

Export Control Reform Act of 2018: What it Means and How to Prepare

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Export Control Reform Act of 2018 (“ECRA”)

- Became law on August 13, 2018
- Establishes permanent statutory authority for U.S. export controls on commercial, dual-use, and less sensitive military items (EAR)
- Adds export controls on “emerging and foundational technologies” that are “essential to the national security of the United States”
- Requires a formal interagency process led by BIS for identifying such “emerging and foundational technologies”
- Provides authority for tightening export controls on countries subject to U.S. arms embargoes
- Codifies and increases penalties for violations
- Enhances BIS enforcement authority

■ ECRA - Key Terms and Provisions

■ “United States Person”

- any individual who is a citizen or national of the United States or who is an individual described in subparagraph (B) of section 274B(a)(3) of the Immigration and Nationality Act;
- a corporation or other legal entity which is organized under the laws of the United States, any State or territory thereof, or the District of Columbia; and
- any person in the United States.

■ “Foreign Person”

- (A) any natural person who is not a lawful permanent resident of the United States, citizen of the United States, or any other protected individual (as such term is defined in section 274B(a)(3) of the Immigration and Nationality Act;
- (B) any corporation, business association, partnership, trust, society or any other entity or group that is not incorporated in the United States or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of a foreign government (e.g., diplomatic mission).

■ “Item” – commodity, software, or technology

ECRA - Key Terms and Provisions (cont.)

- “Export” includes:
 - (A) the shipment or transmission of the item out of the United States, including the sending or taking of the item out of the United States, in any manner; and
 - (B) the release or transfer of technology or source code relating to the item to a foreign person in the United States.
- “Reexport” includes:
 - (A) the shipment or transmission of the item from a foreign country to another foreign country, including the sending or taking of the item from the foreign country to the other foreign country, in any manner; and
 - (B) the release or transfer of technology or source code relating to the item to a foreign person outside the United States.
- Deemed reexport – not defined
- “Technology” **includes** information, in tangible or intangible form, necessary for the development, production, or use of an item

ECRA Section 1758 – Emerging and Foundational Technology Provisions

- Regular ongoing interagency process for identifying emerging and foundational technologies
- Limited to technologies “essential to the national security of the United States”
- Do not include technologies already subject to export controls
- Public notice and comment
- Newly identified technologies will be added to CCL
- BIS can implement interim controls/license requirements

Emerging Technologies ANPRM

- Public comments sought on:
 - How to define emerging technology to assist identification of such technology in the future;
 - criteria to apply to determine whether there are specific technologies within these general categories that are important to U.S. national security;
 - sources to identify such technologies;
 - other general technology categories that warrant review to identify emerging technology that are important to U.S. national security;
 - the status of development of these technologies in the United States and other countries;
 - the impact specific emerging technology controls would have on U.S. technological leadership;
 - any other approaches to the issue of identifying emerging technologies important to U.S. national security, including the stage of development or maturity level of an emerging technology that would warrant consideration for export control.

Emerging Technologies ANPRM - Representative Categories

- biotechnology;
- artificial intelligence and machine learning technology;
- position, navigation, and timing technology
- microprocessor technology;
- advanced computing technology;
- data analytics technology;
- quantum information and sensing technology;
- logistics technology;
- additive manufacturing (e.g., 3D printing);
- robotics;
- brain–computer interfaces;
- hypersonics;
- advanced materials; and
- advanced surveillance technologies.

Industry Concerns

- 231 public comments filed (estimates):
 - 89 companies, 63 trade associations, 27 universities
 - 22 comments on biotech, 93 comments on AI, 23 position/timing/navi, 31 comments on microprocessor tech, 11 on advance computing, 24 on data analytics, 32 on quantum and sensing, 9 on logistics, 32 on additive manufacturing, 22 comments on robotics, 5 comments on brain-computer interfaces, 9 comments on hypersonics, 11 on advanced materials, and 10 on advanced surveillance.
- Most frequent concerns are:
 - Sweepingly broad categories of items
 - Investment
 - R&D
 - Innovation leadership
 - Trade policy vs. national security
 - U.S. economic competitiveness
 - Increased cost/delays for U.S. entities

What does ECRA mean for your export compliance program?

■ Key Takeaways

- Exports of new products may will require licenses depending on the destination, end-user, and end-use of the product or information.
- Potential limits put in place on not only who can buy the products, but also who works for or invests in the company.
- Concern with non-U.S. persons working on R&D efforts in the U.S. - may require licenses to participate if involving these emerging technologies.
- Big picture enforcement concerns

■ Timing

- NPRM
- ANPRM on foundational technologies

■ Ensuring Compliance with ECRA

- Coordination between and among the business, R&D, compliance, and legal functions
- Prepare to act fast once changes are announced
- Educate the supply chain and obtain from all levels and functions

■ Questions?


