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VIA FEDERAL E-RULEMAKING PORTAL:
HTTPS://WWW.REGULATIONS.GOV
Eileen Albanese, Director
Office of National Security and Technology Transfer Controls
Bureau of Industry and Security
U.S. Department of Commerce
14th and Constitution Avenue, NW
Washington, DC 20230

RE: Implementation of Additional Export Controls on Certain Advanced Computing and Semiconductor Manufacturing Items (Docket No. BIS-2022-0025)

Dear Ms. Albanese:

Thank you for the opportunity to provide comments to the U.S. Department of Commerce, Bureau of Industry and Security ("BIS") Interim Final Rule published in the Federal Register on October 13, 2022, regarding the implementation of additional export controls on certain advanced computing and semiconductor manufacturing items (the "Interim Final Rule").

The Interim Final Rule made significant and complex changes to U.S. export control requirements related to advanced chips, software, and semiconductor manufacturing equipment and deviated from BIS' standard approach of imposing multilateral, rather than unilateral, controls. We represent a broad range of companies in the electronics manufacturing supply chain who have been profoundly impacted by the changes and ask BIS to consider the following observations and suggestions, which are drawn from our experience advising these parties. While we fully support BIS's objectives as laid out in the Interim Final Rule, namely, to protect vital U.S. national security interests, these objectives align with other changes to the Export Administration Regulations ("EAR") that BIS has made since 1992, each of which were primarily based on multilateral controls. It is therefore less clear to the

industry why such significant unilateral requirements were imposed prior to engagement with and agreement from major U.S. allies.

We encourage BIS, in formulating the Final Rule, to ensure that the new controls are appropriately and narrowly targeted, and written clearly such that industry can execute any new requirements in the least burdensome manner possible while still meeting U.S. national security objectives. We also ask BIS to consider, in the absence of multilateral controls, issuing a temporary general license to ensure that U.S. persons are on equal footing with their foreign competitors until and unless the restrictions become more global.

We explain in more detail below our specific concerns with the Interim Final Rule and our suggestions for how to help resolve these issues.

Our comments focus on at least the following areas:

- *Overbreadth* – the Interim Final Rule lacks clarity regarding the full scope of what is subject to controls and what requires licensing.

- *Harm from unilateral controls* – without multilateral engagement, the Interim Final Rule unfairly penalizes U.S. persons and U.S. companies who will simply be replaced by their foreign competitors not subject to the same restrictions.

- *Burdensome diligence obligations* – the Interim Final Rule imposes obligations on industry that cannot be met even by the U.S. Government. For example, and as outlined in greater detail below, BIS imposes obligations on industry to determine exactly what may be occurring in certain buildings in China in order to determine whether an inappropriate use of EAR-controlled items may be occurring. However, as noted in BIS' revisions to EAR §744.11, certain governments, such as China, fail to provide the visibility needed to determine end use and end users. To impose an obligation on industry that cannot be met by the U.S. Government shifts the burden inappropriately.

- *Interpretations that mirror sanctions requirements under the Office of Foreign Assets Control* and the International Emergency Economic Powers Act ("IEEPA") rather than the Export Control Reform Act of 2018 ("ECRA"). Control of "US person" activities and "facilitation" or "support" are examples of where BIS appears to have overreached.

I. Overly Broad Controls on U.S. Persons

The Interim Final Rule is overly broad, particularly with respect to the prohibitions on U.S. person "support" for certain semiconductor manufacturing activities in EAR § 744.6(c)(2). In the absence of clear scoping restrictions, these broad controls create difficulty for U.S. companies and individuals trying to comply and make it almost impossible for them to understand what they can and cannot do. Moreover, in the absence of clear direction on how broadly BIS will interpret and enforce these far-reaching restrictions, companies may de-risk to avoid possible enforcement actions and result in harm to legitimate and beneficial global trade.

Restrictions on exports of services by U.S. persons are traditionally administered by the U.S. Department of Treasury's Office of Foreign Assets Control ("OFAC"), which has accordingly developed a framework of guidance and authorizations over time to facilitate the implementation of these restrictions. For example, OFAC carved out from its prohibitions certain support activities by U.S. persons such as the provision of legal advice and counseling on the requirements of and compliance with the laws of the United States and has issued enforcement actions that define the scope of U.S. person facilitation. Without that framework and history to define the new restrictions, the BIS controls on activities by U.S. persons are unclear and create uncertainty and difficulty within industry and trade.

