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## U.S. Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items Restricting Chinese Access and Updates BIS's Unverified List

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On October 7, 2022, the U.S. Department of Commerce, Bureau of Industry and Security (“**BIS**” or “**the Agency**”) published two rules that (i) added new export controls that will restrict the People’s Republic of China (“**China**”) from purchasing and manufacturing certain advanced computing integrated circuits (“**IC**”), semiconductors and related items used in military applications, and (ii) updated its regulations related to the Unverified List for national security and foreign policy reasons. BIS also is implementing additional export controls in response to the Biden Administration’s review of the United States’ export control policy concerning China. These new export controls apply to items produced in the United States, as well as to items manufactured abroad that are the “direct product” of U.S. technology.

### Key Highlights:

- The new export controls will interfere with China’s ability to (i) access specific high-end computer chips; (ii) manufacture advanced semiconductors; and (iii) develop and maintain supercomputers.
- BIS is adding advanced computing and semiconductor manufacturing items to the Commerce Control List (“**CCL**”), including (i) specific advanced computer chips; (ii) computer products containing advanced computing chips; and (iii) semiconductor manufacturing equipment and related items (software and technology).
- BIS is establishing new license requirements on exports to China for the following items: (i) items used to manufacture or develop semiconductor manufacturing equipment and related products; (ii) items designated for Chinese semiconductor fabrication facilities that are intended for certain IC end-uses; and (iii) items destined for supercomputer end-uses.
- BIS is making clear that “U.S. Persons”<sup>1</sup> will require a license to perform certain activities that aid the development or manufacture of specific ICs in China, even in cases where the specific end-use of such items cannot be determined by the U.S. Person.
- The new rules clarify that foreign government actions that prohibit BIS from conducting end-use checks under the Export Administration Regulations (“**EAR**”) could result in the addition of involved entities to BIS’s Entity List thereby interfering with a company’s ability to access U.S. technology.
- BIS is establishing a Temporary General License to mitigate the short-term impact of the new export controls on the semiconductor industry.

## I. New Interim Final Rule Imposes Export Controls on Advanced Computing and Semiconductor Manufacturing Items

BIS's new interim final rule (*Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification*) (the "New Interim Final Rule") imposes restrictive controls on the following: (i) certain advanced computing semiconductor chips (including chips, advanced computing chips, integrated circuits, or ICs); (ii) transactions for supercomputer end-uses; and (iii) transactions involving specific entities on the Entity List. The New Interim Final Rule also adds export controls on certain semiconductor manufacturing items and on transactions for certain IC end-uses. Specifically, the New Interim Final Rule creates two new Foreign Direct Product ("FDP") rules<sup>2</sup> related to advanced computing and "supercomputers" and it expands the scope of an existing FDP rule to cover additional Chinese entities on the Entity List. The New Interim Final Rule also makes clear that U.S. Persons that support the development or production of ICs connected to the provision of items used to produce the most advanced semiconductors needed for military programs (e.g., missile programs or programs related to nuclear explosive devices) require a license, including in cases where U.S. Persons are unable to verify the specific end-use of such items.<sup>3</sup> This New Interim Final Rule expands the scope of licensing requirements for 28 existing entities on the Entity List located in China for national security and foreign policy reasons as well.<sup>4</sup> The Agency is accepting public comments about these changes until December 12, 2022.

The New Interim Final Rule strives to ensure that Chinese companies are unable to develop, produce, or transfer advanced computing and semiconductor technology to China's military. Accordingly, U.S.-based companies should reassess their businesses' short- and long-term goals as a result of these new controls. Companies should be proactive and consider potential business implications if they are unable to export certain items to China.

We highlight certain changes resulting from this New Interim Final Rule below.

### A. Changes Resulting from BIS's New Interim Final Rule

#### 1. Updates to the Commerce Control List

The New Interim Final Rule updates the CCL to include additional export controls on advanced computing and semiconductor manufacturing items through the creation of four new Export Control Classification Numbers ("ECCNs") and license requirements.

