GIBSON DUNN

United States Creates New Export Controls on China for Semi-Conductor Manufacturing Technology, Advanced Semiconductors, and Supercomputers in New Phase of Strategic Tech Competition

Client Alert | October 13, 2022

On October 7, 2022, the Department of Commerce Bureau of Industry and Security ("BIS") released broad changes in the Export Administration Regulations ("EAR") that together will create an effective embargo against providing to China the technology, software, manufacturing equipment, and commodities that are used to make certain advanced computing integrated circuits ("ICs") and supercomputers. These changes include new restrictions on the participation by U.S. companies on enabling any semiconductor development or production at a facility in China[1] that manufactures or even potentially manufactures certain advanced ICs. BIS explained that it developed this sweeping set of new regulations to curtail China's use of these items in the development of weapons of mass destruction, artificial intelligence and supercomputing-enhanced war fighting, and in technologies that enable violations of human rights. BIS further noted that these broad-based controls are necessary to address China's mobilization of vast resources to support its defense modernization and the implementation of its "military-civil fusion" development strategy in ways that are contrary to U.S. national security and foreign policy interests.

BIS framed this new set of regulations as an interim final rule, which allows it to impose immediate controls with specified effective dates. Generally speaking, the new restrictions on exports of items associated with semiconductor manufacturing activities went into effect immediately on October 7, 2022, and the new restrictions on the exports of supercomputers, as well as associated parts, software, and technology, will come into effect on October 21, 2022. In addition, a new licensing requirement for support of foreign items destined for use in Chinese company development and production of ICs will become effective between these two dates, on October 12. In the table below we summarize almost 20 separate changes that BIS's interim final rule is implementing in the coming weeks.

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Effective Fri., Oct. 7, 2022 (U.S. Time)	Effective Wed., Oct. 12, 2022 (U.S. Time)	Effective Fri., Oct. 21, 2022 (U.S. Time)
15 C.F.R. § 740.2 (**NEW** restriction on license exceptions for certain ECCNs)	15 C.F.R. § 744.6 (**NEW** and **Expanded** controls on U.S. person's ability to support China development of integrated circuits)	15 C.F.R. § 734.9(e) (**Revised** Entity List FDP Rule to add additional restrictions to 28 Chinese entities on the Entity List)

15 C.F.R. § 740.10 (**Revised** recordkeeping requirement for License Exception RPL)		15 C.F.R. § 734.9(h) (**NEW** Advanced Computing FDP Rule)
15 C.F.R. § 742.6 (**NEW** Regional Stability (“RS”) Controls for semiconductor manufacturing items sent to China)		15 C.F.R. § 734.9(i) (**NEW** Supercomputer FDP Rule)
>15 C.F.R. § 744.11(b) (**NEW** criteria for adding entities to the Entity List)		15 C.F.R. Part 734, Supplement No. 1 (**NEW** model certification for Advanced Computing FDP Rule)
15 C.F.R. § 744.23 (**NEW** semiconductor manufacturing end-use prohibitions)		15 C.F.R. Part 736, Supplement No. 1 (**NEW** Temporary General License for certain newly controlled activities)
15 C.F.R. Part 774, Supplement No. 1 (**NEW** ECCN 3B090 and **Revised** ECCNs 3B991, 3D001, and 3E001)		15 C.F.R. § 740.2 (**NEW** Restriction on License Exceptions for certain ECCNs) This is an expansion of the new controls implemented on Oct. 7, 2022.
		15 C.F.R. § 742.6 (**NEW** RS Controls for semiconductor manufacturing and advanced computing items to China) This is an expansion of the new controls implemented on Oct. 7, 2022.
		15 C.F.R. § 744.1 (**NEW** restrictions on supercomputer and semiconductor manufacturing end-use prohibitions)
		15 C.F.R. § 744.11 (**NEW** licensing requirements concerning expansion of Entity List FDP Rule and “Footnote 4” Entity List entities)
		15 C.F.R. § 744.23 (**New** supercomputer and semiconductor manufacturing end-use prohibitions) This is an expansion of the new controls implemented on Oct. 7, 2022.
		15 C.F.R. Part 744, Supplement No. 4 (**NEW** Footnote 4 added to 28 Chinese entities on Entity List to account for expansion of Entity List FDP Rules)
		15 C.F.R. § 762.2 (**NEW** recordkeeping requirement to retain Advanced Computing FDP Rule