Although BIS issued FAQs to further explain these restrictions, they were issued over two weeks after the Interim Final Rule was published in the Federal Register and did not resolve every question. As one example, EAR § 744.6 prohibits U.S. persons from providing "support" for weapons of mass destruction-related end uses. EAR § 744.6(c) then explains that certain specified activities by U.S. persons involving items not subject to the EAR used in semiconductor fabrication could involve "support" for a prohibited weapons of mass destruction-related end use, but it doesn't say that these specified activities are the *only* activities by U.S. persons related to semiconductor fabrication that are considered prohibited "support" for weapons of mass destruction related end uses.

Through FAQ #IV.A2, BIS apparently limited the prohibitions for U.S. persons in §744.6(c) to activities directly related to the provision of specific items to or servicing of specific items for advanced PRC fabs. However, the FAQ guidance also says that it does not purport to limit the scope of §744.6(b). This leaves it unclear whether U.S. person "support" for semiconductor fabrication is limited to shipping, transmitting, transferring or servicing items for advanced PRC fabs, or if it also includes the broad scope of "support" in EAR § 744.6(b), including performing *any* contract, service, or employment that you "know" may assist or benefit advanced semiconductor fabrication in the PRC.

Moreover, while industry can seek advisory opinions from BIS to gain further clarity into the application of the new rules to specific scenarios, responses to advisory opinion requests have been backlogged and delayed, leaving companies

to guess how broadly BIS will interpret these restrictions, and forced to make a risk assessment with no enforcement context as to whether they want to act conservatively and lose business, or proceed and potentially face severe export penalties. Predictability in government policies is particularly crucial in the semiconductor industry, given the long lead times needed to plan research and production investments and to form business partnerships and supply arrangements. Without that predictability and certainty, the U.S. semiconductor industry is hamstrung and cannot maintain its technical advantage, particularly without similar restrictions on "support" activities by non-U.S. persons through multilateral controls.

For these reasons, we recommend that the new restrictions on semiconductor manufacturing be implemented solely through BIS's traditional jurisdiction over exports, re-exports, and transfers (in-country) of items subject to the EAR, rather than a new, untested, and overly broad restriction on U.S. person "support" activities.

II. Lack of Multilateral Engagement

The lack of multilateral engagement on the new export controls has created an unequal playing field for U.S. industry. Currently, these export controls are implemented unilaterally: no corresponding restrictions have been issued by the European Union, United Kingdom, Canada, or U.S. allies in Asia. The absence, to-date, of strategic coordination with U.S. allies has resulted in U.S. companies and U.S. persons being unfairly penalized. The fact that BIS had to issue, concurrently with the Interim Final Rule, one-year licenses to certain semiconductor companies to continue their operations in China on a temporary basis further demonstrates that the issuance of the Interim Final Rule was premature and should have been delayed until the United States had obtained support from its allies.

Moreover, while our European allies were quick to adopt new export controls and sanctions against Russia in light of its recent conflict with Ukraine, China is not Russia, and its economic and geopolitical circumstances are very different. As a result, we expect that it will take some time before our allies are able to implement similar controls, even when faced with increasing U.S. government pressure.

If U.S. allies do not implement complementary export controls soon, the U.S. semiconductor restrictions will cause foreign buyers to replace U.S. devices and equipment with comparable foreign components. As explained above, the new rules are complex and ill-defined. Foreign buyers who do not want to spend the time or money engaging with the regulations to understand the scope of the new restrictions (or face the risk of an enforcement action in the face of broad and untested regulations) will likely continue to "de-Americanize" their supply chain. In certain cases, the new restrictions target widely available technologies where alternative foreign suppliers can be lined up easily. Foreign firms can also "design out" U.S.

technologies, given the difficulties in complying with the new export control restrictions. Additionally, if U.S. firms suffer loss on global chip sales to China, this will lead to a reduction in revenue to fund research for the next generation of U.S. chips or equipment, thus impacting the United States' ability to maintain its technical advantage.

Multilateral export controls are not just necessary to achieve parity with foreign competitors, they are explicitly a policy underpinning the Export Control Reform Act of 2018, 50 U.S.C. 4811 *et seq.* ("ECRA"), which provides the legal authority for the EAR. In the ECRA, Congress specifically provided that "[e]xport controls should be coordinated with the multilateral export control regimes", noting that "[e]xport controls that are multilateral are most effective, and should be tailored to focus on those core technologies and other items that are capable of being used to pose a serious national security threat to the United States and its allies." *Id.* at § 4811(5).

