

THE US-CHINA BUSINESS COUNCIL

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USCBC Comment on Export Controls on Semiconductor Manufacturing Items and Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections

Bureau of Industry and Security (BIS), Commerce

Docket Numbers: 2023-23049, 2023-23055

January 17, 2023

The US-China Business Council (USCBC) welcomes the opportunity to submit comments to the Bureau of Industry and Security (BIS) on the Semiconductor Manufacturing Equipment (SME IFR) and Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections (AC/S IFR) interim final rules. USCBC represents over 270 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 new SME and AC/S IFR. USCBC supports BIS's efforts to protect US national security and prevent the proliferation of technologies that have clearly defined national security applications.

However, USCBC is concerned that the updated controls on computers and equipment – and potential future controls related to infrastructure-as-a-service (IaaS) – are overly broad, lack needed certainty, and risk inadvertent harm to American competitiveness and global leadership in technology. BIS should endeavor to work with industry to demystify compliance obligations and to craft strategic controls that are narrowly targeted to address national security objectives without undermining US industry and US competitiveness globally.

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 costs for US manufacturers and consumers. Revenues generated in China are reinvested in US R&D activities, which in turn allows US companies to maintain their competitive edge over Chinese and foreign competition. US semiconductor companies, which overwhelmingly control the highest value add elements of the supply chain, are particularly well situated to use their positions to maintain and advance their competitive edge.

US technological leadership is critical to advancing US national security interests and ensuring that the United States remains at the forefront of the development of strategic technologies is essential to economic growth and security. US technology companies are global leaders, providing secure, reliable, and innovative products and services to hundreds of millions of customers around the world. It is crucial that BIS assess the impacts of its controls on US companies and supply chains to ensure that they do not inadvertently damage US competitiveness and, by extension, US national security interests.

US companies – as well as multinational companies from US allies and partners with a US presence – have longstanding, sophisticated export control compliance programs to lawfully acquire export licenses and ensure that their products and processes are not furnishing the development of a sanctioned entity, end user, or military end-use technology. Despite ever lengthening and increasingly costly timelines, companies have withheld US exports until they acquire licenses or until rigorous applicability assessments can be completed. The controls announced on October 7, 2022, and October 17, 2023, have significantly increased the compliance burden on US companies. It is essential that BIS increase its own resources to ensure that its system functions in an expedient and consistent way.

USCBC also urges BIS to coordinate its controls with US allies and partners. The lack of alignment between national export control systems has asymmetrically disadvantaged US companies and has been counterproductive to the stated objective of restricting China’s ability to obtain critical technologies, as foreign competitors have increased their exports of material into China. Inadequate coordination with allies and partners has accelerated the development of a semiconductor ecosystem in China devoid of American products and processes, resulting in reduced visibility and access to China’s marketplace, all while failing to significantly deprive China of advanced technologies from third countries.

Issues with the AC/S IFR

There are numerous concepts and definitions within the AC/S IFR that require additional clarification and refinement from BIS. Enacting changes in line with the below suggestions will ensure fair interpretation, streamline implementation, and enhance company compliance and business planning.

Notified Advanced Computing (NAC)

We propose that the NAC process function as a true license exception. As the rule is currently written, a license exception with a pre-notification and approval is not an exception but a slimmed-down license. BIS should implement a one-time Commodity Classification System (CCATS) review to determine whether future notifications are required or if companies can follow an annual reporting process. To a further extent, we propose that BIS explore bulk NAC authorizations and shift reporting requirements to post-shipment.

NAC’s definition of “use in data centers” requires clarification considering the variation in size, power, and structure of data centers. We propose that BIS identify specific applications or data centers that the US government is targeting. We also propose a definition that links the parameters of the CPU/GPU for determining “use in data centers.” Additional specificity for the term “data center” and its associated NAC-covered products would minimize the impact on industry while still achieving BIS’s objective.

BIS should issue additional clarification for the definition of “multiple exports.” It is unclear if it refers to multiple exports to the same party or the same product. It is also unclear if the exports must all be associated with a single purchase order. Clarification is also needed on whether a NAC for a parent company applies to subsidiaries. It is also unclear whether the NAC requirement applies to exports where a D:5/Macau entity is party to the transaction but is not the final destination.

