

Commerce Department Will Move Forward With More Stringent Export Controls for Certain Emerging Technologies

Skadden

01 / 10 / 20

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

Michael E. Leiter

Partner / Washington, D.C.
202.371.7540
michael.leiter@skadden.com

Daniel J. Gerkin

Counsel / Washington, D.C.
202.371.7194
daniel.gerkin@skadden.com

Nicholas A. Klein

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

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

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

Through the Export Control Reform Act of 2018 (ECRA), which was enacted in August 2018, Congress directed the U.S. Department of Commerce to conduct an interagency review process to identify “emerging and foundational technologies” and to impose controls on the export, reexport or in-country transfer of such technologies. As discussed in detail in our [prior summary](#), on November 19, 2018, the Bureau of Industry and Security, U.S. Department of Commerce (BIS) published an advance notice of proposed rulemaking (ANPRM) soliciting comments on the criteria to be used to identify “emerging technologies” that are essential to U.S. national security. In the ANPRM, BIS compiled a representative list of broadly scoped technologies, including, for example, artificial intelligence (AI) and machine learning technology, that BIS, through the interagency process and outreach to industry and academia, will assess to identify any specific “emerging technologies” (a) that are important to U.S. national security and (b) for which effective controls can be implemented without negatively impacting U.S. leadership in the science, technology, engineering or manufacturing sectors.

Apart from the ECRA mandate for BIS to identify and control emerging technologies, BIS has long held the authority to impose export controls on new technology. Under the Export Control Classification Number (ECCN) 0Y521 series, BIS may classify as part of the series and impose temporary controls on a technology for one year (which may be extended) while it reviews that technology and decides which permanent controls are appropriate. The 0Y521 series was created as part of the Export Control Reform Initiative in 2012 specifically to address the emerging technology concern that the ECRA now seeks to remedy, and the series may be considered a simpler mechanism to impose apt controls on new technologies given that it allows BIS to immediately control a technology and then gather additional information to tailor those controls, as well as to present the technology to relevant multilateral bodies for their consideration. For example, BIS published an [interim final rule](#) on January 6, 2020 using the ECCN 0Y521 series to impose export controls on geospatial imagery software “specially designed” for training a Deep Convolutional Neural Network to automate the analysis of geospatial imagery and point clouds. This software was immediately classified as ECCN 0D521 and subject to Regional Stability controls — meaning an authorization is required for export to any country other than Canada — while BIS evaluates the technology and determines appropriate permanent controls. License applications for this technology will be considered on a case-by-case basis and a government-use License Exception GOV is the only available license exception for such technology. Comments on the interim rule may be submitted until March 6, 2020. Although the use of the ECCN 0Y521 series for this artificial intelligence software is not technically part of the emerging technology review process under the ECRA, the end result is largely the same.

Although the ECCN 0Y521 rulemaking hinted at the types of emerging technologies that BIS ultimately might control through the ECRA process, BIS has not yet specifically identified any such technologies as “emerging technologies.” By all indications, the application of controls on “emerging technologies,” as with the software described above, will be narrowly tailored to only a handful of very specific commodities, software or technologies. For example, BIS recently submitted a [proposed rule](#) to the Office of Information and Regulatory Affairs (OIRA), a statutory part of the Office of Management and Budget within the Executive Office of the President, for regulatory review to cover “Gate-All-Around Field Effect Transistor (GAAFET)” technology, which relates to semiconductor manufacturing. No details regarding this proposed rule are known, but the specificity with which the technology has been identified at least suggests that BIS intends to adopt more narrowly construed controls. Further-

Commerce Department Will Move Forward With More Stringent Export Controls for Certain Emerging Technologies

more, the proposed rule format indicates that BIS intends to solicit public comment before implementing additional controls, unlike in the ECCN 0Y521 series process described above.

Other technologies reportedly under consideration to be controlled under the new review procedure relate to additive manufacturing for energetic materials (*i.e.*, explosives), quantum computing (*i.e.*, quantum diluted refrigerators), certain precursor chemicals associated with the manufacture of nerve agents and certain single-use cultivation chambers for use in handling biological materials. The specifics and timing of the issuance of any rulemaking is uncertain, although we understand that a rule will be published in a matter of weeks. It is not clear whether controls on these technologies also will take the form of proposed rules or whether, for example, controls will be applied immediately through the use of the existing ECCN 0Y521 process for emerging technologies or delayed while these technologies are considered by multilateral bodies, such as the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies or the Australia Group, which addresses technologies useful for the development of chemical or biological weapons. It is also unclear at what

point any such emerging technologies may be considered “critical technologies” for purposes of establishing the jurisdiction of the Committee on Foreign Investment in the United States over U.S. acquisitions or non-controlling investments pursuant to the Foreign Investment Risk Review and Modernization Act (FIRRMA). The artificial intelligence software for geospatial analysis identified in the January 6, 2020 interim final rule, however, is now a “critical technology” under FIRRMA.

We also understand that BIS is poised to issue an ANPRM regarding the identification and control of so-called foundational technologies, described as items that currently are subject to control only for Anti-Terrorism reasons. This ANPRM is expected to have a 60-day public comment period.

The coming year promises to be momentous for technology export controls. Accordingly, companies operating in any of the industries identified by BIS in November 2018 should carefully monitor regulatory developments to ensure that no opportunities are lost to shape rulemaking regarding emerging or foundational technologies.