



**Comments of the
Semiconductor Industry Association**

On

**The Proposed Rule Entitled
“End-Use and End-User Based Export Controls, Including U.S. Persons Activities
Controls: Military and Intelligence End Uses and End Users”**

89 Fed. Reg. 60985 (July 29, 2024)
RIN 0694-AJ43
Docket No. 240712-0193

Submitted October 11, 2024

The Semiconductor Industry Association (SIA) submits these comments in response to the request from the Bureau of Industry and Security (BIS) within the Department of Commerce (Commerce) in the above-captioned proposed rule, entitled “End-Use and End-User Based Export Controls, Including U.S. Persons Activities Controls: Military and Intelligence End Uses and End Users,” (the “Military/Intelligence Proposed Rule”) as well as the Proposed Rule entitled “Export Administration Regulations: Crime Controls and Expansion/Update of U.S. Persons Controls,” 89 Fed. Reg 60998 (the “Foreign-Security Proposed Rule”) (collectively, the “July 2024 Proposed Rules”).

Part I contains introductory and background comments about SIA and semiconductors. Part II contains general comments about the Military/Intelligence Proposed Rule and the Foreign-Security Proposed Rule. Part III contains comments, questions, and requests about specific provisions in the July 2024 Proposed Rules for BIS’s consideration.

Part I – Introduction and Background

SIA has been the voice of the U.S. semiconductor industry for almost 50 years. SIA member companies represent more than 99% of the U.S. semiconductor industry by revenue and nearly two-thirds of non-U.S. firms, and are engaged in the research, design, and manufacture of semiconductors. The U.S. is the global leader in the semiconductor industry today. Continued U.S. leadership in semiconductor technology will drive economic strength, national security, and global competitiveness. More information about SIA and the semiconductor industry is available at <https://www.semiconductors.org/>.

Semiconductors are complex products critical to the functioning of everyday consumer electronics, communications, and computing devices in the automotive, industrial, financial, medical, retail, and many other sectors of the economy. They are also critical components for future technologies, such as artificial intelligence, quantum computing, and 5G/6G telecommunications.

As stated in both the House and Senate versions of the 2021 National Defense Authorization Act: “*The leadership of the United States in semiconductor technology and innovation is critical to the economic growth and national security of the United States.*”¹ Given how important the economic vitality and competitiveness of the U.S. semiconductor industry is to national security, as a general matter, it is critical to ensure that U.S. export controls are narrowly tailored and designed to achieve specific national security objectives.

SIA has long supported policies that safeguard national security without unduly harming commercial innovation, manufacturing, employment, and continued American leadership in critical technologies. While SIA recognizes that targeted measures designed to address risks from foreign military, security, and intelligence services are necessary to safeguard U.S. security both domestically and abroad, per Section 1753(b) of the Export Control Reform Act of 2018 (ECRA), we urge the U.S. government to “seek to secure the cooperation of other governments and multilateral organizations to impose control systems that are consistent,” to ensure that such controls are effective in accomplishing the stated national security objectives.

We also strongly encourage the U.S. government to ensure the private sector has meaningful opportunities to provide insights to the U.S. government. We appreciated Secretary Raimondo’s announcement² in November 2023 that Commerce was in the process of establishing the President’s Export Council Subcommittee on Export Administration (PECSEA). However, almost a year later, BIS has yet to appoint any members to PECSEA or hold a meeting. During this time, BIS has issued several consequential export control rules without the benefit of consultation with the senior executives with strategic authority within their companies that were nominated to serve on the PECSEA. We, therefore, again, strongly urge the Commerce Department to prioritize standing up PECSEA without further delay.

Finally, SIA has long been a partner of the U.S. government in providing support and feedback regarding export control policy, particularly with respect to semiconductors, and we appreciate the opportunity to provide comments, questions, and requests with respect to the July 2024 Proposed Rules.

Part II – General Comments

Comment II.A: The continued unilateral approach to U.S. export controls is not sustainable.

¹ H.R. 6395 § 1824(b) and S. 4049 § 1098(b).

² Remarks by Commerce Secretary Gina Raimondo at the Meeting of the President’s Export Council,” U.S. DEPARTMENT OF COMMERCE, Nov. 29, 2023, <https://www.commerce.gov/news/speeches/2023/11/remarks-commerce-secretary-gina-raimondo-meeting-presidents-export-council>.

