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Mr. Tongele Tongele
c/o Office of Nonproliferation and Treaty Compliance
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
1401 Constitution Ave, NW
Washington, DC 20230

Subject: Comment on Advanced Notice of Proposed Rulemaking Regarding the Identification and Review of Controls for Certain Foundational Technologies (ANPRM)

Ref: 85 Fed. Reg. 52934 (Aug. 27, 2020) 85 Fed. Reg. 64078 (Oct. 9, 2020);
RIN 0694-AH80; Docket # 200824-0224

Dear Mr. Tongele:

Business Roundtable (BRT) is an association of chief executive officers of America's leading companies working to promote a thriving U.S. economy and expanded opportunity for all Americans through sound public policy.¹ We appreciate the opportunity to provide comments in response to the ANPRM regarding the identification and review of controls for certain foundational technologies. Please find below Business Roundtable's general comments for consideration followed by an appendix with more detailed comments.

Export controls are a critical piece of the United States' national security strategy. Enforceable and well-defined export controls that are regularly reviewed and updated with stakeholders are vital to maintaining U.S. military and intelligence advantages. As BIS works to develop a regulatory process to identify and propose potential controls on uncontrolled foundational technologies essential to the national security of the United States, Business Roundtable supports BIS efforts to conduct its review consistent with the standards set forth in the Export Control Reform Act of 2018 (ECRA), 50 U.S.C. §§ 4801-4851 and best regulatory and policy practices to

¹ <https://www.businessroundtable.org>

implement effective export controls. Business Roundtable also encourages BIS to continue to consider and develop any proposed new controls in a transparent manner and consistent with the ECRA statute to ensure the regulatory process benefits from full stakeholder engagement and to provide predictability for industry. Working closely with stakeholders through each step of the regulatory process will best enable compliance and advance the underlying essential national security objectives.

U.S. leadership in science, technology, engineering, and mathematics (STEM) supports U.S. national security. Any foundational technology identification and control efforts should assess the potential for negative competitive implications on U.S. economic and innovation leadership and competitiveness. As ECRA states, the “national security of the United States requires that the United States maintain its leadership in science, technology, engineering, and manufacturing sectors, including foundational technology that is essential to innovation.” The U.S. Government has traditionally employed a “run faster” strategy to enable U.S. companies to best compete at home and abroad and out-innovate their foreign counterparts by strengthening investment in technology and making sure that all components of the national innovation system, including people, institutions, and regulations support U.S. leadership in innovation. This strategy should continue to advance separately from the export control regime, which should remain focused on the underlying essential national security objectives. Increasing sales of American goods and services abroad increases jobs and funds innovation in the United States. Attracting the best international talent enhances U.S. innovation leadership. Weakening the competitiveness of U.S. companies by imposing overly broad or unilateral export controls will weaken U.S. innovation leadership, which in turn weakens U.S. national security.

BIS should not impose new foundational technology controls unless it has fully considered the impact such controls would have on the U.S. economy and innovation leadership. Before proposing any new unilateral controls over foundational technologies that are essential to U.S. national security, BIS should consult closely with industry and clearly demonstrate that it has fully assessed the overall impact to the U.S. economy.

Export controls should advance specific statutory national security objectives, and not be used to advance unrelated trade policy or economic policy objectives. A competitive and innovative U.S. economy depends on investment in research and development and ensuring that U.S. industry remains globally competitive and has access to the best and brightest talent around the world. Using export controls to advance unrelated economic or trade policy objectives could harm U.S. industry. Accordingly, export controls have traditionally been narrowly tailored to apply to items that are clearly and directly related to a military-, intelligence-, or proliferation-related concern.² Export controls should be used for what they are designed for – to advance specific national security objectives – rather than to change economic behavior or modify trade policies or practices in foreign countries.

² As set out in ECRA section 4817, the policy objective of the emerging and foundational technology identification and control efforts is to advance U.S. national security interests. For this reason, we are not commenting in this letter on how U.S. export controls should be used to advance foreign policy objectives.

BIS should evaluate, in close consultation with affected industries, the economic impact of controlling additional foundational technologies. As the U.S. government considers possible national security-based controls over foundational technologies that are not currently controlled for national security reasons, it should consult closely with potentially affected industries to assess and understand how specific controls might undermine: (i) U.S. Science, Technology, Engineering and Mathematics (STEM) capabilities; (ii) competitiveness; or (iii) broader national security objectives. The U.S. government should also work closely with industry to clearly understand the foreign availability of any technologies under consideration for control as a foundational technology. In addition, new export controls (and discussions of possible new export controls) should avoid creating incentives for foreign commercial buyers to (i) lock out U.S. companies, (ii) fracture global and regional supply chains, or (iii) harm R&D systems that support American jobs, growth, and innovation.

