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January 31, 2023

Matthew Borman, Deputy Assistant Secretary  
Bureau of Industry and Security  
U.S. Department of Commerce  
1401 Constitution Ave NW  
Washington, D.C. 20230

**Subject:** Seagate Technology Comments on Interim Final Rule - Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use

**Reference:** 87 Fed. Reg. 62186; RIN 0694-AI94; Docket # 220930-0204

Dear Mr. Borman:

Seagate Technology LLC (together with its affiliates, “Seagate” or “the Company”) is a Nasdaq-listed storage solutions business that serves customers throughout the world. It manufactures hard disk drives (“HDDs”), solid state drives (“SSDs”), enterprise data storage systems, and gaming storage systems, among other products. Seagate has operations around the globe and employs nearly 4,000 people in the United States. It is a world leader in data storage infrastructure solutions, particularly HDDs, and is a major contributor to U.S. global technology leadership.

On October 13, 2022, the Bureau of Industry and Security (“BIS”) published a new rule (the “October 13 Interim Final Rule”), which substantively changes the Entity List foreign-produced direct product rule (“the Entity List FDPR”) by revising the first clause of paragraph (e)(1)(i)(B) of 15 C.F.R. § 734.9 (“the Major Component Provision”) to remove the requirement that, to be subject to the EAR under the Major Component Provision, foreign-produced items must be the “direct product” of a complete plant or “major component” of a plant that is itself the “direct product” of U.S.-origin ‘technology’ or ‘software.’<sup>1</sup> See 87 Fed. Reg. at 62189.

Prior to October 13, the Major Component Provision of the Entity List FDPR read:

***“Direct product” of a complete plant or ‘major component’ of a plant.*** A foreign-produced item meets the product scope of this paragraph if the foreign-produced item is produced by any plant or ‘major component’ of a plant that is located outside the United States, when the plant or ‘major component’ of a plant, whether made in the U.S. or a foreign country, itself is a “direct product” of U.S.-origin “technology” or “software” that is specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the CCL. 15 C.F.R. § 734.9(e)(1)(ii) (Oct. 12, 2022).

Following the October 13 Interim Final Rule, the revised Major Component Provision of the Entity List FDPR reads:

***Product of a complete plant or ‘major component’ of a plant that is a “direct product.”*** A foreign-produced item meets the product scope of this paragraph (e)(1)(i)(B) if the foreign-produced item is produced by any plant or ‘major component’ of a plant that is located outside

<sup>1</sup> The October 13 Interim Final Rule also implements additional export controls on China, which primarily relate to advanced computing and semiconductor manufacturing. See 87 Fed. Reg. 62186.



the United States, when the plant or ‘major component’ of a plant, whether made in the U.S. or a foreign country, itself is a “direct product” of U.S.-origin “technology” or “software” that is specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the CCL. 15 C.F.R. § 734.9(e)(1)(B).

BIS asserts that this revision to the Major Component Provision “does not alter the scope or requirements of the existing Entity List FDP rule that applies to entities designated with footnote 1 on the Entity List” and instead merely “reflect[s] alignment with the unchanged scope of the paragraph, as the plant or ‘major component’ of the plant that must be a ‘direct product’ of U.S.-origin ‘technology’ or ‘software.’” 87 Fed. Reg. 62189. However, as discussed in detail below, this is in fact a substantive change to the Entity List FDPR because the rule, as it is now written, purports to regulate *any* foreign-produced item that incorporates a component that was itself made using a plant or major component of a plant specified in the FDPR. This is contrary to existing BIS guidance and would dramatically and unlawfully expand BIS’s power to regulate foreign-made items. The substantive difference between the pre- and post-October 13, 2022 Major Component Provisions is confirmed by the text of the regulations, as well as BIS’s own statements and guidance.

