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Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
14th Street and Pennsylvania Avenue NW
Washington, DC 20230

Attn: Kirsten Mortimer, Office of National Security and Technology Transfer Controls

Subject: ***Review of Controls for Certain Emerging Technologies*, 83 Fed. Reg. 58,201 (Nov. 19, 2018), 83 Fed. Reg. 64,299 (Dec. 14, 2018)**

Reference: **BIS 2018–0024**
RIN 0694–AH61

Dear Ms. Mortimer,

Internet Association[1] appreciates the opportunity to provide comments on behalf of the association and its members in response to the Bureau of Industry and Security (BIS) advanced notice of proposed rulemaking, *Review of Controls for Certain Emerging Technologies*, 83 Fed. Reg. 58,201 (Nov. 19, 2018), 83 Fed. Reg. 64,299 (Dec. 14, 2018) (the "ANPRM"). Internet Association is the only trade association that exclusively represents U.S.-based global internet companies on matters of public policy. Our mission is to foster innovation, promote economic growth, and empower people through the free and open internet. Our members believe that a free and open internet is essential for individuals' access to information and a competitive economy, and is also an important component of an effective U.S. foreign policy and national security strategy.

Internet Association supports the goal of the ANPRM, which is to protect U.S. national security. We also agree that there are significant challenges involved in identifying controls for "emerging technologies." Notwithstanding these challenges, we urge the U.S. government to take a measured and deliberate approach to this rulemaking. Unduly broad restrictions will harm technological development in the U.S. and will be counterproductive to U.S national security.

The broad categories identified in the ANPRM include many technologies – from speech and audio processing technology, to position, navigation, and timing technology, among others –that are already essential to the operations, technological leadership, and competitiveness of Internet Association members. Many of these technologies are already used routinely by consumers in business, entertainment, and communications. Development and use of technologies covered by these categories is not limited to large, recognized U.S. internet companies. The open architecture of the internet allows anyone with a compelling product to launch with few barriers to entry. It is the smaller companies that would be least able to navigate overbroad rules, and whose competitiveness would be disproportionately harmed. For these reasons, imposing overly broad or unclear export controls on emerging technologies would jeopardize this country's economic and technological competitiveness. In

[1] Internet Association represents leading internet companies including Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Eventbrite, Expedia, Facebook, Google, Groupon, Handy, HomeAway, IAC, Intuit, letgo, LinkedIn, Lyft, Match Group, Microsoft, Pandora, PayPal, Pinterest, Postmates, Quicken Loans, Rackspace, Rakuten, reddit, Salesforce.com, Snap Inc., Spotify, Stripe, SurveyMonkey, Thumbtack, TransferWise, TripAdvisor, Turo, Twilio, Twitter, Uber Technologies, Inc., Upwork, Vivid Seats, Yelp, Zenefits, and Zillow Group.

addition, it would harm U.S. national security by deterring the development and use of these technologies in the U.S. and driving technological innovation offshore.

Cutting-edge technologies are the cornerstone of U.S. competitiveness, but these are highly globalized industries and areas of research. The U.S. has served as the world's incubator for technology development for decades in large part because of our country's openness to global collaboration, partnerships, and trade. But this can change. We urge the U.S. government to be mindful of the potential consequences of deterring startups, researchers, and innovators, from working, hiring, and building their businesses in the U.S. due to ambiguous or overbroad regulation, or regulation that is out of sync with global norms.

Because this proposed rulemaking would introduce U.S. export controls into uncharted territory, we urge BIS and other interested U.S. government agencies to follow the rulemaking model that has worked well in developing other U.S. export controls, with substantial opportunity for input from all potentially impacted stakeholders. Internet Association and its members wish to be a partner in this process.

I. Recommendations

Internet Association respectfully submits for consideration by BIS the following principles that we believe are important for the success of this rulemaking.

A. Continued engagement is essential.

In the ANPRM, BIS states that it is "anticipated" that the ANPRM and subsequent U.S. government deliberations will lead to "proposed rules for new Export Control Classification Numbers (ECCNs)." We strongly support the idea that this should be an iterative and interactive rulemaking. BIS should not seek a fast result at the expense of a good result in an area with such complexity and importance to our economy.

