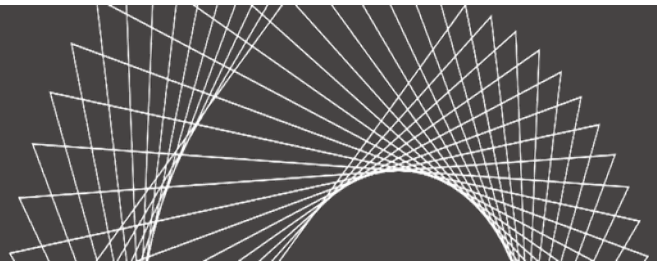
Developments in U.S. Export Control Law, Regulations, and Policy



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Export Control Basics – a reminder

- Export controls are the rules that govern:
  - the export, reexport, and transfer
  - by U.S. and foreign persons
  - of commodities, technology, software, and services
  - to destinations, end uses, and end users
  - to accomplish various national security and foreign policy objectives.
- Testimony describes the system governed by the EAR:
  https://docs.house.gov/meetings/FA/FA00/20180314/107997/HHRG-115-FA00-Wstate-WolfK-20180314.pdf

All Export Controls on One Page

Actor: U.S. Person or Foreign Person (people and companies) / Act: Export, Reexport, or Transfer	**Physical Things** ("Goods," "Commodities," "Defense Articles")	**Information** ("Technology," "Technical Data")	**Software**	**Services** ("Defense services" or WMD-related "activities")
Destinations (Countries or regions, for listed items, or embargoed destinations for all else)				
End Uses (e.g., WMD end uses regardless of item's classification)				
End Users (e.g., SDNs or listed entities, regardless of item's classification)				

Statutes Relevant to the Export Administration Regulations (EAR)

- First U.S. export control law was in 1774, prohibiting exports to England.
- Modern system developed in a 1949 export law, which was repealed by the the Export Administration Act of 1979.
- The 1979 Act was the authority for the EAR. It had complex and Cold War-focused requirements.
- The 1979 Act, however, expired several decades ago (2001 and earlier).
- EAR were continued in effect each year by annual declarations of "emergency" under International Emergency Economic Powers Act (IEEPA).
  - IEEPA had few specific standards or requirements and thus gave great discretion to the Bureau of Industry and Security (BIS) to administer the EAR.
- Until August 2018, Congress could not agree on what a new export control law should be.

National Defense Authorization Act (NDAA)

- On August 13, 2018, the NDAA became law. It included:
  - The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA)

  and
  - The Export Control Reform Act of 2018 (ECRA).
- FIRRMA is administered by the Committee on Foreign Investment in the United States (CFIUS), which is led by the Treasury Department.
- ECRA is administered by BIS, which is part of the Commerce Department, and is the authority for the EAR.
  - ECRA is now codified at 50 U.S.C. sections 4801-4851. It is written in plain English and is relatively short. I would encourage you to read it straight through.
  - EAR are still at 15 C.F.R. parts 730-774, and take much longer to read straight through…….

Motivation for New Laws

- Bipartisan concerns in Congress that the foreign direct investment laws administered by CFIUS and the export control rules did not have enough authority to address changes in Chinese investment strategy and targets—such as those described in the "Made in China 2025" plan—particularly those involving uncontrolled investments in emerging technologies and early stage companies.
- Legitimate concerns that China was acquiring uncontrolled U.S.-origin "emerging" and "foundational" and other dual-use technologies to modernize its economy to the detriment of the United States and to modernize the Chinese military ("civil-military fusion").
- See Congressional testimony at:

  https://docs.house.gov/meetings/IF/IF17/20180426/108216/HHRG-115-IF17-Wstate-WolfK-20180426.pdf.

Policy Justification of FIRRMA Sponsor

In the words of Senator John Cornyn (R-Texas), a co-sponsor of FIRRMA, "the context for this legislation is important and relatively straight forward, and it's China . . . . China has also been able to exploit minority-position investments in early-stage technology companies . . . . The Chinese have figured out which dual-use emerging technologies are still in the cradle, so to speak, and not yet subject to export controls. And, there is no real difference between a Chinese state-owned enterprise and a 'private' Chinese firm, in terms of the national security risks that exist when a U.S. company partners with one."

