

## SIX NEW CRITICAL TECHNOLOGIES FOR CFIUS – COMMERCE DEPARTMENT IMPLEMENTS MULTILATERAL CONTROLS ON EMERGING TECHNOLOGIES

On October 5, 2020, the Commerce Department's Bureau of Industry and Security ("BIS") issued a [Final Rule](#) implementing multilateral controls on emerging technologies. The United States and other participating states agreed to implement these controls at the December 2019 Plenary meeting of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies ("**Wassenaar Arrangement**") to improve regional and international security and stability. Effective immediately, the Final Rule revises the Commerce Control List ("**CCL**") to add six emerging technologies that are deemed essential to US national security, while making other corrections and revisions. Moreover, non-US investments in companies that produce, design, test, manufacture, fabricate, or develop these technologies (identified by their Export Control Classification Numbers ("**ECCNs**")) now may be subject to mandatory filings under the United States' foreign direct investment regime: the Committee on Foreign Investment in the United States ("**CFIUS**").

### Background

The Export Control Reform Act of 2018 ("**ECRA**") defined emerging and foundational technologies as those technologies "essential to the national security of the United States," requiring that such identified technologies have appropriate export controls to ensure they are not used by other nations to compromise US national security. As detailed in our November 2018 briefing (available [here](#)) BIS issued an Advanced Notice of Proposed Rulemaking ("**ANPRM**") identifying fourteen broad areas of emerging technology it was considering for enhanced controls. In addition, the recent expansions of CFIUS' jurisdiction in the wake of the Foreign Investment Review Modernization Act of 2018 ("**FIRRMA**") explicitly

included emerging technologies – most notably through the Critical Technology Pilot Program which identified some emerging technologies via NAICS code (more information [here](#)). The Pilot Program and its identification of Critical Technologies were later incorporated into the concept of a "TID US Business" - with the "T" in the acronym referring to those Pilot Program-era designations and emerging and foundational technologies. More information on those changes can be found in our [briefing](#) on those developments. Further, CFIUS and export controls have become increasingly intertwined, with CFIUS set to replace the Pilot Program-era NAICS codes with export control authorization requirements as of October 15, 2020.

### Multilateral Controls on Emerging Technologies

Since the flurry of activity surrounding the 2018 ANPRM, BIS has designated emerging technologies on a rolling basis by making revisions to the CCL. Several items are now under enhanced controls including discrete microwave transistors (3A001), post-quantum cryptography (5A002), air-launch platforms (9A004), and certain artificial intelligence-based software (0D521).

This Final Rule adds six emerging technologies as follows:

<b>Emerging Technology</b>	<b>Direct ECCN Change</b>	<b>Related EAR changes</b>
<b>Hybrid additive manufacturing (AM)/computer numerically controlled (CNC) tools</b>	2B001	N/A
<b>Computational lithography software designed for the fabrication of extreme ultraviolet (EUV) masks</b>	3D003	N/A
<b>Technology for finishing wafers for 5 nanometer (nm) production</b>	3E004	N/A
<b>Digital forensics tools that circumvent authentication or authorization controls on a computer (or communications device) and extract raw data</b>	5A004	License Exception ENC, 5D002, 5E002
<b>Software for monitoring and analysis of communications and metadata acquired from a telecommunications service provider via a handover interface</b>	5D001	5E001
<b>Sub-orbital craft</b>	9A004	9A515, License Exception STA, 9A012

These emerging technologies are not only subject to enhanced export controls, but their designation means that they are now considered Critical Technologies by CFIUS. Therefore, non-US investors may be subject to CFIUS' mandatory filing requirement for certain investments (both controlling and non-controlling) in US companies that produce, design, test, manufacture, fabricate, or develop one or more of these technologies.

## **Know your company, know your transaction – compliance and due diligence are critical**

As a threshold matter, companies that deal in these emerging technologies should ensure that their export control compliance policies and procedures account for the increased level of controls that apply to these technologies. In light of FIRRTA and the modern CFIUS process, investors and companies should also pay close attention to the due diligence process to ensure that regulatory clearance risks are accounted for and transactions proceed smoothly. The importance of that approach is only increased by the addition of these emerging technologies to the CCL. In order to handle future announcements by the Commerce Department of "emerging technologies," companies must have a risk-based compliance approach to handle "emerging technology" designations as they are announced. In total, US designations of "emerging technologies" is another tool for extending national security to trade and commerce, and further reason companies should be knowledgeable of these developments to ensure they are in compliance when dealing in exports from the US or foreign investment in US companies.

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