Moreover, the ECRA acknowledges that "[e]xport controls applied unilaterally to items widely available from foreign sources generally are less effective in preventing end-users from acquiring those items. Application of unilateral export controls should be limited for purposes of protecting specific United States national security and foreign policy interests." *Id.* at § 4811(6). In light of this policy, it is incumbent on BIS to seriously consider whether these controls would be more appropriately issued once other countries are on board.

Given these concerns, we respectfully suggest that BIS issue a temporary general license to address the transition period or otherwise roll back the restrictions until or unless there is multilateral engagement.

III. Unachievable Diligence Requirements

Pursuant to the Interim Final Rule, U.S. persons engaged in exports and servicing to or within the PRC must first obtain "knowledge" of whether the item(s) in question will be used in the "development" or "production" of integrated circuits at a semiconductor fabrication "facility" in the PRC that fabricates advanced integrated circuits meeting the criteria specified in the Interim Final Rule. *See* EAR § 744.6(c)(2). In its October 28, 2022, FAQs, BIS stated that each building on a PRC company's campus is considered to be a separate "facility", but nonetheless asserted that, even where a corporate entity has multiple buildings located on one campus, parties still need to exercise "sufficient due diligence" to ensure their item or activity is only for an unrestricted fabrication. BIS stated that appropriate due diligence includes "review of publicly available information, capability of items to be provided or serviced, proprietary market data, and end use statements."

If U.S. persons cannot obtain such "knowledge" through diligence or are unsure about whether the semiconductor fabrication facility fabricates integrated circuits meeting the specified criteria, then a license is required. *See* EAR §744.6(c)(2)(iv)-(vi). This requirement represents an unprecedented burden shift. Whereas BIS has previously required that companies not engage in willful blindness or ignorance regarding the end use of their exports, this component of the rule effectively mandates diligence via a licensing requirement.

"Knowledge" that an item will not be used for the specified semiconductor fabrication end uses in China can also be particularly difficult to obtain. The new rules introduce significantly increased requirements for end user due diligence that require firms to conduct detailed investigations of their customers and business partners in addition to obtaining signed certifications of compliance.

Complicating this matter, and as illustrated by a Final Rule published in the Federal Register by BIS on October 13, 2022, is that BIS has noted "a sustained lack of cooperation" by the government of the PRC in verifying bona fides and conducting end-use checks that "effectively prevents BIS from determining compliance with the EAR."[1] If the U.S. Government itself cannot verify end use in China, then U.S. industry – and particularly small businesses with limited resources to dedicate to diligence reviews and investigations – faces an insurmountable task.

Moreover, BIS has not provided guidance on what degree of diligence would be considered sufficient to confer "knowledge" that an item would not be used for a prohibited semiconductor-related end use. In a speech on November 2, 2022, Assistant Secretary of Commerce for Export Administration Thea Rozman Kendler noted that BIS does not currently anticipate publishing new or updated due diligence guidance for semiconductor-related transactions in China beyond the Know Your Customer and Red Flag Indicators Guidance in Supplement No. 3 to EAR §732. This Guidance was last updated in conjunction with Export Control Reform and predates the Interim Final Rule by over eight (8) years.

For these reasons, we ask that BIS amend Supplement No. 3 to the EAR or issue further guidance to specify the types of additional diligence measures that would be sufficient to confer "knowledge" that an item will not be used in the "development" or "production" of integrated circuits at a semiconductor fabrication "facility" in the PRC that fabricates advanced integrated circuits meeting the criteria specified in the Interim Final Rule.

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1 *See* "Revisions to the Unverified List; Clarifications to Activities and Criteria That May Lead to Additions to the Entity List," 87 Fed. Reg. 61971-61977 (Oct. 13, 2022), available at: https://www.federalregister.gov/documents/2022/10/13/2022-21714/revisions-to-the-unverified-list-clarifications-to-activities-and-criteria-that-may-lead-to.

IV. Misapplication of Sanctions Concepts and Jurisdiction

As explained in Section I above, the Interim Final Rule imposes a license requirement on specific activities of U.S. persons that "support" the "development" or "production" of certain integrated circuits in China. *See* EAR § 744.6(c)(2). Such "support" activities include a U.S. person's "facilitating" a prohibited shipment, transmission, or transfer (in-country). *See* EAR § 744.6(b)(6). The EAR does not define the term "facilitate," but this term has a long history in the sanctions regulations administered by OFAC. Over the years, OFAC has broadly interpreted "facilitate" to cover numerous activities by a U.S. person to indirectly undertake activities that would be prohibited if the facilitator engaged in them directly. Here, such a broad interpretation by BIS would be inappropriate, based on BIS's more limited legal authority and jurisdiction.