Motivations for ECRA Generally

- There were also bipartisan good government desires to:
  - have permanent statutory authority for EAR to address modern export control issues;
  - enhance export control enforcement authorities; and
  - codify in law decades of BIS practice, policies, and regulatory reforms – including the Obama Administration's Export Control Reforms.
- Unlike FIRRMA, however, there was not much public or legislative debate about ECRA, other than at one HFAC hearing and the committee mark-up. Rather, as discussed later, ECRA was primarily a vehicle to carry forward the congressional objectives of identifying and controlling the release of emerging and foundational technologies through the export control system rather than through, as originally proposed in FIRRMA, a CFIUS-led outbound investment control authority to spot possible such technologies in overseas ventures before they occurred.

A Rare Moment of Bipartisan Regular Order

- Republicans and Democrats overwhelmingly agreed to changes in August 2018. See:

  https://thehill.com/blogs/congress-blog/economy-budget/401985-a-rare-nonpartisan-good-news-story-in-washington

  and

  https://www.akingump.com/en/news-insights/the-export-control-reform-act-of-2018-and-possible-new-controls.html.

Foreign Direct Investment and Export Controls

- The rules regarding foreign investment in the United States and export controls are now connected and overlapping to address, among other things, policy concerns over the release to foreign persons in the U.S. and abroad of "emerging" and "foundational" technologies to be identified. See:

  https://www.akingump.com/en/news-insights/the-cfius-reform-legislation-firrma-will-become-law-on-august-13.html.

- In sum, CFIUS uses its authority over *inbound* investment to address concerns, inter alia, regarding transfers of potentially sensitive uncontrolled technologies to foreign persons. The EAR focuses on *outbound* activities (and releases to foreign persons in the United States of controlled technology) to address technology transfer concerns regarding identified technologies.

- Emerging and foundational technologies added to the EAR's CCL will simultaneously expand CFIUS's scope over foreign investments in the US involving such technologies.

FIRRMA Implementing Regulations

- Effective November 10, 2018, Treasury Department "Pilot Program" regulations impose *mandatory* filing requirements with CFIUS 45 days before non-controlling foreign investments from any country in various types of United States businesses involved with "critical technologies." See:
  - https://www.akingump.com/en/news-insights/cfius-pilot-program-expands-jurisdiction-and-imposes-mandatory.html.

- Treasury published on September 17, 2019 proposed rules on most of the remaining FIRRMA issues. See:
  - https://www.akingump.com/en/news-insights/treasury-releases-proposed-cfius-regulations-to-implement-firrma.html

2018 FIRRMA Pilot Program

- Purpose: Test-run of new FIRRMA authority and address perceived national security risks that were the policy drivers of the legislation.
- Take-away 1: **Expands CFIUS jurisdiction** to certain noncontrolling investments in U.S. businesses that are involved in "critical technologies."
- Take-away 2: **Introduces mandatory disclosures**. Parties must file a declaration to CFIUS if the relevant transaction could result in control of a "Pilot Program U.S. Business" by a foreign person or if the transactions involves a covered non-controlling investment in a Pilot Program U.S. Business.

Pilot Program: Which U.S. Business are Captured?

- Pilot Program U.S. Business: any U.S. business that **produces, designs, tests, manufactures, fabricates or develops** a "**critical technology**"
  - A "critical technology" is most technology that is controlled on a U.S. export control list—the CCL, the USML, and the NRC's list.
    - Not all technologies on the CCL are caught though. AT-only technologies, for example, are not "critical technologies."
  - This definition will expand to cover "emerging" and "foundational" technologies that are being identified by the U.S. government through an ongoing interagency process.

- This critical technology must be:
  - (i) **utilized in** connection with the U.S. business's activity in one or more of **targeted industries**
  - (ii) **designed** by the U.S. business **specifically for** use in one or more of the **targeted industries**.

Significance for Export Control Compliance Professionals

- To determine whether a mandatory CFIUS filing is required before investments where uncontrolled technology could be released to a foreign person, the U.S. business will need to be certain of the export control status of the technologies—even if they are not traditionally exported.
- Only after identifying all such technologies will it be possible to determine which of the company's technologies constitute "material nonpublic technical information" —i.e., that which is for the development of controlled technology.
- Thus, export control compliance personnel should be involved in all early stage investment decisions and due diligence efforts to advise on possible mandatory CFIUS requirements related to such technology.
- Compliance programs traditionally focused on situations when technologies are to be exported or released to foreign persons should be revised to account for the new Pilot Program obligations.
- "We are all export control professionals now."