Presenting this revision as non-substantive and consistent with the pre-October 13, 2022 version of the Entity List FDPR is confusing to industry. Indeed, in revising the text of the Major Component Provision of the Entity List FDPR, BIS has simultaneously left in place text identical to that of the pre-October 13 version of the Major Component Provision in both the Russia/Belarus FDPR and the Russia/Belarus-Military End User FDPR. The Interim Final Rule creates more confusion about the scope of the Entity List FDPR and brings the rule into direct conflict with longstanding BIS policy guidance that BIS continues to publish on its website for industry reference. This revision to the Entity List FDPR also exceeds BIS’s statutory authority by granting the agency the power to regulate foreign-made items without sufficient nexus to the United States. As a practical matter, the change will also impose substantial burdens on regulated parties and risk further straining relationships with allied countries.

Seagate urges BIS to return the text of the first clause of the Major Component Provision to its original phrasing.

#### **I. The October 13 Interim Final Rule’s Change to the Major Component Provision Substantively Changes the Entity List Foreign-Produced Direct Product Rule.**

Contrary to BIS’s statement in the Federal Register notice, altering the first clause of the Major Component Provision to remove the requirement that an item subject to the Major Component Provision be a “direct product” of a complete plant or major component changes the scope of the Entity List FDPR because it opens the door for BIS to assert jurisdiction over an item merely because it incorporates any component — no matter how small or how far removed in the production process — that was made using a plant or major component of a plant specified in the FDPR.<sup>2</sup>

Prior to October 13, the Major Component Provision applied only to foreign-produced items that were the “direct product” of plants or major components of plants specified in the FDPR. BIS previously and publicly articulated this “direct product” requirement in explicit text in the preamble to the final Entity List FDPR that was published on August 20, 2020:

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<sup>2</sup> Even without the first clause, the phrase “produced by” connotes a direct relationship. However, Seagate is concerned that the intentional deletion of the phrase “direct product” from the first clause would support an inference that, going forward, BIS intends “produced by” to have a more expansive meaning.



BIS received some comments stating concerns about complying with the new rule. *The commenters pointed out that the production line of these items may be long and complex. They asked, ‘How can we possibly delve that deeply into the supply chains and design chains of our customers and suppliers?’* This rule answers that question by imposing a license requirement on certain software or technology that is the direct product of certain software or technology subject to the EAR and certain items that are the *direct product of major equipment* subject to the EAR when the foreign-produced item will be incorporated into, or will be used in the ‘production’ or ‘development’ of any ‘part,’ ‘component,’ or ‘equipment’ produced, purchased, or ordered by Huawei or its listed non-U.S. affiliates; or Huawei or its listed non-U.S. affiliates is a party to any transaction involving the foreign-produced item, e.g., as a ‘purchaser,’ ‘intermediate consignee,’ ‘ultimate consignee,’ or ‘end-user.’ 85 Fed. Reg. at 51600 (emphasis added).

In February 2022, BIS issued another final rule addressing the Entity List FDPR. In the accompanying Federal Register notice, BIS explained that it had “received requests for additional guidance about determining the scope of production equipment in relation to the Entity List” FDPR. 87 Fed. Reg. 6023. In response, BIS sought to clarify the FDPR “by adding double quotation marks around terms that are defined in part 772 of the [Export Administration Regulations], e.g., direct product, technology, software, and equipment.” *Id.* at 6023. BIS added double quotations marks to “direct product,” including in § 734.9(e)(1)(ii) regarding the Major Component Provision. That double-quotation-mark term “direct product” is defined in part 772 of the EAR as “[t]he **immediate** product (including processes and services) produced **directly** by the use of technology or software” 15 C.F.R. § 772.1 (emphasis added).

