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# Congress Finalizes CFIUS and Export Control Reform Legislation

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The Congressional Conference Committee has agreed on a final version of the Foreign Investment Risk Review Modernization Act (FIRRMA), which is legislation designed to reform and modernize the Committee on Foreign Investment in the United States (CFIUS) review process. FIRRMA represents the first update to the CFIUS statute in more than a decade and implements a number of key changes. Notably, the legislation extends the CFIUS review timeframes, increases the types of transactions subject to CFIUS's jurisdiction, makes certain notifications mandatory, and establishes a process for potentially expedited review and approval of certain transactions. Congress has also finalized export control reform legislation that establishes a new process for controlling emerging and foundational technologies, which CFIUS has viewed as highly sensitive in recent years.

As previously reported, on June 18, 2018, the US Senate passed its version of FIRRMA, which was included within the National Defense Authorization Act for Fiscal Year 2019 (NDAA). The US House of Representatives then passed its version of FIRRMA on June 26, 2018, as standalone legislation. A Conference Committee was established to reconcile the House and Senate versions of the NDAA, and the final version of the NDAA—including FIRRMA—was released in a Conference Report on July 23, 2018. The Conference Report for the NDAA can be found here, with the agreed-upon FIRRMA language starting at page 1362. The NDAA also contains the Export Controls Act of 2018[1] (ECA), which largely codifies existing export control practice but also implements a new process led by the US Department of Commerce[2] to identify and protect "emerging and foundational technologies." This new process was developed as an alternative approach to address technology-transfer concerns; it replaces provisions originally included in FIRRMA that would have expanded the types of technology-transfer transactions that CFIUS is able to review.

The House passed the NDAA Conference Report on July 26, 2018, and it is anticipated that the Senate will pass it shortly. Once both houses have passed the Conference Report, the bill will go to President Trump for signature. The Trump Administration expressed support for the Conference Report, and in particular its inclusion of

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1 The ECA starts on page 1464 of the Conference Report.

2 The Department of Commerce regulates dual-use controls under the Export Administration Regulations.

FIRRMA.[3] It is expected that President Trump will sign the NDAA, including FIRRMA and the ECA, into law in August.

The following discussion highlights the key provisions of FIRRMA and the ECA and offers our perspective on them.

## FIRRMA

**FIRRMA expands the types of transactions that CFIUS may review, but empowers CFIUS to significantly limit such expansion.**

Currently, CFIUS may only review mergers, acquisitions, or takeovers that could result in control of a US business by a foreign person. In response to growing concern that other types of cross-border transactions could present national security risks, and that parties were increasingly using those other transaction types to avoid CFIUS review, FIRRMA expands "covered transactions" (i.e., transactions subject to CFIUS's jurisdiction) to specifically include a number of new transaction types. At the same time, FIRRMA permits—and in certain contexts requires—CFIUS to further refine or limit the expansion of its review authority through the regulations that CFIUS will promulgate. This reinforces the United States' open investment policy by enabling CFIUS to limit the expansion of its authority to those transactions most likely to raise national security concerns, while providing CFIUS with the flexibility to respond to evolving concerns through subsequent revisions to its regulations. As a practical matter, however, it means that the full scope of CFIUS's expanded authority will not be known until CFIUS drafts and publishes its regulations implementing FIRRMA.

FIRRMA adds four new types of "covered transactions":

