

**Comment 1 of 2 of the
Semiconductor Industry Association**

In Response to the Request for Comments about

**Areas and Priorities for US and EU Export Control Cooperation
under the Trade and Technology Council**

**Ref: 86 Fed. Reg. 67904 (Nov. 30, 2021);
Docket No. 211123-0244; XRIN 0694-XC088**

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The Semiconductor Industry Association (SIA) is the trade association representing the semiconductor industry in the United States. SIA member companies are engaged in the research, design, and manufacture of semiconductors. The U.S. is the global leader in the semiconductor industry, and continued U.S. leadership in semiconductor technology is essential to America's continued global economic and technology leadership. More information about SIA and the semiconductor industry is available at 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 all other sectors of the economy. They are also critical components for future technologies, such as artificial intelligence, quantum computing, and 5G/6G telecommunications. Few industries, if any, have a supply chain and development ecosystem as complex, geographically widespread, and intertwined as the semiconductor industry. Furthermore, the U.S. semiconductor industry is characterized by an ever-diversifying range of business models and relationships crossing national and regional boundaries. The United States is the world leader in the semiconductor market, with U.S. firms accounting for nearly half of all semiconductor device and equipment sales and an even higher percentage of critical design tools.

Key to U.S. success in semiconductors is access to overseas markets. In fact, the U.S. semiconductor industry relies on overseas markets for more than 80% of its sales, which U.S. firms then re-invest back into their research and development efforts. They then use the results of these efforts to out-innovate foreign competition. A report by the Boston Consulting Group (BCG) termed this phenomenon a "virtuous cycle" essential to maintaining U.S. leadership in semiconductor technology.¹ Trade with and joint development efforts involving companies in EU member states is critically important to this mission. Similarly, success of the industry and our collective national security and foreign policy objectives depend upon level playing fields with respect to export controls, particularly their scope, application, and enforcement by and among foreign partner countries.

¹ <https://www.bcg.com/en-us/publications/2020/restricting-trade-with-china-could-end-united-states-semiconductor-leadership>

SIA has long been a partner of the U.S. Government to provide support regarding reforms and modernization of export control policy, particularly with respect to semiconductors. SIA, therefore, appreciates the opportunity to provide its comments in response to BIS's request for comments about how to make the existing U.S. and EU export control regulations, policies, and practices more transparent, efficient, effective, and convergent.

SIA Responses to BIS's Requests for Comments

BIS has asked for comments "on ways in which existing U.S. and/or European Union dual-use export control policies and practices may be more transparent, more efficient and effective, more convergent, and fit for today's challenges, in particular with regards to the control of emerging technologies from all interested persons" that will assist BIS in developing ideas and proposals, as well as facilitate a productive dialogue with the European Union. "Comments providing specific and concrete examples where further convergence in U.S. and EU export control practices and policies could enhance international security and the protection of human rights, and support a global level-playing field and joint technology development and innovation, would be particularly helpful."

In response to this request, we polled our members on issues they would like presented to BIS, particularly those that create unnecessary friction on trade with and involving the EU. They are set forth below. The first group of comments pertain to differences in U.S. License Exceptions and EU general authorizations. The second group pertains to requests to consider alignment and clarification of U.S. and EU authorities and common strategic-level policy objectives. The third group lists requests for the U.S. and EU member states to consider harmonizing various regulatory structures, definitions, and policies, to the extent there is not a policy reason for the differences. The fourth group lists recommendations pertaining to human rights issues. The fifth group of comments miscellaneous suggestions for to advance the common objectives of U.S. and EU member state export control authorities.

