

House Committee Holds Hearing on Export Control Reform Bill

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Donald L. Vieira

Partner / Washington, D.C.
202.371.7124
donald.vieira@skadden.com

Jennifer Ho

Associate / Washington, D.C.
202.371.7266
jennifer.ho@skadden.com

Nicholas A. Klein

Associate / Washington, D.C.
202.371.7211
nicholas.klein@skadden.com

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Four Times Square
New York, NY 10036
212.735.3000

1440 New York Ave., N.W.
Washington, D.C. 20005
202.371.7000

skadden.com

On March 14, 2018, the House Committee on Foreign Affairs held a hearing titled “Modernizing Export Controls: Protecting Cutting Edge Technology and U.S. National Security” to examine the proposed Export Control Reform Act (ECRA). Introduced on February 15, 2018, by Committee Chairman Ed Royce, R-Calif., the ECRA is a bipartisan effort to modernize the U.S. export control regulations. During the hearing, committee members expressed concern about the attempts of certain nations — particularly China and Russia — to acquire dual-use technologies from the United States, including robotics, artificial intelligence and other emerging technologies. The committee discussed the critical role that the U.S. export control regime plays in securing U.S. national security and the importance of overlapping regulatory jurisdiction with the Committee on Foreign Investment in the United States (CFIUS).

If passed, the ECRA would repeal the Export Administration Act of 1979 (EAA) and replace it with a modern, permanent statutory authority to regulate the export, re-export and transfer of U.S. goods, software and technology. This long-awaited legislation is the first attempt to establish a permanent U.S. export control regime since congressional efforts to renew the EAA failed in 2001. Currently, the Department of Commerce’s Bureau of Industry and Security (BIS) administers the Export Administration Regulations (EAR), under a presidential delegation of authority under the International Emergency Economic Powers Act. The ECRA promises to enhance the stability and predictability of U.S. export controls.

Although the proposed legislation generally would codify the existing U.S. export control regime, it also would establish new mechanisms, such as an interagency review process and additional congressional oversight, designed to preserve U.S. technological advantage in emerging technologies, science, engineering, manufacturing and other industries critical to U.S. national security and foreign policy. These new provisions, however, may have a significant impact, especially for U.S. companies owned or controlled by foreign entities and companies engaged in development of new technology. Some of the key provisions in the ECRA include the following:

U.S. Subsidiaries of Foreign Companies. As currently drafted, the ECRA defines a “United States person” to include corporations organized under the laws of the United States if natural U.S. persons own more than 50 percent of the outstanding capital stock of the entity. This definition would treat U.S. subsidiaries of foreign companies as foreign persons, which would restrict their access to certain technology and may impose additional licensing requirements for the conduct of their business.

Emerging Technologies. The ECRA would revise the definition of “technology” to include “foundational information” and “know-how,” broadening the scope of the EAR to cover developmental activities not previously regulated. This expansion of the EAR is aimed at regulating emerging technologies earlier in the development process. Companies engaged in technology development would need to ensure product classification and licensing determinations are made at an earlier stage of development than they do currently.

Interagency Review Process. The legislation would require the president to establish a formal, ongoing interagency process to regularly review and identify key emerging technologies and assign appropriate export controls. The Departments of State, Defense, Commerce and, as appropriate, the Office of the Director of National Intelligence or other federal agencies would advise on the identification of national security threats;

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review and approve criteria for including and removing items from the list of controlled items; and obtain evaluations regarding the effectiveness of the legislation.

Increased Congressional Oversight. The ECRA would require an annual report analyzing the effectiveness of the ECRA in addressing threats to U.S. national security; its impact on U.S. scientific and technological leadership; its consistency with export controls imposed by other countries; a summary of regulatory changes; and efforts undertaken to identify and control critical technologies. Additionally, the legislation would require congressional notice prior to any amendment to the EAR.

Best Practice Guidelines. The ECRA would require a formal publication of “best practice” guidelines to assist persons in developing and implementing, on a voluntary basis, effective export control programs.

Anti-Boycott Regulations. The ECRA also provides permanent authority for existing anti-boycott regulations. These regulations prohibit U.S. persons from taking or agreeing to take actions with the intent to comply with or support a foreign boycott that is contrary to U.S. national security or foreign policy interests.

Missile Proliferation Controls. The ECRA would authorize the president to impose substantial sanctions targeting trade in missile equipment and technology. U.S. and foreign persons that illegally export, conspire or facilitate an export of certain items related to missile equipment or technology may face a two-year license debarment. Sanctions may also be imposed against both U.S. and foreign persons that knowingly and materially contribute to the use, development, production, stockpile, or acquisition of chemical or biological weapons through the export of goods and technology.

Penalties for Violations. The legislation would codify civil and criminal penalties for violations of export controls or anti-boycott regulations. Violations may be subject to civil penalties of \$250,000 or an amount that is twice the value of the transaction, whichever is greater, and/or a revocation of export privileges. A knowing violation may lead to criminal fines of up to five times the amount or value of the transaction or \$500,000, whichever is greater, and imprisonment for up to five years. A willful violation

may lead to criminal fines of up to five times the amount or value of the transaction or \$1 million, whichever is greater, and imprisonment for up to 10 years. A conviction could also lead to criminal forfeiture and a bar to licensing for up to 10 years.

Key Takeaways

The ECRA is a “critical element of the national security policies underlying the laws and regulations governing foreign direct investment in the United States,” according to language in the bill. The updated export control regime is meant to work in tandem with the foreign investment review process to identify emerging and critical technologies that may be of interest to U.S. national security. Similar to the Foreign Investment Risk Review Modernization Act — the proposed legislation to reform the CFIUS review process, which is also working its way through Congress — there is a substantial interest in maintaining U.S. leadership in science, engineering and technology vital to national security.

In contrast to the EAA, which has been criticized for its rigidity, the ECRA places a heavy emphasis on flexibility and efficiency in the U.S. export control system. The proposed interagency process is intended to facilitate the identification of emerging critical technologies to provide comprehensive and accurate export controls in response to the fast-paced demands of industry and U.S. national security. Flexibility in export controls is also essential to addressing new threats and facilitating intelligence sharing among U.S. national security and foreign policy agencies.

Should the ECRA become law, it would grant the president broad authority to establish and enforce export controls and anti-boycott regulations. Given the substantial civil and criminal penalties that may arise if export control laws are violated, it is in companies’ best interests to develop robust export control compliance policies and procedures. Implementing an export control compliance program is a mitigating factor in a civil penalty action and is likely to reduce any such penalty imposed for a violation.

We will track the progress of the ECRA legislation and provide updates as new developments occur.