- **Certain real estate transactions.** In recent years, CFIUS has raised concerns about a number of transactions in which the US business had facilities or assets in close proximity to sensitive government installations. CFIUS's current authority does not, however, allow it to review real estate transactions such as short-term leases, or transactions that lack a "US business," even if such transactions pose similar proximity concerns. To address this, FIRRMA expands CFIUS's jurisdiction to review real estate transactions, while providing for some limitations to keep this authority narrowly focused on transactions that may present national security concerns.
    - *Expansion*: FIRRMA authorizes CFIUS to review the purchase or lease by, or a concession to, a foreign person of private or public real estate in the United States that (1) is, is located within, or will function as part of, an air or maritime port; or (2) is in close proximity to a US military installation or to another facility or property of the US Government that is sensitive for reasons relating to national security; could reasonably provide the foreign person the ability to collect intelligence on activities being conducted at such an installation, facility, or property; or could otherwise expose national security activities at such an installation, facility, or property to the risk of foreign surveillance.
    - *Limitations on expansion*: Single housing units and (unless otherwise prescribed by CFIUS) real estate in urbanized areas will be excluded. CFIUS may prescribe other criteria to further refine the real estate transactions subject to its review. Of particular note, CFIUS must further define the term "foreign person" for purposes of these real estate transactions and specify criteria to limit the covered real estate transactions to "the investments of certain categories of foreign persons." Such criteria "shall take into consideration how a foreign person is connected to a foreign country or foreign government, and whether the connection may affect the national security of the United States." Depending on how CFIUS implements this provision, it could potentially significantly limit the scope of CFIUS's real estate reviews (e.g., to transactions involving foreign persons from only certain categories of countries).
- **Certain "other investments" involving critical infrastructure, critical technologies, or sensitive data.** In recent years, CFIUS has also raised concerns with minority investments that, while not providing a foreign investor with "control" of a US business (and thus not being subject to CFIUS's current review authority),

[3] https://www.whitehouse.gov/briefings-statements/statement-press-secretary-house-passage-ndaa-conference-report/

could nonetheless raise national security concerns by providing the foreign investor with influence over, or access to, the sensitive facilities, systems, information, or technology of the US business. As with the real estate provisions, FIRRMA expands CFIUS's authority to review these types of sensitive transactions while also requiring that CFIUS implement certain limitations to more narrowly tailor its jurisdiction to transactions most likely to raise national security concerns.

- *Expansion*: FIRRMA authorizes CFIUS to review any "other investment" by a foreign person in any unaffiliated US business that (1) owns, operates, manufactures, supplies, or services "critical infrastructure"; (2) produces, designs, tests, manufactures, fabricates, or develops one or more "critical technologies"; or (3) maintains or collects sensitive personal data of US citizens that may be exploited in a manner that threatens national security. FIRRMA states that subject to the forthcoming CFIUS regulations, "critical infrastructure" means "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security." "Critical technologies" will include emerging and foundational technologies identified pursuant to the ECA's new export control process (see below).

- *Limitations on expansion*: As with real estate transactions, FIRRMA limits the scope of this new authority in several ways.

    - FIRRMA defines "other investment" to be investments that are non-controlling, but also non-passive. The transaction must afford the foreign person (1) access to some material non-public technical information in the possession of the US business; (2) the right to nominate or be a member or observer on the US business's board of directors; or (3) any involvement, other than through voting of shares, in substantive decision making of the US business regarding sensitive personal data, critical technologies, or critical infrastructure.

    - In addition, FIRRMA contains specific clarifications for investment funds that could exclude a significant amount of private equity-type investments. FIRRMA clarifies that "other investment" does not include indirect investment by a foreign person through an investment fund—notwithstanding the foreign person's membership on the fund's advisory board or a committee of the fund—if (1) the fund is managed exclusively by a US general partner, managing member, or equivalent; (2) the advisory board or committee does not have the ability to control investment decisions of the fund or decisions made by the general partner, managing member, or equivalent related entities in which the fund is invested; (3) the foreign person does not otherwise have the ability to control the fund; and (4) the foreign person does not have access to material nonpublic technical information as a result of its participation on the advisory board or committee.

    - Moreover, as with the real estate transactions, CFIUS must further define the term "foreign person" for purposes of these "other investments" and specify criteria to limit the application to "the investments of certain categories of foreign persons." This may have the effect of CFIUS creating categories of investors that would be exempt from this expansion and could therefore potentially significantly limit the scope of what "other investments" CFIUS reviews.

- **Changes in rights.** FIRRMA expressly authorizes CFIUS to review any change in the rights that a foreign person has with respect to a US business in which the foreign person has an investment, if that change could result in foreign control of the US business or in an "other investment" involving critical infrastructure, critical technologies, or sensitive data.

