

CLIENT ALERT

New Far-Reaching Export Controls on Semiconductors and Advanced Computing Adopted to Slow China's Technological Rise

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As part of a far-reaching package of new rules intended to increase pressure on China and maintain American technological leadership, the U.S. Department of Commerce (“**Commerce**”) is once again expanding the reach of the Foreign Direct Product Rule (“**FDPR**”) for exports to China while also adding new classes of controlled products and restrictions on U.S. person support for the development or production of certain integrated circuits. The new [rules](#), released on October 7, 2022, are designed to halt exports to China of a variety of advanced computing and semiconductor-related items and to prevent China from acquiring the means to produce high-end computer chips on its own. In adopting these new rules, the Commerce Department continues a pattern of expanding its regulation of a broad swath of extraterritorial conduct using U.S. export controls, pursuing one of the most systemic expansions of U.S. export controls in the past decade.

Specifically, the new rules:

- Add certain advanced computing chips, semiconductor manufacturing equipment, and associated technology to new Commerce Control List (“**CCL**”) categories;
- Establish new end-use controls for certain items on the CCL; and
- Expand the scope of the FDPR, addressing entities on the Entity List to cover those items and to include additional end-users.

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In addition, the rules take some innovative steps both to expand Commerce's reach and to mitigate the most immediate and severe impacts on the global supply chain. For instance, the rules restrict certain activity by U.S. persons, but also introduce a model "certificate of compliance" to Commerce's regulations that exporters can use as one diligence tool to help comply with the expanded FDPR. Additionally, the new rules establish a "temporary general license" for exports, reexports, or transfers of items covered by the rules in certain circumstances. The new provisions will go into effect in phases, with some applicable beginning immediately on October 7, and others in effect on October 12 and 21. Commerce held a public briefing to discuss the new rules on October 13, 2022, and has asked for public comments on the new rules over the 60 days following publication, though some of the rules will have already been in effect by then.

1. Key Elements of the New Rules

a. **Additional Items on the Commerce Control List and Regional Stability Controls**

The baseline for the new rules is the specification of several new categories in the CCL. The products captured by these new categories were not necessarily uncontrolled (*i.e.*, EAR99 goods) previously; however separately categorizing them simplifies implementing the corresponding controls discussed below. Specifically, the rule adds categories 3A090 (certain high-performance **integrated circuits**, or "**ICs**"), 3B090 (advanced semiconductor manufacturing equipment), 4A090 (computers, electronic assemblies, and components that contain ICs captured by 3A090), and 4D090 (software associated with 4A090). Each of these new categories is controlled due to Regional Stability ("**RS**") when the products or associated technologies are exported to China. Commerce also made edits to 3D001, 3E001, and 4E001 to capture these new ECCNs and to also add RS controls to them when exporting to China.

The new RS controls took effect October 7, 2022 for items controlled under ECCNs 3B090, 3D001 (for software associated with ECCN 3B090), and 3E001 (for technology associated with ECCN 3B090). For these categories, Commerce additionally exempts deemed exports to Chinese nationals located outside of China from control. On October 21, 2022 the new RS controls will expand to include items specified in ECCNs 3A090, 4A090, 5A992 (that meet or exceed the performance parameters of ECCN 3A090 or 4A090), and associated software and technology in ECCNs 3D001 (for software associated with ECCN 3A090), 3E001 (for technology associated with ECCN 3A090), 4D090, 4E001 (for technology associated with ECCNs 4A090 and 4D090), and 5D992 (that meet or exceed the performance parameters of ECCN 3A090 or 4A090).

The new rules also substantially limit the availability of license exceptions for all of the identified CCL entries, with License Exceptions RPL, GOV, and TSU available only in limited circumstances. Applications for licenses to export, reexport, or transfer (in country) semiconductor manufacturing items destined to end users in China that are headquartered in the United States or in a country in the EAR's Country Group A:5 or A:6 (as identified in EAR Part 740, Supp. No. 1) will be considered on a case-by-case basis; other applications will be reviewed with a presumption of denial.

