First emerging technologies identified and controlled for export in the EAR

International Trade Alert

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In its long-awaited debut, the US Department of Commerce, Bureau of Industry and Security (BIS) has published a Final Rule that identifies the first[1] “emerging technologies” described in the Export Control Reform Act of 2018 (ECRA).[2] The ECRA directed BIS to lead a regular interagency process to identify and add to the Export Administration Regulations (EAR) controls on “emerging” and “foundational” technologies that are “essential to the national security of the United States.” Having been designated as “emerging technologies” by the interagency process, the Final Rule imposes export controls on (i) certain precursor chemicals, (ii) the Middle East respiratory syndrome-related coronavirus (MERS-related coronavirus), and (iii) single-use cultivation chambers with rigid walls.

Although additional controls on more prevalent technologies are expected soon – such as on artificial intelligence, robotics, or additive manufacturing – the Final Rule reflects the results of the February 2020 meeting of the Australia Group – a 42-nation multinational export control regime that drives cooperation and consistency in global export controls. The US has agreed to implement changes to the EAR in accordance with this meeting, and, in doing so, has identified these items as “emerging technologies.”

Effective June 17, 2020, the Commerce Control List (CCL) will reflect appropriate changes to Export Control Classification Numbers (ECCNs) 1C350, 1C351 and 2B352. In addition to enhanced export controls on these items, their designation as an “emerging technology” makes them a “critical technology” under the regulations.
governing the Committee on Foreign Investment in the United States (CFIUS). CFIUS will have expanded jurisdiction to review foreign investments in US businesses engaged with these items, and mandatory filing with CFIUS may be required for such investments.

Emerging technologies identified in the Final Rule

The Final Rule identifies a narrow band of items as emerging technologies, including certain precursor chemicals, the Middle East respiratory syndrome-related coronavirus (MERS-related coronavirus), and single-use cultivation chambers with rigid walls. Specifically, the following ECCNs will be revised to add items and implement chemical/biological (CB) and anti-terrorism (AT) controls:

- **ECCN 1C350 (Chemical Weapons Precursors):** addition of 24 precursor chemicals and mixtures containing 30 percent or more of one of these chemicals.
- **ECCN 1C351 (Human and Animal Pathogen and Toxins):** addition of the Middle East respiratory syndrome-related coronavirus (MERS-related coronavirus).
- **ECCN 2B352 (Equipment Capable of Use in Handling Biological Materials):** amended to include a technical note to ECCN 2B352.b to specifically identify that the ECCN controls single-use cultivation chambers with rigid walls.

Notably, the technology for the development, production, or use of these items will now be controlled under ECCNs 1E001, 2E001, 2E002 or 2E301.

Additional emerging technology designations forthcoming

The Final Rule is notable primarily because it represents the initial designation of emerging technologies under the ECRA and provides some insight into how BIS will treat emerging technologies going forward. This Final Rule demonstrates BIS’s effort to consult with multilateral regimes to identify emerging technologies and work towards consistent global controls. In addition, as part of its effort to identify emerging technologies, BIS has formed the Emerging Technology Technical Advisory Committee (ETTAC), which met for the first time on May 19, 2020. We expect several additional rulemakings this year that will identify additional categories of items as emerging and foundational and impose export controls where none exist today. These future rulemakings – some of which are deep into the approval process – may similarly impose controls for reasons other than national security (NS), including, for example, regional stability (RS) or other reasons, with each imposing differing levels of restrictions on exports. Another expected, but notable development, is the use of “emerging technologies” to restrict items tangential to the targeted technology. In this Final Rule, BIS has also controlled related testing, inspection and production equipment and related materials, thus broadening the scope and impact of the “emerging technologies” designation.

Please contact the authors or your regular DLA Piper contact if you have any questions on this development or export controls in general.

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[1] Earlier this year, export controls were imposed on a specific geospatial imagery software under ECCN 0D521. Although the result may be substantially the same, this software was not designated as an “emerging technology.” For more information, see our previous client alert: https://www.dlapiper.com/en/us/insights/publications/2020/01/commerce-imposes-export-licensing-requirement-on-geospatial-imagery-software/


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