Section 1753(b) of the Export Control Reform Act of 2018 (ECRA) requires that the President “seek to secure the cooperation of other governments and multilateral organizations to impose control systems that are consistent” with U.S. controls. Despite this, the U.S. government plans to proceed with regulatory action in the absence of similar export control mechanisms in other countries.

As explained in SIA’s previous comment submissions to BIS,³ it is critical that U.S. seeks to achieve multilateral alignment on export controls. The Commerce Department and Congress⁴ have both underscored that multilateralism is fundamental to the overall effectiveness of export controls, and SIA strongly agrees.

While SIA appreciates the U.S. government’s efforts to engage with U.S. allies and partners to more closely align export controls, SIA is not aware of any other allied partner or nation export control regime that has, or is contemplating implementing, anything similar to the July 2024 Proposed Rules. In fact, allied governments do not have equivalent controls to the U.S. Entity List or U.S. end use and end user controls in Part 744 of the EAR; thus even in cases where other countries have harmonized their technology-based export controls on specific items with the controls maintained by the United States, they generally have not imposed similar end-use or end-user controls. For example, European Union (EU) export controls are primarily list-based, and the end use and end user controls that do exist under EU export controls are limited to preventing the development of weapons of mass destruction. The EU’s end use/end user controls are also nowhere near as broadly applicable as existing military end use/end user and military-intelligence end use/end user rules at EAR § 744.21 and 744.22. This gap between U.S. and European export controls will widen further if the July 2024 Proposed Rules are implemented.

If competitors of U.S. industry are not bound to the same or similar end use/end user controls and support restrictions, the entities of concern targeted by the July 2024 Proposed Rules will backfill available supplies from foreign competitors not subject to U.S. export controls, undermining the effectiveness of the proposed controls. SIA therefore respectfully requests BIS to consider further tailoring the scope of the controls so as to address specific U.S. foreign policy and national security objectives, as

³ Comments of the Semiconductor Industry Association (SIA) on “Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections; and Export Controls on Semiconductor Manufacturing Items; Corrections and Clarifications,” (89 Fed. Reg. 23876 (April 4, 2024)), April 29, 2024, <https://www.regulations.gov/comment/BIS-2023-0016-0036>; Comments of the Semiconductor Industry Association (SIA) on “Implementation of Additional Export Controls: Certain Advanced Computing Items Supercomputer and Semiconductor End Use; Updates and Corrections,” (88 Fed. Reg. 73458 (Oct. 25, 2023)), Jan. 17, 2024, <https://www.regulations.gov/comment/BIS-2022-0025-0074>; Comments of the Semiconductor Industry Association on “Export Controls on Semiconductor Manufacturing Items,” (88 Fed. Reg. 73424 (Oct. 25, 2023)), Jan. 17, 2024, <https://www.regulations.gov/comment/BIS-2023-0016-0015>.

⁴ See Sections 1752(4-6) of the Export Control Reform Act of 2018.

elaborated in our comments below. We also urge BIS to work quickly and aggressively to ensure that U.S. allies adopt comparable controls.

Comment II.B: The semiconductor industry in the United States takes its export compliance obligations seriously and seeks rules and associated definitions that are clear and implementable.

SIA member companies – which include semiconductor companies headquartered both in the United States and outside the United States – take very seriously their responsibility to have robust and comprehensive compliance programs, which include, among other things, conducting due diligence and supply-chain tracing to identify and remove bad actors from their supply and distribution chains. As such, it is important that export control regulations, associated definitions, and resulting compliance obligations are clear, risk-based, implementable, and manageable. However, as outlined in the specific comments below, the July 2024 Proposed Rules are vague in several critical respects. We therefore seek clearer guidance in the final rule to alleviate confusion and further support industry’s compliance with the rule.

Given the breadth and complexity of the proposed new and expanded controls, SIA respectfully requests that BIS provide for a delayed effective date to give industry time to obtain any necessary clarifications from BIS and prepare their internal systems and policies to implement the proposed controls.

