The Export Control Reform Act of 2018

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Topics of Discussion

- ECRA: What is it?
- How did we get it?
- What’s the Same?
- What’s Different?
  - Export Administration
  - Export Enforcement
- Emerging Technologies
Export Control Reform Act of 2018


Subtitle B, Title XVII, Public Law 115-232 (132 Stat. 2210 (August 13, 2018))

How did we get here?

- Many efforts over the years to renew the Export Administration Act of 1979, or replace it:
  - Bills introduced with the intent of renewing the EAA of 1979
  - Bills introduced to completely replace the EAA
  - Bills introduced with a focus strictly on enforcement authorities
  - Bills involving different subjects entirely, that had export control elements tacked on

- Close Calls:
  - S. 149 “The Export Administration Act of 2001” - completely new export control legislation
  - S. 2000 “The Export Enforcement Act of 2007” - renewing the EAA with revisions to the enforcement provisions

- ECRA Process:
  - Internal negotiations to find a vehicle to move the bill forward led to H.R. 5040 being tacked on to H.R. 5841, which was the House version of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA)
ECRA: What’s the Same?

- The Export Administration Regulations
- Controls on exports, reexports and transfers (in-country) of items subject to the EAR
- Controls on certain activities by U.S. Persons
- Multilateral and unilateral controls
- Confidentiality
- Prohibition of fees
- Interagency review (E.O. 12981)
- Interagency Dispute Resolution Process
ECRA: What’s New?

- ECRA is leaner than the EAA, with less details about process, providing greater flexibility and removing some limitations.
- As part of the licensing process, assessment of the impact of the export of the item on the U.S. defense industrial base
  - Denial of applications of items the export of which would have significant negative impact on the defense industrial base
- Requirement to develop methodology for providing information to U.S. exporters (especially small businesses) with information on export controls and compliance thereof
- Requirement to establish an ongoing process to identify and regulate, as appropriate, emerging and foundational technologies
- Required review of United Nations and U.S. arms embargoes, the scope of controls specific to military end-use and end-users and the items on the Commerce Control List subject to such controls
ECRA: What’s New? (Enforcement)

- Affirms existing law enforcement authorities
- Specifically identifies additional authorities:
  - Undercover investigations
  - Wiretapping
  - Overseas investigations
  - Civil forfeiture (new language for EAA concept)
Emerging Technologies

What are “emerging technologies”?

- Essential to the national security of the United States, but not already subject to export controls
- Not “fundamental research” or otherwise outside the scope of the Export Administration Regulations

ECRA authorizes Commerce to establish appropriate controls, including interim controls

Identification of technologies: Advance Notice of Proposed Rulemaking (ANPRM) published November 19

- Foundational technologies to be considered separately
Emerging Technologies: Advanced Notice of Proposed Rulemaking

- Seeks input on the criteria for defining and identifying emerging technologies
- Provides a representative list of general categories of emerging technology, including: biotechnology, artificial intelligence, PNT technology, microprocessor technology, advanced computing technology, quantum information and sensing technology, data analytics technology, logistics technology, robotics, additive manufacturing, brain-computer interfaces, hypersonics, advanced materials, and advanced surveillance materials
- Comments due on December 19, 2018
- Next steps: Proposed Rule(s) and Final Rule
Questions?
Thank You!

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