

CLIENT ALERT

Bureau of Industry and Security (BIS) Launches the "Foundational Technologies" Advance Notice of Proposed Rulemaking (ANPR)

August 31, 2020

The long-awaited sequel to the still-pending advanced notice of proposed rulemaking (ANPR) for Emerging Technologies from November 19, 2018, is finally here (see our prior alert). On August 27, 2020, BIS published an ANPR seeking comment on the definition of, and criteria for, identifying “foundational technologies,” as required by Section 1758 of the Export Control Reform Act of 2018 (ECRA). Not only may this rulemaking result in additional controls for items that were either uncontrolled or only subject to limited controls, but it could expand the range of companies where even minimal foreign investment can trigger review by the Committee on Foreign Investment in the United States (CFIUS).

Unlike the Emerging Technologies ANPR where BIS identified a non-exhaustive list of technologies it was considering, the Foundational Technologies ANPR merely states “foundational technologies essential to the national security are those that may warrant stricter controls if a present or potential application or capability of that technology poses a national security threat to the United States.” It suggests such foundational technologies might be found in those items currently only controlled for Anti-Terrorism purposes or for military end use or end user purposes, and specifically highlights “indigenous military innovation efforts in China, Russia and Venezuela.”

After two years since ECRA was enacted, the lack of any clear consensus as to what should qualify as “foundational technologies” is demonstrated by the issues on which the ANPR seeks comment. BIS seeks comment on how to define “foundational technologies” while simultaneously seeking information on the status of development of such unidentified technologies and on the impact further controls would have on their continued development. The issues suggest, however, that BIS is considering both additional end use/end user controls over certain technologies and perhaps expanding scope to “enabling technologies, including tooling, testing and certification equipment.”

Comments are due on Monday, October 26, 2020.

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