- **Evasion.** Additionally, a covered transaction includes any other transaction, transfer, agreement, or arrangement designed or intended to evade or circumvent the CFIUS process. This concept is part of the current CFIUS regulations, but FIRRMA provides express statutory authority for such reviews.

The expansions to the definition of a "covered transaction" for evasion and changes in rights that could result in foreign control of a US business will take effect immediately upon the enactment of FIRRMA. The remaining expansions will take effect on the earlier of (1) 18 months after the date of the enactment of FIRRMA; or (2) 30 days after the publication in the Federal Register of a determination by the Secretary of the Treasury (as the

chairperson of CFIUS) that the regulations, organizational structure, personnel, and other resources necessary to administer the new provisions are in place.

**FIRRMA introduces a new "declaration" process that makes notification of certain transactions mandatory and offers a potential path for some transactions to receive approval on an expedited basis following a shortened notification.**

Historically, parties have had to submit a full joint voluntary notice to receive formal feedback from CFIUS. FIRRMA introduces a streamlined process for shorter notifications, called "declarations," that may enable some transactions to effectively receive CFIUS approval based upon an abbreviated notification and in a condensed timeframe. This also offers an avenue for parties unsure of whether to file to potentially gain clarity without first having to go through a full notice and review. Significantly, while parties are permitted to start with a declaration (rather than a full notice) in any case, in certain circumstances declarations are required—meaning that the CFIUS process will no longer be voluntary for such transactions. The following are the key elements of the declaration process:

- The parties to a covered transaction may submit a declaration for CFIUS's consideration at the parties' discretion in lieu of a full notice.
- The regulations implementing FIRRMA will specify the information to be contained in declarations, but FIRRMA states that declarations should be abbreviated notifications that generally would not be longer than five pages.
- Upon receiving a declaration (either voluntary or mandatory), CFIUS can take one of four actions: it may (1) request that the parties file a full written notice, (2) advise the parties that it cannot complete action based on the declaration and that they may submit a notice in order for CFIUS to complete action, (3) initiate a unilateral review of the transaction, or (4) notify the parties in writing that CFIUS has completed all action with respect to the transaction (i.e., cleared the transaction). FIRRMA states that CFIUS must take one of these actions within 30 days of receiving the declaration. CFIUS's use of this provision in practice will affect parties' CFIUS strategy. For example, if most declarations result in the need for a full filing, parties may ultimately determine that it is more efficient to file a full notice from the outset. By contrast, if declarations become an effective tool for quickly clearing relatively benign transactions with a nexus to US national security, parties may file them more often, including in cases where parties may not otherwise be inclined to file full notices.
- The following describes FIRRMA's provisions regarding mandatory declarations:
    - FIRRMA makes declarations mandatory for transactions involving an investment that results in the acquisition, directly or indirectly, of a "substantial interest" in a US business involved in critical infrastructure, critical technology, or sensitive data by a foreign person in which a foreign government has, directly or indirectly, a "substantial interest."[4] Notwithstanding the general requirement, FIRRMA permits CFIUS to waive the requirement for the submission of a declaration with respect to a foreign person if CFIUS determines that (1) the foreign person demonstrates that their investments are not directed by a foreign government; and (2) the foreign person has a "history of cooperation" with CFIUS.
    - FIRRMA requires CFIUS to prescribe regulations "specifying the types of covered transactions" for which CFIUS requires a declaration. This means that under its new regulations CFIUS may require declarations more broadly, including in cases that do not involve substantial foreign government ownership. For example, FIRRMA explicitly states that CFIUS may require mandatory declarations with respect to any covered transaction that involves a US business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies.

[4] CFIUS will define the term "substantial interest" by regulation, and in developing such regulation must consider the means by which a foreign government could influence the actions of a foreign person, including through board membership, ownership interest, or shareholder rights. An interest that is excluded from FIRRMA's definition of the term "other investment" or that is less than a 10% voting interest shall not be considered a substantial interest.