All SIA suggestions require coordinated efforts by export control subject matter experts in the U.S. the European Commission (EC), and the EU member states. For the sake of drafting efficiency, the comments below ask for efforts from the Export Control Working Group (ECWG) when referring to such authorities collectively. SIA also understands that regulatory and other changes cannot be implemented by the ECWG alone and must be implemented by BIS, in coordination with the other export agencies, and within the EU member states. Thus, the comments below list out the topics SIA would ask the ECWG to work on in such a way that the efforts would result in changes to actual export control regulations or guidance issued by BIS, DG TRADE, or the EU member state authorities, as appropriate. References to "Annex II" are references to the "Statement of of Export Control Cooperation" in the September 29, 2021 "[U.S.-EU Trade and Technology Council Inaugural Joint Statement](#)."

I. License Exceptions and General Authorizations

A. Work to Harmonize EU001 and License Exception STA with respect to U.S.-EU Trade

SIA strongly encourages the ECWG to develop a plan that would result in the reduction of unnecessary burdens and frictions imposed on U.S.-EU trade, joint development efforts, and compliance efforts as a result of the differing scopes among Union General Export Authorizations, such as EU001, member state national general export authorisations, and license exceptions in the EAR. (This comment, of course, does not refer to items that do not now require a license based on its reason for control for trade between the U.S. and the EU.) The primary purpose of EU001 and license exceptions such as STA is to reduce unnecessary burden and licensing obligations involving dual-use trade by and among close foreign partners. That objective is only partially successful, however, because EU001 and STA and other EAR license exceptions have significantly different scopes of items covered, items excluded, conditions for use, and countries authorized to receive items under the provisions. It would be a significant and massively complex exercise to list out and chart the dozens of variations between EU001 and STA.

Thus, our recommendation would be for the ECWG to start a policy analysis exercise with a clean slate and then work backwards: that the experts assume the existence of a hypothetical general authorization / license exception that does not impose any controls on trade in dual-use items by and among the U.S. and EU member states. They should then decide, as a policy matter, what the types of items for which each government would still want to see a license application when the destination is the U.S. or an EU member state. We suspect most of the current differences are the result of legacy ad hoc and uncoordinated decisions. It makes more sense then to decide which specific items and destinations among the U.S. and the EU member states warrant additional controls and then work together to identify those items as carve-outs from a broad and largely harmonized EU001/STA authorization.

B. Work to Harmonize Other License Exceptions

The U.S. has many license exceptions for which there is not a direct counterpart in member state regulations. Thus, we would encourage the ECWG to develop proposed changes to U.S. and member state rules to harmonize the scope and application between the other significant license exceptions, particularly License Exception LVS (limited value shipments), TSR (technology and software under restriction), RPL (replacement parts), TSU (technology and software unrestricted), AVS (aircraft, vessels, and spacecraft), and ENC (encryption software and technology).

C. Do Not Remove License Exception APR with Respect to Exports from EU Member States

The foundation upon which the ECWG's work is based is that the U.S. and the EU have faith and confidence in each other's export control systems. In light of this, we strongly encourage BIS not to remove the availability of License Exception APR (additional

permissive reexports) with respect to shipments of items subject to the EAR from the EU. If the U.S. is concerned about EU enforcement or license application review procedures with respect to such items, then we would encourage the U.S. and the EU to work out such issues at a government-to-government level rather than imposing a redundant license obligation on items shipped from outside the United States.

II. Alignment and Clarification of Authorities and Common Strategic-Level Policy Objectives

A. The EC or EU Member States Should Provide Guidance or Definitions Regarding Their Interpretation of Their Article 9 Authority to Impose Controls on Unlisted Dual-Use Items, End-Uses, and End-Users for Reasons of “Public Security.”

Export Control Reform Act (ECRA) of 2018 gives BIS broad authority to impose unilateral controls, alone or as part of a plurilateral effort (i.e., outside a multilateral regime process) on items for general national security or foreign policy reasons. BIS also has a long history of using such authority for list-based, end-user, end-use controls.