The New Interim Final Rule establishes the following new ECCNs for items (including related software and technology) exported, reexported, or transferred (in-country) to or within China:

| ECCN  | Description of Export Control   | Effective        |
|-------|---|------------------|
| 3A090 | Restrictions on certain high-performance ICs.   | October 21, 2022 |
| 3B090 | Restrictions on certain semiconductor manufacturing equipment.  | October 7, 2022  |
| 4A090 | Restrictions on computers, electronic assemblies, and components containing ICs in ECCN 3A090.  | October 21, 2022 |
| 4D090 | Restrictions on software specially designed or modified for the development or production of computers and related equipment, electronic assemblies, and components therefor specified in ECCN 4A090. | October 21, 2022 |

## 2. New Regional Stability Controls & Related License Requirements

The New Interim Rule imposes new regional stability (“RS”) controls on software and technology related to items described in new ECCNs 3A090, 3B090, 4A090, and 4D090.<sup>5</sup> This New Interim Final Rule controls advanced computing ICs and computer commodities that contain such ICs identified therein for RS and anti-terrorism (“AT”) reasons.<sup>6</sup> As a result, exporters will need a license to export, reexport, or transfer (in-country) to or within China the items described in the following ECCNs: 3A090, 3B090, 4A090, 5A992 (that satisfy the performance parameters of 3A090 or 4A090) and related software and technology in 3D001 (for 3A090 or 3B090), 3E001 (for 3A090 or 3B090), 3B090, or 3D001 (for 3A090 or 3B090), 4D090, 4E001 (for 4A090 and 4D090), and 5D992 (that satisfy the performance parameters of 3A090 or 4A090).<sup>7</sup> In addition, exporters will need a license to export from China to another country technology described in ECCN 3E001 (for 3A090) when the following criteria is met: (i) the covered technology is developed by an entity headquartered in China that is the direct product of software subject to the EAR, and (ii) the covered technology is for the “production” of commodities identified in ECCNs 3A090, 4A090, or identified elsewhere on the CCL that satisfy the performance parameters of ECCNs 3A090 or 4A090.<sup>8</sup>

The New Interim Final Rule makes ECCNs 3D001 and 3E001 subject to new RS license requirements. ECCN 3D001 (“‘Software’ ‘specially designed’ for the ‘development’ or ‘production’ of commodities controlled by 3A001.b to 3A002.h, 3A090, or 3B (except 3B991 and 3B992)”) is controlled for RS reasons. The RS license requirement applies to “software” for commodities controlled by 3A090 or 3B090 when exporting to China. ECCN 3E001 (“‘Technology’ according to the General Technology Note for the ‘development’ or ‘production’ of commodities controlled by 3A (except 3A980, 3A981, 3A991, 3A992, or 3A999), 3B (except 3B991 or 3B992) or 3C (except 3C992)”) also is controlled for RS reasons. The RS controls apply to “technology” for commodities controlled by 3A090 or 3B090 or “software” specified by 3D001 (for 3A090 or 3B090 commodities) when exporting to China.<sup>9</sup> Similarly, ECCN 4E001 (“‘Technology’ as follows (see List of Items Controlled)”) is controlled for RS reasons. The RS controls apply to “technology” for commodities controlled by 4A090 or “software” specified by 4D090 when exporting to China.<sup>10</sup> License exception automated commercial environment eligibility is available for existing ECCN 4E001.a (for the “development”, “production” or “use” of equipment or “software” specified in ECCNs 4A005 or 4D004) and for new ECCN 4E001.c, excluding to Country Group E:1 or E:2.<sup>11</sup> License exception strategic trade authorization ineligibility is added for ECCN 4E001.a (for the “development”, “production” or “use” of equipment or “software” specified in ECCNs 4A005 or 4D004) and ECCN 4E001.c to any of the destinations listed in Country Groups A:5 and A:6.

## 3. Restraints on U.S. Persons’ Activities

The New Interim Final Rule emphasizes that semiconductor manufacturing items enable the “development” or “production” of advanced ICs that can contribute to weapons of mass destruction (“WMD”) end-uses described in 15 C.F.R. § 744.6(b). This New Interim Final Rule revises 15 C.F.R. § 744.6 (“Restrictions on specific activities of ‘U.S. persons’”) to further control the activities of U.S. Persons that may contribute to WMD applications.<sup>12</sup> The New Interim Final Rule also informs<sup>13</sup> the public that U.S. Persons supporting the development or manufacture of ICs that satisfy specific criteria in China elicits the general prohibitions outlined in 15 C.F.R. § 744.6(b) thereby imposing a license requirement effective October 12, 2022 without exception.<sup>14</sup> Applicants face a presumption of denial when applying for an export license that authorizes participation in the activities described in this New Interim Final Rule (e.g., U.S. Persons that ship, transmit, or transfer (in-country) to or within China of any item not subject to the EAR).<sup>15</sup>