- Mandatory declarations are not required with respect to investments by investment funds if certain conditions are met, including that the fund is exclusively managed by a US general partner or equivalent.
- CFIUS may not require a declaration to be submitted more than 45 days before the completion of a covered transaction. If CFIUS requires the submission of a declaration, it cannot request that the declaration be withdrawn and refiled, except to permit parties to correct material errors or omissions.
- CFIUS may impose penalties if parties fail to comply with mandatory declaration requirements.

The declaration process is dependent upon the regulations to be promulgated by CFIUS. Accordingly, the declaration process will not take effect immediately upon FIRRMA being signed into law. Instead, the FIRRMA provisions establishing the new declaration process will become effective on the earlier of (1) 18 months after the date of the enactment of FIRRMA; or (2) 30 days after the publication in the Federal Register of a determination by the Secretary of the Treasury (as the chairperson of CFIUS) that the regulations, organizational structure, personnel, and other resources necessary to administer the new provisions are in place.

**FIRRMA lengthens the time period of the CFIUS process, but also limits timing for the pre-review process.**

- The period for the initial CFIUS review will extend from 30 calendar days to 45 calendar days. This provides additional time for the Director of National Intelligence to prepare the National Security Threat Assessment for each transaction, which is currently due on Day 20 but will be due on Day 30 under FIRRMA.
- Investigations will generally remain a 45-calendar-day process, though in "extraordinary circumstances" (which shall be defined in the CFIUS regulations), at the request of the head of the lead agency, the CFIUS chairperson can extend an investigation for one 15-day period. In total, this can result in a 105-day formal CFIUS cycle, comprising a 45-day review, a 45-day investigation, and a 15-day extension.[5] Although the timing for the CFIUS process will increase, allocating more time in the process may enable more cases to be resolved within the initial review period or within one full CFIUS review and investigation cycle. The declaration process may also serve as a way to effectively receive expedited CFIUS approval for less sensitive transactions.
- FIRRMA states that the CFIUS time periods shall be tolled during lapses in appropriations. This means that the statutory time periods for the CFIUS process would be paused during a government shutdown.
- FIRRMA requires CFIUS to provide comments on a draft (i.e., pre-filing) or formal written notice or accept a formal written notice within 10 business days after it is submitted. This timing requirement will apply only in cases where the parties stipulate that the transaction is a covered transaction. Given that the prefiling and notice acceptance processes have been taking substantially longer in recent years, this provision should help provide more timing certainty to the pre-review process.

The new timeframes described above, other than the 10-business-day response periods for the pre-filing stage, will apply with respect to any covered transaction the review or investigation of which is initiated on or after the date FIRRMA is enacted.

**FIRRMA provides broad authority for CFIUS and the president to take action when a transaction presents national security concerns.**

FIRRMA updates provisions for actions to be taken where there are national security concerns, including imposing and administering mitigation measures. In many cases, these provisions formally codify what has been long-standing CFIUS practice.

- If a party to a covered transaction has voluntarily chosen to abandon the transaction, CFIUS may impose mitigation conditions on any party to the transaction to effectuate the abandonment.

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5 This does not include the optional presidential review period, which remains 15 calendar days after the transaction is referred to the president. Presidential reviews happen rarely.

- If CFIUS reviews a completed transaction, it may impose "any" interim mitigation measures to address a national security risk pending completion of the review and/or investigation. This provision provides broad authority for CFIUS to impose interim mitigation conditions to address national security concerns in closed transactions prior to completing the review process.
- CFIUS may suspend a proposed or pending covered transaction that may pose a national security risk while a CFIUS review or investigation is ongoing. As CFIUS review is currently an ostensibly voluntary process, parties are generally entitled to close a transaction prior to receiving CFIUS approval. In practice, however, where CFIUS has had concerns, it has issued instructions or even mitigation measures preventing closing prior to completion of the CFIUS process. FIRRMA explicitly authorizes such interim prohibition.
- FIRRMA provides various mechanisms to address mitigation oversight and the substance of mitigation agreements. In particular, FIRRMA allows for the imposition of a mitigation agreement only if the agreement is likely to (1) be effective, (2) allow for verifiable compliance, and (3) enable effective monitoring of compliance. It also prescribes required elements of mitigation compliance plans. Where parties engage an independent third party to monitor compliance with mitigation requirements, FIRRMA requires CFIUS to ensure that the third party has no fiduciary obligation to any of the parties to avoid conflicts of interest.
- FIRRMA provides that CFIUS must periodically review the appropriateness of mitigation agreements and terminate, phase out, or otherwise amend the agreement if a threat no longer requires mitigation.
- FIRRMA authorizes additional actions that CFIUS or the lead agency can take in cases where parties do not comply with mitigation requirements: negotiating a plan of action to remediate the lack of compliance, requiring that parties notify all of their covered transactions to CFIUS for a five-year period, and seeking injunctive relief.
- CFIUS will establish a formal process to identify non-notified and non-declared transactions. CFIUS currently actively searches for non-notified transactions of interest and requests that parties file when it wants to review a particular covered transaction that may raise national security considerations. This provision formalizes this function.

