

Bureau of Industry and Security

BIS 2019 | ANNUAL CONFERENCE ON EXPORT CONTROLS

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CFIUS and Export Controls

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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.



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BIS's CFIUS Review

- Main elements of BIS's review:
 - Assessment of export control implications related 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.



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BIS's CFIUS Review

- 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); and
 - If the transaction raises any national security concerns.



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BIS's CFIUS Review: Compliance History

- A list of corporate entities and corporate officers involved in the transaction is provided to the Export Enforcement (EE) for vetting.
- EE reviews the list to evaluate the bona fides (i.e., legitimacy and reliability) of the parties and for enforcement concerns.



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Interaction between CFIUS and Export Controls

- 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



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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 partially implemented this through the Pilot Program that was launched in November 2018



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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



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Conclusion

- CFIUS and export controls are important, complementary authorities utilized to protect U.S. national security
- FIRRTA and ECRA reemphasized this connection
- The CFIUS Critical Technology Pilot Program is one example of the importance of the links between export control and CFIUS authorities