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January 31, 2023

Ms. Eileen Albanese  
Director, Office of National Security and Technology Transfer Controls  
Bureau of Industry and Security (BIS)  
U.S. Department of Commerce  
1401 Constitution Avenue, NW  
Washington, DC 20230

RE: Comments on 87 Fed. Reg. 62186 (Oct. 13, 2022); RIN 0694-AI94; Docket No. 220930-0204

Dear Ms. Albanese:

The Business Roundtable (the Roundtable) submits these comments in response to the request from the Bureau of Industry and Security (BIS) in the above-captioned interim final rule (IFR).<sup>1</sup> The Roundtable appreciates the opportunity to comment on this IFR which amends the Export Administration Regulations (EAR) to impose new export controls designed to limit China's ability to obtain advanced computing chips that can be used to train large-scale artificial intelligence models and power its military and surveillance systems. Given the novel and complex nature of the IFR, as well as the fact it has considerable extraterritorial reach, the Roundtable urges BIS to work closely with industry to provide clarifications and improvements to this rule and future controls.

The Roundtable is an association of the chief executive officers (CEOs) of America's leading companies that has worked to promote a thriving U.S. economy through sound public policy for the past fifty years. The Roundtable's members lead companies that operate across all sectors of the U.S. economy, generate more than \$9 trillion in annual revenue, and directly employ twenty million people in all fifty states.

The Roundtable understands that export controls are a vital tool for protecting U.S. national security. Its members also agree that U.S. leadership in technological innovation is central to protecting U.S. national security and that this leadership depends on U.S. businesses and

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<sup>1</sup> See Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. 62186 (October 7, 2022) (interim final rule).

workers remaining competitive in global markets.<sup>2</sup> However, to ensure that the new controls protect national security without undermining U.S. competitiveness, the Roundtable urges BIS to: (1) return to regular and consistent practice by providing industry with an opportunity to comment on the technical components and potential economic impacts of future controls in advance of their entry into force; (2) enhance the clarity, simplicity, and predictability of these and future export control regulations; and (3) refrain from imposing new export controls on a unilateral basis unless absolutely necessary.

## **I. Return to Regular and Consistent Rulemaking**

The Roundtable recognizes that BIS was not legally obligated<sup>3</sup> to comply with the requirements for notice of proposed rulemaking and public comment before the IFR became effective. Nonetheless, the Roundtable believes that the absence of a formal process for soliciting input on the IFR prior to it taking effect is contrary to the spirit and purpose of ECRA section 4817(a)(2)(C),<sup>4</sup> which requires that BIS “include a notice and comment period” before publishing unilateral controls over emerging and foundational technologies. BIS has defined “emerging and foundational technologies” to include advanced semiconductor technologies and semiconductor production equipment in subsequent regulations.<sup>5</sup>

Congress inserted a specific notice and comment requirement in ECRA Section 4817(a)(2)(C) because it understood that there was a risk for unintended “over- and under-controls” when imposing new unilateral controls on previously uncontrolled items with complex technologies, supply chains, and economic considerations. This requirement is consistent with Congress’s instruction that the executive branch be “informed by multiple sources of information” before publishing any new unilateral controls on emerging or foundational technologies outside the multilateral regime process.<sup>6</sup>

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<sup>2</sup> See Export Control Reform Act of 2018, 50 U.S.C. § 4811(3) (“The national security of the United States requires that the United States maintain its leadership in the science, technology, engineering, and manufacturing sectors, including foundational technology that is essential to innovation. Such leadership requires that United States persons are competitive in global markets.”).

<sup>3</sup> See ECRA, 50 U.S.C. § 4821 (exempting functions exercised pursuant to the terms of the Act from typical administrative procedure requirements); Administrative Procedure Act, 5 U.S.C. § 553(a)(1) (exempting proposed rules from notice and comment requirements when they involve a military or foreign affairs function of the United States).

<sup>4</sup> See *id.* § 4817(a)(2)(C).