#### 4. BIS Updates its Entity List

The New Interim Final Rule also expands the licensing requirements related to 28 existing entities on the Entity list located in China effective October 21, 2022.<sup>16</sup> Specifically, this New Interim Rule adds footnote 4 to these entities, as well as a reference to the Entity List FDP rule related to license requirements. As a result, a license will be required to export, reexport, or transfer additional foreign-produced items to a footnote 4 entity if the following criteria is satisfied: (i) the foreign-produced item is the direct product of software or technology subject to most ECCNs in Category 3, 4, and 5 of the CCL; and (ii) the foreign-produced item will be incorporated into, or will be used in the development or production of any part, component, or equipment produced, purchased, or ordered by any entity with a footnote 4 designation.<sup>17</sup> The license requirement for the footnote 4 entities is found in a new 15 C.F.R. § 744.11(a)(2)(ii) and in such entities' entries in Supplement No. 4 to Part 744 of the EAR.

#### 5. Temporary General Licenses

The New Interim Final Rule establishes Temporary General Licenses to mitigate the initial impact of these new export controls on the semiconductor supply chain. Specifically, these licenses will permit limited Chinese manufacturing activities for items with end-uses outside of China. These licenses also will permit exports, reexports, or transfers to or within China by eligible companies involved in inspection, testing, distribution, integration and assembly activities related to: (i) items described in ECCNs 3A090 and 4A090, as well as related software and technology described in ECCNs 3D001, 4D090, 3E001 or 4E001; and (ii) computer and IC items, and related components, software and technology prescribed elsewhere in the CCL that satisfy the criteria described in ECCN 3A090 or ECCN 4A090. Temporary General Licenses are available through April 7, 2023.

#### B. CFIUS Implications

BIS's New Interim Final Rule also will have implications related to the Committee on Foreign Investment in the United States (the "Committee" or "CFIUS")—an interagency committee that reviews certain transactions involving foreign investment in the United States for national security concerns. The New Interim Final Rule is entirely consistent with and should be read in conjunction with an Executive Order issued by President Biden in September 2022.<sup>18</sup> The stated purpose of that Executive Order is to align CFIUS' role, actions and capabilities with the Biden Administration's national security priorities (e.g., preserving U.S. technical leadership, safeguarding sensitive data of Americans, and increasing U.S. supply chain resilience).<sup>19</sup> In this regard, the New Interim Final Rule implements new export controls that will convert certain items into "critical technologies"<sup>20</sup> for CFIUS' purposes by controlling them for RS reasons.<sup>21</sup> Specifically, all four new ECCNs will now constitute critical technologies.

- ECCN 3A090 ("Integrated circuits as follows (see List of Items Controlled)") imposes license requirements for RS reasons;
- ECCN 3B090 ("Semiconductor manufacturing equipment, not controlled by 3B001, as follows (see List of Items Controlled) and 'specially designed' 'parts,' 'components,' and 'accessories' therefor") imposes license requirements for RS reasons;
- ECCN 4A090 ("Computers as follows (see List of Items Controlled) and related equipment, 'electronic assemblies,' and 'components' therefor") imposes license requirements for RS reasons; and
- ECCN 4D090 ("Software' 'specially designed' or modified for the 'development' or 'production,' of computers and related equipment, 'electronic assemblies,' and 'components' therefor specified in ECCN 4A090") imposes license requirements for RS reasons.

Similarly, the changes to both ECCNs 5A992 and 5D992 could also convert certain products into critical technology when the applicable performance parameters are met as discussed above in Section I.A.2. Conversely, the changes to ECCNs 3D001, 3E001, and 4E001 will have no impact to the CFIUS analysis because they each already constituted critical technology.<sup>22</sup> These are important changes because they expand CFIUS' jurisdiction to review certain non-controlling investments into companies that are involved with these technologies. More specifically, these changes can now trigger a mandatory CFIUS filing obligation when a foreign person invests in an U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies and a license is required to export those critical technologies.