Other than with respect to Article 4 catch-all controls for WMD or military applications in arms embargoed countries, the EU member states only have the authority, under Article 9, to impose controls on unlisted items if for reasons of “public security.” Neither the EC nor any member state has ever defined this term – and EU member states have rarely applied it. For the sake of facilitating future SIA general and technical comments on possible new controls, we ask the EC and EU member state authorities to announce, in general or specific terms, their views as to what “public security” means. Does it authorize all the non-regime-based controls that would be required to implement Annex II? Or is there a different definition in mind?

In addition, we ask the EC or EU member states to announce whether the Article 9 “public security” authority could authorize member states to impose end-use controls, such as the US military end-use controls, or end-user controls, such as U.S. Entity List controls. The answer to whether this or other EU authorities would allow EU member states to create end-use or end-user controls will be critical to the quality of future comments about how to make the U.S. and the EU systems more convergent, effective, and efficient.

Similarly, we ask the EC or EU member states to announce whether their Article 9 authority to impose controls for human rights-related reasons also allows for the creation of end-use- and end-user-specific controls (in addition to controls on specific unlisted items).

B. Work to Limit the Disparate Impact of Extraterritorial Controls

For the sake of leveling the playing fields and making the export control systems more convergent, we ask the EU representatives to consider facilitating the adoption and use of extraterritorial controls, such as through license conditions and other tools that are similar to U.S. de minimis, direct product, or the foreign-produced direct product rules.

Similarly, we ask U.S. officials to consider whether they would alter U.S. extraterritorial rules if EU member states adopted domestic controls that would achieve the same objectives through domestic controls. In addition, we ask the ECWG to consider a more regular adoption of plurilateral controls – i.e., controls imposed by the U.S. and EU member states under their Article 9 “public security” authority – to reduce the need for disparate extraterritorial controls. Such controls, as noted in Annex II of the U.S.-EU Joint statement, have significant detrimental impact on supply chains. Working together to coordinate controls to achieve common objectives would greatly reduce such negative impacts on U.S. and EU companies and also would be far more effective for governments’ objectives.

C. State Publicly Whether the ECWG is Working Toward Controls on Items that Do not Meet Traditional Definitions of “Dual-Use” Items.

EU Regulation Article 2(1) defines “dual-use” items as “items, including software and technology, which can be used for both civil and military purposes, and includes items which can be used for the design, development, production or use of nuclear, chemical or biological weapons or their means of delivery, including all items which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices.” The U.S. defines a “dual-use” item as “one that has civil applications as well as terrorism and military or weapons of mass destruction (WMD)-related applications.” The Wassenaar Arrangement states that “dual-use” items “to be controlled are those which are major or key elements for the indigenous development, production, use or enhancement of military capabilities,” (i.e., for items on the munitions list).

The U.S. and the EC, however, announced in Annex II of their Joint Statement that export controls should be used, among other things, to:

- i. respond to human rights abuses (other than just with respect to cyber-surveillance items);
- ii. create a “global level playing field;”
- iii. address “legal, ethical, and political concerns” about emerging technologies;
- iv. respond to civil-military fusion policies in countries of concern;
- v. avoid disruptions to strategic supply chains;
- vi. respond to “technology acquisition strategies, including economic coercive measures;” and
- vii. achieve “strategic” economic objectives.

These objectives go much further than traditional “dual-use” regulations to control the export of commodities, software, and technology necessary to develop, produce, or use weapons of mass destruction or conventional military items. Thus, for the sake of

informing our and other public comments in the future, we ask the ECWG to state whether its intention is to develop controls that go beyond “dual-use” items, as defined, and into otherwise completely civil items necessary to accomplish the objectives in Annex II.

III. Harmonization of Regulatory Structures, Definitions, and Policies

A. Work to Align Definitions of Control Parameters in the Respective Regulations

The U.S. and the EU lists of dual-use items contain multiple types of control parameters that are critical to determining when an item is and is not listed. Some are defined unilaterally and others multilaterally, but all are applied inconsistently. The primary examples include “specially designed,” “capable for use with,” “designed or modified,” and “required.” For the sake of removing unnecessary burdens, enhancing compliance, and creating a level playing field between U.S. and EU exporters, we ask the ECWG to develop a plan that would result in consistent application of the definitions of these terms, both in their letter and application. The ultimate goal would be that exporters could be confident that an item controlled based on such a parameter in the U.S. would be equally controlled or not in an EU member states, and vice versa.