<sup>5</sup> See Review of Controls for Certain Emerging Technologies, 83 Fed. Reg. 58201, 58202 (Nov. 19, 2018) and Identification and Review of Controls for Certain Foundational Technologies, 85 Fed. Reg. 52934 (Aug. 27, 2020).

<sup>6</sup> See ECRA, 50 U.S.C. § 4817(a)(2)(A) (explaining that the interagency process designed to identify emerging and foundational technologies which should be subject to export controls “shall” be informed by “multiple sources of information” including “(i) publicly available information; (ii) classified information, including relevant information provided by the Director of National Intelligence; (iii) information relating to review and investigations of

The Roundtable believes that many unnecessary disruptions and unintended consequences associated with the rule could have been addressed had BIS sought industry feedback and data before publishing it. For example, BIS provided additional guidance on the scope of the rule through a FAQ posted to the Department of Commerce website on October 28, 2022 to address confusion about the definition of facilities and persons subject to the IFR. Had BIS sought industry feedback prior to making the rule effective, much of this confusion could have been mitigated. Furthermore, many Roundtable members remain concerned that one unintended consequence of the IFR may be that China will increase its production of legacy node semiconductors and flood global markets with those products at significantly reduced prices. Business Roundtable recommends that BIS continue to engage with industry to address this potential unintended consequence of the rule and issue additional FAQs in response to comments submitted through this Federal Register process to minimize further unnecessary disruptions to the global semiconductor market.

## **II. Reduce Uncertainty and Compliance Complexity**

The Roundtable urges BIS to simplify and clarify its export control regulations for this IFR and recommends that the Administration increase industry engagement before adopting future export controls to make them more effective, transparent, and predictable. Business Roundtable agrees that BIS must constantly update export controls to respond to evolving national security and foreign policy challenges. But these challenges also demand more public and private sector engagement to promote compliance with new controls, improve their effectiveness, and ensure that those controls do not undermine the ability of U.S. companies to compete in other markets.

The IFR contains among the most novel and complex EAR provisions ever issued which require costly due diligence and fact gathering to determine applicability.<sup>7</sup> For example, many companies have struggled to understand the scope of the end-use restrictions set forth in Section 744.23 of the rule, particularly insofar as they require a license for exporting common inputs to China that may eventually contribute to the development of certain controlled parts,

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transactions by the Committee on Foreign Investment in the United States [ . . . ]; and (iv) information provided by the advisory committees established by the [Commerce Secretary] to advise the Under Secretary of Commerce for Industry and Security on controls under the Export Administration Regulations, including the Emerging Technology and Research Advisory Committee.”).

<sup>7</sup> For example, the IFR includes complex and difficult to apply foreign direct product rules which impose controls on foreign-made commercial items produced with now-controlled U.S. software and products. Determining if a foreign-made commercial item was produced, even in part, by foreign equipment that was the direct product of U.S.-origin technology that is now controlled is exceedingly difficult. This is particularly true with respect to equipment that was created overseas or exported from the United States years ago without the need for any authorizations or related notice about whether it was produced from covered technology.

components, or equipment.<sup>8</sup> Furthermore, for companies that supply components or materials, there may be many layers of purchasing between themselves and any covered fabrication facility engaged in “development” or “production” of NAND, logic, or DRAM integrated circuits. Accordingly, the Roundtable requests that BIS prepare an exclusive list of covered fabrication facilities to facilitate compliance with this section of the rule.

As a result of this complexity and burden, many foreign companies may choose to design out or stop incorporating U.S.-branded technology, software, components, and equipment in their foreign products to prevent them from being subject to future U.S. export controls. In remarks last November, Secretary Raimondo suggested plans for new controls that could reach biotechnology, biomanufacturing, AI, quantum computing, and clean energy technologies.<sup>9</sup> Imposing similarly novel and complex controls in these and other sectors on items with clear commercial applications risks broader economic disruptions and unintended consequences absent intensive consultations with affected industries prior to the adoption of those controls.