Part III – Comments on Specific Provisions of the Military/Intelligence Proposed Rule and Foreign-Security Proposed Rule

Comment III.A: BIS should clarify the destination scope of the proposed new and revised end use/end user controls.

SIA requests that BIS clarify the meaning of the words “of” and “from” in the destination scopes of the new proposed military end users (MEU), intelligence end users (IEUs), and foreign security end users (FSEUs) controls under the July 2024 Proposed Rules.

Specifically, with respect to **MEUs**, the Military/Intelligence Proposed Rule would require a BIS license for the export, reexport, or transfer (in-country) of any item subject to the EAR with “knowledge,” as defined at EAR § 772.1, that the item is “intended, entirely or in part, for:

- (1) A ‘military end use,’ as defined in paragraph (f)(1) of [§ 744.21], when the ‘military end use’ occurs in, or the product of the ‘military end use’ is destined to Macau or a country specified in Country Group D:5 in supplement no. 1 to part 740 of the EAR; or

(2) A ‘military end user,’ as defined in paragraph (f)(2) of [§ 744.21], wherever located, **of** Macau or a country specified in Country Group D:5 in supplement no. 1 to part 740 of the EAR.” (Emphasis added.)

With respect to **FSEUs**, the Foreign-Security Proposed Rule would require a BIS license for the export, reexport, or transfer (in-country) of items subject to the EAR and specified on the Commerce Control List (CCL) with “knowledge” that the item is “intended, entirely or in part for ‘foreign-security end users,’ as this term is defined in paragraph (f) of [§ 744.25], **of** a country listed in Country Group D:5 or E.” (Emphasis added.)

Similarly, with respect to **IEUs**, Military/Intelligence Proposed Rule would require a BIS license for the export, reexport, or transfer (in-country) of any item subject to the EAR with “knowledge” that the item is “intended, entirely or in part, for an ‘intelligence end user,’ wherever located, that is **from** a country or destination specified in Country Group D or E, but not also listed in A:5 or A:6 in supplement no. 1 to part 740 of the EAR.” (Emphasis added.)

SIA requests that BIS clarify what is meant by an MEU or an FSEU “**of**” Macau or a country in Country Groups D:5 or E, as applicable, and by an IEU “**from**” a country in Country Groups D or E (that is not also listed in Country Groups A:5 or A:6). For example, do “of” and “from” have the same meaning in this context, or are they distinguishable? Would these proposed rules apply to MEUs, FSEUs, or IEUs physically located in the relevant countries, registered under the laws of relevant countries, headquartered in these countries, majority-owned by an organization headquartered in these countries, or something else?

If these proposed controls would apply to MEUs, IEUs, and FSEUs headquartered in the relevant countries, SIA reiterates its previous filed comments requesting that BIS clarify the definition of the term “headquartered” in the EAR.⁵ This definition could be adopted under one of two approaches: either (1) a simple, objective test, like situs of incorporation or legal organization, or (2) a multipart, subjective “nexus” test. In either case, BIS should provide guidance in an FAQ that includes specific examples and best practices and that defines steps an exporter should take to verify the location of an entity’s “headquarters.” It is also crucial that the relevant guidance should be based on publicly available and readily determinable information to allow an exporter to make determinations regarding where a company is headquartered with reasonable efforts. For example, if BIS decided to use “control” as a condition to determine a company’s

⁵ Comments of the Semiconductor Industry Association (SIA) on “Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections; and Export Controls on Semiconductor Manufacturing Items; Corrections and Clarifications,” (89 Fed. Reg. 23876 (April 4, 2024)), April 29, 2024, <https://www.regulations.gov/comment/BIS-2023-0016-0036>

ultimate parent, it is helpful to provide specific criteria to determine what constitutes “control.”

Comment III.B: BIS should clarify the meaning of the term “support” in the definition of a “military-support end user” (MSEU).

Under the Military/Intelligence Proposed Rule, BIS proposes a new license requirement for the export, reexport, or transfer of items that are subject to the EAR and identified by any ECCN on the CCL (e.g. excluding EAR99 items) with “knowledge” that the item is intended, entirely or in part, for a “military-support end user,” or MSEU. Per the rule, an MSEU would be defined to mean “any person or entity whose actions or functions **support** [emphasis added] ‘military end uses,’ as defined in § 744.21(f)…MSEU also includes entities designated with a footnote 6 on the Entity List in supplement no. 4 to [EAR Part 744].”