Any export controls on foundational technologies should be narrowly applied to specific technologies that are essential to U.S. national security. As BIS reviews potential controls on foundational technologies, it should adopt a definition for “foundational technologies” consistent with the standards in ECRA. BIS should avoid creating general or abstract definitions of foundational technologies.

Unilateral export controls should not be applied to purely commercial foundational technologies that are widely available outside the United States. Moreover, not all controls need to be imposed on exports and reexports worldwide. BIS should exercise discretion to impose unilateral controls on exports to identified end users for end uses of greatest concern.

Multilateral export controls developed with other countries will best advance national security objectives and preserve U.S. economic competitiveness. ECRA clearly states that with rare and narrowly tailored exceptions, unilateral controls over widely available commercial items harm U.S. competitiveness and are not effective at preventing the proliferation of the items at issue to countries of concern. The imposition of unilateral controls on well-established and widely used categories of technology could significantly and negatively affect U.S. research, commercial, and service industries and place them at a disadvantage relative to foreign industries, which ultimately harms U.S. national security. Controls on any new specific foundational technologies should be pursued multilaterally to be most effective. The U.S. government’s past imposition of unilateral export controls over commercial technologies that are not unique to the United States and that are not tailored to address specific national security threats ended up harming not only U.S. business, but also the underlying national security concerns the controls were designed to address. A prime example of this was the imposition of unilateral export controls by the U.S. government on all commercial satellite commodities, software, and technology regardless of sensitivity in the late 1990s. This contributed to significant loss of the U.S. commercial satellite industry’s worldwide market share, harming the health of the U.S. defense and commercial industrial bases.

Commerce should maintain existing exclusions for fundamental research and certain published information. To sustain U.S. competitiveness and national security, “fundamental research,” as defined in the Export Administration Regulations (EAR), should continue to be excluded from any new export controls on foundational technologies. Additionally, exclusions established in ECRA for “published” information, including information that is released by instruction at academic institutions, and information that is included in a patent or patent application should be maintained. Restrictions in these areas would stifle scientific advancements around the world. Historically, the exclusions above – as well as the broader export control policy framework – has allowed for cross-border collaboration that enables U.S. industry and academia to lead the world in many critical technologies, in part due to the ability of the U.S. to attract top international talent to its businesses, schools, and communities. It is imperative that these exclusions are preserved.

Thank you for consideration of these comments and the more specific recommendations in the Appendix. Business Roundtable appreciates the opportunity to continue engagement with the Administration on its implementation of ECRA.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul H. DeLaney, III". The signature is fluid and cursive, with a long horizontal stroke at the end.

Paul H. DeLaney, III
Vice President, Trade and International
Business Roundtable

Appendix: Specific Comments in Response to BIS Questions

I. Relevant Statutory and Regulatory Provisions

A. Statutory Standards Governing the Identification and Control of “Foundational” Technologies

ECRA section 4817(a) requires the Administration to conduct an interagency effort to identify “foundational” technologies that “are *essential* to the national security of the United States” (emphasis supplied) and that are not now subject to a multilateral control on the Commerce Control List (CCL) of the Export Administration Regulations (EAR) or described on one of the other lists of technologies the U.S. controls for export. After a public notice and comment process, it requires the imposition of controls on their export, reexport, and in-country transfers consistent with the standards in the section and elsewhere in ECRA. ECRA § 4817(b).

Although ECRA does not define “national security,” BIS’s notice includes illustrative examples of now-uncontrolled commercial technologies of national security concern to be addressed by the effort, specifically those that:

- (i) could “support indigenous military innovation efforts” in China, Russia, and Venezuela;
- (ii) are “being utilized or required for innovation in developing conventional weapons, enabling foreign intelligence collection activities, or weapons of mass destruction applications;” and
- (iii) “have been the subject of illicit procurement attempts which may demonstrate some level of dependency on U.S. technologies to further foreign military or intelligence capabilities in countries of concern or development of weapons of mass destruction.”³

These examples track ECRA’s definition of a “dual-use” item, which is an item that has “civilian applications and military, terrorism, weapons of mass destruction, or law-enforcement-related applications.”⁴

In deciding whether to identify such a technology as “foundational” and impose unilateral controls on its export, reexport, and in-country transfer, ECRA section 4817(a)(2)(B) requires the Administration to consider the:

- (i) development of foundational technologies in foreign countries (i.e., their foreign availability);

³ 85 Fed. Reg. at 52934.