		supply chain certificate)
		15 C.F.R. § 772.1 (**NEW** definition for "supercomputer" under the Commerce Control List ("CCL"))
		15 C.F.R. Part 774, Supplement No. 1 (**Revised** Note 3 to Category 3, Product Group A; **Revised** ECCNs 3A991, 3D001, 3E001, 4A994, 4D994, 4E001, 5A992, and 5D992; **NEW** ECCNs 3A090, 4A090, and 4D090)

On October 7, 2022, BIS also released a final rule adding 31 Chinese technology companies to the Commerce Department's Unverified List. It also revised the criteria for inclusion on the Entity List to include an entity's refusal or a host country's continued interference in the ability of the entity to provide its bona fides or information to verify end-use checks. A concurrent rule issued by Commerce's Export Enforcement division states that it will be applying a new, staged approach to adding companies to the Entity List where a foreign government interferes in end-use checks, essentially using the Unverified List as a first step.

We explain and outline the impacts of each of the new provisions below.

New Controls for Exports to China of Advanced IC, Advanced IC Manufacturing Equipment, and Associated Commodities, Software and Technology (15 C.F.R. §§ 740.2, 740.10, 742.6, and Part 774, Supplement No. 1)

One of the most consequential changes contained in the new regulations is the imposition of unilateral "Regional Stability" or RS controls on exports to China of advanced computing ICs, computer commodities that contain such ICs, and certain semiconductor manufacturing equipment, as well as associated software and technology. These new unilateral controls impose a license requirement for exports, reexports, and in-country transfers of identified items to or within China.

The new RS-based licensing requirement will be imposed in stages on a set of new and revised items defined by Export Control Classification Numbers ("ECCNs"). The new RS controls on certain semiconductor manufacturing items, as well as associated software and technology, became effective on October 7, 2022. Similar controls on certain advanced computing items will come into effect on October 21, 2022.

- Effective October 7, 2022:
  - **New** ECCN 3B090 to control certain semiconductor manufacturing equipment and specially designed parts, component, and accessories.
  - **Revised** ECCNs 3B991, 3D001, and 3E001 to account for new RS controls and corresponding changes in light of new ECCN 3B090.
- Effective October 21, 2022:
  - **New** ECCNs 3A090, 4A090, and 4D090 to control specified high-performance ICs; certain computers, electronic assemblies, and components containing ICs; and associated software, respectively.
  - **Revised** ECCNs 3D001, 3E001, and 4E001 for the software and technology associated with ECCNs 3A090, 4A090, and 4D090, as well as 5A992 and 5D992 for commodities and software that meet or exceed the performance parameters of ECCNs 3A090 or 4A090.

BIS further restricted access in China to the items described by these ECCNs by limiting the availability of most license exceptions for these items, including the widely used license exception for encryption items (referred to as "ENC"). Prior to this rule change, some advanced ICs did not require licensing when exported to China solely because they incorporated an information security functionality that could qualify for license exception ENC after certain classification, filing, and/or reporting requirements were met. Under the new rules, license exception ENC will not be available to overcome the new RS license requirements for items that also meet the classification criteria for ECCNs 3A090, 4A090, and the associated software and technology in 3D001, 3E001, 4D090, and 4E001.

Importantly, the new RS controls do not apply to deemed exports or deemed reexports.