Notably, businesses need to conduct robust CFIUS due diligence even if transactions are not subject to a mandatory filing requirement. Businesses also must determine whether there is a sufficient nexus to national security to warrant a voluntary filing even where there are no critical technologies implicated.

As a practical matter, the New Interim Final Rule will have limited real word consequences for foreign investors generally, and Chinese investors specifically, because most foreign investors in the semiconductor industry typically would voluntarily file with CFIUS in light of its long interest in this sector even when a mandatory filing was not triggered.

## **II. New Final Rule Adds 31 Chinese Entities to the Unverified List**

BIS's new final rule (*Revisions to the Unverified List; Clarifications to Activities and Criteria That May Lead to Additions to the Entity List*) (the "New Final Rule") adds several parties to the Unverified List ("UVL") effective October 7, 2022. The Unverified List identifies parties whose bona fides BIS has been unable to verify. UVL-listed parties are disqualified from receiving items subject to the EAR through a license exception. UVL-listed parties require exporters to file an Automated Export System record for all exports to them. Exporters must also obtain a statement from each UVL-listed party prior to transferring, exporting, or reexporting to such party any item subject to the EAR which is not subject to a license requirement.<sup>23</sup>

BIS's New Final Rule adds 31 Chinese parties to the UVL because the Agency could not adequately complete end-use checks for each of the listed parties and, thus, was unable to verify their bona fides. This New Final Rule also removes 9 Chinese parties from the UVL as they have satisfied BIS's verification requirements. Consequently, this New Final Rule will prevent the use of certain license exceptions and it will require UVL statements for exports, reexports, or transfers to listed parties when such activities are not subject to a license requirement.

Additionally, BIS makes clear through this New Final Rule that it may add additional entities to the Entity List if there is a sustained lack of cooperation by the host government that prevents BIS from conducting end-use compliance checks under the EAR.