The term “support” is not defined in the Military/Intelligence Proposed Rule for purposes of the proposed new MSEU control. Of note, while “support” is defined for purposes of the U.S. person activities controls at EAR § 744.6, even as revised under the Military/Intelligence Proposed Rule, this definition would be explicitly limited to the U.S. person “support” controls and would not be applicable to the proposed definition of an MSEU. The term “support” also is not defined elsewhere in the EAR.

SIA submits that clarity for identifying entities considered to be MSEUs would be critical for companies’ due diligence and compliance efforts, given that ambiguities with respect to what is meant by “support” could lead to different interpretations, and in turn lead to different applications of the proposed control. For example:

- Under the proposed MSEU rule, any company that markets or sells a dual-use item subject to the EAR (e.g., a radio) for both consumer and military use could be deemed to be an MSEU, even if military use sales are only a negligible fraction of overall sales. Would a company be considered an MSEU even if 99.9% of its products are for consumer use, but 0.1% of sales are made to a military entity in Macau or Country Group D:5? What is the threshold for which a largely consumer-focused company is determined to be an MSEU?
- Would the MSEU rule apply to the provision of mass market workforce productivity items (e.g., mobile phones or laptops) subject to the EAR and sold in widely available retail outlets to an entity that handles procurement for the Chinese government, including the Chinese military, where that entity is cited in media reports as also handling the procurement of tanks and munitions? Would the rule also apply to items tested and operated on a Chinese telecommunications carrier network, which also carries military and government data?

- Most universities have a Reserve Officers Training Corps (ROTC) or ROTC-like program. Would that make all universities in Macau or Country Group D:5 an MEU or an MSEU?⁶

Given the potentially broad application of the proposed definition of an MSEU and the challenges that companies would face in performing due diligence necessary to determine whether an entity is an MEU (as set out below in Comment III.F), BIS should limit the scope of the MSEU control to entities identified on the Entity List with an applicable footnote designation. SIA also recommends that BIS clarify the definition of “support” for purposes of this control, preferably by defining it to reference specific, exhaustive examples of activities that would be considered as “support” activities. In order to qualify as an MSEU, the defined relationship to the military should be direct and explicit.

Comment III.C: BIS should clarify what is meant by the phrase “other entities performing functions on behalf of” government intelligence, surveillance, or reconnaissance organizations in the definition of “intelligence end user” (IEU).

Pursuant to the Military/Intelligence Proposed Rule, the term “intelligence end user” would be defined to mean “any foreign government intelligence, surveillance, or reconnaissance organizations **or other entities performing functions on behalf of such organizations** [emphasis added]. IEU includes entities designated with a footnote 7 on the Entity List in supplement no. 4 of [EAR Part 744].”

SIA requests that BIS clarify the proposed IEU definition at EAR § 744.24(f) to limit the scope of entities that would qualify as IEUs in accordance with the approach set out in the preamble of the Military/Intelligence Proposed Rule, in which BIS explained the following with respect to the proposed definition of an IEU:

“BIS intends that this would include entities performing intelligence functions such as planning and directing, processing and exploiting, analyzing and producing, disseminating and integrating, surveilling, and evaluating and providing feedback. This definition is intended to cover traditional espionage and economic espionage activities.”

That is, the “performing functions on behalf of” language should be limited to performing intelligence, surveillance, or reconnaissance functions, and BIS should provide specific, exhaustive examples of what activities constitute “intelligence, surveillance, or reconnaissance functions.”

⁶ *Nikkei Asia*, “China to strengthen military education at universities,” September 11, 2024, <https://asia.nikkei.com/Business/Education/China-to-strengthen-military-education-at-universities>

In addition, the broad country scope for the IEU control to include all Group D countries creates a risk that some intelligence agencies in the Middle East will turn to alternative and less secure foreign suppliers for information technology (IT) hardware and software needs. Governments around the world, including in the Middle East and other regions within the scope of the IEU rule, rely on U.S. technology for their IT networks (i.e., hardware for daily operations and data recovery, software for email, database management etc.), but there are alternative and comparable foreign sources of supply that can displace these U.S. technologies.