While BIS and OFAC share some overlapping jurisdiction, the underlying statutory authorities for the EAR and the OFAC regulations are no longer aligned – the current EAR is legally framed by ECRA, not IEEPA. This distinction underscores that controls on "facilitation" or "facilitating" enacted by BIS under the authority of the EAR or ECRA must be more limited than controls imposed by OFAC under IEEPA's broad authority. In its October 28, 2022 FAQs, BIS appears to have (somewhat) walked back the broad scope of facilitation implied by the Interim Final Rule, explaining that the U.S. persons control in § 744.6(c)(2) applies only to U.S. persons who authorize shipments, conduct deliveries, or service items used in the "development" or "production" of integrated circuits to fabrication facilities in the PRC that fabricate integrated circuits meeting the criteria specified in the Interim Final Rule. *See* FAQ #IV.A2. In line with this FAQ response, BIS also noted that it is considering "appropriate revisions" to the Interim Final Rule to ensure that the rule provides "maximum clarity" to achieve its policy objective. We urge BIS, in making such revisions, to take a tailored approach that reflects both how Congress has assigned BIS jurisdiction under ECRA, as well as the manner in which the agency has traditionally approached export controls.

BIS imposes controls in a generally more tailored/targeted manner than OFAC, providing guidance to the regulated community regarding the application of particular restrictions. For example, in her June 15, 2022 Keynote Remarks at the American Association of Exporters and Importers Annual Conference and Expo, Assistant Secretary Kendler stated that at BIS, "We're thinking about … how to make sure we are as clear as we can be for you – exporters and industry – to obtain the information you need and fulfill your obligations under the law…[W]e are paying attention, focused on the details of how transactions may be structured, and taking into account the practical realities of how trade professionals such as yourselves

operate."[2] And, specifically in the context of the Interim Final Rule, BIS has referred to the changes to the regulations as "a series of targeted updates" and promised that it will "work closely with industry as we implement all elements of the Administration's semiconductor agenda".[3]

OFAC, unlike BIS, has traditionally viewed itself as primarily a foreign policy agency, leverages its authority to issue sanctions on a "sweeping" basis[4] and is far less engaging with industry than BIS. *See*, *e.g.*, April 21, 2017 Statement from Secretary Mnuchin on OFAC Sanctions ("In consultation with President Donald J. Trump, the Treasury Department will not be issuing waivers to U.S. companies, including Exxon, authorizing drilling prohibited by current Russian sanctions"). The breadth of OFAC's approach to restricting activities of U.S. persons may apply in a sanctions context, but runs counter to BIS' generally more targeted approach. Yet the way the regulations are currently written, we are concerned that even activities by U.S. persons that OFAC has carved out of its prohibitions or for which OFAC has issued broad authorizations could be construed as U.S. person "support" that must be specifically authorized by BIS, making BIS control over such activities broader and more restrictive than OFAC.

For these reasons, we ask BIS to revise the Interim Final Rule to ensure that the controls on U.S. person 'facilitation' and other forms of "support" are aligned with the FAQs and appropriately tailored to reflect the aims of the ECRA and the agency's historical relationship with industry.

Conclusion

Thank you for your consideration of these comments and careful attention to the impact of the Interim Final Rule, as these issues are of crucial importance to our clients. While we respect BIS's objective to protect U.S. national security in issuing the semiconductor restrictions, we believe that this goal can be achieved in a way that is more narrowly tailored to accomplish the agency's objectives without creating detrimental harm to U.S. industry.

We appreciate the opportunity to comment and stand ready to answer any questions you may have regarding the regulations and our observations. Clarification of these regulations is essential to remediate what has been a challenging and impactful compliance obligation for the industry. Please contact

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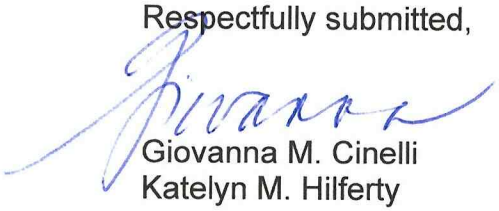
2 https://bis.doc.gov/index.php/documents/about-bis/3032-2022-06-15-bis-as-kendler-aaei-remarks-as-prepared/file.

3 https://bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file.

4 *See*, *e.g.*, https://home.treasury.gov/news/press-releases/jy0127; https://home.treasury.gov/news/press-releases/jy0771.

the undersigned at giovanna.cinelli@morganlewis.com or by telephone at 202.739.5619.

Respectfully submitted,



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