⁴ ECRA § 4801(2).

- (ii) effect unilateral export controls imposed pursuant to this section may have on the development of such items in the United States; and
- (iii) effectiveness of unilateral export controls imposed pursuant to this section on limiting the proliferation of foundational technologies to foreign countries.

Every decision to identify and unilaterally control an item as “foundational” must be screened against these three standards, at a minimum. If an item is widely available outside the United States, it is not a good candidate for unilateral control under this ECRA section. If a unilateral control would harm development of the item in the United States or would be ineffective at preventing its export to countries of concern, then it would equally not be a good candidate for a unilateral control under ECRA section 4817.

In addition, ECRA section 4817 is an element of the broader ECRA statement of policy for export controls in section 4811(1), which is that the United States should “use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary – (A) to restrict the export of items which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States; and (B) to restrict the export of items if necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations.”

Section 4811(3) emphasized that “the national security of the United States requires that the United States maintain its leadership in the science, technology, engineering, and manufacturing sectors... Such leadership requires that United States persons are competitive in global markets.” Business Roundtable agrees that continued U.S. STEM leadership underpins U.S. national security. The ability of U.S. businesses to enhance their competitiveness at home and abroad, hire additional workers, and invest in research and development in the United States anchors the strength of the U.S. economy and is critical to U.S. national security. Maintaining U.S. STEM leadership should guide BIS and the other agencies as they consider potential new controls on foundational technologies.

B. Unilateral List-Based Controls Must be *Tailored* to Address *Specific* National Security Concerns

ECRA sections 4811(5) states that “[e]xport controls should be coordinated with the multilateral export control regimes. Export controls that are multilateral are most effective, and should be *tailored* to focus on those *core technologies* and other items that are capable of being used to pose a *serious* national security threat to the United States and its allies.” (emphasis supplied). Subsection (6) goes on to state that “[e]xport controls applied unilaterally to items widely available from foreign sources generally are less effective in preventing end-users from acquiring those items. Application of unilateral export controls should be limited for purposes of protecting *specific* United States national security and foreign policy interests.” (emphasis supplied).

C. Proposed Controls Should Be Consistent with the Standards for Control in the Multilateral Export Control Regimes

Consistent with the broader standards described above, ECRA section 4817(c) states that the Administration “shall propose that any technology identified pursuant to [this foundational technologies identification effort] be added to the list of technologies controlled by the relevant multilateral export control regimes.” Although the provision allows for consideration of continued unilateral controls if the regime efforts are unsuccessful after three years, an implication of this provision is that the Administration should identify foundational technology controls with which the relevant multilateral regimes are reasonably likely to agree and that are consistent with the regimes’ scopes of authority.

II. **How “Foundational Technologies Essential to the National Security of the United States” Should be Defined and Supported**

Comment 1: The foundational “technologies” identification and control effort should be limited to identifying and controlling foundational “technologies,” not commodities or software.

Although ECRA gives the Administration authority to impose controls over commodities and software, the specific ECRA provision at issue in BIS’s notice (i.e., section 4817) refers only to possible additional controls on foundational “technology.” Section 4817 does not refer to “commodities” or “software.” Section 4817’s technology-centric structure is not an isolated reference but is rather a core element to its scope and purpose. No other ECRA section is so explicitly limited in its scope to “technology.”⁵ All references in other ECRA sections are either to “items” or to a group of the three types of items as separate, such as in section 4825(b)(2)(A).

For purposes of identifying that which is subject to the section 4817 standards, this distinction is legally relevant because ECRA section 4801(11) defines “technology” as including “information, in tangible or intangible form, necessary for the development, production, or use of an item.” Section 4801(7) defines “item” as a “commodity, software, or technology.” Thus, the three types of items do not overlap as a definitional matter. “Technology” is not a “commodity,” for example. The EAR reinforces this point in its definition of “commodity,” which is “any article, material, or supply *except technology and software.*” 15 C.F.R. § 772.1. The statement of policy in section also specifically distinguishes between controls on “commodities,” “software,” and “technology” as separate types of “items.”