BIS’s formal guidance also underscores that prior to October 13, 2022, the Major Component Provision applied only to the “direct product[s]” of plants or major components of plants specified in the FDPR. In De Minimis Question 1 of BIS’s Frequently Asked Questions (“FAQs”), BIS stated that “incorporation of a part that is subject to the EAR pursuant to the Entity List FDP rule **does not necessarily make the larger foreign product subject to the EAR.**” See BIS [De Minimis FAQ 1](#) (emphasis added). Similarly, in Supply Chain FAQ 4, BIS noted that the EAR imposes a license requirement for exporting, reexporting, or transferring a “foreign-produced direct product (i.e., the component) when there is ‘knowledge’ that it (the foreign-produced direct product) will be incorporated” into a product sent to a footnote 1 designated entity. See BIS [Supply Chain FAQ 4](#). At minimum, the new scope of the Major Component Provision requires BIS to revise this directly conflicting FAQ guidance.

By substantively amending the rule while providing conflicting guidance, the agency is acting in a manner that is contrary to its statutory mandates. See, e.g., 50 U.S.C. §§ 4811(8), 4813(a)(12), (15). Congress directed that “[t]he authority under [ECRA] may be exercised only in furtherance of all of the objectives set forth in” the first 10 enumerated paragraphs in 50 U.S.C. § 4811. 50 U.S.C. § 4811(11). Paragraph (8) states that “[t]he export control system must ensure that it is **transparent, predictable, and timely.**” 50 U.S.C. § 4811(8) (emphasis added). Congress further directed that “[i]n carrying out [ECRA] on behalf of the President, the Secretary [of Commerce] shall . . . keep the public appropriately apprised of changes in policy, regulations, and procedures established under [ECRA]” and “establish and maintain processes to inform persons, either individually by specific notice or through amendment to any regulation or order issued under this subchapter, that a license from [the Bureau] is required to export.” 50 U.S.C. § 4813(a)(12), (15) (emphasis added).

Although the change in the October 13 Interim Final Rule is purportedly motivated by BIS’s desire to bring first clause into alignment with the text that follows, the previous version of the provision contained no such misalignment. The ordinary meaning and usage of the term “produced by” entails that the produced item is the immediate result of the plant or major component at issue. Further, BIS has not



made corresponding changes in other foreign direct product rules with the exact same language. For example, both the Russia/Belarus FDPR Major Component Provision and the Russia/Belarus-Military End User FDPR Major Component Provision contain the same language as the Entity List FDPR Major Component Provision in both the first clause and in the paragraphs that follow.

The Russia/Belarus FDPR Major Component Provision reads:

***"Direct product" of a complete plant or 'major component' of a plant.*** A foreign-produced item meets the product scope of this paragraph (f)(1)(ii) if it meets both of the following conditions:

- (A) ***The foreign-produced item is produced by any plant or 'major component' of a plant*** that is located outside the United States, when the plant or 'major component' of a plant, whether made in the United States or a foreign country, itself is a "direct product" of U.S.-origin "technology" or "software" subject to the EAR that is specified in any ECCN in product groups D or E of the CCL; and
- (B) The foreign-produced item is identified in supplement no. 6 to part 746 of the EAR or is not designated EAR99. 15 C.F.R. § 734.9(f)(1)(ii) (emphasis added).

The Russia/Belarus-Military End User FDPR Major Component Provision also uses identical language:

***"Direct product" of a complete plant or 'major component' of a plant.*** A foreign-produced item meets the product scope of this paragraph (g)(1)(ii) if ***the foreign-produced item is produced by any plant or 'major component' of a plant*** that is located outside the United States, when the plant or 'major component' of a plant, whether made in the United States or a foreign country, itself is a "direct product" of U.S.-origin "technology" or "software" subject to the EAR that is specified in any ECCN in product groups D or E in any categories of the CCL. 15 C.F.R. § 734.9(g)(1)(ii) (emphasis added).

Presumably, the agency consciously decided not to alter these provisions, which continue to regulate only items that are the "direct product" of complete plants or major components.<sup>3</sup>

This underscores that the change to the first clause of the Entity List FDPR Major Component Provision is more than a mere "alignment with the unchanged scope of the paragraph." 87 Fed. Reg. 62189. Rather, it represents a change in the rule. Retaining language in other foreign direct product rules such as the Russia/Belarus FDPR and Russia/Belarus-Military End User FDPR confuses the applicable standards for compliance with BIS's foreign direct product rules.

