Lenovo.com
8001 Development Drive
Morrisville, NC 27560

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VIA FEDERAL E-RULEMAKING PORTAL

Information Technology Controls Division
Bureau of Industry and Security ("BIS")
Department of Commerce

Re: Comment on the Definition of "Headquartered", Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections, 88 Fed. Reg. 73,458 (Oct. 25, 2023)

Regulations.gov ID No. BIS–2022–0025, RIN 0694–AI94

To whom it may concern:

Lenovo (United States) Inc. and Lenovo Global Technology (United States) Inc. (together, "Lenovo U.S.", and collectively with all its parent, subsidiary, and affiliate companies, "Lenovo") submit this letter in response to the request for comments in the Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections, 88 Fed. Reg. 73,458 (Oct. 25, 2023) ("AC/S IFR").[1] Our comment is limited to question 6, which is reproduced below:

> *6. Definition of headquartered companies.* BIS seeks comments on the definition [of] entities headquartered in, or whose ultimate parent company is headquartered in, either Macau or a destination specified in Country Group D:5, including comments on the ability to access information required to assess the status of a foreign party and any other factors that would support the policy goal of limiting access to advanced computing capability by Macau parties or a destination specified in Country Group D:5 parties.

See 88 Fed. Reg. at 73,486. In pertinent part, the AC/S IFR imposes an end-user-based license requirement when there is knowledge that "[a]ny item subject to the EAR and specified in ECCN 3A001.z, 3A090, 4A003.z, 4A004.z, 4A005.z, 4A090, 5A002.z, 5A004.z, 5A992.z, 5D002.z, or 5D992.z is destined to any destination other than those specified in Country Groups D:1, D:4, or D:5 (excluding any destination also specified in Country Groups A:5 or A:6) for an entity that is headquartered in, or whose ultimate parent company is headquartered in, either Macau or a destination specified in Country Group D:5 (e.g., a PRC-

[1] The AC/S IFR directed comments to be submitted no later than December 18, 2023. *See* 88 Fed. Reg. 73,458. However, on December 15, 2023, BIS extended the time to submit comments to January 17, 2024. *See* 88 Fed. Reg. 86,821 (Dec. 15, 2023). Accordingly, this comment is timely submitted.

headquartered cloud or data server provider located in a destination not otherwise excluded)." 15 C.F.R. § 744.23(a)(3)(i). However, the AC/S IFR does not define the term "headquartered".

While Lenovo does not offer a proposed definition of "headquartered" for purposes of the AC/S IFR, Lenovo respectfully submits that any definition adopted by BIS should exempt organizations located outside of Country Groups D:1, D:4, and D:5 (excluding Country Groups A:5 and A:6) with an ultimate parent located in Macau or Country Group D:5, but the day-to-day operations of which are not controlled by an entity located in Macau or Country Group D:5.

Lenovo understands the policy rationale of imposing a license requirement under 15 C.F.R. § 744.23(a)(3)(i) for advanced computing items destined for companies that have an ultimate parent headquartered in Macau or Country Group D:5. BIS explained in the AC/S IFR that this control "is needed to ensure that the national security objectives of the October 7 IFR and this AC/S IFR are not undermined by Macau, PRC, or other Country Group D:5 entities setting up cloud or data servers in other countries to allow these headquartered companies of concern to continue to train their AI models in ways that would be contrary to U.S. national security interests". 88 Fed Reg. at 73,482. That is, the risk that parent companies in Macau or Country Group D:5 could direct their subsidiaries to acquire advanced computing items outside of Country Groups D:1, D:4, or D:5 (excluding Country Groups A:5 and A:6) contrary to the intent of the October 7, 2022 and October 17, 2023 controls is sufficiently high to justify the end-use control at § 744.23(a)(3)(i).