BIS should also clarify or define “the NAC notification is limited to six items.” Additionally, BIS should clarify its guidance on the meaning of “a distributor may not be a party to the NAC notification.” It is unclear if this prohibits NAC license exceptions for all transactions involving distributors or if it means that exporters are not required to declare a distributor on their NAC pre-notification submissions.

Certain controlled items are sold in consumer markets through reseller and distribution channels. As long as the distributor is identified as a party to the transaction and meets the end use and end user criteria for NAC, it is unclear why such orders should be precluded from leveraging the NAC process. BIS should expediently provide clarification on these points through an FAQ.

ECCN Clarification and Redundancy

As the rules are currently written, there is no differentiation between products that are eligible for NAC processes versus export licenses. BIS should create ECCN subcategories to specify which products are NAC-eligible and which products need an export license.

Clarification is also needed regarding the requirement for a license when advanced computing items pass through a Chinese company but are designed for a non-Country Group D:5 end user. Within the rule changes to ECCN 3A090, further clarification is needed on the “or worldwide” clause, as its lack of a definition may result in licensing policy discrepancies and challenges to implementation.

As with the October 7 rule, the creation of new, catch-all ECCNs has resulted in redundancies with older ECCNs. BIS should re-evaluate existing controls to ensure they are consistent, clear, and up to date. Overlapping ECCNs with different licensing requirements creates significant compliance burdens for companies and will lengthen review processes at BIS. We are concerned that the interagency license application review has become increasingly lethargic.

Foreign Direct Product Rule (FDPR)

The use of “produced by” in the new FDPR represents a significant expansion of the direct product concept under the prior system. BIS should enumerate the specific manufacturing processes that constitute “produced by” and provide additional metrics for making the determination in an FAQ. Given the significant expansion of regulatory scope represented by this change, we suggest that BIS initiate a new comment process for the FDPR.

Temporary General Licenses (TGL)

As the rules are currently written, it is unclear what constitutes knowledge of the “ultimate end use,” and it is unclear what is expected of exporters that are not aware of the ultimate end use. BIS should provide additional guidance on the scope of “ultimate end use” concerning technology transfer, especially regarding whether it includes software and technology.

Further, as written, the rules indicate that TGLs do not apply to production for end use within a D:1, D:4, or D:5 subject to a valid license or license exception, including the NAC. To align the TGL with other elements of its policy, BIS should include a carveout for those authorized activities.

Clarity is also needed on whether the 2023 TGL supersedes the expiration of the 2022 TGL. It is unknown whether companies can use the new TGL to continue or resume activities that qualify for the TGL product and end-use scope. Clarification on this aspect of the TGL will improve business planning and enhance predictability.

While the length of TGL validity is generous, we propose that BIS create a new permanent license exception with the same criteria as the TGL. As the TGL is only applicable to anti-terrorism controlled items for certain end-users, and as BIS has acknowledged its license review standard will be a

presumption of approval under such circumstances, BIS should alleviate the burden on industry in applying for licenses that will be presumptively approved prior to the TGL's expiration. Such an approach would be more efficient and predictable for all parties and would remain consistent with US national security objectives.

Definition of "Headquartered In"

The definition of "headquartered" needs additional clarification to ensure that industry participants apply a uniform understanding of the term to their compliance efforts. To provide clarity, BIS should establish metrics that can be used to assess whether a company's ultimate parent is headquartered in a Country Group D:5 location. BIS should furnish specific examples and best practices in an FAQ. To facilitate compliance with restrictions, BIS should also provide a continually updated list of entities that meet these criteria, which will allow companies to use standard screening processes to identify customers subject to restrictions.

As currently written, "headquartered in" is a vague and overly broad concept with different meanings depending on the recipient and could include entities with minority Chinese ownership. It is also ineffective because detailed ownership information on non-public companies is generally not publicly available. It will be difficult for US companies to determine whether a customer is "headquartered in" a D:5 country. Under the current framework, companies will spend significant compliance resources conducting due diligence that is unlikely to catch restricted entities.

