



US-China Business Council Comments Regarding Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification

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The US-China Business Council (USCBC) welcomes the opportunity to submit comments to the Bureau of Industry and Security (BIS) on the interim final rule (IFR) on the implementation of additional export controls on certain advanced computing and semiconductor manufacturing items; supercomputer and semiconductor end use; entity list modification. USCBC represents nearly 280 American companies that do business with China. We hope to work in partnership with the US government to provide practical solutions, necessary clarifications, and appropriate strategic considerations to implementing the requirements of the IFR. USCBC supports BIS' efforts to protect US national security and safeguard the proliferation of technologies with defense applications. To successfully implement an export controls strategy that does not inadvertently harm American competitiveness, BIS should provide further clarification on important definitions and, in the future, furnish changes to its regulations with prior disclosure. USCBC also urges BIS should coordinate its export controls system with allies. USCBC supports narrow, clearly defined licensing parameters that focus on identifiable military end users and uses. Clarity, coordination, and preemptive disclosure will lead to a more effective, less disruptive export controls system.

Trade with China brings many important benefits to the US economy and American workers. It also acts as a stabilizing force for one of the most consequential bilateral relationships in the world. Advanced US manufacturers of all sizes and their American business partners and consumers have benefitted from globally integrated supply chains that have improved efficiency and lowered production costs for US firms. Revenues generated in China are often reinvested in global and US R&D activities, which in turn allows US companies to maintain their competitive edge over Chinese and foreign competition.

Many US companies – as well as multinational companies from US allies and partners with a US presence – have longstanding, sophisticated export control compliance programs to acquire export licenses and ensure that their products and processes are not furnishing the development of a sanctioned entity, military end user, or military end use technology. Companies have, despite ever lengthening and costly timelines, withheld the exports of technologies and processes until thorough audits of their end uses, end users, and legal applicability assessments are complete. BIS can aid companies in their compliance operations and minimize disruptions to business by disclosing changes to the export controls system prior to implementation.

BIS' October 7 IFR contains a number of definitional ambiguities that are impeding US companies' ability to deploy appropriately scoped compliance programs. USCBC has outlined several key terms and concepts for additional clarification. This letter raises concerns around:

- Alike ECCNs with unclear delineation.
- Lack of adequate definition on key terms: facility, support, production, servicing, and facilitation.
- Lack of clarity around covered US person activities.
- Lack of clarity around covered business processes involving the entity list.

Definitional uncertainties have resulted in a dearth of tech-related exports to China, even in products and processes that are secondary and tertiary to the scope of the IFR. BIS should continue to publish FAQs and work with industry to bring the scope of its export controls regime in line with stated objectives to control China's access to leading edge technology.

BIS should also work with US allies and partners to develop multilateral export controls as soon as possible. If US allies and partners are not subject to similar controls, companies from those countries will have access to additional revenue streams which will, in short order, create a global competitive disadvantage for US firms in like sectors. Failing to coordinate efforts with allies will result in the development of semiconductor supply chains where American firms are "designed out" of the markets developed without American products and processes.

Defining enforcement applicability

ECCN overlap

Regional Stability (RS) requirements apply to the new ECCNs (such as 3A090, 3B090, and 4A090). Certain products could fall under the new ECCNs and existing ECCNs like 5A992, 3D001, 3E001, 4E001, and 5D992. Further ECCNs 5A002, 5D002, 5B002, and 5E002 are not noted or listed in the Commerce Control List (CCL) and do not fall under RS requirements. As a result, there are scenarios where it is unclear which ECCN takes precedence.

For example, a ECCN 5A992 item, equipment not controlled by 5A002, is essentially a 5A002 item that only differs by pricing and marketing (with exception of mostly ENC b2 items). BIS should specify which ECCN would take precedence when a product may fall under two different ECCNs or benchmarks between ECCNs are not clear. More preferably, BIS should amend its ECCNs so that there is no ambiguity about which category a product, service, or component falls under.

Definitions

There are new terms that, within the context of the new rule, are not clearly defined for industry reference. When a rule includes new terms that are key factors for consideration, BIS should provide more definitional details. Specifically, the exact definition of "facility," "production," "support," "facilitation" and "servicing" is not clear under the new rules. BIS has provided definitions within rules before, such as section 734.9 (a) of the FDP rules. BIS should amend the IFR to include more definitions next to relevant terms. Doing so will minimize ambiguity and

ease compliance burdens. When terms are used in the IFR that could overlap with other rules and/or CCL categories, consideration should be made to include the definition with reference to other categories with similar terms.

BIS should consider reconfiguring certain definitions to factor in business processes in the logistics sector. For example, “support” is broadly defined to include “shipping, transmitting, or transferring (in country) items not subject to the EAR.” However, companies in the freight and transportation sectors may not have sufficient technical information related to commodity classification and end use. The disparity between compliance requirements and industry practices belies significant costs, delays, and may result in the isolation of US logistics firms and decrease US knowledge of logistics and business patterns in China’s high-tech sector. BIS should also publish additional guidance on how logistics firms can understand and apply “support” requirements to their supply chains without inducing severe operational disruptions.

Definition of Semiconductor Fabrication Facility

BIS’ October 28 FAQ provided helpful information on the definition of facility, stating that subsequent steps that do not alter technology levels after restricted production are not covered. However, it is still unclear if facility only includes places where production takes place, or if it also includes offices where design takes place. BIS should publish additional information on which upstream, design stage semiconductor fabrication facilities are covered. On the downstream side, it is not clear whether a facility that is only engaged in quality testing at an advanced node facility is covered by the IFR. BIS should clarify what elements of facility, development, and production are covered in the IFR by enumerating the exact business and production processes that fall within its definition of facility, development, and production.