BIS will review license applications to export, reexport, and transfer in-country RS-controlled items to PRC-IC fabricators under a presumption of denial. However, BIS will review applications for semiconductor manufacturing items destined to end users in China that are headquartered in the United States or in certain closely allied nations listed in Country Groups A:5 and A:6 on a case-by-case basis.

New Controls on Specified High-Performance Computing ICs and Commodities That Contain Them (15 C.F.R. Part 774, Supplement No. 1)

BIS is also adding new unilateral "anti-terrorism" or AT controls on the export of certain high-performance ICs, and their associated software and technology. These ICs can be found in a wide range of applications, including central processing units ("CPU"), graphics processing units ("GPU"), tensor processing units ("TPU"), neural processors, in-memory processors, vision processors, text processors, co-processors/accelerators, adaptive processors, and field-programmable logic devices ("FPLDs"). These new IC controls are described under ECCNs 3A991p and 4A994.l, and their corresponding software and technology controls under ECCNs 3D991, 3E991, 4D994, and 4E992, and exports, reexports, and transfers of these items to Iran, North Korea, and Syria will now require licensing.

Impact of New AT Controls on Certain Foreign National Employees in the United States – Deemed Exports

Whenever BIS identifies new technologies for control, companies and other organizations that employ foreign nationals in the United States need to consider whether the new controls will impose a requirement for them to obtain "deemed export" licenses. With respect to these new controls on these high-performance ICs and the commodities that contain them, BIS clarified that foreign national employees who did not previously require a license, but now do, will not require licensing unless they are provided access to new technology or software that exceeds the scope of the technology or software they received previously. For example, an Iranian national technologist who lawfully accessed technology or software specified in new ECCN paragraphs 3A991.p or 4A994.l prior to the effective date would not need a new license to continue receiving the same technology or software, but would require a license for the release of controlled technology or software different from that previously released, even if the technology or software is classified under the same ECCNs.

Although this clarification creates something of a safe harbor for existing national employees who support U.S. domestic companies with the development of high-performance ICs, the harbor is not particularly deep or wide, and we expect these new export controls to pose significant deemed export compliance challenges for many. Among other challenges, few companies would have already created detailed inventories of the specific software and technology its employees have access to that Commerce now controls with the new ECCNs prior to their creation last week. Moreover, even if and when such inventories are developed, the question of what would constitute the release of a new or different software or technology to the foreign national employee will immediately present itself. For example, would foreign national's writing of new source code for the

same piece of software be considered new? What if the employee is asked to work on design changes for a similar, but different IC than a company currently sells? Not only will many companies have significant difficulties identifying access to the newly controlled technologies, and then construing what releases of technology and software are new, but once they determine a license is needed, the companies and the foreign national employees will then be faced with a protracted period of uncertainty as BIS adjudicates the deemed export license application, a process that often takes between six and twelve months.

New and Expanded Foreign Direct Product ("FDP") Rules

BIS is also significantly expanding the application of its existing Entity List FDP rules and creating two new FDP rules on advanced computing ICs and supercomputers. These rules come into effect October 21, 2022.

1. *Entity List FDP Rule (15 C.F.R. §§ 734.9(e), 744.11, and Part 744, Supplement No. 4)*

After early attempts to cut off the flow of U.S.-origin items to Huawei, BIS modified the national security-related control known as the Foreign Direct Product Rule to enable it to target a broader range of exports to specific companies that it has designated to the EAR Entity List ("Entity List FDP rule"). The Foreign Direct Product Rule concept is at the farthest end of U.S. efforts to extend its export controls jurisdiction extraterritorially because it applies to non-U.S.-origin items that are the direct products of specified U.S.-origin software and technology, or of "major components" or whole plants that are the direct product of this software and technology. BIS also has used new FDP rule modifications to limit the access by Russian and Belarusian military end users and military intelligence end users to commodities produced with controlled U.S. software and technology.