However, Lenovo believes this policy rationale should not extend to an organization that does not have its day-to-day operations directed by an entity headquartered in or other party located in Macau or Country Group D:5, even if the ultimate parent is headquartered in Macau or Country Group D:5. As a reflection of their global footprint, it is increasingly popular for multinational companies to adopt headquarters in two or more countries around the world.[2] Applying the "headquarters" test in such situations is difficult for those engaging in business with the dual-headquartered company. Lenovo itself is dual headquartered in Morrisville, North Carolina and Beijing, China.[3] Examples of other international companies headquartered in the United States and elsewhere include Applied Materials, Inc. (shared headquarters in Santa Clara, California; Shanghai, China; Netherlands; and Japan),[4] Halliburton (Houston, Texas and Dubai),[5] consulting company Forrester Research (Cambridge, Massachusetts and London),[6] and gaming device company Razer (San Diego, California and Singapore).[7] Such companies also often have executives of multiple nationalities that reside in offices located around the world.

Although dual headquarters should not automatically exclude a company with an ultimate parent in Macau or Country Group D:5 from the rule, Lenovo suggests that additional analysis is necessary to identify where an entity is controlled. Looking exclusively at whether an ultimate parent is headquartered in Macau or Country Group D:5 would be overinclusive in application to subsidiaries and affiliates that are not managed or overseen by the ultimate parent. In a company with two or more headquarters and executives located around the world, the day-to-day operations of some or all of its subsidiaries and affiliates may be managed completely outside of Macau or Country Group D:5, even if an ultimate parent

[2] *See, e.g.*, Phred Dvorak, *Why Multiple Headquarters Multiply*, Wall St. J. (Nov. 19, 2007), https://www.wsj.com/articles/SB119543170674797387.

[3] *See* https://www.lenovo.com/us/en/about/locations/.

[4] *See* https://www.appliedmaterials.com/us/en/contact/locations.html.

[5] *See* Mohammed Abbas and Anna Driver, *Halliburton to move headquarters, CEO to Dubai*, Reuters (Aug. 9, 2007), https://www.reuters.com/article/idUSN11266584/.

[6] *See* https://www.forrester.com/contact-us/.

[7] *See* https://www.razer.com/about-razer.

in those locations retains some protective shareholder rights. In such cases, the policy rationale for extending § 744.23(a)(3)(i) of the EAR to all subsidiaries and affiliates of a foreign parent headquartered in Macau or Country Group D:5 would not and should not apply.

Lenovo maintains that an exemption for subsidiaries and affiliates the day-to-day operations of which are not controlled by an ultimate parent located in Macau or Country Group D:5 is consistent with how the U.S. government has approached issues involving foreign ownership in similar contexts. For example, the antiboycott regulations administered by BIS apply a "controlled in fact" test that considers "the authority or ability of a domestic concern to establish the general policies or to control day-to-day operations of its foreign subsidiary, partnership, affiliate, branch, office, or other permanent foreign establishment" in determining whether to treat the foreign party as a U.S. person. *See* 15 C.F.R. § 760.1(c). Lenovo believes it would be appropriate to apply a similar carveout to the definition of "headquartered" and exclude from the definition any entity that has an ultimate parent company headquartered in Macau or Country Group D:5 but which does not exercise control over the day-to-day operations of the entity. Lenovo respectfully submits that this carveout would balance the policy interests of BIS and the compliance burdens of counterparties conducting diligence in order to comply with the AC/S IFR.

In the alternative, Lenovo suggests exempting business lines located outside of Country Groups D:1, D:4, and D:5 (excluding Country Groups A:5 and A:6) with an ultimate parent located in Macau or Country Group D:5 that have been reviewed by the Committee on Foreign Investment in the United States ("CFIUS"), if CFIUS has either concluded all action under Section 721 of the Defense Production Act with respect to the business lines without the need for mitigating actions or subjected the business lines to a mitigation agreement. Because CFIUS considers, among other things, the diversion risk for controlled commodities, software, and technology as part of its review, the national security risks presented by the ultimate beneficial ownership of those business lines – to the extent there are any – would already be mitigated. Accordingly, there would not be the same policy rationale for including those business lines in the definition of "headquartered" as there would be for business lines that have not been reviewed by CFIUS for national security risks.

We appreciate the opportunity to submit comments in response to the AC/S IFR and hope that BIS finds them constructive in forming a final rule. We look forward to BIS's response.

Sincerely,

Shama Patari

Shama K. Patari
Executive Director, Legal, Global Government
Relations, Trade Regulations, Ethics & Compliance
Lenovo United States