B. Work to Reduce the Unnecessary Disparate Impact of U.S. Deemed Export Control Rules Involving Nationals of E.U. Member States

Joint U.S.-EU development efforts are occasionally hampered because the U.S. has a deemed export rule and EU member states do not. We realize that not all dual-use technologies require a license to release to EU nationals and that EAR section 734.20 (activities that are not deemed exports) resolved most barriers to joint efforts between U.S. and EU companies. Nonetheless, discrepancies and unnecessary compliance burdens exist. We, therefore, ask that the U.S. authorities do what they can to expand the scope of License Exception STA to further reduce the compliance burden and complexity involved when deciding whether the release of dual-use technology subject to the EAR to an EU national requires a license.

C. Work to Harmonize the Export Control Treatment of “Software as a Service”

The U.S. has published guidance on the issue over the years that says, in essence, such services are not controlled events, unless the activity would result in the export of controlled software or technology or the provision of an already-controlled service, such as a defense service. EU member states have not been as clear in the guidance on the topic. We ask that ECWG determine whether an alignment on such issues is possible and, if so, to publish coordinated and updated guidance on the topic.

D. Work to Harmonize Export Control Treatment of Issues Related to Cloud Storage

Neither the U.S. nor EU member states have published guidance on what the export

control considerations and rules are with respect to the use of and transmission of technical data and software from the cloud. Given that increasingly cross-border nature of U.S. and EU operations, we ask the ECWG to consider whether common U.S.-EU guidance and standards on this topic could be created.

E. Announce that the U.S. and EU Member States are Willing to Consider Program Authorizations

The structure and content of U.S. and EU export control authorizations permit the issues of authorizations for whole programs (rather than item-by-item authorizations). Given that such authorizations would greatly facilitate U.S.-EU joint development efforts, we encourage both the ECWG to make it clear that U.S. and EU authorities are willing to accept and consider the issuance of such authorizations.

F. Develop Guidance so that the Classification and Rating Determination Processes Result in the Same Outcomes for the Same Items

Most of the dual-use items on the U.S. and the EU list are identical. So that an item is officially classified/rated the same way when an exporter asks for an official determination, we ask that the ECWG develop guidance, best practices, standard interpretations, and information-exchange efforts to reduce differences in results between the U.S. and EU authorities with respect to the same items.

G. Work to Harmonize the Treatment of “Published Information and the Results of “Fundamental Research”

The U.S. has clear and well-tested definitions of when software and technology are not subject to any export controls because they are “published” or the results of “fundamental research.” We respectfully ask that the U.S. share the results and scope of its efforts with its EC and EU member state counterparts and work to harmonize such carve-outs to the extent possible.

H. Work to Level the Playing Field, to the Extent Possible, With Respect to the Application of Controls on Unlisted Items to Arms Embargoed Destinations.

In EAR sections 744.21, 744.22, 744.17, and 744.6, the U.S. has detailed “military end-use,” “military end-user,” “military-intelligence end-use,” and “military-intelligence user” controls on the export of specific types of commodities, software, technology (and, in some cases, services) that are not identified on multilateral regime lists if destined to China, Russia, and other countries of concern. EU Regulation Article 4(1)(b) gives EU member states the authority to impose catch-all controls on exports to arms embargoed countries if the authority notifies an exporter that the export might be for a military application. The application of this authority among EU member states is either non-existent or inconsistent. Moreover, no EU member state has written material guidance on its application of this authority or published implementing regulations.

In any event, the scope and reach of the US rules in this regard are significantly broader in scope and impact. They thus create a significantly unlevel playing field between U.S.

and EU exporters. We strongly encourage the ECWG to do the work necessary to level this playing field, not only for its own sake but to more effectively address issues pertaining to the use of unlisted dual-use items for military applications in countries subject to arms embargoes.