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<sup>3</sup> Deputy Assistant Secretary Matthew Borman has reinforced in public comments that the Russia/Belarus and Russia/Belarus Military End User FDPRs apply only to the "direct product" of complete plants or major components specified in the FDPRs. See Telephonic Press Briefing with Matthew Borman, U.S. Commerce Department Deputy Assistant Secretary for Export Administration (March 29, 2022) (stating that if a "foreign-made product . . . is . . . produced on a line that uses a U.S. tool or piece of equipment, then that ***direct product*** going to Russia may also be subject to these restrictions"; and describing chips "caught by the foreign direct product rule because the chips are . . . ***manufactured on a fabrication line using a U.S. tool***") (emphasis added).



If BIS were to attempt to apply this newly revised version of the Major Component Provision to conduct occurring before October 13, 2022, the regulation and resulting enforcement approach would be impermissibly retroactive in violation of the Due Process Clause. *See, e.g., PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 44 (D.C. Cir. 2016) (agency “violated due process by retroactively applying [a] new interpretation to . . . conduct that occurred before the date of the [agency’s] new interpretation”), *reh’g en banc granted, order vacated on other grounds* (Feb. 16, 2017); *see also Nat’l Min. Ass’n v. Dep’t of Lab.*, 292 F.3d 849, 859 (D.C. Cir. 2002) (regulation is impermissibly “retroactive if it . . . creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past” (citations and quotation marks omitted)).

## **II. BIS’s Proposed Change to the Entity List FDPR Major Component Provision Exceeds the Authority Congress Granted to it under the Export Control Reform Act**

In addition to introducing substantial confusion to the regulations, the change to the first clause of the Major Component Provision also purports to grant BIS new powers in excess of the regulatory authorities granted to it by Congress under ECRA.

ECRA explicitly limits BIS’s regulatory authority to “items subject to the jurisdiction of the United States.” 50 U.S.C. § 4812(a)(1). The changes to the Interim Final Rule would expand BIS’s authority to regulate items that are not made in the United States, contain no U.S. content, and were not made using U.S. technology, software, or equipment, merely because the items in question incorporate components made using U.S.-designed equipment. For example, the Interim Final Rule would allow BIS to assert jurisdiction over a television set made in South Korea that contains no U.S.-origin content, but which incorporates a chip made in Taiwan using a machine that also contains no U.S.-origin content but which was designed with the aid of U.S. software.

Congress’s use of “subject to the jurisdiction of the United States” in ECRA should be construed in light of the jurisdictional reach of the EAR at the time of enactment. The EAR at the time of ECRA’s enactment did not purport to regulate foreign-produced items that were not the direct product of a plant or major component of a plant. Rather, the “major component” provision of the traditional foreign direct product rule that was in place at the time of enactment was clearly limited to foreign-produced items that were the “direct product” of a plant or major component thereof, which was itself the direct product of U.S. software or technology. *See* 15 C.F.R. § 736.2(b)(3)(ii) (Dec. 2018).

Further, as a general matter, statutes are presumed to apply only within the United States, unless Congress provides a clear statement to the contrary. *RJR Nabisco, Inc. v. European Cnty.*, 136 S. Ct. 2090, 2100 (2016). ECRA contains no such clear statement, and thus it is not clear that the FDPR may by default apply to items with no apparent nexus to the United States.

Additionally, the *Charming Betsy* canon makes clear that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Under settled principles of international law, a sovereign generally cannot exercise jurisdiction extraterritorially unless it regulates something with a *direct* effect in its territory. *See* The Restatement (Fourth) of Foreign Relations Law § 401—Categories of Jurisdiction (2018). The “direct” element of the agency’s Major Component Provision is thus necessary, at a minimum, to align it with international legal norms that Congress is presumed to have respected in limiting BIS’s authority to “items subject to the jurisdiction of the United States.”

