



BILLING CODE 3510-33-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 742 and 774

[Docket No. 200824-0224]

RIN 0694-AH80

Identification and Review of Controls for Certain Foundational Technologies

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The Bureau of Industry and Security (BIS) controls the export, reexport, and transfer (in-country) of dual-use and certain military items through the Export Administration Regulations (EAR), including the Commerce Control List (CCL). Many items (commodities, software, and technology) subject to the jurisdiction of the EAR are listed on the CCL. Pursuant to the Export Control Reform Act of 2018, BIS and its interagency partners are engaged in a process to identify emerging and foundational technologies that are essential to the national security of the United 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. In order to determine if technologies are foundational, BIS will evaluate specific items, including items currently subject only to anti-terrorism (AT) controls on the CCL or those designated as EAR99. This ANPRM seeks public comment on the definition of, and criteria for, identifying foundational

technologies. Comments on this ANPRM will help inform the interagency process to identify and describe such foundational technologies.

DATES: Submit comments on or before [INSERT 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments through either of the following:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. The identification number for this rulemaking is BIS-2020-0029.
- *Address:* By mail or delivery to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2099B, 14th Street and Pennsylvania Avenue NW, Washington, DC 20230. Refer to RIN 0694-AH80.

FOR FURTHER INFORMATION CONTACT: Tongele Tongele, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, Department of Commerce by: phone (202) 482-0092; fax (202) 482-3355; or email Tongele.Tongele@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 1758 (50 U.S.C. 4801) of the Export Control Reform Act of 2018 (ECRA) requires the Department of Commerce to establish appropriate controls on the export, reexport, or transfer (in country) of emerging and foundational technologies. Under ECRA, emerging and foundational technologies are those technologies that are essential to the national security of the United States and are not critical technologies described in Section 721(a)(6)(A)(i)-(v) of the Defense Production Act of 1950, as amended (DPA). ECRA notes the national security

importance of U.S. leadership in science, technology, engineering, and manufacturing, including foundational technology that is essential to innovation. Items subject to the Export Administration Regulations (EAR) (15 CFR parts 730 – 774) that are not covered by the DPA’s definition of critical technologies are items controlled only for anti-terrorism (AT), crime control (CC), or short supply (SS) reasons, subject to United Nations (UN) embargoes, or designated as EAR99.

Section 1758 of ECRA requires that foundational technologies be identified, and that BIS establish appropriate controls for that technology under the EAR. At a minimum, such controls would apply to countries subject to an embargo, including an arms embargo, imposed by the United States.

ECRA also requires that the interagency process is to take into account:

- The development of foundational technologies in foreign countries;
- The effect export controls may have on the development of such technologies in the United States; and
- The effectiveness of export controls imposed pursuant to ECRA on limiting the proliferation of foundational technologies to foreign countries.

For purposes of this ANPRM, the term foundational technologies includes not only “technology” but also “commodities” and “software” as used in the EAR.

BIS now seeks public comment to inform the interagency process to identify and describe foundational technologies. For example, foundational technologies could include items that are currently subject to control for military end use or military end user reasons under Supplement No. 2 to part 744 of the EAR. Many of these items, including semiconductor manufacturing

equipment and associated software tools, lasers, sensors, and underwater systems, can be tied to indigenous military innovation efforts in China, Russia or Venezuela. Accordingly, they may pose a national security threat.

There may be additional items, classified on the CCL at the AT level or as EAR99 for which an export license is not required for countries subject to a U.S. arms embargo that also warrant review to determine if they are foundational technologies essential to the national security. For example, such controls may be reviewed if the items are being utilized or required for innovation in developing conventional weapons, enabling foreign intelligence collection activities, or weapons of mass destruction applications.

BIS, through an interagency process, seeks to determine whether there are specific foundational technologies that warrant more restrictive controls, including technologies that have been the subject of illicit procurement attempts which may demonstrate some level of dependency on U.S. technologies to further foreign military or intelligence capabilities in countries of concern or development of weapons of mass destruction.

BIS welcomes comments on: 1) how to further define foundational technology to assist in identification of such items; 2) sources to identify such items; 3) criteria to determine whether controlled items identified in AT level Export Control Classification Numbers (ECCNs), in whole or in part, or covered by EAR99 categories, for which a license is not required to countries subject to a U.S. arms embargo, are essential to U.S. national security; 4) the status of development of foundational technologies in the United States and other countries; 5) the impact specific foundational technology controls may have on the development of such technologies in the U.S.; 6) examples of implementing controls based on end-use and/or end-user rather than, or in addition to, technology based controls; ; 7) any enabling technologies, including tooling,

testing, and certification equipment, that should be included within the scope of a foundational technology; and 8) any other approaches to the issue of identifying foundational technologies important to U.S. national security, including the stage of development or maturity level of an foundational technology that would warrant consideration for export control.

BIS does not seek to expand jurisdiction over technologies that are not currently subject to the EAR, such as “fundamental research” described in § 734.8 of the EAR.

BIS will review public comments submitted in response to this ANPRM to help inform BIS and its interagency partners’ efforts to identify, reevaluate and subsequently control foundational technologies. This interagency process is expected to result in rules and comment periods with new control levels for items currently controlled for AT reasons on the CCL or new ECCNs on the CCL for technologies currently classified as EAR99.

OMB has determined that this action is significant under Executive Order 12866.

Submission of Comments

Comments should be submitted to BIS as described in the **ADDRESSES** section of this ANPRM by [INSERT 60 DAYS FROM DATE OF PUBLICATION OF THIS NOTICE IN THE FEDERAL REGISTER].

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Deputy Assistant Secretary for Export Administration

[FR Doc. 2020-18910 Filed: 8/26/2020 8:45 am; Publication Date: 8/27/2020]