

**November 20, 2018**  
**Regulatory Alert:**

**BIS Publishes Notice Asking for Information on Emerging Technologies**

**[Export Controls and Sanctions Group](#)**

**Benjamin H. Flowe, Jr.**

**John A. Ordway**

**Daniel Fisher-Owens**

**Babak Hoghooghi**

**Perry S. Bechky**

**Ray Gold**

**Jason A. McClurg**

**Michelle Turner Roberts**

For more information on this Alert, please contact Ray Gold ([raygold@bcr-dc.com](mailto:raygold@bcr-dc.com)), Dan Fisher-Owens ([dfo@bcr-dc.com](mailto:dfo@bcr-dc.com)) or your regular contact at BCR.

To subscribe to our practice group Alerts, please contact [exportalerts@bcr-dc.com](mailto:exportalerts@bcr-dc.com).

This Alert contains general guidance, is for informational purposes only, and should not be construed as a legal opinion on the application of this guidance to any specific facts or circumstances. Opinions expressed herein are solely those of the authors.

Yesterday, the Commerce Department's Bureau of Industry and Security ("BIS") published in the *Federal Register* an advance notice of public rulemaking concerning the U.S. Government's review of controls for so-called emerging technologies. ([83 Fed. Reg. 58201 \(Nov. 19, 2018\)](#).)

BIS is asking for information from the public to assist Commerce and other agencies in proposing specific emerging technologies for control on the Commerce Control List, apparently under new Export Control Classification Numbers ("ECCNs"). The notice identifies the following 14 general areas of 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 technology;
- (10) Robotics;
- (11) Brain-computer interfaces;
- (12) Hypersonics;
- (13) Advanced Materials; and
- (14) Advanced surveillance technologies.

We recommend that companies active in these sectors review the notice and determine whether they might be affected. If so, we recommend submitting comments and/or participating in anticipated Technical Advisory Committee meetings in the coming months, to ensure your company's views are taken into account during the process of reviewing these technologies.

At this stage, Commerce specifically asks for comments on:

- How to define emerging technology to assist future identification;
- Criteria to apply to determine whether there are specific technologies within these general categories meriting control;
- Sources to identify such technologies;
- Other general technology categories that warrant review to identify emerging technology that merits control;
- 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;

- Other approaches to the issue of identifying emerging technologies meriting control, including the stage of development or maturity level that would warrant consideration for export control.

Commerce's notice is a first step in the implementation of Section 1758 of the Export Control Reform Act of 2018 ("ECRA"), which was enacted on August 13, 2018. ECRA Section 1758 requires the establishment of an interagency process to identify and control both "emerging" and "foundational" technologies that are essential to the national security of the United States and not already subject to export controls. ECRA Section 1758 requires the Commerce Department to establish appropriate EAR controls, including interim unilateral controls, on emerging and foundational technologies identified by the interagency process. At a minimum, Commerce must require a license for exports/reexports of such technologies to any countries subject to a U.S. embargo, including an arms embargo. As one noteworthy example, the People's Republic of China ("China") is subject to a U.S. arms embargo.

Commerce's notice does not address the identification of foundational technologies, which will be the subject of a separate Commerce notice in the future. Commerce's November 19 notice does ask, however, for comments on treating emerging and foundational technologies as separate types of technology.

With respect to emerging technologies, Commerce is focusing on technologies that are currently controlled as EAR99, which is the basket category for items subject to the EAR, but not controlled on the Commerce Control List.

In the notice, Commerce states that it "does not seek to alter existing controls on technology already specifically described in the CCL." Further, Commerce states that it "does not seek to expand jurisdiction over technologies that are not currently subject to the EAR, such as 'fundamental research' described in § 734.8 of the EAR."

The deadline to submit comments is December 19, 2018. This is clearly a short amount of time for the public to prepare and provide comments on these very broad and very important topics, so we recommend that affected businesses begin working on their comments as soon as possible. Some in industry plan to ask Commerce for more time, but there is no guarantee that an extension will be granted. While there will be another opportunity for the public to provide comments before a final rule/interim final rule, industry should consider filing comments on this November 19 notice. Otherwise, it may be difficult to roll-back momentum created in this first round for broad, vague, or otherwise unnecessary controls.

There is a substantial risk that providing the information requested by Commerce will be used by the U.S. Government to impose significant new controls in the subject technology areas. On the other hand, not participating in the comment process may result in the imposition of controls that are more burdensome than would have otherwise been the case.

With the passage of the ECRA, it is likely that stronger Commerce export controls will be imposed on at least some emerging technologies. It seems unlikely that the interagency process created by the ECRA will conclude that no new controls are needed. Another factor is that this new process provides the Trump Administration with a way to impose more stringent export controls on China without singling China out.

The U.S. Government's enhanced focus on emerging and foundational technologies is also reflected in the recent enactment of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), which substantially expanded and strengthened the process for review by the Committee on Foreign Investment in the United States ("CFIUS") of foreign investment for national security reasons. CFIUS filings will now be mandatory in various circumstances, including certain minority investments by foreign investors into U.S. companies with controlled goods and technology. Emerging and foundational technology is included as part of CFIUS's jurisdiction, meaning that Commerce's forthcoming definition of this new concept will affect investment as well as exports.

Commerce's notice is also consistent with the annual report that the U.S.-China Economic and Security Review Commission ("Commission") provided on November 14, 2018 to Congress in which the Commission recommends stronger action against China in a wide array of areas. ([USCC 2018 Annual Report](#)). In the area of export controls, the Commission's main recommendation to Congress is to "[e]nhance consultations on mitigating the export of dual-use technology to China and identifying other foundational technologies essential for national security."

Under these circumstances, we recommend that companies give careful consideration to providing comments to the Commerce Department, including whether to provide comments as an individual company and/or under the umbrella of an industry association. As general themes, we believe that Commerce should be encouraged to consult thoroughly with its Technical Advisory Committees before issuing even proposed rules, to perform thorough foreign availability assessments, and to refrain from imposing broad or vague controls that would inhibit the development of technology and jeopardize U.S. leadership.