There is also ample evidence that Congress never intended to grant BIS such expansive authority to regulate foreign-made items. When considering similar jurisdictional restrictions in the Trading with



the Enemy Act in 1977 (which also refers to property “subject to the jurisdiction of the United States”), Assistant Secretary of the Treasury for International Affairs C. Fred Bergsten testified before Congress that the executive would “apply any new extraterritorial controls sparingly.” Statement of C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs, Amending the Trading With the Enemy Act, Subcomm. on International Finance of the Comm. on Banking, Housing, and Urban Affairs (Sept. 8, 1977), at 5. Congress also rejected the initial Export Control Reform Bill of 2018 that lacked the jurisdictional limitation “subject to the jurisdiction of the United States.” Export Control Reform Act of 2018, H.R. 5040, 115th Cong. (2018), Section 103.

### **III. There Are Serious Practical Reasons to Oppose BIS’s Change to the First Clause of the Major Component Provision**

BIS’s proposed change to the Entity List FDPR Major Component Provision poses serious practical concerns for both industry and government.

Industry has consistently raised with BIS that a regulation with such expansive reach would pose significant difficulty to companies that would be required to engage in extreme review of upstream supply chains to ensure compliance with the rule. As noted above, commenters on the original Entity List FDPR asked this very question to BIS, and BIS affirmatively stated that the rule addressed these concerns by applying only to the direct product of certain designated equipment. Manufacturers have meticulously planned and reviewed their manufacturing processes in reliance on this guidance. However, in an industry replete with lengthy and complex supply chains, this type of planning and review is reliant on a rule that is limited in scope and easily interpreted, both characteristics which BIS’s Interim Final Rule eliminates.

The scope of review that this new rule may require is enormous, making it essentially impossible to determine how the rule applies to complex items with multiple assembly processes. This will expose manufacturers to heightened risks of liability that even increased compliance expenditures cannot fully address, as the sheer breadth and opacity of the rule as revised may make it impossible to ever fully know whether a specified piece of equipment may have been used at some distant point in the supply chain. This is not feasible for industry, and such a rule cannot be complied with.

Further potential for confusion exists because BIS has not made any updates to its existing guidance on the Entity List FDPR to accompany the change in the first clause of the Major Component Provision. BIS’s De Minimis FAQ 1 guidance continues to advise that “incorporation of a part that is subject to the EAR pursuant to the Entity List FDP rule does not necessarily make the larger foreign product subject to the EAR” despite the fact that this is plainly contradicted by the revision to the first clause of the Major Component Provision.

In addition and separately, this change poses significant problems for the U.S. government’s relationships with its allies and partners. As noted above, rather than making the text of the Entity List FDPR more straightforward and consistent, the revision in the Interim Final Rule introduces further inconsistency between the Major Component Provisions of the Entity List FDPR and the Russia/Belarus and Russia/Belarus-Military End User FDPRs, both of which continue to use the same text as the pre-October 13 Entity List FDPR Major Component Provision.

### **IV. Conclusion**

The change to the first clause of the Major Component Provision of the Entity List FDPR in the Interim Final Rule is substantive and materially alters both the obligations of manufacturers and the asserted regulatory power of BIS. The rule as revised is overly expansive and is not authorized by



Congress under ECRA. Further, the rule as revised is effectively impossible for industry to comply with and risks BIS's use of the FDPR in other, more constrained and appropriate contexts. In the interests of both clarity and effectiveness, BIS should instead return the first clause of the Major Component Provision to its original text, reflecting that the Entity List FDPR applies only to items that are the direct product of a complete plant or major component of a plant specified in the FDPR.

Sincerely,

A handwritten signature in blue ink that reads "Katherine E. Schuelke".

Katherine Schuelke  
SVP, Chief Legal Officer and Corporate Secretary  
Seagate Technology