In order to provide stakeholders with an adequate opportunity to provide meaningful input and guidance, BIS should submit at least one detailed proposed rule, identifying any specific new ECCNs covering emerging technologies, for public comment, with at least a 90-day comment period, prior to publishing any final or interim final rules. If a first proposed rule generates significant concern among stakeholders, BIS should submit an additional proposal for public comment prior to finalizing any rules in this area. BIS should also develop mechanisms for industry participants to provide comments or other input on a confidential basis in order to protect proprietary and business confidential information from public disclosure.

B. The rulemaking should account for practical realities of technology development.

All of the categories identified in the ANPRM, from biotechnology to artificial intelligence to robotics, include technologies that are being developed outside of the U.S., and many U.S.-based companies have already acquired or formed different types of collaborative relationships with non-U.S. counterparts in order to benefit from innovation taking place outside of the U.S. Similarly, many U.S.-based companies and institutions recruit from global talent pools. Development of many of these technologies also relies on global research networks and publicly available information.

Given these practical realities, it will be futile and counterproductive to impose broad export controls on many of these technologies. For any specific "emerging" technology that would be subject to a proposed regulation, the U.S. government should carefully consider how developments in these technologies are occurring, the current status of research and development specific to each technology, as well as

existing applications and commercial markets. U.S. export controls will not be effective in controlling technologies that are already global.

C. A multilateral approach should be planned from the outset.

Section 1758(c) of the Export Control Reform Act requires the U.S. government to seek multilateral controls for any newly identified emerging technologies. We urge that the U.S. government begin this engagement process immediately. Longstanding U.S. government policy has acknowledged that unilateral export controls are far less effective than controls developed through multilateral efforts, such as through the Wassenaar Arrangement. Unilateral controls would also jeopardize U.S. technological leadership. Accordingly, we urge that BIS not impose any controls unilaterally, and only impose controls if there is a clear path towards agreement by all Wassenaar member countries. The U.S. government should devote technical and diplomatic resources in order to avoid an outcome where a domestic final rule cannot gain acceptance in multilateral fora. The U.S. government should consider the position of key partners and allies on any new specific ECCNs prior to the publication of a proposed rule by BIS.

D. Provide precise and clear guidance for any new controls.

The ANPRM indicates that it is "anticipated" that any new controls would be implemented through specific ECCNs. To the extent that any new export controls on particular technologies are imposed, it is critical that BIS do so using ECCN entries that clearly and affirmatively describe the precise items in each area of emerging technology that BIS finds - with stakeholder and Wassenaar Arrangement engagement - warrant increased control. BIS should avoid "catch-all" control categories, which create confusion and compliance problems, and are ultimately less effective, due to the ambiguity of their scope and application. BIS should take steps to provide as much specificity and clarity as possible in order to promote the effectiveness of the controls and to ensure they are understood by the entities developing and using the relevant technologies.

BIS should also provide robust guidance to accompany any new controls, such as technical definitions, frequently asked questions, etc., along with broader policy statements to make clear the policy intent underlying each set of new controls. The guidance should be issued simultaneously with the publication of any new controls. BIS should also allocate internal staff and other resourcing to ensure that it can respond quickly to requests for clarification and technical assistance from U.S. stakeholders. Precision and clarity, combined with useful implementation resources, will maximize the effectiveness of any new controls.

E. BIS should not impose controls on deemed exports, deemed re-exports, or other intra-company transfers.

Engineers and computer scientists from around the world contribute to U.S. technological leadership. While this includes U.S. engineers and scientists, it is critical that U.S. industry maintain the ability to attract and work with the best talent worldwide. Overbroad or ambiguous controls will deter the world's most talented scientists and developers – U.S. and non-U.S. alike – from accepting positions with U.S. companies, and will deter other industry stakeholders from conducting technological development activities in the U.S. If international collaboration in cutting-edge technology is quashed, U.S. leadership will suffer.