These explicit statutory standards in ECRA are identical to those in the EAR before ECRA and that continue to apply. BIS’s statement in its notice that for “purposes of this ANPRM, the term foundational technologies includes not only ‘technology’ but also ‘commodities’ and ‘software’ as

⁵See, e.g., ECRA sections 4817(b)(2)(A); (b)(2)(B); (b)(2)(C); (b)(3)(A); (b)(3)(B); (b)(3)(C); (b)(4)(A); (b)(4)(C); (c)(1); and (c)(2).

used in the EAR” conflicts with the ECRA statutory language that defined the scope of the foundational “technology” identification and control effort and existing EAR guidance⁶ Business Roundtable recommends that BIS follow the ECRA statutory standards when proposing any new unilateral controls under section 4817 and that its scope be limited to identifying and controlling “technologies,” and not “software” or “commodities.” We recommend that BIS limit its effort to identifying and controlling “technology” consistent with the structure, guidance, and wording in ECRA on the issue.

Comment 2: An EAR definition of “foundational technologies” should be tied to the standards and terms in ECRA and the EAR.

BIS asked in its notice for comments on “how to further define foundational technology to assist in identification of such items.”⁷ BIS should adopt a definition for export control purposes based on, and bounded by the statements of policy in ECRA, and draw from existing EAR definitions. Any proposed definition should reinforce the core ECRA policy that disfavors unilateral controls. BIS should include in any definition a requirement to demonstrate that each of the statutory ECRA standards for the imposition of such controls has been met. Any workable definition will also depend first on the U.S. Government’s clearly identifying a specific essential national security threat to justify the imposition of any unilateral controls.

Comment 3: BIS bears the burden of justifying how each technology (or item) proposed for control as “foundational” meets ECRA’s standards.

The core element of potential additional controls over foundational “technologies” or “items” is that they are “foundational,” which means that they are basic, applied and already generally widely available. They are the technologies upon which other items are developed and produced. BIS should explain in any proposed rule regarding such technologies how the control is justified given ECRA’s general emphasis on not imposing unilateral controls over technology for which there is comparable foreign availability. In addition, BIS should describe in any such notice how a new control could be effective at preventing its proliferation to countries of concern if it is, by definition, generally available and common. For each technology identified in a proposed rule to be controlled as “foundational,” BIS has the burden of providing sufficient information justifying why the proposal meets each of the relevant statutory standards within ECRA.

The burden to meet the statutory requirements of ECRA to justify imposition of new controls on current foundational technologies without current controls should include BIS addressing several criteria to demonstrate that its approach to this review of potential foundational technology controls will be circumscribed by a definition consistent with the statute. A definition’s criteria should include demonstrating why the technology proposed to be controlled is “essential” to U.S. national security; what the specific weapons-, military-, or intelligence-related application the control is designed to address; why the unilateral control would not harm domestic research; why

⁶ 85 Fed. Reg. at 52934.

⁷ Id.

the rule would be effective at stemming the proliferation of the identified technology to countries of concern; and the results of BIS's full consideration of the impact on the U.S. economy that would result from the unilateral control.

Comment 4: BIS should identify the specific national security threats to be addressed by new foundational technology (or item) controls that are not already being controlled.

BIS asks in its notice for comments on the “criteria to determine whether controlled items identified in AT level Export Control Classification Numbers (ECCNs), in whole or in part, or covered by EAR99 categories, for which a license is not required to countries subject to a U.S. arms embargo, are essential to U.S. national security.”⁸ The International Traffic in Arms Regulations (ITAR) control all articles the U.S. government has determined “provide a critical or military or intelligence advance such that” ITAR controls are warranted.⁹ The EAR's 600 series ECCNs control all other items that are exclusively used for military applications that do not warrant ITAR control.¹⁰ These ECCNs also include controls over all technology required for the development or production equipment of any sort that is specially designed to develop or produce military items is also already export controlled.

BIS should outline the gaps that exist between (i) these and other existing specific and catch-all export controls and (ii) the threats motivating identification and unilateral control efforts ECRA requires. Once the government identifies the threats to be addressed that are not already being addressed by existing list-based, end-use, and end-user controls, then government, industry, and other experts can work together to identify the specific technologies that should be controlled to address the specific essential national security threat not addressed by the current export control regime.

Comment 5: Proposed controls should be limited to addressing national security concerns, not trade or other economic policy issues.