The above changes will all take effect on the date of enactment of FIRRMA and will apply with respect to any covered transaction the review or investigation of which is initiated on or after the date of FIRRMA's enactment.

**FIRRMA suggests additional factors that CFIUS may consider as part of its national security analysis.**

The current CFIUS statute sets forth various factors that CFIUS may consider when conducting its national security analysis. FIRRMA does not modify or expand these factors, but instead expresses the "sense of Congress" that CFIUS may also consider the following factors:

- whether a covered transaction involves a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect US leadership in areas related to national security;
- the potential national security-related effects of the cumulative control of, or a pattern of recent transactions involving, any one type of critical infrastructure, energy asset, critical material, or critical technology by a foreign government or foreign person;
- whether any foreign person engaging in a covered transaction with a US business has a history of complying with US laws and regulations;
- the control of US industries and commercial activity by foreign persons as it affects the capability and capacity of the United States to meet the requirements of national security, including the availability of human resources, products, technology, materials, and other supplies and services;
- the extent to which a covered transaction is likely to expose, either directly or indirectly, personally identifiable information, genetic information, or other sensitive data of US citizens to access by a foreign government or foreign person that may exploit that information in a manner that threatens national security; and

- whether a covered transaction is likely to have the effect of exacerbating or creating new cybersecurity vulnerabilities in the United States or is likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled activities against the United States, including such activities designed to affect the outcome of any election for federal office.

These new factors focus on a number of key themes that have been of increasing importance to CFIUS in recent years, such as securing sensitive technology; protecting the US defense supply chain; ensuring US technical advantages, particularly in the defense space; and emphasizing the importance of cyber security. Although CFIUS already routinely considers these factors in its reviews, as noted above FIRRMA does not make consideration of these factors mandatory.

**FIRRMA establishes rules related to civil actions challenging CFIUS determinations.**

FIRRMA provides that a civil action challenging a CFIUS action or finding may be brought only in the US Court of Appeals for the District of Columbia Circuit. This provision allows for special handling of classified or other information subject to privilege or protections so that the information is not compromised or made public. This change will take effect on the date of enactment of FIRRMA.

**FIRRMA authorizes CFIUS to impose filing fees.**

Currently, CFIUS does not levy any fees on parties undergoing review. However, FIRRMA authorizes CFIUS to require a filing fee for CFIUS reviews that will vary by transaction. CFIUS will determine the fee amounts by regulation, but FIRRMA states that the fee may not exceed the lesser of one percent of the value of the transaction or $300,000 (adjusted annually for inflation). FIRRMA requires that the fee be based on the value of the transaction, taking into consideration factors such as the expenses of the Committee, the effect of the fee on small business concerns, and the effect of the fee on foreign investment.

The section of FIRRMA authorizing filing fees takes effect immediately upon enactment, but the provision authorizes CFIUS to impose fees that it must determine by regulation. Accordingly, the filing fee would not apply to transactions until CFIUS promulgates a regulation addressing the fee requirements.

