

# BIS requests comments on “Foundational Technologies,” with the goal of developing new export and CFIUS controls

September 4, 2020

In a Federal Register Notice dated August 27, 2020, the US Department of Commerce, Bureau of Industry and Security (BIS) issued an advance notice of proposed rulemaking (ANPROM) seeking comments from the public concerning the criteria for defining “foundational technologies.” Since August 2018, with the enactment of the Export Control Reform Act (ECRA), BIS had been charged with defining the terms “emerging technologies” and “foundational technologies” to then impose heightened export controls on these technologies to control and safeguard these technologies deemed under ECRA to be “essential to the national security of the United States.” In addition, the criteria for defining “foundational technologies” and “emerging technologies” will impact the administration of non-US investment in the United States under CFIUS and FIRRMA. Previously, BIS elicited comments from the public for input to define “emerging technologies,” but this effort remains to date mostly conceptual and BIS has not yet issued any concrete guidance and related heightened export controls for “Emerging technologies.”

In particular, BIS is asking interested parties to submit comments by October 26, 2020, concerning “foundational technologies” that may include “commodities” and “software” to respond to the following:

- How to further define foundational technology to assist in identification of such items;
- sources to identify such items;
- criteria to determine whether controlled items identified in AT level Export Control Classification Numbers (ECCNs), in whole or in part, or covered by EAR99 categories, for which a license is not required to countries subject to a US arms embargo, are essential to US national security;
- the status of development of foundational technologies in the United States and other countries;
- the impact specific foundational technology controls may have on the development of such technologies in the US;
- examples of implementing controls based on end-use and/or end-user rather than, or in addition to, technology based controls;
- any enabling technologies, including tooling, testing, and certification equipment, that should be included within the scope of a foundational technology; and
- any other approaches to the issue of identifying foundational technologies important to US national security, including the stage of development or maturity level of a foundational technology that would warrant consideration for export control.

The August 27, 2020, ANPROM provides only limited guidance on what BIS targets as a potential “foundational technology” that may warrant increased export controls, but provides a few examples, including: items that are currently subject to control by BIS “for military end use or military end user reasons, such as semiconductor

manufacturing equipment and associated software tools, lasers, sensors, and underwater systems,” items subject to Anti-Terrorism controls, such as items “that are being utilized or required for innovation in developing conventional weapons, establishing foreign intelligence collection activities, weapons of mass destructions” and “technologies that have been subject to illicit procurement.”

For interested parties considering to comment, the ANPROM provides limited guidance as to whether it is in the best interest of the commenter to publicly join the debate. Clearly, the task of defining the criteria to identify “foundational technologies” subject to increased export controls is, for the most part, still at a conceptual stage, except for the few concrete examples that BIS identifies as being under consideration for inclusion as a “foundational technology. Interested parties focused on industries that are specifically named, such as for example, “semiconductor manufacturing equipment” and “lasers,” may have a vested interest in commenting.

There is general consensus that the goal of enhanced national security for the United States must be advanced. The challenge is to develop an export control regime and administer restrictions on foreign investment under CFIUS and FIRRMA that support the goal of achieve increased national security without unduly restricting US commercial endeavors from competing internationally in high-tech fields.

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