I. Consider Foreign Availability Outside the U.S. and the EU Before Proposing Multilateral and Plurilateral Controls

When considering new controls to be imposed plurilaterally or multilaterally, we ask the ECWG to factor in whether the specific items at issue are widely available outside the U.S. and the EU before imposing controls. We realize that controls must at times be imposed even when there is foreign availability, but we nonetheless encourage the development of a process to gather such information (such as through public comments) and to develop standards for when a widely available dual-use item should not be the subject of a plurilateral control because of widespread availability.

IV. Human Rights Issues

A. When Considering New Controls to Address Human Rights Issues, Consider US Carefully Crafted End-Use and End-User Controls If List-Based Controls Would Have Broad Collateral Impacts on Widely Available Commerce Items.

Multiple statements of the Biden-Harris Administration, EU officials, and the Trade and Technology Council have emphasized the plan to use export controls to address human rights issues. SIA does not discourage or oppose such efforts. To the contrary, we encourage and welcome them. The types of items at issue, however, tend to be that of widely commercial items. Except in cases where specific items are capable of being identified, most human-rights-related issues will need to be addressed through controls on specific end-uses or specific end-users. Given the difficulty inherent in end-use-based controls, we respectfully ask that they be carefully crafted and tested with industry and prosecutors to make sure that they are clear, capable of being complied with, and enforceable, and do not have unintended impacts.

B. Harmonize the List of Current and Future Items to be Controlled to Address Human-Rights-Related Objectives

The U.S. has a list of items unilaterally controlled for “crime control” reasons to address human-rights-related concerns. But for recent EU-specific catch-all controls pertaining to cyber-surveillance technologies, the EU member states do not have such controls, although they have the broad authority to create them under Article 9. As the ECWG develop lists of new items to control, we ask that the list of items now unilaterally controlled and the lists of items to be controlled be harmonized to the extent possible to level the playing field and to have more effective controls.

V. Miscellaneous

A. Encourage Military Interoperability

As the ECWG develops new control standards, we encourage it to adopt a rule that the U.S. and the EU will reduce regulatory burdens on dual-use items in order to facilitate military operability among NATO and other close foreign partners.

B. Clarify the Reference to “Supporting a Global Level-Playing Field” in Annex II

Principle 2 in in Annex II states that a reason for export controls is “supporting a global level-playing field.” We ask the ECWG to explain whether this refers to the desire to make it so that just U.S. and EU companies are not disadvantaged vis-à-vis one another as a result of US and EU export controls? Or is it referring to responding to Chinese and other government’s practices that create uneven economic implications for companies from different countries? Or does it have a different meaning?

C. Clarify whether Technology Leadership in Semiconductor Development and Production is a per se Policy Objective of the ECWG, Regardless of Whether an Item is a Traditional “Dual-Use” item.

In light of the general tone and direction of the Annex II objectives, we respectfully ask whether the ECWG plans on developing and proposing controls on semiconductor-related items solely for the sake of maintaining U.S. and EU technology leadership with respect to such items. That is, does the ECWG plan to propose controls on items that do not have any identifiable application for military uses merely to achieve a technology leadership objective as an end in itself? Or before any such semiconductor-related controls are proposed, must there first be a clear military application for such items to be considered a “dual-use item” to make it a candidate for plurilateral or multilateral controls?

D. Joint Outreach and Education Efforts are Encouraged.

SIA encourages the ECWG to arrange for joint U.S.-EU outreach and training seminars and the similarities and differences between U.S. and EU member state export controls rules, practices, obligations, and enforcement.

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Thank you again for the opportunity to provide comment on this important effort to improve U.S.-EU cooperation on export control. If you have any additional questions or would like to discuss these comments further, please contact Meghan Biery at mbiery@semiconductors.org.