To the extent BIS adopts new controls on emerging technology, BIS should not impose any such controls on intra-company exports, re-exports, or transfers of technology between or amongst U.S. companies and their non-U.S. subsidiaries, or on intra-company deemed exports or re-exports to foreign national (or dual or third country national) employees of U.S. companies or their non-U.S. subsidiaries. If BIS does not take steps to maintain the free-flow of ideas and technology within multinational U.S.

companies and amongst their employees, export controls would devastate the ability of U.S. companies to innovate and achieve or maintain leadership positions in these technological areas.

It is also essential to maintain clear rules delineating activities that are beyond the scope of U.S. export controls. Internet Association therefore strongly supports the position taken in the ANPRM that the U.S. government should not seek to expand jurisdiction over activity that is not currently subject to the Export Administration Regulations (EAR), such as "fundamental research" collaborations.

F. Any new controls should be narrowly tailored.

In many cases, a licensing requirement operates as a prohibition. Even when there is a permissive licensing policy, many stakeholders simply lack the capacity or resources to apply for licenses. In other instances, the research, collaboration, hiring, or other decisions that could be restricted are too fast-moving to go through the licensing process. A requirement to seek licenses, even if obtainable, is often impractical in areas of dynamic and global technological innovation. This is one reason that new controls must be precise and tailored to address only particular aspects of the emerging technologies that are identified as being critical from a U.S. national security perspective.

At the same time, any new licensing requirements should themselves be narrowly tailored. In every case, BIS should consider whether licensing requirements are necessary for destinations beyond embargoed countries. In some cases, license exceptions (potentially coupled with reporting requirements) may be an appropriate regulatory approach, particularly in areas in which the U.S. government still lacks sufficient data or understanding about the nature and reach of a specific technology. A graduated approach may be warranted, where data collected through reporting could help inform decisions related to controls, so that BIS can most effectively and efficiently tailor any new controls.

II. A proposed approach to defining "emerging technologies"

Internet Association proposes the following definition of the term "emerging technologies":

"Emerging Technologies" are specific technologies that:

(a) are "required" for the "development" of items that:

(i) provide the United States with a specific and identifiable qualitative military advantage;
(ii) are essential to the national security interests of the United States; and
(iii) are not specified on the Commerce Control List or the United States Munitions List; and

(c) are not available in or otherwise being produced in foreign countries; and

(b) do not include "production" technology or any aspect of "use" technology for items in production.

III. Comments on specific technologies

Given the short timeframe for comments, Internet Association is unable to offer detailed comments on any specific technologies for consideration by BIS at this time, although we look forward to having the opportunity to do so as this rulemaking process proceeds. The technology areas identified in the ANPRM include many specific technologies that are not "emerging." To cite but one example, many of the identified subcategories of "artificial intelligence" – from natural language processing, to object recognition, to scheduling and game playing – already are in widespread global commercial use, and

U.S. companies rely on international collaboration as a critical part of the technology development process. These types of technologies cannot and should not be restricted through new export controls.

IV. Conclusion

We support the use of an ANPRM process to begin to consider this issue, which is of great importance to many U.S. industries and other U.S. stakeholders. Export controls are only likely to be effective at achieving their intended national security objectives if carefully considered and narrowly tailored, particularly in an area as global, dynamic, and intangible as exports of "emerging technologies." As evidenced by the U.S. commercial satellite control efforts in the late 1990s, unilateral controls over widely available commercial items can seriously undercut U.S. technological leadership. This is not an area for trial and error. It is critical to take a tailored approach from the outset, working in close collaboration with U.S. stakeholders and multilateral export control regimes.

Internet Association strongly believes that a free and open internet, and U.S. technological and economic leadership, play a critical role in supporting U.S. national security and foreign policy objectives. These interests require that the U.S. take a nimble and global approach to internet-related technological development, which weighs heavily against overly restrictive export controls.

Internet Association looks forward to continued engagement and collaboration with other stakeholders in this rulemaking process.

If you have any questions please do not hesitate to contact Jordan Haas, Internet Association's Director of Trade Policy, at 202-770-2924 or jordan@internetassociation.org.

Respectfully submitted,

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