ECRA – What It Does Not Change

- **Main Point: The Export Administration Regulations (EAR) are exactly the same until and unless BIS decides to amend them.**
  - For example, ECRA did not require any changes to the EAR's licensing policies or rules regarding the export, reexport, or transfer to any particular destination, end use, or end user of commodities, technologies, or software subject to the EAR.
  - ECRA is leaner than the 1979 law—it has far fewer limitations and requirements, and it gives BIS great flexibility in deciding what the EAR should require and prohibit.
- Extraterritorial Reach: the EAR still apply to items subject to the EAR outside the United States and still impose requirements regarding their reexport from third countries.

Core ECRA Policy Statements

- Section 4811(1): The United States should "use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary:
  - to restrict the export of items which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States; and
  - to restrict the export of items if necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations."
- Section 4811(5): "Export controls should be coordinated with the multilateral export control regimes. Export controls that are multilateral are most effective, and should be tailored to focus on those core technologies and other items that are capable of being used to pose a serious national security threat to the United States and its allies."

Export Controls and Trade Policy

- ECRA is thus a tool to further U.S. national security and foreign policy (including human rights) objectives. It is NOT designed to be used as a trade policy tool.
  - "National security," however, is not defined. The Trump Administration has been willing to call traditionally trade policy actions (e.g., imposition of tariffs) "national security" issues.
  - Trump Administration's National Security Strategy states that "economic security is national security."
  - How one defines "national security" goes right to the heart of the debate and decisions about which technologies should be identified and controlled as "emerging" or "foundational."
    - Traditional view (in essence): Identify those items that pertain to providing a military or intelligence advantage; work backwards to find the dual-use items of importance to same; draft ECCNs to describe and get multilateral support to enhance effectiveness.
    - Trump Administration view (of some and in summary): China's economic modernization, particularly in Made in China 2025 sectors, is a national security threat, particularly when combined with Military-Civil-Fusion policies. Controls should be broader in scope to address economic competitiveness, based on view that controls on the export of technology can delay advancements in China. (Again issue is much more complicated than these bullets).

Other Things ECRA Did Not Change

- The rules created under the Obama Administration's Export Control Reform (ECR) effort.
  - Indeed, ECRA specifically incorporates ECR concepts, definitions, policy statements, and the general goal to reduce burden among the different agencies caused merely by different lists, regulations, and forms.
- The U.S. Government's processes and rules for receiving, reviewing, and deciding upon license applications.
- The rules that keep licensing-related information confidential and that prohibit the charging of fees for license applications or other requests to BIS.
- Antiboycott rules and laws are identical.

More Things not changed by ECRA, but.....

- ECRA does not change or require changes to the “fundamental research” or “published” carve-outs from the EAR.
  - There is no known effort to change any of the definitions of these and related terms of significance to universities and research institutions.
- ECRA does not require changes to CCL, but Commerce is continuing to work with the agencies to revise and update the categories on a regular basis. Both Commerce and State are looking for ideas for how the space/satellite controls can be improved. Indeed, to the Administration’s credit, Commerce and State recently asked for comments on the space- and launch-related controls.

ECRA Penalties and Enforcement

- Codifies existing maximum civil and criminal penalties:
  - Civil - $300,000 or twice the value of the transaction.
  - Criminal - $1 million and up to 20 years imprisonment.
- ECRA enhances BIS's enforcement authorities, putting it on par with other enforcement agencies (DHS, FBI), including the authority to conduct investigations outside the U.S., "consistent with applicable law."
- BIS still has the broad authority to add foreign entities to the "Entity List," which prohibits the export, reexport, and transfer of ALL items subject to the EAR to the listed entity – such as was the case with the order against ZTE, Jinhua, and Huawei.
  - How BIS uses this authority in 2019 will be an important topic to watch.

ECRA – What is New (Sort of)

- ECRA section 4817 requires BIS to lead an "ongoing" interagency effort to identify "emerging" and "foundational" technologies that are "essential to the national security of the United States" and that are not now identified in one of the multilateral export control regimes such as the Wassenaar Arrangement.
- Terms are not defined, but BIS has referred to "emerging" technologies as "non-mature" technologies and "foundational" as mature technologies.
  - Again, BIS has confirmed that this effort will not change the "fundamental research" carve-out from the EAR, although the concepts are similar to "foundational."

So, Why the New Section 4817 Requirement?