BIS has now expanded its Entity List FDP rule to cover 28 China-based entities that it had already designated to the Entity List over the last several years for their alleged participation in nuclear and other weapons of mass destruction proliferation, as well as surveillance and other human rights violations. Thus, in addition to requiring licenses for exports of U.S. origin items, any non-U.S. based exporters also will require U.S. export licenses to export, reexport or transfer items that are direct products of technology or software classified by the following ECCNs: 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D002, 5D991, 5E001, 5E002, or 5E991, as well as the direct product of any plant or "major component" of a plant that is the "direct product" of U.S.-origin "technology" or "software" that is specified in the ECCNs listed above. These ECCNs apply to most ICs, computers, telecommunications, and information security items controlled by Commerce.

BIS also has created two new, similarly structured FDP rules to target the export, reexport and transfer of foreign direct products used to develop or produce ICs and supercomputers for China-based manufacturers.

2. *Advanced Computing FDP Rule (15 C.F.R. §§ 734.9(h), 762.2, and Part 734, Supplement No. 1)*

The Advanced Computing FDP rule expands the scope of the EAR to certain items destined for China, as well as certain items produced in China. The rule is applicable whenever an exporter has "knowledge" (as defined under the EAR to cover actual knowledge and an awareness of a high probability, which can be inferred from acts constituting willful blindness) that the item is (1) destined for China or will be incorporated into any "part," "component," "computer," or "equipment" (not designated EAR99) destined for China, or (2) the technology is developed by an entity headquartered in China for the "production" of a mask or an IC wafer or die. The foreign-produced items that are affected by this new rule include those items that are either:

- (i) the "direct product" of "technology" or "software" subject to the EAR and specified in ECCNs 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D090, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D002, 5D991, 5E001, 5E991, or 5E002; and

  (a) are described by ECCNs 3A090, 3E001 (for 3A090), 4A090, or 4E001 (for 4A090); or

  (b) are ICs, computers, "electronic assemblies," or "components" specified elsewhere on the CCL that meet the performance parameters of ECCNs 3A090 or 4A090;

- (ii) or are produced by any complete plant or "major component" of a plant that is located outside the United States, when the plant or "major component" of a plant, whether made in the United States or a foreign country, itself is a "direct product" of U.S.-origin "technology" or "software" that meets the requirements discussed immediately above.

As a suggested compliance aid, BIS has provided a suggested (voluntary) sample certification that suppliers can complete to comply with this Advanced Computing FDP. *See* Supplement 1 to Part 734. In this certification, the supplier would assert that an item being provided will be subject to the EAR if a future transaction meets the destination scope outlined above. If a certificate is not provided by a supplier, BIS explains that the supplier's customers will need to complete additional due diligence to determine if the item purchased is subject to the Advanced Computing FDP's licensing requirement for onward exports to China. BIS further notes, however, that the certification alone should not be the only due diligence conducted before an export occurs. Moreover, BIS advises that entities outside of China that receive 3E001 for 3A090 technology from China should consider confirming that a license was obtained to export such technology from China, as the provisions of the Advanced Computing FDP also extend to certain items produced in China by China-based manufacturers. If no such license has been obtained, the item would have been exported from China in violation of the EAR. In addition, parties involved in supporting the transaction would be subject to the EAR's General Prohibition 10, which prohibits any person from taking further action on a transaction with knowledge (see definition above) that a violation has occurred or is about to occur.

3. *Supercomputer FDP Rule (15 C.F.R. §§ 734.9(i) and 772.1)*

Similarly, BIS has now issued the Supercomputer FDP rule to expand the scope of the EAR to certain items destined for China whenever the exporter has "knowledge" that the foreign-produced item will be (1) used in the design, "development," "production," operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of a "supercomputer" (as defined in the EAR) located in or destined to China; or (2) incorporated into, or used in the "development," or "production," of any "part," "component," or "equipment" that will be used in a "supercomputer" located in or destined to the China.

