violations remain at \$1 million per violation and, in the case of an individual, up to 20 years in prison (or both). With respect to enforcement, among other things, the ECRA allows BIS to conduct investigations within the United States and outside the United States consistent with applicable law.

The ECRA requires BIS and other relevant agencies to publish and update “best practices” guidelines to assist persons in developing and implementing effective export control programs, which, as a reminder, the ECRA notes will be given weight as a mitigating factor in a civil penalty action. BIS will also establish a system to provide U.S. persons, particularly small- and medium-sized U.S. businesses, assistance in complying with U.S. export controls, including arrangements for BIS to provide counseling to businesses on filing applications and identifying controlled items and seminars and conferences to

educate businesses on export controls, licensing procedures, and related obligations.

### **KEY TAKEAWAYS**

Companies dealing in the representative technology categories described above, which will be used to assist BIS with defining and identifying “emerging” technologies, should consider participating in the comment process to lessen the impact that heightened export controls could have on its technologies. In addition, companies should begin evaluating the impact that export control restrictions could have on sales outside the United States, supply chain arrangements, collaborative agreements with foreign countries involving such technologies, and research and development being performed on such technologies by foreign persons.

Companies in the aerospace, defense, or military intelligence industries may be impacted by the risk of denials of export licenses if any exports may result in a “significant negative impact” on the U.S. defense industrial base and/or increased licensing obligations due to the provision of certain services by U.S. persons.

Companies should evaluate their current export control compliance programs and internal controls to take into account the ECRA’s changes to the export license review process and expanded controls on certain activities of U.S. persons, and evaluate whether any of its technologies could be considered “emerging and foundational technologies.”

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