ECRA's primary statement of policy in sections 4811(1) and 4817 highlights that export controls are limited to achieving specific national security and foreign policy objectives. These standards are reflected in ECRA's definition in section 4801(2) of “dual-use” items, which are items that have both “civilian applications and military, terrorism, weapons of mass destruction, or law-enforcement-related applications.” The export control system is not designed to advance unrelated trade, industrial, or other economic policies. It is also not for use in advancing the interests of specific industries or companies competing in the U.S. and global marketplace. The Administration should maintain this separation and keep export controls tailored to their statutory purpose. Export controls, if used unilaterally, overbroadly, or for purposes outside the

⁸ 85 Fed. Reg. at 52934.

⁹ 22 C.F.R. § 120.3(b).

¹⁰ 15 C.F.R. § 730.3.

statutory national security and foreign policy objectives, can severely disrupt the competitiveness of U.S. industries that are critical to U.S. economic strength and thus its national security.

Comment 6: The U.S. government should continue to work to develop multilateral arrangements with a small group of close allies with high-tech manufacturing capabilities for tailored controls.

Prior to the passage of ECRA, policymakers debated whether the definition of “national security” in the technology transfer context needed to be expanded beyond its traditional direct connection to specific military or intelligence applications due to concerns over China’s technology acquisition strategies and civil-military fusion strategies. ECRA moved the foundational technology policy issue from the foreign investment controls legislation to section 4817 of ECRA and directed BIS to address concerns with foundational technologies through an export controls review, including the effectiveness of existing multilateral export control regimes. Business Roundtable supports the United States exploring additional ways to work with allies and key countries who also produce foundational technologies reaching a consensus between a traditional multilateral regime approach (which can be cumbersome) and unilateral controls (which are harmful) to lead a robust multilateral effort to hasten the identification and control process while maintaining U.S. competitiveness and focusing on national security objectives. Such efforts with allies should include encouraging those governments to establish authorities needed to expedite and align efforts.

Comment 7: Foundational technologies should not be identified and restricted if a unilateral control would harm research into the technology in United States – and great weight should be given to industry comments about such harms.

BIS asks for information about “the impact specific foundational technology controls may have on the development of such technologies in the U.S.”¹¹ This request is consistent with ECRA sections 4811(1), 4811(3), and 4817(a)(2)(B)(ii), which directs BIS to ensure that any new unilateral controls not harm domestic research into the very technologies ECRA seeks to prevent countries of concern from obtaining and seeks to sustain U.S. innovation leadership. The ability of companies to continue funding cutting-edge commercial research depends on their ability to access global markets and sell commercial products and related technologies around the world.

The competitiveness, innovation leadership, and jobs of Business Roundtable members depend on the ability to sell to global customers, operate supply chains globally and regionally and source inputs, components, and products around the world. Employing foreign national employees who often can better understand local needs and issues is also critical to the success of the U.S. companies. Unilateral technology controls that would harm, whether as a legal, practical, or economic matter, the ability of U.S. companies to conduct research in the United States would be inconsistent with ECRA.

¹¹ Id.

Comment 8: BIS should delay the imposition of any new controls until the technology can be controlled multilaterally absent a time sensitive and essential national security threat.

BIS should delay implementation of any controls over newly identified foundational technologies until after the relevant multilateral regime has also agreed to identify the same technology on its control list, particularly given the potential harm unilateral controls could impose on U.S. industry in light of rapid innovation cycles, worldwide capabilities, and supply chains. Waiting to implement controls until multilateral controls can be implemented would keep U.S. companies on a level playing field with its foreign competitors in allied countries and avoid undermining U.S. technology leadership.

Comment 9: Proposed controls should be consistent with multilateral regime standards for control – or the regime standards should be changed to match any controls with a novel policy purpose before they are imposed domestically.

ECRA requires any new foundational technology controls to be submitted to the relevant multilateral regime so that they do not remain a unilateral control for long. Implicit in this statutory requirement is the requirement that such a control be consistent with the multilateral regime's policy for what should be listed on the regime's control lists. If BIS is considering a new foundational control for national security reasons outside the current scope of a regime's organizational documents, the U.S. government should work within the regime to revise and update the regime's mission statement. Efforts to revise a regime's mission would enhance the effort to address novel essential national security concerns in concert with other key countries. For example, the Wassenaar Arrangement's charter was amended after 9/11 so that its mission also included the prevention of "acquisition of conventional arms and dual-use goods and technologies by terrorist groups and organizations, as well as by individual terrorists."

Comment 10: BIS should consider end-use and end-user controls for any new controls on foundational technologies.