- The CFIUS reform bill (FIRRMA), as introduced, would have given CFIUS jurisdiction to review investments by most U.S. companies in foreign countries.
  - Congress originally wanted this authority so that CFIUS could determine—without lists or public involvement—whether technologies it decided were "emerging" or "foundational" might be transferred to countries of concern (e.g., China) as part of the investment.
- Congress eventually decided that it would be better to require the dual-use export control system led by BIS to handle in a regular-order way the identification and control of "emerging" and "foundational" technologies.
- BIS always had the authority to do this (such as through the 0y521 process created in 2012)—and it indeed regularly updated its control lists—but ECRA made the process mandatory and created standards for what should and should not be considered "emerging" or "foundational" technologies warranting control.

ECRA Standards for Identifying Technologies as "Emerging" or "Foundational"

- In deciding whether to identify a technology as "emerging" or "foundational" and impose *unilateral* controls—i.e., controls imposed only on U.S. items—ECRA requires the Administration to take into account:
  - The development of the technologies in foreign countries (i.e., their foreign availability);
  - The effect controls would have on the development of the technologies in the United States; and
  - Whether the control would be effective in preventing the proliferation of the technologies to countries of concern.

- Most of the public comments filed on the topic basically asked the Administration to abide by these standards strictly when deciding which new technologies to add to the CCL as "emerging" or "foundational."

Additional ECRA Requirements

- Before imposing controls on "emerging" or "foundational" technologies, ECRA also requires the Trump Administration to:
  - reach out to all available sources of information, including industry and academia; and
  - publish as proposed rules any new controls and get industry comments on them before imposing final rules.

- After imposing any new unilateral controls as new Export Control Classification Numbers (ECCNs) in the EAR's Commerce Control List, ECRA requires the Administration to try to get a multilateral export control regime to agree to the same control so that the United States is not alone in the control.
- BIS, however, may proposed rules to get industry comments on what controls should be proposed to the regimes for possible multilateral control.

Licensing Requirements

- ECRA requires that licensing requirements be imposed on exports of "emerging" and "foundational" technologies to countries subject to arms embargoes, which includes China.
- ECRA leaves to BIS the decision regarding whether to impose licensing requirements to other countries. BIS has not decided what to do.
- Licensing requirements will also apply to "deemed exports," i.e., releases of technology in the United States to nationals of countries that have a license requirement, but BIS could create exceptions in certain cases.
- Although BIS leads the effort, all final decisions will be the result of coordination with the departments of Defense, State, and Energy, other agencies, as well as parts of the White House.

“Emerging” Technology Identification Effort

- BIS has not yet proposed controls on the export of any “emerging” technologies.
- Rather, in November 2018, BIS asked the public for comments on the process it should use to identify “emerging technologies essential to U.S. national security. The technology areas BIS said it was studying “included:”
  - “biotechnology,”
  - “technology related to “artificial intelligence,”
  - “Position, Navigation, and Timing (PNT) technology,”
  - “microprocessor technology,”
  - “advanced computing technology,”
  - “data analytics technology,”
  - “quantum information and sensing technology,”

(Continued on next slide)

“Emerging” Technology Topics (Cont.)

- “logistics technology,”
- “additive manufacturing” technology,
- “robotics” technology,
- “brain-computer interface” technology,
- “hypersonic” technology,
- technology related to “advanced materials,” and
- “advanced surveillance technologies.”

- BIS did not state that it planned to impose controls over all such technology areas. Rather, BIS asked for advice on which elements of such technologies that are not now controlled are:
  - “essential to the national security,” and
  - not widely available outside the United States.

“Emerging” Technology Next Steps

- Industry comments on the process were due on January 10, 2019.
  - The short amount of time to provide comments indicates that BIS is under pressure to move quickly on identifying new technologies to control.
- Industry comments seem to be concerned that unilateral controls on commercial technology available outside the United States could harm U.S. industry. Comments are reviewable at: https://www.regulations.gov/docket?D=BIS-2018-0024
- BIS will review comments and, working with the departments of Defense, State, Energy, and other agencies, decide which technologies to propose for control. There is no specific date, but I expect a proposed rule in the summer.
- This effort is intellectually more difficult than anything we did in ECR. It’s easy to comprehend technology to develop landing gear. It’s radically harder to comprehend technology related to quantum computing—and even harder to sort out the subsets thereof essential to U.S. national security.

Will the Controls be Broad or Narrow?