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b. New End-Use Controls

The new regulations then impose further controls on a variety of exports based on their end-use. Specifically, Commerce establishes a presumption of denial for license requests for end-users in China for “**semiconductor manufacturing equipment**” and so-called “**supercomputers**” when certain conditions are met.

For manufacturing equipment-related exports, the new rules impose a license requirement under a presumption of denial to the following three categories:

1. Any item subject to the EAR when the exporter knows it will be used in the development or production of integrated circuits at a semiconductor factory located in the PRC that manufactures ICs meeting specified criteria.
2. Any item classified in Product Group B, C, D, or E in Category Three when the exporter knows it will be used in the development or production of integrated circuits at any semiconductor fabrication facility located in the PRC, but the exporter *does not know* whether such semiconductor fabrication “facility” fabricates integrated circuits that meet any of the criteria in category (1) above.
3. Any item subject to the EAR when the exporter knows it will be used in the development or production in the PRC of any parts, components or equipment specified under ECCN 3B001, 3B002, 3B090, 3B611, 3B991, or 3B992.

No license exceptions are applicable to the new semiconductor manufacturing equipment end-use controls. As with the new CCL-based controls, under these new end-use controls applications for licenses to export, reexport, or transfer items subject to the EAR to end-users in China that are headquartered in the United States or in countries in Country Group A:5 or A:6 will be reviewed on a case-by-case basis. These new end-use controls took effect on October 7, 2022.

For supercomputer-related exports, the new regulations will apply a presumption of denial to license requests for certain products destined for use in:

1. the development, production, use, operation, installation, maintenance, repair, overhaul or refurbishing of a supercomputer located in China; or
2. the incorporation into, or development or production of, any component or equipment that will be used in a supercomputer located in China.

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Once again, no license exceptions are applicable to the new supercomputer-related end-use controls. These controls take effect on October 21, 2022.

c. New Restrictions on U.S. Person Activity

The Export Reform Control Act of 2018 (“**ECRA**”) specified that no U.S. person may “support” specified WMD-related and military intelligence-related end uses and end users, which Commerce generally implemented via EAR § 744.6. As part of this rulemaking, Commerce makes findings that semiconductor manufacturing items that enable the “development” or “production” of advanced ICs may support the WMD-related and military intelligence-related end uses and end users singled out by the ECRA and amends § 744.6 accordingly. Therefore, U.S. persons will now require a license to ship, transmit, or transfer (in-country) to or within the PRC or service within the PRC: 1) items not subject to the EAR intended to assist the “development” or “production” of ICs meeting certain parameters (or if the U.S. person is unsure whether the ICs meet the parameters), or 2) items not subject to the EAR that meet “technical parameters set forth on the CCL” or meet the requirements of certain CCL entries.

These prohibitions on U.S. person activity are effective beginning October 12, 2022. No license exceptions are applicable to these restrictions, though again, applications for end-users in China that are headquartered in the United States or a country in Country Group A:5 or A:6, will be considered on a case-by-case basis.

d. Further Expansion of the FDPR

The new rules build on the FDPR that Commerce has increasingly used as an export control tool. The FDPR had prohibited the export, first to Huawei and its subsidiaries, and then to entities in Russia and Belarus, of certain foreign-produced items that were the direct product of, or the direct product of a plant or major component of a plant that was itself the direct product of, certain specified U.S.-origin technology or software.

With its most recent rulemaking, Commerce first expands the FDPR to encompass both supercomputers (as defined above) and other “**advanced computing**” inputs (essentially items identified in new ECCN 3A090 or 4A090, ICs that meet or exceed the parameters set in those ECCNs, or any item used in their development) destined for the PRC. Accordingly, any of these items, even if they are foreign produced, that are either direct products of U.S. technology, or the direct product of a plant or major component of a plant that is a direct product of U.S. technology, now require a license for export to China.

Second, Commerce expanded the scope of the so-called “**Entity List FDPR**” (EAR § 734.9(e)) which had previously applied primarily to Huawei and its subsidiaries. Commerce has now added an additional 28 Chinese entities (all already listed on the Entity List) to the revised end-user scope of the Entity List FDPR.

