

NEW BARGAINING CHIPS: US DEPARTMENT OF COMMERCE IMPOSES NEW EXPORT CONTROLS ON THE SEMICONDUCTOR INDUSTRY AND IMPOSES CHANGES TO THE UVL AND ENTITY LIST

THE ADVANCED COMPUTING AND SEMICONDUCTORS RULE

Summary of the New Export Controls

On October 13, 2020, BIS published the [Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification](#) interim final rule (the "**Advanced Computing and Semiconductors Rule**"), amending the Export Administration Regulations ("**EAR**") to impose, among other things, new license requirements for the export, reexport, or transfer (in country) of certain semiconductor, advanced computing and semiconductor manufacturing items to, from or within China. It also imposes new restrictions on US persons. The newly imposed export restrictions include the following key changes:

New Items added to the Commerce Control List: The Advanced Computing and Semiconductors Rule adds certain advanced and high-performance computing chips, computer commodities containing such chips, and semiconductor manufacturing equipment and related items to the Commerce Control List under four new Export Controls Classification Numbers ("**ECCN**") and revises existing ECCNs for associated software and technology (including 3A991, 3D001, 3E001, 4A994, 4D994, 4E001, 5A992, and 5D992). These new ECCNS are:

- 3A090 for specified integrated circuits ("**ICs**");
- 3B090 for specified semiconductor manufacturing equipment and "specially designed" parts, components, and accessories thereof;
- 4A090 for specified computers, electronic assemblies, and components that contain ICs; and,
- 4D090 for specified software "specially designed" or modified for the development or production of computers classified as ECCN 4A090 and related equipment, electronic assemblies, and components.

New License Requirements: Through the Advanced Computing and Semiconductors Rule, BIS imposed new license requirements for the following general categories: (1) certain advanced computing semiconductor chips and computer commodities that contain such chips; (2) certain items that are intended for a supercomputer located in or destined to China; (3) certain semiconductor ICs; (4) certain semiconductor manufacturing equipment, (5) a supercomputing end use in China; and (6) end use for semiconductor manufacturing in China.

Expanding the Foreign Direct Product ("FDP") Rule: BIS also expanded the scope of the EARs FDP rules by adding two new FDP rules for non-US made items when there is "knowledge" such items are destined to China, one for advanced computing and the other for supercomputing. The Advanced Computing and Semiconductors Rule also expands the existing FDP rule that applies when non-US made items are destined to companies on the Entity List. As a result, BIS has expanded the extraterritorial reach of EAR license requirements for non-US-produced items to include, in certain circumstances, advanced computing and semiconducting items destined for China if they are made from or using certain US technology or equipment.

US Person Restrictions: The Advanced Computing and Semiconductors Rule also imposes license requirements on US persons (defined as US citizens and green card holders; companies formed under US laws and their foreign branches; and asylees and refugees) to, among other things, "support" (broadly defined) the "development" or "production" of certain ICs and semiconductor manufacturing in China. The restrictions apply even if the support does not involve items subject to the EAR (i.e., even if the activity is limited to support for China-origin items).

Phased Implementation: The Advanced Computing and Semiconductors Rule is implemented in phases. The restrictions on semiconductor manufacturing items became effective on October 7, 2022. The restrictions on U.S. persons' ability to support the development, production, or use of ICs at certain semiconductor fabrication facilities in China went into effect on October 12, 2022, and the advanced computing and supercomputer controls, as well as the other changes in the rule, are effective on October 21, 2022.

Limited Temporary General License: In order to minimize the short-term impact on the supply chain of semiconductors, the Advanced Computing and Semiconductors Rule also establishes a limited in scope Temporary General License ("TGL") by allowing specific, limited activities related to items enumerated in the TGL that are destined for use outside of China. Specifically, the TGL authorizes certain exports, reexports, or transfers (in country) by certain companies (as detailed below) "to continue or to engage in integration, assembly (mounting), inspection, testing, quality assurance, and distribution of items covered by ECCN 3A090, 4A090, and associated software and technology in ECCN 3D001, 3E001, 4D090, or 4E001; or any item that is a computer, integrated circuit, 'electronic assembly' or 'component' and associated software and technology, specified elsewhere on Commerce Control List (supplement no. 1 to part 774), which meet or exceed the performance parameters of ECCN 3A090 or 4A090." It does not authorize exports, reexports, or in-country transfers or exports from abroad to end users or "ultimate consignees" in China. The TGL is effective October 21, 2022 through April 7, 2023, although it could be renewed at that time.