- If the Trump Administration strictly follows the ECRA standards, then the new controls will only be over a very small list of non-mature specific technologies that are unique to the United States, not currently export-controlled, and *essential* to the national security.
- If, however, the Trump Administration defines "national security" broadly, as it has done in other trade policy actions, then the controls could be over any of the broad technology areas identified in the Made in China 2025 plan.
- Personal view and guess: I have confidence in the export control officials and believe that the list will be quite narrowly tailored—and will be of technologies that would have eventually been controlled anyway.
  - I suspect proposed rules will be published by the end of the year.

“Foundational” Technologies

- During the Congressional debate over FIRRMA, there was a general concern that China was using “foundational” U.S.-origin items, such as semiconductors, to build other items that could be harmful to U.S. national security interests.
- The term was never defined and BIS may ask for industry advice this winter regarding which technologies it should control as “foundational.”
- Deciding which technologies to control as “foundational” is a much harder effort because they are, by definition, basic and common. ECRA discourages unilateral controls over technologies that are already available outside the United States.
  - My guess is that it will result in China-specific controls over many types of previously de-controlled and AT-only-controlled technologies.
  - BIS has said in conferences that it will publish by the end of the year a request for comments on the process it should follow when identifying foundational technologies. Stay tuned.

ECRA and China in 2019

- Although ECRA does not change any policies regarding exports to China, it does require a study of whether items that do not now require a license to China should.
  - Administration is trying to identify "chokepoint" technologies – those that, if controlled, would delay China's development in the technology of concern. Key issue is foreign availability.
- Review was supposed to have been completed in May 2019.
- Likely proposed and final rules to be published by the end of the year.
  - Expansion of the military end use rule to include military end users and more types of items?
  - China-specific licensing controls over AT-only items?
  - Removal of license exceptions such as APR and CIV for China exports?
  - Change in the EAR's licensing policies regarding exports to civil end uses in China?
  - Addition of part 744 controls over services by U.S. persons for intelligence agencies not involving controlled technologies?

Testimony re export controls and China

- If you want to read more detail about the export control system and my views pertaining how it can and should be used with respect to China, read my testimony before the Senate Banking committee on the issue:

https://www.banking.senate.gov/imo/media/doc/Wolf%20Testimony%206-4-19.pdf

- The on-line version of the testimony has many hot links to source and other materials that may be of use or interest.

The Entity List

- The U.S. Government has a range of tools to use to sanction or attempt to influence the behavior of foreign persons and entities engaged in acts contrary to U.S. national security and foreign policy interests.
- One of the tools is the Entity List, which BIS administers. In essence, the export, reexport, transfer of commodities, software, and technology "subject to the EAR" is prohibited to listed entities without a BIS license.
  - Unlike OFAC sanctions, it does not prohibit other types of transactions, such as imports or commercial transactions not involving the export, reexport, or transfer of items subject to the EAR.
- Entity List has been used more broadly than before:
  - Jinhua – to address intellectual property theft issues.
  - Huawei – to address, apparently, a wide range of concerns, including sanctions and cyber security issues.
  - Multiple Chinese corporate and state entities involved in human rights violations in China
- Watch for more use – and Chinese reaction to dealing with US companies generally as a result.

Other ECRA/EAR Regulations in 2019??

- Control over non-military guns, ammunition, and related items will be moved to Commerce Department's control from State Department.
  - Effective date is reportedly going to be 45 days after publication (rather than the traditional 180 days), so start updating your compliance programs and training now if relevant to your company.
- Minor updates of military controls and commercial spacecraft rules.
- Regular implementation of regime rules.
- Creating (i) a single export control agency, or at least harmonizing the EAR and the ITAR, and (ii) a single online form for use by BIS, DDTC, and OFAC etc. will have to wait until next Administration.

General Comment

- Export control rules exist to implement very real national security and foreign policy objectives.
- Unless companies and universities spend the resources necessary to understand and comply with the rules, U.S. national security and foreign policy objectives are harmed. (So, thank you for being here and holding these conferences!) Remind your management how important you are. Seriously.
- Similarly, Congress should significantly increase the appropriations for BIS, DDTC, and the other export control agencies so that they can staff up. The issues are only getting more complex requiring ever more expertise and resources. Without such support, and effective Administration implementation and enforcement, the same national security and foreign policy objectives are harmed—and U.S. industry is harmed as well.

Questions?