744.23 states that semiconductor fabrication facilities in China that fabricate integrated circuits that meet the criteria set forth in (“744.23(a)(2)(iii) Criteria”) are subject to the IFR but does not offer a list of specific fabs. To reduce ambiguities around what facilities fall under the scope of the IFR, BIS should consider publishing a list of fabs manufacturing advanced nodes covered by the IFR. An additional issue is that the scope of the new export controls will naturally expand as China’s industry brings more sub-14nm fabs online. BIS should develop a mechanism to accommodate for shifting parameters of advanced node production and maintain an appropriate balance between policy scope, burden, and effectiveness.

BIS’ FAQ clarifies that licensing policy for semiconductor fabrication facilities is applied at the building level. However, semiconductor fabs are complex structures that have the capability to produce a wide variety of mature and advanced chips. BIS should take this complexity into account and work with industry to find a way to allow mature manufacturing to continue while controlling access to advanced manufacturing in the same facility.

US Person Activities

BIS should provide more information about what qualifies as a restricted US person activity. Controlled support activities include shipping, transmitting, facilitating, transferring, and servicing, and BIS’ FAQ provided important clarification which specified that some clerical

activities are not covered. However, BIS should consider amending the list of controlled activities to specify whether additional business processes are controlled or not. Doing so will decrease compliance delays arising from ambiguous language. For example, it is not clear if restrictions apply to a US person that is processing product payments but is not conducting the physical transfer of subject items. BIS should also consider publishing additional information on restricted US person activities in the context of the advanced computing sector, as business processes in this sector differ from those of other sectors, such as the IC industry. Furthermore, facilitation is not clearly defined in the EAR or in the IFR. BIS should clarify the definition as, “Authorizing, servicing, and conducting support on the production of advanced nodes.”

Expanded Entity List Rules

It is not clear what specific activities involving expanded entity list (Footnote 4) entities may be prohibited, assuming the product scope is met, especially if the activity does not involve providing any products to the Footnote 4 entity and the entity is not a party to the transaction between the parties buying and providing the foreign-made item.

For example, 744.11 states that a license is required for the incorporation of a foreign-made item into any “part,” “component,” or “equipment,” produced by a Footnote 4 entity. However, BIS does not specify if a license is needed for incorporation by a third-party procuring parts components, or equipment made by the Footnote 4 entity that then incorporates a foreign made item into Footnote 4’s product, and the procedure is not done on behalf of the Footnote 4 entity, nor will the final product be destined for a Footnote 4 entity. BIS should release additional clarification on whether license requirements apply to sales to third parties assembling a mixture of foreign-made and Footnote 4 entity components that are not destined for a Footnote 4 entity.

Interactions with Chinese Customers

USCBC is seeking further clarification from BIS on end use checks with Chinese customers. BIS should also consider amending the EAR to offer a clearer definition of “destined” as it applies to business actions between Chinese and foreign firms by publishing guidance clarifying the government’s expectations to sales to customers that are supply chain intermediaries. BIS should work with industry to develop standards for end use validations for customers that are several layers above the actual end use. BIS should provide further clarity on the use of end use declarations or other methods that customers can use to instill confidence on the part of the customer regarding compliance with export control rules.

Additionally, the limited duration of export control licenses reduces the willingness of compliant Chinese firms to sign long-term contracts with American suppliers. To offset the increasingly broad and complex rules set out in the IFR, BIS should consider extending the validity period for export licenses. BIS should ensure that previously granted licenses remain valid and reapplication procedures remain efficient and transparent throughout regulatory changes.

Multilateral coordination

It is crucial that BIS harmonize its export controls program with global producers of like products, processes, and services. BIS should work within the US interagency process and with

foreign governments to standardize procedures across global supply chains. Doing so will not only help minimize the cost and complexity of compliance, but it will also level the playing field for US companies that compete with foreign firms in China. Failing to harmonize export oversight activities undermines the strategic intentions of the US export controls program in areas where there are other international suppliers.

Impacts on competitiveness

Generally speaking, export controls reduce market access for certain American firms, increase the cost of doing business in China or other countries, and create consumer preferences for domestic and third country products. According to USCBC's [2022 member survey](#), 45 percent of respondents reported that they lost sales due to customer uncertainty of continued supply resulting from of US-China trade tensions. This in turn can impede the ability of certain US firms to perform R&D activities, support US operations, reinvest in the US and globally, and ultimately maintain their competitive edge. As it implements the recent export controls, BIS should also work within the US interagency process and with US industry to assess the impact of those export controls on US international competitiveness and US employment in advanced manufacturing. BIS should also work within the interagency and with industry to balance the effects of its export control regime with other government priorities for bolstering American industrial competitiveness.

USCBC appreciates the opportunity to comment on this IFR and hopes to continue to work with the administration to craft an export control strategy that is effective, implementable, and promotes America's long-term global competitiveness. Clarification, communication, and openness with US commercial stakeholders will help BIS accomplish its goal of keeping key technologies away from military end users without engendering a broad exodus of tangentially related business activity. Coordinating efforts with US allies and partners will ensure that foreign competitors do not rush to fill the gap and undermine US positions globally. We hope to help BIS craft a strategy that balances the US administration's geostrategic priorities with the practical complexities of the global semiconductor ecosystem.