The foreign-produced items affected by this new rule are as follows:

- foreign-produced items that are the "direct product" of "technology" or "software" subject to the EAR and specified in ECCNs 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, 5E991, 5D002, or 5E002; or

- are produced by any plant or "major component" of a plant that is located outside the United States, when the plant or "major component" of a plant, whether made in the United States or a foreign country, itself is a "direct product" of U.S.-origin "technology" or "software" that is specified in the ECCNs 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991,

5E001, 5E991, 5D002, or 5E002.

As of October 21, 2021, “supercomputer” will be specifically defined under the EAR as “a computing “system” having a collective maximum theoretical compute capacity of 100 or more double-precision (64-bit) petaflops or 200 or more single-precision (32-bit) petaflops within a 41,600 ft^3 or smaller envelope.” Commerce’s definition for “supercomputer” is interesting in at least two ways. First, it appears that a large variety of advanced ICs can be used to create the level of computing power density outlined by the definition. Thus, this definition creates a kind of catch-all for computing power regardless of how it is achieved. Second, data center providers, and those who support them, may need to consider whether any specific data center could conceivably meet this computing power threshold.

4. *Temporary General License (15 C.F.R. Part 736, Supplement No. 1)*

Taken together, these new sets of RS, FDP, and ECCN-defined controls will have a significant impact on the ability of China-headquartered companies to obtain access to the commodities, technology and software required to manufacture ICs and Supercomputers. But a larger policy comes into focus when one considers a Temporary General License (“TGL”) that BIS issued alongside these controls.

The TGL authorizes companies headquartered in the United States or in a subset of other countries (those not headquartered in Country Groups D:1 or D:5 or E) to continue exporting certain ICs and associated software and technology for specified purposes to their affiliates and subsidiaries located in China through April 7, 2023, provided that none of the ultimate recipients of the items being manufactured with these products are located in China. The announced objective for the TGL is to mitigate the immediate disruption that these new controls will have on users of the TGL’s supply chains. Once the TGL expires in April 2023, exporters will need to apply for an individually validated export license to export such advanced computing chips, assemblies containing them, and related software and technology to China for supply chain-related activities, such as assembly, inspection, quality assurance, and distribution. These applications will carry a presumption of denial, although license applications for semiconductor manufacturing items destined to end users in China that are headquartered in the United States or in certain closely allied nations listed in Country Groups A:5 and A:6 will be reviewed on a case-by-case basis.

The TGL allows, at least until April 7, 2023, companies to continue exporting the following items:

- ECCNs 3A090, 4A090, and associated software and technology in ECCNs 3D001, 3E001, 4D090, or 4E001; and

- any item that is a computer, IC, “electronic assembly” or “component” and associated software and technology, specified elsewhere on CCL which meets or exceeds the performance parameters of ECCNs 3A090 or 4A090.

The TGL’s expiry in April 2023 provides but a short time for U.S. and other Group A:5 and A:6 headquartered companies to find alternative fabricators for ICs. Other non-China based fabricators may already be at capacity, and the timeline for bringing new fabrication facilities online and qualifying them to produce new ICs is far longer than the timelines currently contemplated by the TGL.

New End-User/End-Use Controls (15 C.F.R. §§ 744.1 and 744.23)

The new regulations also restrict China’s access to ICs and supercomputing through the imposition of new end-user and end-use controls. These controls are knowledge-based controls that require exporters to seek BIS licensing when they know, are informed, or are otherwise unable to determine that their exports will be put to certain end uses.

On October 7, 2022, these end-user/end-use prohibitions were extended to the following:

- any item subject to the EAR used in the “development” or “production” of ICs at a semiconductor fabrication “facility” located in China which fabricates certain ICs such as advanced logic, NAND, and DRAM ICs;
- any item subject to the EAR and classified in an ECCN in Product Groups B, C, D, or E in Category 3 of the CCL when the individual or entity knows the item will be used in the “development” or “production” of ICs at any semiconductor fabrication “facility” located in China, but for which the individual or entity does not know whether such semiconductor fabrication “facility” fabricates advanced ICs; and
- any item subject to the EAR for which the individual or entity will be used in the “development” or “production” in China of any “parts,” “components” or “equipment” specified under ECCNs 3B001, 3B002, 3B090, 3B611, 3B991, or 3B992.

