

This comment is being submitted anonymously and with the specific products and competitors in question removed to protect our competitive interests.

The new 744.23 export regulations, as understood by us, go far beyond the news headlines that imply restrictions only apply to the latest and greatest technology. As written, I believe that sections § 744.23 (a)(1)(v), (2)(v) (“Prohibition (v)”) ban my company from exporting any EAR99 product, no matter how low tech, to any Chinese company involved in developing domestic Chinese semiconductor equipment (specifically, for the development or production in the PRC or Macau of any parts, components, or equipment specified under ECCN 3B001, 3B002, 3B090, 3B611, 3B991, or 3B992 “–Category 3B Items”). While at first glance this may seem like a reasonable policy, there are a number of unintended consequences.

My US based company provides an EAR99 product to semiconductor equipment manufacturing companies and their subcontractors around the world. We currently have a large part of the worldwide market for these EAR99 items, which are commercial off-the-shelf products that are not customized for Chinese customers. At present, the barrier to entry into our market is not technical; but rather based on relationships, pricing, and lead time, advantages that we have invested in over the last 20 years. BIS will not be able to impede Chinese manufacturers from obtaining EAR99 products like ours in China, as explained below.

There are multiple foreign companies, including a Chinese company, that would like to compete with us, which until now have been unable to because of our immediate availability of product and critical business relationships built over decades. The inability of my company to export to China without a license due to the new semiconductor controls has already led to opening the market up to an existing Chinese company which previously had very little market penetration. If we are not allowed to resume selling our products very soon, we will likely lose the business forever and simply hand it over to the Chinese while doing nothing to further the US policy goals. We submitted our first license application to BIS in early January (covering a one year’s supply for one of our Chinese customers) and are concerned with BIS’s license policy of a “presumption of denial.” Going through the licensing process for every export to China will not be feasible. We also submitted a request for an advisory opinion regarding Prohibition (v) to confirm if the prohibition to export items for the “development” and “production” of listed ECCN 3B items also includes the *incorporation* of EAR99 products in China that are used in ECCN 3B items. Our fear is that even if we were granted a license, the delays caused by the application process for each order of our commodity item would eliminate our lead time advantage over our foreign competitors. If it is decided that my company must stop exporting EAR99 products to China, this will lead directly to a reduction of various US jobs at our US manufacturing plant and several million dollars annually in revenue.

Over time, there is the additional potential for our current major customers to begin to purchase product from our Chinese competitor once they have established themselves as a reliable supplier in China, further eroding our revenue and employee count. Should we not be able to export our products because of Prohibition (v) or only after a lengthy BIS licensing reviews, then our Chinese customers will simply obtain the competitor product from China and/or another non-US/non-China source. By determining that our products fall under Prohibition (v), BIS will only hurt a US manufacturer, but not prevent companies in China from obtaining products with identical function.

Further, from a regulatory perspective, we note that the wording in §744.23(a)(2)(v) prohibits the “development” or “production” of Category 3B Items. It does not prohibit the incorporation of EAR99 items into Category 3B Items. When we compare the wording in §744.23(a)(2)(v) with, for example, the parallel §744.23(a)(2)(ii) prohibition, we note that (ii)—in the same provision 744.23—goes beyond “development” or “production,” by specifically prohibiting:

*“(ii) The **incorporation** into, or the “development” or “production” of any “component” or “equipment” that will be used in a “supercomputer” located in or destined to the PRC;.*

If BIS wanted to prohibit the incorporation of EAR99 items (such as screws, tubing, etc.) into Category 3B Items, it should have written Prohibition (v) accordingly, by explicitly prohibiting the incorporation of any item that is subject to the EAR into a Category 3B Item—just as it did in §744.23(a)(2)(ii). If BIS thought that the terms “development” or “production” included the incorporation of EAR items into Category 3B Items, why did it add “incorporation” in the prohibited activities of §744.23(a)(2)(ii)? It could have stricken “incorporation” and rely on the terms “development” and “production.” We note that others in the industry may be interpreting this discrepancy between subsection (ii) and (v) to their advantage and exporting their products that will be incorporated into ECCN 3B items in China without a license. If BIS believes that Prohibition (v) includes incorporation, then at a minimum BIS should clarify this in Prohibition (v).

I strongly urge that these rules be revised as follows:

- (i) To clarify that Prohibition (v) does NOT include the incorporation of simple, commercial, off-the shelf EAR99 products, such as tubing, screws, and other simple products, at the beginning of the supply chain (as noted above, the products, which in turn are incorporated into Category 3B Items).
- (ii) If, alternatively, BIS believes that Prohibition (v) also prohibits “incorporation” to not subject *all* items subject to the EAR to Prohibition (v), but carve-out simple,

commercial, off-the shelf EAR99 products, such as tubing, screws, and other simple products, which are available outside the US and where US suppliers will simply be replaced by foreign suppliers.

- (iii) If BIS will not implement the suggested changes of (i) or (ii) above, to at least change the licensing policy for EAR99 items like ours in Section 744.23(d) to “*case-by-case*” (instead of a presumption of denial) and to clarify in the wording of Prohibition (v) that it also pertains to incorporation, so that everyone is aware of this.

While I understand the overarching policy goals, I feel that the policy as written, essentially surrenders all US based CNC machining related to the semiconductor industry and bound for China to domestic Chinese manufacturers.

Regards