BIS asks for "examples of implementing controls based on end-use and/or end-user rather than, or in addition to, technology based controls."¹² ECRA section 4813(a)(2) explicitly requires the creation of lists of end-users and end-uses that are determined to be a threat to national security and foreign policy interests of the United States. ECRA sections 4813(a)(2) and 4814(b)(2)(C) together preserve the authority of BIS to add entities to the Entity List that are engaged in or pose a significant risk of becoming involved in activities contrary to the national security or foreign policy interests of the United States.

New foundational controls based on a product/technology list approach could be ineffective, unworkable, or do more harm than good given the potential foreign availability of these types of items. Adopting end-uses and the end-users approaches, however, that target how a technology

¹² Id.

is being used and who is using it can better address essential national security risks and controls to mitigate that risk. The EAR already has a well-developed structure to implement tailored end-use and end-user controls. BIS should consider such ECRA-authorized approaches to addressing national security concerns.

To address challenges of scaling implementation of such controls, Commerce should explore the potential for use of novel technological solutions. These could include software- and/or hardware-based tools to enforce and monitor government-imposed restrictions on users and uses, and to secure the infrastructure surrounding these technologies. Such a digital transformation of export controls could make them more effective, more dynamic, and more comprehensive while preserving U.S. technological leadership.

Comment 11: BIS should tailor any new controls to specific transactions and companies rather than through industry-wide technology controls.

The EAR has many tools to address a novel national security issue that do not involve identifying new technology controls on the CCL. ECRA section 4817(b)(1) gives BIS the authority to impose interim controls “such as by informing a person that a license is required for export.” If used judiciously, this plenary “is informed” authority can be an effective tool at addressing a particular national security issue involving specific transactions without having to impose controls on the broader area of technology involved.

Comment 12: With respect to any new foundational technology controls, BIS should adopt (i) an intercompany exemption for affiliates and (ii) an intra-company deemed export exemption for bona fide full-time regular foreign national employees.

ECRA was passed in tandem with the Foreign Investment Risk Review Modernization Act (FIRRMA). FIRRMA explicitly excluded investments by foreign affiliates of U.S. companies from the scope of the new authorities it gave to the Committee on Foreign Investment in the United States (CFIUS).¹³ Consistent with this carve-out in FIRRMA, BIS should use the broad authority from ECRA section 4817(b)(4)(B) to establish a similar intercompany exception for any new foundational technology controls under consideration. Such an exception is reasonable because the risk of diversion from within a corporate family is generally low, while the risk of economic harm to a U.S. affiliate posed by a unilateral control on transactions with its foreign affiliates is quite high. Such an intercompany exception could exclude transactions involving affiliates in Country Group E countries or affiliates that are proscribed entities.

Comment 13: BIS should regularly review, revise, and update the CCL consistent with the standards and requirements in ECRA.

As BIS analyzes multiple types of technologies, and technologies that depend upon them, through this ANPRM process, BIS should propose the removal or revision of ECCNs that have not been

¹³ FIRRMA section 4565(a)(4)(B)(iii)

reviewed for years or decades. None of the items now controlled in the CCL were created under the standard in ECRA section 4811(1) – that export controls should be used “only after full consideration of the impact on the economy of the United States and only to the extent necessary.” Absent research not made public, BIS does not have in its files any studies of any sort that analyze the “impact on the economy of the United States” of any of the EAR’s controls or whether existing controls exist “only to the extent necessary.” Moreover, ECRA section 4811(3) requires that the impact of the EAR’s implementation on U.S. industry’s “leadership and competitiveness must be evaluated on an ongoing basis. . .” Similarly, ECRA section 4811(7) mandates that an “efficient process should be created to regularly update the controls, such as by adding or removing such items.”

BIS should add rules to the EAR that would govern a process for affected exporters to petition for removal or modification of a current control that is not consistent with ECRA’s standards. This process could allow for the submission of ECRA-relevant information that was not available to the government at the time it imposed the existing control, such as a change in foreign sourcing, technological advancements, or overwhelming commercial applications in situations where there not has not been a specific national security basis for the control articulated. Removing items from the EAR will focus limited resources on those technologies and items with the highest essential national security effect.

Comment 14: Any foundational rules should explicitly state that they do not apply to “fundamental research”

Business Roundtable welcomes that BIS specifically states in its notice that it “does not seek to expand jurisdiction over technologies that are not currently subject to the EAR, such as ‘fundamental research’ described in § 734.8 of the EAR.”¹⁴ BIS should reiterate this point clearly in any proposed and final rules pertaining to foundational technologies to remove any remaining uncertainty in the private sector and academic research communities about the issue.

¹⁴ 85 Fed. Reg. at 36483