On October 21, 2022, these end-user/end-use prohibitions also will apply to certain “supercomputers” as defined under the EAR, namely:

- any IC subject to the EAR and specified in ECCNs 3A001, 3A991, 4A994, 5A002, 5A004, or 5A992 when the individual or entity knows the item will be used in (1) the “development,” “production,” “use,” operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of a “supercomputer” located in or destined to China; or (2) incorporation into, or the “development” or “production” of any “component” or “equipment” that will be used in a “supercomputer” located in or destined to China; and
- any computer, “electronic assembly,” or “component” subject to the EAR and specified in ECCNs 4A003, 4A004, 4A994, 5A002, 5A004, or 5A992 when the individual or entity knows the item will be used for the activities described above.

Commerce notes that it will review all end-user/end-use license applications with a presumption of denial, but that it will consider license applications for semiconductor manufacturing items destined to end users in China that are headquartered in the United States or in certain closely allied nations listed in Country Groups A:5 and A:6 on a case-by-case basis.

Activities of U.S. Persons (15 C.F.R. § 744.6)

Effective October 12, U.S. persons will be prohibited from engaging in certain activities, even when dealing with items that are non-U.S. origin.

Specifically, BIS will now require U.S. persons to apply for licenses to facilitate or engage in shipping, transmitting or transferring to or within China the following products:

- any item not subject to the EAR that the individual or entity knows will be used in the “development” or “production” of ICs at a semiconductor fabrication “facility” located in China that fabricates certain ICs such as advanced logic, NAND, and DRAM ICs; or in the servicing of any such items;
- any item not subject to the EAR and meeting the parameters of any ECCN in Product Groups B, C, D, or E in Category 3 of the CCL that the individual or entity knows will be used in the “development” or “production” of ICs at any semiconductor fabrication “facility” located in China, but for which the individual or entity does not know whether such semiconductor fabrication “facility” fabricates certain ICs such as advanced logic, NAND, and DRAM ICs; or in the servicing of any such items; or

- any item not subject to the EAR and meeting the parameters of ECCNs 3B090, 3D001 (for 3B090), or 3E001 (for 3B090) regardless of end use or end user; or in the servicing of any such items.

Commerce will review all such license applications with a presumption of denial, although license applications for semiconductor manufacturing items destined to end users in China that are headquartered in the United States or in certain closely allied nations listed in Country Groups A:5 and A:6 will be reviewed on a case-by-case basis.

Additions to Unverified List ("UVL") and Changes to Entity List Designation Criteria (15 C.F.R. § 744.11(b))

The new final rule adds specific criteria for designation to the more restrictive Entity List:

- an entity precludes access to, refuses to provide, or provides false or misleading information related to the parties to the export transaction or the underlying item; or
- where there is a sustained lack of cooperation by the entity's host government to facilitate end-use checks of entities on the UVL.

In a related statement of a new policy in line with these changes in the final rule, BIS laid out a two-step process whereby companies that do not complete requested end-use checks within 60 days will be added to the UVL, and if those companies are added to the UVL due to the host country's interreference, after a subsequent 60 days of the end-use check not being completed, the company on the UVL will be transferred to the Entity List.

The new policy states that for all companies currently on the UVL as of the date of the policy (October 7, 2022), including the 31 new China company additions, the 60-day "escalation" clock begins immediately.

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[1] As a reminder, under current U.S. export controls, China also includes the Hong Kong Special Administrative region after the United States revoked Hong Kong's special status under U.S. law in 2020.

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