### **III. Apply Unilateral Controls Sparingly**

In ECRA, Congress emphasized 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” and therefore, unilateral export controls are appropriate only for protecting “specific United States national security and foreign policy interests.”<sup>10</sup> The Roundtable welcomes recent reports that the Biden Administration has reached agreement with Japan and the Netherlands to impose complementary controls and will review the terms of that agreement once it is released. Nonetheless, the Roundtable emphasizes that the new rule will become ineffective and counterproductive unless these key allies impose similar list-based, end-user, and end-use controls on their exporters.

Without well-aligned multilateral or plurilateral controls, the rule will be ineffective because foreign companies not subject to the same controls eventually will be able to export to China most of the types of items and services that would have otherwise come from the United States or U.S. companies. And over time, these foreign exports and services will also support and expand China’s indigenous capabilities. We understand that the reported agreement with Japan and the Netherlands, as well as the foreign-direct product rules that apply to the high-

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<sup>8</sup> See IFR § 744.23(a)(2)(v).

<sup>9</sup> See Remarks by Commerce Secretary Gina Raimondo on *U.S. Competitiveness and the China Challenge* (Nov. 30, 2022) (“We believe that there are three families of technologies that will be of particular importance over the coming decade: first, computing-related technologies, including microelectronics, quantum information systems, and artificial intelligence; second, biotechnologies and biomanufacturing; and third, clean energy technologies. We will continue to take action to protect our advantage and maintain as large a lead as possible in these foundational technologies.”).

<sup>10</sup> 50 U.S.C. § 4811(5)-(6).

performance chip, entity list, and supercomputing parts of the IFR, are intended to address this concern. However, the efficacy of the agreement with Japan and the Netherlands will depend on its scope and enforcement. Furthermore, the foreign-direct product rules only will be effective if foreign companies continue to use U.S.-origin technology, software, or equipment. If products do not incorporate U.S.-origin or derived content, the foreign-direct product rules have no effect. Unilateral foreign-direct product rules incentivize companies over time to design out the U.S.-origin technology, software, and equipment from their products so as not to fall within scope of controls. The timelines for displacing U.S. products and services will vary for different types of technology, software, and equipment, but whatever the displacement time horizon, a unilateral rule will become less effective over time in controlling the types of exports and services the IFR intends to target.

At the same time, if the IFR is enforced unilaterally, it will become counterproductive by harming the U.S. domestic industrial base, as foreign companies not affected by the rule will gain market share in China and use the proceeds of those sales to invest in research and development that may enable them to out-compete U.S. companies affected by these controls. Moreover, if companies remove U.S. products and services from their semiconductor supply chains in response to the IFR's foreign-direct product rules, the negative effects will not be limited to the China market but third-country markets as well. For these reasons, the Roundtable urges the Administration to explain the scope of the controls that Japan and the Netherlands will impose, as well as to continue to work closely with industry to implement the IFR's foreign-direct product rules.

#### **IV. Conclusion**

The Business Roundtable understands the importance of the national security objectives that Congress and the Biden Administration seek to advance with enhanced export controls on emerging and foundational technologies. The Roundtable requests, however, that BIS provide an opportunity for notice and comment pursuant to the terms of ECRA and increase engagement with industry before adopting future controls on emerging technologies. Furthermore, the Roundtable requests that BIS reduce the complexity of future controls to enhance their effectiveness and minimize compliance costs. Finally, the Roundtable supports the Administration's continuing efforts to ensure that similar controls are adopted by key trading partners to ensure their effectiveness and to minimize the IFR's potential anti-competitive impacts on the U.S. semiconductor industry.

If you have any additional questions or would like to discuss these comments further, please contact Jennifer Thornton ([jthornton@brt.org](mailto:jthornton@brt.org)) or Paul Jackson ([pjackson@brt.org](mailto:pjackson@brt.org)).