

Bureau of Industry and Security

BIS 2020

POLICY AND REGULATORY UPDATES
A DIGITAL EXPERIENCE

September 2, 2020



Bureau of Industry and Security

BIS 2020

POLICY AND REGULATORY UPDATES
A DIGITAL EXPERIENCE



CFIUS and Export Controls

Eric Longnecker
Office of Strategic Industries and Economic Security



Commerce's Role in CFIUS

- The Secretary of Commerce has delegated CFIUS responsibilities and authorities to the International Trade Administration (ITA) and BIS.
 - ITA:
 - Serves as Commerce's CFIUS Coordinator.
 - Provides analysis of economic vulnerabilities, market trends, and business rationale.
 - BIS:
 - Provides analysis of dual-use export control implications and defense industrial base issues.

3



BIS's CFIUS Reviews

- Main elements of BIS's review:
 - Assessment of export control implications as it relates to the BIS-administered Export Administration Regulations (EAR):
 - Licensing History;
 - Product Classifications; and
 - Compliance History.
 - Assessment of defense industrial base issues.
 - Includes a review of the U.S. company's Defense Priorities and Allocations System (DPAS) compliance.

4



BIS's CFIUS Reviews

- BIS Licensing Staff review the parties' statements regarding product classification and determine the following:
 - Whether the U.S. party classified its items correctly;
 - Whether the controlled technology associated with the U.S. party's items requires a license to export to the country of the foreign acquirer (and if there are license exceptions available);
 - If the transaction raises any national security concerns.

5



BIS CFIUS Reviews: Compliance History

- A list of corporate entities and corporate officers involved in the transaction is provided to the Office of Export Enforcement (EE) for vetting.
- EE reviews the list to determine whether there are current investigations or derogatory information.

6



Interaction Between CFIUS and Export Controls

- CFIUS only takes action if other authorities are not sufficient to address the risks arising from a transaction
- Export control regulations (both the EAR and the ITAR) are among the other authorities frequently implicated in CFIUS reviews
- As a result, how these authorities complement each other and interact is a common issue for BIS

7



FIRRMA and ECRA

- The passage of FIRRMA and ECRA emphasized the interaction and complementary nature of CFIUS and export controls
- For instance, FIRRMA contains a definition of “critical technologies” that is in part linked to the EAR
- If a U.S. company is involved in “critical technologies,” it can be subject to part of the expanded definition of a “covered transaction” – in particular the “other investment” provision which allows CFIUS to review certain non-controlling investments
- CFIUS has published a proposed rule that would amend the mandatory declaration process for investments into U.S. companies with “critical technologies” that would link the requirement for a mandatory filing to whether the export of the technology at issue would require an export authorization to the investor(s)

8



FIRRMA and ECRA

- FIRRMA's definition of "critical technologies" (as it relates to the EAR) includes regime-controlled items as well as items controlled for RS and SL reasons
- It also includes any items that are controlled under the "emerging and foundational technologies" provision in ECRA
- CFIUS is also specifically identified as a source of information for BIS and export control agencies to identify "emerging and foundational technologies" for control evaluation purposes

9



Conclusion

- CFIUS and export controls are important, complementary authorities utilized to protect U.S. national security
- FIRRMA and ECRA reemphasized this connection
- The review of "other investments" into U.S. companies with critical technologies is an example of this linkage

10