Product Servicing

BIS should consider issuing an exception for servicing consumer products which contain components meeting the 3A090.a or 3A090.b parameters, such as videogame consoles, that were sold prior to November 17. Without an exception, US manufacturers may face a competitive disadvantage and significant legal exposure under China's consumer protection laws, which mandate the provision of replacement parts for up to two years following the sale of a consumer product. BIS could consider a corresponding requirement that the consumer must return the defective component for destruction by the manufacturer, such that the manufacturer can verify that it is providing a replacement and not an additional export.

Consideration of Controls on IaaS

Regarding BIS's inquiry on the feasibility of additional regulations related to IaaS, USCBC is concerned that the imposition of novel controls has the potential to disadvantage US cloud service providers (CSPs) in the global market and undermine trust in American CSPs. Overly broad controls risk reducing US CSPs' sales to global customers, stifling their innovation and technological advancement, impeding the adoption of their technologies worldwide, and pushing customers to foreign CSPs. Given the unprecedented nature of new controls on IaaS and the significant potential for unintended consequences, we ask that BIS consider the following:

- Provide a sufficiently lengthy opportunity for notice and comment that is considered before any controls take effect for any regulatory proposal that would expand export controls to IaaS.
- Conduct a formal impact assessment that considers both the strategic and economic implications of such regulations on highly globalized services, including the potential that such

controls could prompt global companies to diversify away from American cloud service providers.

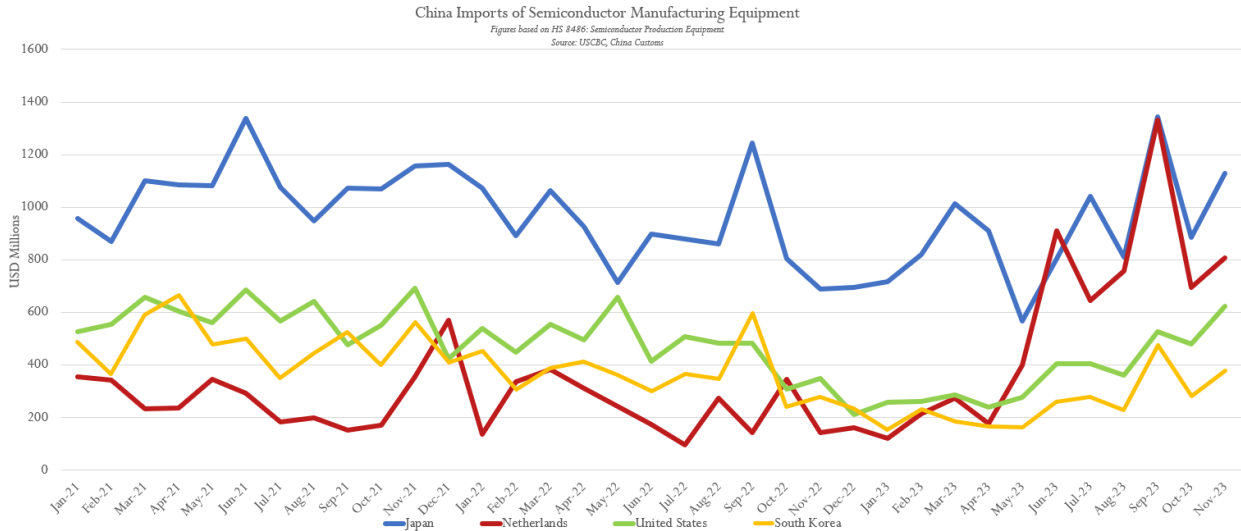
- Coordinate with US allies and partners before instituting any controls to ensure US companies are not disproportionately impacted.
- Target any controls to a narrow, clearly defined set of entities that have identifiable US national security risks.

Issues with the SME IFR

Lack of International Harmonization

USCBC is concerned that the SME IFR places US companies at a significant disadvantage relative to their counterparts from other countries. Differences between US rules and the rules of other countries have resulted in lost market share for US firms without significantly inhibiting China’s access to semiconductor manufacturing equipment. Key points of departure between US rules and those in Japan and the Netherlands include US controls on the activities of US persons in China, as well as controls associated with items that are “specially designed.”