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- <sup>1</sup> “U.S. Person(s)” means any U.S. citizen, U.S. permanent resident alien, or protected individual defined in 8 U.S.C. § 1324b(a)(3), as well as any juridical person organized under the laws of the United States (including foreign branches) for purposes of 15 C.F.R. §§ 732.3(j), 736.2(b)(7), 740.21(e)(1), 744.6, 744.10, 744.11, 744.12, 744.13, 744.14, and 745.2(a)(1). See also 15 C.F.R. §§ 740.9, 740.14, and 740.21(f)(2) and Parts 746 and 760 of the EAR for definitions of “U.S. Person” that are specific to those sections and parts.
- <sup>2</sup> The FDP rules define when certain foreign made items are subject to the EAR.
- <sup>3</sup> See Section IV.C. of the New Interim Final Rule (“Providing Public Notice That ‘U.S. Person’ ‘Support’ for ‘Development’ or ‘Production,’ of Integrated Circuits That Meet Certain Specified Criteria Implicates the General Prohibitions in § 744.6(b) of the EAR”).
- <sup>4</sup> See 15 C.F.R. Supplement No. 4 to Part 744 (“Entity List”), which lists specific entities subject to license requirements for certain items under Parts 744 and 746 of the EAR. A license is required to export, reexport, or transfer (in-country) any item subject to the EAR when an entity that is listed on the Entity List is a party to the transaction as described in 15 C.F.R. § 748.5(c) through (f) of the EAR. See 15 C.F.R. § 744.11 for licensing requirements in the context of a “standards-related activity.”
- <sup>5</sup> See 15 C.F.R. § 742.6 (“Regional stability”). The license requirements in Section 742.6(a)(6) do not apply to deemed exports or deemed reexports.
- <sup>6</sup> ECCNs 3A090 and 4A090 are controlled for RS reasons for exports or reexports to China through the addition of new RS control described in 15 C.F.R. § 742.6(a)(6), as well as for AT reasons when exported to a country with an AT:1 license requirement (e.g., Iran, Syria and North Korea). ECCNs 3D001, 3E001, 4D090, and 4E001 provide the related “software” and “technology” controls on the CCL for the items controlled in ECCNs 3A090 and 4A090.
- BIS is adding ECCN 3B090 to control certain advanced semiconductor manufacturing equipment for RS and AT reasons, subject to limited license exceptions. ECCN 3B090 is referenced under the related “software” and “technology” controls under ECCNs 3D001 and 3E001.
- BIS also is adding ECCN 4D090 to account for the software related to the items controlled in ECCN 4A090.
- <sup>7</sup> See 15 C.F.R. § 742.6.
- <sup>8</sup> See 15 C.F.R. § 742.6 and 15 C.F.R. § 734.9(h)(1)(i)(B)(1) and (h)(2)(ii).
- <sup>9</sup> See 15 C.F.R. § 742.6(a)(6).
- <sup>10</sup> See 15 C.F.R. § 742.6(a)(6).
- <sup>11</sup> See 15 C.F.R. § 740.22 for eligibility criteria.
- <sup>12</sup> The Export Control Reform Act of 2018 (“ECRA”) authorizes the United States to control an U.S. Person’s activity that relates to nuclear explosive devices, missiles chemical or biological weapons, whole plants for chemical weapons precursors, foreign maritime nuclear projects, and foreign military intelligence services. BIS has previously imposed some of these controls in 15 C.F.R. § 744.6 (“Restrictions on specific activities of ‘U.S. persons’”). However, these existing controls generally require the U.S. Person to have knowledge that their activities are contributing to prohibited end-users or end-uses. The New Interim Final Rule highlights the challenges associated with identifying items that are manufactured for restricted end-uses, which abates the intended effect of these existing controls. The new activity control on U.S. Persons under the EAR for “support” (including the provision of services and foreign produced items not subject to the EAR, but capable of producing such ICs (e.g., advanced logic ICs)) is consistent with the ECRA.
- <sup>13</sup> 15 C.F.R. § 744.6(c) provides that BIS may inform U.S. Persons of an export license requirement due to activity that could involve the type of support defined in 15 C.F.R. § 744.6(b)(6) to the end-uses and end-users described in paragraphs (b)(1) through (5) of Section 744.6. BIS notifies the public of new license requirements through amendment to the EAR published in the Federal Register.
- <sup>14</sup> No license exceptions are available to overcome the license requirements in 15 C.F.R. § 744.6(b)(1) through (4) or (c)(2).
- <sup>15</sup> 15 C.F.R. § 744.6(e)(3) states that there is a presumption of denial for applications to export, reexport, or transfer (in-country) items subject to the license requirements of 15 C.F.R. § 744.6(c)(2), subject to exception (i.e., license applications for end-users in China headquartered in the United States or in a Country Group A:5 or A:6 country will be reviewed on a case-by-case basis).
- <sup>16</sup> The Entity List identifies entities that are prohibited from receiving all or some of the items subject to the EAR unless the exporter secures a license. The EAR imposes additional license requirements on exports, reexports, and transfers (in-country) to listed entities and it limits the availability of most license exceptions for these activities. See the license review policy for each listed entity in the “License Review Policy” column of the Entity List and the Federal Register document that added the entity to the Entity List for available license exceptions.

- <sup>17</sup> See 15 C.F.R. § 734.9.
- <sup>18</sup> See Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States, 87 Fed. Reg. 57,369 (Pres. Doc. Sept. 20, 2022).
- <sup>19</sup> See [From the Bully Pulpit: President Biden Orders CFIUS to Strengthen Its Reviews in Light of Evolving National Security Risks](#) for additional information on President Biden's Executive Order regarding national security policies related to CFIUS.
- <sup>20</sup> 31 C.F.R. § 800.215 defines critical technologies as items controlled pursuant to: (i) the International Traffic in Arms Regulations; (ii) certain EAR export controls; (iii) select agents and toxins; (iv) nuclear-related equipment and supplies; and (v) emerging and foundational technologies.
- <sup>21</sup> See 31 C.F.R. § 800.215(b)(2).
- <sup>22</sup> The technology specified in ECCN 4E001 is controlled for surreptitious listening reasons.
- <sup>23</sup> No license exceptions may be used for exports, reexports, or transfers (in-country) to unverified parties. Restrictions on exports, reexports, and transfers to persons listed on the UVL are provided in [15 C.F.R. § 744.15](#). The UVL is provided in [Supplement No. 6 to Part 744](#) of the EAR.

If you have questions concerning the contents of this alert, or would like more information, please speak to your regular contact at Weil or to the authors:

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