It is only available to companies that are not headquartered in Country Groups D:1, D:5, or E. Eligible companies must comply with all required criteria under the TGL, including its recordkeeping requirements, in order to rely on the TLG.

BIS clarified during its October 13 public briefing that once the TGL expires, license applications will be reviewed on a case by case basis for companies not headquartered in EAR Country Groups D:1, D: 5, or E.

BIS Model Certificate: BIS also published in new supplement no. 3 to part 734 of the EAR a model certificate to, among other things, assist exporting parties with the "knowledge" factor for the expanded FDP rules and mitigate risk arising from the new rule. However, BIS confirmed during its public briefing that use of this certificate is not a required step, nor does it remove the need to conduct adequate KYC due diligence.

Limited Savings Clause: Shipments of items that would require a license as a result of the Advanced Computing and Semiconductors Rule "that were on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export, on October 7, 2022, may continue to the destination under the previous license exception eligibility or without a license so long as they have been exported, reexported or transferred (in-country) before November 7, 2022." Items that are not underway before midnight on November 7, 2022 require a license. There is also a limited savings clause for certain specified deemed exports and reexports to Chinese nationals of specified technology and software that previously did not require a license if the person already had authorized access to such technology and software prior to the implementation of the Advanced Computing and Semiconductors Rule.

BIS Rationale and Objectives

During the BIS public briefing on October 13, 2022, BIS clarified its rationale and objectives for issuing the Advanced Computing and Semiconductors Rule. According to the Assistant Secretary for Export Administration, BIS has long imposed controls on exports to China to address national security and foreign policy threats, and to restrict access to technologies that can be used for military and proliferation applications such as development of weapons of mass destruction. Nevertheless, China's recent military-civil fusion strategy seeks to eliminate the barriers between its military and civilian research and commercial sectors, making it more difficult to determine which items are made for restricted end uses, thereby diminishing the effect of BIS' previous export controls.

Specifically, BIS emphasized that China's efforts to develop and employ advanced artificial intelligence ("AI") illustrates the national security and foreign policy concerns BIS is seeking to address with the Advanced Computing and Semiconductors Rule. The 2021 *Final Report of the National Security Commission on Artificial Intelligence* describes AI technology as the "quintessential dual-use technology," noting that AI technologies are the most powerful tools in generations for expanding knowledge, increasing prosperity, and enriching human experience. AI capabilities that are facilitated by supercomputing and built on advanced semiconductors present urgent US national security concerns, as they allow AI to be utilized to improve the speed and accuracy of military decision making, planning, and logistics.

These AI capabilities can also create concerns when they are applied to support facial recognition surveillance system for human rights abuses, or employed for the diffusion of communications for disinformation campaigns that undermine democratic governance. As such, the Advanced Computing and Semiconductors Rule was designed to address these national security and foreign policy considerations.

THE ENTITY LIST CRITERIA AND UVL RULE

The [Revisions to the Unverified List: Clarifications to Activities and Criteria that May Lead to Additions to the Entity List](#) final rule (the "**Entity List Criteria and UVL Rule**"), published by BIS on October 13, 2022, among other things, aims to exert pressure on non-US governments that are uncooperative when BIS determines whether a foreign entity complies with the EAR.

The Entity List Criteria and UVL Rule clarifies that a sustained lack of cooperation by the host government that effectively prevents BIS from investigating and determining compliance with the EAR may lead to the addition of the entity being investigated to the Entity List. For instance, lack of cooperation by a foreign government that prevents BIS from verifying the bona fides of companies on the Unverified List can result in those parties being moved to the Entity List, if an end-use check is not timely scheduled and completed.

In addition, this rule further adds 31 new entities to the Unverified List.

CONCLUSION

As the National Security Advisor Jake Sullivan recently stated, the United States is changing its export controls strategy from "*maintaining relative advantage*" over competitors in foundational technologies to "*maintaining as large of a lead as possible*." The two new BIS rules, together with the recently passed CHIPS Act, significantly restrict China's access to key technologies necessary to develop its semiconductor industry. The Biden Administration may also impose additional export controls to further limit China's critical technology developments. Accordingly, companies should closely monitor those developments and be prepared to conduct enhanced due diligence for future transactions with China.

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