

## The "Emerging and Foundational" Impact of the Export Control Reform Act

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The Export Control Reform Act of 2018 (ECRA) will have a foundational and emerging impact on the future of U.S. export controls and foreign direct investment.

The ECRA sits within the voluminous John S. McCain National Defense Authorization Act for fiscal year 2019 (signed by President Trump on August 13th, 2018), tucked right behind the Foreign Investment Risk Review Modernization Act (FIRRMA) revising foreign direct investment requirements in the U.S.

As to its foundational impact on export controls, the ECRA codifies existing U.S. export control law by providing permanent statutory authority for the Export Administration Regulations (EAR), which are administered and enforced by the Department of Commerce. The initial authority for the EAR was provided by the Export Administration Act of 1979 (EAA), which lapsed in 2001. Since the 2001 EAA lapse, the President annually reauthorizes and continues the EAR by executive order and annual continuation notice. Although noteworthy, for most exporters the ECRA's permanent statutory authority function is only a minimally impactful administrative footnote.

As to its emerging impact on exports, Section 1758 of the ECRA creates a mandate for the U.S. government to identify and control the export of "emerging and foundational technologies" (E&F Technologies) essential to U.S. national security. ECRA establishes an interagency review process to continually identify E&F Technologies and, if warranted, control any essential E&F Technology under EAR export controls. The Departments of Commerce, Defense, Energy and State will be the lead agencies conducting the interagency review process, with support from other federal agencies as appropriate.

The public debate surrounding the enactment of FIRRMA and ECRA suggest that E&F Technologies may focus on technology for the following types of items: autonomous vehicles and automatized driving assistance systems, 5G, hydrogen and fuel cells, and biotechnology, as well as robotics, artificial intelligence and machine learning.[1]The ECRA excludes from review as a potential E&F Technology those items already listed on the United States Munitions List (USML) of the International Traffic in Arms Regulations (ITAR) and the Commerce Control List (CCL) of the EAR. Identified E&F Technologies will drop their default designation as EAR99 items, becoming classified and listed on the CCL and subjected to item-based export controls and license requirements under the EAR. The level of item-based export controls imposed on an E&F Technology by the Department of Commerce will take into account the potential end uses and end users of the technology. At a minimum, Section 1758 of the ECRA directs the Commerce Department to require a license for the export of any E&F Technology destined to a country that is subject to an arms or other U.S. embargo - including the U.S. arms embargo with China. A license application to export an E&F Technology to a U.S.-embargoed country may have a presumption of denial.

For E&F Technologies subject to item-based export controls under the EAR, ECRA permits the Commerce Department to create license exceptions for the provision of technology associated with the following types of transactions:

1. the sale or license of a finished item when such technology is generally made available with the finished item;
2. integration services or similar services, if the U.S. person supporting the transaction generally makes such services available;

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3. transfer of equipment and the provision of associated technology to operate the equipment, if the transfer could not result in the foreign person using the equipment to produce critical technologies;
4. procurement by the U.S. person of goods or services from a foreign person, if the foreign person has no rights to exploit any technology contributed by the U.S. person; and,
5. any contribution and associated support to an industry organization related to an applicable standard or specification by a U.S. person that is a party to the transaction.

As a significant note, Section 1758 of the ECRA compels the Department of Commerce to coordinate and work with U.S. allies to subject E&F Technologies (once identified) to global controls under multilateral export control regimes, such as the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.

Finally, FIRRMA imposes multiple requirements on the Committee on Foreign Investment in the United States (CFIUS) to review proposed foreign investments in E&F Technologies located in the U.S. Pointedly, E&F Technologies (once identified) are now included within the FIRRMA definition of critical technologies, thereby subjecting certain covered transactions containing E&F Technologies to CFIUS review.

In the coming months, information on the initial identification of E&F Technologies will be released, so watch for Miller Canfield updates. If you need further assistance to understand how emerging and foundational technologies may affect your transaction subject to CFIUS review under FIRRMA, we invite you to contact Miller Canfield.

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[1] See generally "Foreign Affairs Committee testimony from March 14, 2018 regarding Modernizing Export Controls: Protecting Cutting-Edge Technology and U.S. National Security" at <https://foreignaffairs.house.gov/hearing/hearing-modernizing-export-controls-protecting-cutting-edge-technology-u-s-national-security/>; and, "FIRRMA Act will give Committee on Foreign Investment a needed update," Sens. John Cornyn (R-TX) and Dianne Feinstein (D-CA), from *The Hill* on March 21, 2018 at <http://thehill.com/blogs/congress-blog/technology/379621-firma-act-will-give-committee-on-foreign-investment-a-needed>.