In contrast to the US system, Japanese and Dutch controls on semiconductor manufacturing and advanced computing are comparatively less stringent, particularly in the absence of equivalent controls regarding citizenship and non-specified sub-assemblies, subsystems, parts, components, and accessories designed for use with controlled equipment. There is also no guarantee that licensing policy in Japan and the Netherlands will be implemented as strictly as the US, which assesses most of its SME controls with a presumption of denial.



Data from China Customs shows that the imposition of export controls has not meaningfully reduced imports of SME from US allies.

BIS should seek to align US controls more closely with Japan and the Netherlands. Such alignment could enhance international cooperation, reduce compliance burdens for businesses, and foster a more level playing field for US companies. It would also mitigate the risk of US firms being at a competitive disadvantage. This would allow the United States to balance national security concerns with the need to maintain competitiveness in the global semiconductor market.

Coordination is also needed with countries other than the Netherlands and Japan where similar controls do not exist. While these concerns were partially remedied by lifting the October 7 restrictions to EAR99 products, USCBC member companies have reported lost sales to foreign competitors in China that are not subject to US export controls. Unilateral action from the United States, or action from just a small coalition of countries, does little to accomplish the government's policy objectives. We suggest that BIS work with the interagency to increase coordination with all international allies. Doing so is necessary to ensure a level playing field in a global marketplace.

Lack of a sliding scale mechanism

USCBC commends BIS's efforts to exempt certain technologies that do not alter the technology level of semiconductors. However, there is no mechanism for reassessing the threshold for "catch all" controls on semiconductor manufacturing equipment that accounts for advances in technology. The lack of a sliding scale to account for China's technological progress will result in ever-growing losses for US firms, even in the future when thresholds established on October 7, 2022, and October 17, 2023, are no longer considered advanced. Establishing a sliding scale would afford greater opportunities for US companies to supply and service technologies that are otherwise widely available in the Chinese marketplace.

Lack of TGL coverage for servicing

As written, the TGL cannot be used to send spare parts to a depot or to support product servicing. We recommend that the TGL also apply to newly controlled NS- and RS- controlled items for products needed to maintain and upgrade certain parts and components without increasing the performance on the tool to "advanced node" levels. Doing so would be in line with the preamble of the SME/IFR which states that the preamble was created to reduce unnecessary regulatory burdens for companies.

Impact on Competitiveness

Overly broad export controls reduce US companies' sales to global customers, stifle their innovation and technological advancement, and impede the adoption of US products and technologies worldwide. According to USCBC's 2023 [Member Survey](#), 51 percent of USCBC member companies lost sales due to customer uncertainty of continued supply resulting from US-China trade tensions. Thirty-four percent of companies saw shifts in suppliers or sourcing due to trade tensions.

These trends are not solely attributable to export controls, but USCBC members in the technology sector have reported lost sales due to customer expectations of imminent export controls, even if controls were never actually imposed. Even the perception that access may be restricted will result in customers moving away from US companies. BIS should establish and maintain communications with China, such as through the export controls information exchange, to provide clarity to the Chinese government and Chinese business community about the objectives and scope of US export control policy.

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.

US export controls have accelerated China's longstanding drive for technological self-sufficiency. This has exposed many companies to the twin pressures of export restrictions and import substitution. In our member survey, 78 percent of respondents said that China's industrial policies have induced increased

competition from Chinese firms that were not previously competitive. Fifty-three percent said industrial policy has enabled supply chains to shift away from American products toward domestic or non-American competitors. While a broader interagency discussion is urgently needed to address the deleterious effects of China's industrial policy, within the export controls context, a separate conversation is needed about the rate at which Chinese firms replace covered technologies. BIS should work with industry and within the interagency to establish a mechanism for determining how China is replacing high tech products, and in those cases, reassessing its licensing policy where fully domestic alternatives exist.

USCBC appreciates the opportunity to comment on the IFRs and hopes to continue to work with the administration to craft an export control strategy that is clear and multilateral and promotes America's long-term global competitiveness. To this extent, we applaud the administration's decision to reestablish the President's Export Council Subcommittee on Export Administration. We hope to help BIS develop a strategy that balances the US administration's geostrategic priorities with the technological realities and efficiencies inherent in the global semiconductor ecosystem.