Accordingly, SIA recommends that the country scope of the IEU rule, like the other rules in the July 2024 Proposed Rules, be limited to D:5 and E countries, creating uniformity of country scope across all these proposed rules to assist the regulated community's due diligence efforts and allow for more focused efforts to strengthen existing, internal compliance processes.

Comment III.D: BIS should conform the definition of U.S. person “support” for foreign military, intelligence, and security services to the existing regulatory definition of U.S. person “support” in the semiconductor context.

The proposed definition of U.S. person “support” applicable in the MEU, MSEU, IEU, and FSEU contexts under EAR § 744.6(b), as set out in the July 2024 Proposed Rules, is potentially extremely broad in scope. Specifically, “support” would be defined to mean:

- (A) “Shipping or transmitting from one foreign country to another foreign country any item not subject to the EAR you know will be used in or by any of the end uses or end users described in [EAR § 744.6(b)(1) - (7)], including the sending or taking of such item to or from foreign countries in any manner;
- (B) Transferring (in-country) any item not subject to the EAR you know will be used in or by any of the end uses or end users described in [EAR § 744.6(b)(1) - (7)];
- (C) Facilitating such shipment, transmission, or transfer (in-country); or
- (D) Performing any contract, service, or employment you know may assist or benefit any of the end uses or end users described in [EAR § 744.6(b)(1) - (7)], including, but not limited to: ordering, buying, removing, concealing, storing, using, selling, loaning, disposing, servicing, financing, transporting, freight forwarding, or conducting negotiations to facilitate such activities.”

The terms “facilitating,” “assist[ing],” and “benefit[ting]” are not defined for purposes of these U.S. person activities controls, nor are they defined elsewhere in the EAR. Such terms have been interpreted broadly in other contexts (e.g., by the Treasury Department’s Office of Foreign Assets Control in the U.S. sanctions context). Absent

guidance from BIS regarding its interpretation of these terms, it will be difficult for U.S. entities and U.S. person employees of non-U.S. entities to know how to comply with the applicable restrictions.

Moreover, this proposed definition of U.S. person “support” could be significantly broader than the definition of U.S. person “support” applicable in the advanced semiconductor manufacturing context under EAR § 744.6(c)(2), pursuant to the October 2022 and 2023 export control rules. Pursuant to EAR § 744.6(c)(3)(i), the scope of U.S. person activities that require a license under EAR § 744.6(c)(2) is limited to U.S. persons who:

- (A) Authorize the shipment, transmittal, or transfer (in-country) of items not subject to the EAR and described in [EAR § 744.6(c)(2)(i) - (iii)];
- (B) Conduct the delivery, by shipment, transmittal, or transfer (in-country), of items not subject to the EAR described in [EAR § 744.6(c)(2)(i) - (iii)]; or
- (C) Service, including maintaining, repairing, overhauling, or refurbishing items not subject to the EAR described in [EAR § 744.6(c)(2)(i) - (iii)].

This discrepancy in the regulatory definition of U.S. person “support” in different contexts involving many of the same destinations (e.g., Macau and countries in Country Group D:5) would create challenges for companies’ compliance with these and other export control rules, since companies would need to impose internal controls on different U.S. person activities in different contexts. The proposed U.S. person support controls in the July 2024 Proposed Rules as drafted are also likely to lead to discrimination against U.S. person employees of non-U.S. companies. This is because, unlike in the advanced semiconductor manufacturing context, there is no carveout from the proposed controls under EAR § 744.6(b) for individuals employed by companies headquartered in allied countries Country Groups A:5 and A:6.

Therefore, SIA encourages BIS to revise the U.S. person “support” definition for purposes of the new MEU, MSEU, military-production, IEU, and FSEU restrictions to conform to the definition of U.S. person “support” in the advanced semiconductor manufacturing context. SIA also respectfully requests that BIS provide a carveout from these U.S. person activities controls for individual U.S. persons employed by companies headquartered in Country Groups A:5 and A:6, as it has done in the advanced semiconductor manufacturing context.

Comment III.E: BIS should narrow the U.S. person support restrictions to listed entities.

