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U.S. Commerce Department to Expand Scope of Export Controls

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In the coming weeks, the U.S. Commerce Department's Bureau of Industry and Security (BIS) is expected to publicly propose new regulations which define and list "emerging technologies" that are "essential to the national security" of the U.S., and require licenses for the export of those technologies to various countries. Section 1758 of the Export Controls Act of 2018 came into effect this August and requires BIS to begin regulating the export from the U.S. of "emerging and foundational technologies." BIS will be proposing a definition and rules for "emerging technologies" first.

The new BIS regulations could represent a significant expansion of the scope of U.S. export controls. Currently, BIS limits technology controls to the technology "necessary" for the development, production, use, operation, maintenance, repair, overhaul, and refurbishment of specific products classified as "dual-use items" or otherwise listed on the Commerce Control List. Disregarding its control of classified technology, the Department of State's Directorate of Defense Trade Controls (DDTC) similarly limits its technology controls to technology "required" for similar aspects of specific products classified as "defense articles" under the U.S. Munitions List. By contrast, the "emerging and foundational technologies" that are soon to be regulated by BIS may cover more than just the technical information related to existing products.

Many high-tech companies are required to comply with U.S. export controls, since their products are advanced enough to have both commercial and defense applications, rendering them "dual-use items" under the jurisdiction of BIS. The Export Controls Act of 2018 will increase the scope of items and technologies that may require licenses both for their physical export and for the transmission of related technical information to individuals located anywhere in the world. These controls restrict the staffing of technical projects, even in the U.S., as well as the movements of goods outside of the U.S., where they or their technology originated in the U.S. Penalties for non-compliance with U.S. export controls can be quite significant. Accordingly, compliance professionals should be mindful of the new proposed regulations BIS will be publishing in the coming weeks and months.