**FIRRMA allows wider dissemination of CFIUS notification information among governmental entities.**

Under current law, information contained in a CFIUS notice may be disclosed only to Congress or in an administrative or judicial action proceeding. Under FIRRMA, there are more exceptions to the disclosure protections. Specifically, information important to the national security analysis or actions of CFIUS may, under the exclusive direction and authorization of the CFIUS chairperson (i.e., the Secretary of the Treasury), be disclosed to any domestic governmental entity, or to any foreign governmental entity of a US ally or partner "only to the extent necessary for national security purposes, and subject to appropriate confidentiality and classification requirements." This change will take effect on the date of enactment of FIRRMA.

**FIRRMA authorizes CFIUS to conduct pilot programs to test implementation of certain FIRRMA provisions.**

As noted above, certain provisions of FIRRMA will not take effect until 18 months after the bill is enacted, or until the CFIUS chairperson determines that CFIUS has the resources necessary to administer the provision (whichever is earlier). However, FIRRMA authorizes CFIUS to conduct pilot programs to implement such provisions during the first approximately year and a half (the provision states "570 days") after the enactment of FIRRMA. If CFIUS decides to conduct a pilot program, it must publish that determination in the Federal Register along with a description of the scope and procedures for the pilot program. CFIUS may begin conducting a pilot program 30 days after publishing the requisite Federal Register notice. Depending upon whether and how the Committee uses the pilot program option, it may provide an avenue for CFIUS to implement key provisions—such as parts of the jurisdictional expansion—prior to promulgating new regulations through the formal review and comment process and before the resources to implement FIRRMA in its entirety are in place.

As indicated above, a number of the most substantial changes under FIRRMA will not take effect until CFIUS promulgates new regulations. Given that Congress has deferred to CFIUS on a number of key issues for

implementing the legislation, the true impact of FIRRMA will not be clear until CFIUS issues the new regulations and the details of implementation are known. Accordingly, a key function of industry and CFIUS lawyers will be providing input on the proposed implementing regulations during the comment period to help develop the regulations.

## ECA

The Export Controls Act of 2018[6] largely codifies the US Department of Commerce's current administration of the US export controls regime, but the bill also requires the Department of Commerce to:

- Establish export controls on "emerging and foundational technologies," which are sensitive technologies not currently captured under the export control regime;
- Conduct an interagency review of license requirements for exports to countries subject to arms embargo; and
- Consider a proposed export's impact to the defense industrial base when reviewing a license application.

**Establishment of new export control regime for sensitive technologies.**

The ECA requires the Secretary of Commerce to "establish appropriate controls under the Export Administration Regulations (EAR) on the export, reexport, or in-country transfer" of technologies deemed by a new interagency group to be "emerging and foundational technologies" that (1) are essential to the national security of the United States; and (2) do not fall within any of the other categories of "critical technologies" specifically enumerated in FIRRMA (including technologies currently captured on the US Munitions List under the International Traffic in Arms Regulations (ITAR) or the Commerce Control List (CCL) under the EAR). The interagency group tasked with identifying such technologies will be formed and led by the president in coordination with the Secretaries of Commerce, Defense, Energy, and State, as well as the heads of other relevant federal agencies. The ECA states that the interagency process shall be informed by multiple sources of information, including publicly available information, classified information, and information relating to CFIUS reviews and investigations. FIRRMA also explicitly allows CFIUS to recommend technologies for identification by the interagency group as "emerging and foundational technologies" based on information arising from CFIUS reviews and investigations, notices and declarations, and non-notified and non-declared transactions identified by CFIUS.

This process is designed to address a gap between technologies that are deemed highly sensitive by the US Government but are not captured by current export control laws and regulations. Under the ECA, in determining the appropriate level of export control for emerging and foundational technologies, the Secretary of Commerce must take into account the potential end uses and end users of the technology, as well as the list of countries to which exports from the United States are restricted. The ECA provides that, at a minimum, the Secretary of Commerce must require a license for the export, reexport, or in-country transfer of emerging and foundational technologies "to or in a country subject to an embargo, including an arms embargo, imposed by the United States." China is subject to a US arms embargo and is therefore captured by this provision.