Given the ambiguity in the meaning of the definitions of “intelligence end user” and U.S. person “support” for such end users, as described above in Comments III.C and III.D, respectively, SIA encourages BIS to likewise narrow the proposed restrictions on U.S.

person support for IEUs to entities and individuals that are identified on the Entity List with an applicable footnote designation.

Under the July 2024 Proposed Rules, the proposed restrictions on U.S. person “support” for MSEUs and FSEUs are limited to support for parties identified on the Entity List and designated by an applicable footnote. But the proposed IEU restrictions have a broader and more ambiguous scope than the MSEU or FSEU restrictions. As discussed in Comment III.C, the language in the definition of IEU regarding “other entities performing functions on behalf of” government intelligence, surveillance, or reconnaissance organizations presents compliance challenges, because a wide range of private entities could be considered to be “performing functions of” government organizations that are engaged in intelligence, surveillance, and reconnaissance activities. The MSEU definition refers to “any person or entity whose actions or functions support ‘military end uses,’” where “support” is undefined (as described in Comment III.B), while the FSEU definition refers to “[o]ther persons or entities performing functions of a ‘foreign-security end user,’ such as arrest, detention, monitoring, or search.”

The vague scope of the proposed IEU definition, in addition to the vague scope of the proposed U.S. person “support” definition, will create a difficult compliance challenge for U.S. entities and U.S. person employees. These companies and individuals will need to undertake extensive due diligence on every entity with which they engage in virtually any capacity that are located in or are from the 46 countries in Country Groups D and E, and not also identified in Country Groups A:5 or A:6, to ensure that such entities do not “perform the functions of” government intelligence, surveillance, or reconnaissance organizations.

SIA therefore requests that the same approach be taken for the restrictions on U.S. person “support” for IEUs as for MSEUs and FSEUs, namely that these restrictions be limited to “support” for IEUs identified on the Entity List with an applicable footnote designation.

Comment III.F: A significant compliance burden would fall on companies in the absence of comprehensive lists of entities of concern compiled and issued by BIS. This could risk both U.S. competitive advantage and national security.

By proposing broad-sweeping restrictions on exports, reexports, and transfers to, and U.S. person support for, broadly-defined categories of entities of concern without designating all such entities to restricted party lists maintained by BIS (e.g., the existing MEU list or the Entity List), BIS would shift an overwhelming burden to private companies to determine whether a customer meets the definition of an MEU, MSEU, IEU, or FSEU. Much of the due diligence required to determine whether an entity would meet these broad definitions could not be automated and would need to be conducted by company personnel who do not have the skill sets or access to resources necessary

to assess intelligence issues. These assessments are unlikely to be straightforward, because private companies do not have the same access as BIS to intelligence resources from other parts of the U.S. government. Moreover, the level of due diligence that would be necessary to comply with the proposed controls could put personnel in certain countries at significant personal risk from target country governments.

Even under the existing MEU rule at EAR § 744.21, many companies invest significant resources – in terms of time, money, and personnel – to conducting research of public sources (both in English and the local language) to screen for certain terms or images that could raise red flags that the entity is an MEU. Bad actors have become quite sophisticated at scrubbing certain terms from their English-language websites, so companies must also manually review the domestic language version of a company's site. By expanding the geographic scope of the proposed MEU and MSEU controls from 7 countries to 23 countries, and the IEU controls to 46 countries, the compliance burden of these manual reviews would increase substantially under the July 2024 Proposed Rules.

Additionally, given the complexity and breadth of the proposed rules, some companies may over- or under-control based on their risk tolerance, with resultant risks to U.S. economic competitiveness and national security in either case. Companies that are overly conservative risk being shut off from large swathes of the legitimate commercial market, which in turn would negatively impact revenue, which then negatively impacts R&D investments, which then negatively impacts market share, in a destructive downward cycle. Over the long term, this could lead to significant erosion of U.S. semiconductor technology and innovation leadership, which undermines U.S. economic competitiveness and national security.

* * *

Thank you for the opportunity to comment on the Proposed Rules. SIA looks forward to continued partnership with BIS and other agencies in providing support and feedback regarding export control policy, particularly with respect to semiconductors.

Uploaded to www.regulations.gov. ID – BIS-2024-0029

Courtesy copy sent to: Eileen.Albanese@bis.doc.gov.