The expanded FDPR goes into effect on October 21, 2022.

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e. Additions to the Unverified List

Commerce additionally, through a separate (related) [rulemaking](#), added 31 entities, including prominent Chinese chip manufacturer Yangtze Memory Technologies Co., Ltd., to the EAR Unverified List (“**UVL**”). The UVL identifies parties for whom Commerce has not been able to confirm bona fides and are accordingly ineligible to receive items subject to the EAR by means of a license exception. Prior to exporting, reexporting, or transferring an item subject to the EAR that does not require a license to a party on the UVL, a party must obtain a written certification statement from the UVL listee.

f. Mitigation Measures

Commerce has also attempted to blunt the most immediate effects and assist exporters with their compliance responsibilities. Notably, BIS has offered a “model certificate” for exporters, reexporters, and transferors to use to clarify responsibilities under the expanded FDPR. The model certificate provides specific language that relevant parties can use to clarify that they are aware the equipment or products they are transacting in are subject to the advanced computing FDPR. Commerce views this certification as a potential tool for reducing the burden on parties in a given supply chain; however, Commerce specifies that “[o]btaining the certification ... does not relieve exporters, reexporters, and transferors of their obligation to exercise due diligence in determining whether items are subject to the EAR.”

Commerce also introduced a “Temporary General License” that allows for exports, reexports, in-country transfers, and exports of items covered by ECCN [3A090](#), [4A090](#), [3D001](#) (for [3A090](#) or [4A090](#) items), [3E001](#) (for [3A090](#) or [4A090](#) items), [4D090](#), or [4E001](#) (for [3A090](#) or [4A090](#) items), or items specified elsewhere on the CCL that meet or exceed the performance parameters of ECCNs [3A090](#) or [4A090](#) from abroad by companies not headquartered in Country Group D1, D5, or E to or within China to continue or to engage in integration, assembly (mounting), inspection, testing, quality assurance, and distribution.

2. Likely Impact

These new regulations represent a significant expansion of U.S. export controls on China. In addition, they may signify the path Commerce intends to take with respect to China going forward, presaging ever greater controls over industries where the U.S. views Chinese competition as a strategic and national security threat (such as biotechnology). For now, the new rules expand Commerce's controls over new categories of semiconductors, computers, and related products and expand the scope of the behaviors and products over which Commerce claims jurisdiction. Companies involved in high technology will need to parse both the rules and their operations to ensure continued compliance and navigate Commerce's ever more complex licensing regime.

As with prior iterations of the FDPR, this newest expansion will have a broad impact on manufacturers across the supply chain. In addition to “know your customer” procedures, exporters who intend to send any of the newly controlled technology (or its equivalent) to the PRC would do well to also institute “know your provider” procedures in order to avoid

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running afoul of the expanded controls. The model compliance certificate will likely be one helpful tool, but manufacturers may need to conduct additional diligence across their commercial relationships.

The U.S. person-related provisions described above dramatically raise the stakes for U.S. citizens or legal permanent residents involved at any stage of the semiconductor supply chain. Even if working abroad for a non-U.S. company, such persons will need to confirm that their activities are not covered by the new license requirements.

Moreover, even lack of knowledge of the end-use will not necessarily be a defense for U.S. persons engaged in activity covered by the new rule. Under the U.S. person restrictions, even where the U.S. person is unsure of whether the ICs being produced in China meet the technical specifications, a license is required. And, this negative presumption is mirrored in the new end-use restrictions as well, where even when an exporter does not know whether a semiconductor fabrication facility produces ICs that meet the identified technical specifications a license is required.

As Commerce implements these new rules over the next month, and digests public comments through the next 60 days, parties should be prepared for additional developments. Industry participants should also prepare for possible Chinese responses to these measures, including through resort to the "[Law on Countering Foreign Sanctions](#)," adopted in 2021. As described above, though, these new rules are complex and are likely to impact significant swaths of a critical and interconnected global industry.

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