The ECA authorizes the Secretary of Commerce to compel various disclosures by certain applicants for licenses or other authorization for the export, reexport, or in-country transfer of emerging and foundational technologies. Notably, applications submitted by or on behalf of a "joint venture, joint development agreement, or similar collaborative arrangement" may be required "to identify, in addition to any foreign person participating in the arrangement, any foreign person with significant ownership interest in a foreign person participating in the arrangement."

- The ECA provides various exceptions to the requirement to impose export controls on emerging and foundational technologies. For example, it does not require the Secretary of Commerce to impose controls on

[6] The NDAA includes the "Export Control Reform Act of 2018," which includes the ECA, discussed herein, as well as the Anti-Boycott Act of 2018, which would require the president to issue regulations prohibiting US persons from taking certain actions with the intent to comply with or support any boycott imposed by any foreign country against Israel.

the export, reexport, or in-country transfer of emerging and foundational technologies pursuant to any of the following transactions:

- The sale or license of a finished item and the provision of associated technology if the US person generally makes the finished item and associated technology available to its customers, distributors, or resellers;
- The sale or license to a customer of a product and the provision of integration services or similar services if the US person generally makes such services available to its customers;
- The transfer of equipment and the provision of associated technology to operate the equipment if the transfer could not result in the foreign person using the equipment to produce critical technologies;
- The procurement by the US person of goods or services, including manufacturing services, from a foreign person, if the foreign person has no rights to exploit any technology contributed by the US person other than to supply the procured goods or services; and
- Any contribution and associated support by a US person to an industry organization related to a standard or specification, whether in development or declared, including any license of or commitment to license intellectual property in compliance with the rules of any standards organization.

In all cases, these exceptions appear designed to distinguish between ordinary-course commercial transactions and arrangements that can transfer fundamental technical knowledge to foreign persons. Transactions that transfer underlying technical capabilities, specifications, or knowledge to foreign persons—such as certain joint ventures—have been of particular concern to CFIUS. This framework seeks to address those concerns by establishing an export control process that can more readily adapt to emerging threats and protect US technology.

**Codification of existing export control practices.**

The ECA largely formalizes and codifies the current practices of the Department of Commerce, which administers US export controls on "dual-use" items with both civilian and military applications via the EAR. The ECA repeals and replaces the current law that underlies US export controls on dual-use items: the Export Administration Act of 1979, which lapsed in 1994 and has been continued since by the International Emergency Economic Powers Act (IEEPA). The ECA codifies the president's specific authorities and the administrative procedures by which the president and the Department of Commerce will continue to regulate the export, reexport, and in-country transfer of items subject to US jurisdiction for national security and foreign policy reasons.

The ECA also codifies civil and criminal penalties that were established under IEEPA. Criminal penalties for willful violations will remain up to $1,000,000 and, for individuals, imprisonment of up to 20 years. Civil penalties will be slightly higher than the current inflation-adjusted penalties under IEEPA: up to the greater of $300,000 or twice the value of the applicable transaction, along with revocation of an export license and prohibition on the ability to export, reexport, or in-country transfer items subject to the ECA.

The ECA emphasizes that all existing regulations, orders, determinations, licenses, or other administrative actions remain in effect until specifically modified, superseded, set aside, or revoked under the authority of the ECA.

**Consideration of exports' impact on US defense industrial base.**

Beyond codification of existing practice with respect to licensing, the ECA adds a requirement that in reviewing an application for a license or authorization, the Department of Commerce consider the impact of a proposed export on the US "defense industrial base" and deny any request that would have a "significant negative impact" on such defense industrial base. License applicants will be required to provide information to address the impact on the defense industrial base in their applications.

**Review of license requirements for embargoed countries.**

The ECA requires the Department of Commerce and other relevant federal agencies to conduct a review of license requirements relating to countries subject to comprehensive arms embargoes (e.g. China). The review will cover the scope of controls that apply to export, reexport, or in-country transfer of items for military end uses and

military end users in countries subject to a comprehensive US or United Nations arms embargo. The review will also include the export, reexport, and in-country transfer of items on the CCL that do not require licensing for export to countries subject to a comprehensive US arms embargo. Any changes to license requirements as a result of the review will be implemented within 270 days of enactment of the ECA.

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