

# BIS Updates October 2022 Semiconductor Export Control Rules

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On October 17, 2023, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) released two interim final rules<sup>1,2</sup> to reinforce and expand controls on (a) advanced semiconductors and related computing items (the Advanced Semiconductors Rule) and (b) semiconductor manufacturing equipment (the Semiconductor Manufacturing Equipment Rule). BIS explained that the new rules, which expand upon the semiconductor export controls BIS imposed in a rule issued October 7, 2022 (the October 2022 Rule),<sup>3</sup> are intended to address China's efforts to obtain advanced integrated circuits (ICs) for the development of artificial intelligence (AI) and other technologies for military applications and to procure manufacturing equipment essential to producing ICs for advanced weapons systems.

The new rules:

- Broaden the technical control parameters for semiconductors and semiconductor manufacturing equipment established in the October 2022 Rule.
- Impose licensing requirements for approximately 40 countries beyond China (Restricted Countries) and end-use controls for companies headquartered or whose "ultimate parent" is located in China and a smaller subset of these additional countries (Prohibited Countries).
- Extend restrictions on activities of U.S. persons, including vis-à-vis companies from Prohibited Jurisdictions.
- Introduce other measures to address the U.S. government's circumvention concerns.
- Add new red flags to assist with compliance.
- Include changes to clarify the October 2022 Rule.

Commerce Secretary Gina Raimondo described the new measures as "clos[ing] loopholes" in the October 2022 Rule and stated they will likely be updated "at least annually." The new rules become effective on November 17, 2023.

## The Advanced Semiconductors Rule

The Advanced Semiconductor Rule expands upon the controls for advanced semiconductors (and computers containing such semiconductors) established in the October 2022 Rule. Key updates include:

- **Changes to technical parameters for ECCN 3A090:** The rule controls additional semiconductors under Export Control Classification Number (ECCN) 3A090 and computers containing such semiconductors under ECCN 4A090 by establishing a new "performance density threshold" to capture semiconductors with lower processing performances. BIS noted that this change is intended to preempt workarounds, such as "simply purchasing a larger number of smaller data center AI chips which, if combined, would be equally powerful as restricted chips." The rule includes a number of exceptions (as well as a new license exception, discussed below) that are intended to calibrate the impact of these expanded controls.

<sup>1</sup> Interim Final Rule, *Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections* (Oct. 17, 2023).

<sup>2</sup> Interim Final Rule, *Export Controls on Semiconductor Manufacturing Items* (Oct. 17, 2023).

<sup>3</sup> Interim Final Rule, *Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification* (Oct. 7, 2022).

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- **New ECCNs based on technical parameters of ECCNs 3A090 and 4A090:** In response to public comments, the Advanced Semiconductors Rule creates nine new ECCNs to control items found elsewhere on the Commerce Control List that meet or exceed the performance parameters of ECCNs 3A090 and 4A090. (The October 2022 rule required exporters to self-identify any such items.)
- **Expansion of controls beyond China:** The Advanced Semiconductors Rule expands the license requirements for ECCN 3A090 semiconductors, 4A090 computers and related products beyond China to the approximately 40 countries identified in Country Groups D:1, D:4 or D:5 of the Export Administration Regulations (EAR) that are not also specified in Country Groups A:5 or A:6 (Restricted Countries — see Appendix 1). License applications will generally be reviewed under a presumption of approval, apart from the applications involving a smaller subset of countries (China and others in Country Group D:5, and Macau) (Prohibited Countries — see Appendix 2), which BIS will review under a presumption of denial.
- **New tiered approach to ECCN 3A090:** The Advanced Semiconductors Rule adopts a two-tiered approach to ECCN 3A090. The most restrictive controls now appear in ECCN 3A090.a and are tied to what BIS describes as “the most powerful data center ICs.” Less advanced semiconductors are now controlled under ECCN 3A090.b. A new license exception for “Notified Advanced Computing” (NAC) authorizes shipments of ICs controlled under ECCN 3A090, 4A090 computers, and related items (other than data center items meeting the parameters of 3A090.a) in several circumstances, provided the terms of the license exception are met. For exports to Prohibited Countries, for example, reliance on license exception NAC requires 25 days’ advance notification so that BIS can determine whether the transaction may proceed under the license exception or instead require a license.
- **New semiconductor end-use controls:** The Advanced Semiconductors Rule adds a new end-use control for ECCN 3A090 semiconductors, ECCN 4A090 computers and related items when the exporter, reexporter or transferor has “knowledge” that the item is destined for any entity headquartered in, or whose “ultimate parent” company is headquartered in, any Prohibited Country (Prohibited Entity). BIS explained that this control is intended to make sure that the new rules “are not undermined” by a Prohibited Entity “setting up cloud or data servers in other countries to allow these headquartered companies of concern to continue to train their AI models in ways that would be contrary to U.S. national security interests.” The Advanced Semiconductors Rule introduces the concept of “ultimate parent” — a term left undefined — into the EAR to further extend the scope of relevant restrictions in an apparent effort to address circumvention risk. The rule also creates a new end-use control for technology specified in ECCN 3E001 (for 3A090 semiconductors) when the technology is subject to certain Foreign Direct Product Rules under the EAR and is developed by a Prohibited Entity.
- **Expansion of restricted support activities by U.S. persons:** The Advanced Semiconductors Rule broadens the scope of the restrictions on support activities by U.S. persons imposed by the October 2022 Rule. The new rule imposes new licensing requirements when U.S. persons provide support with respect to items not otherwise subject to U.S. export controls to any Prohibited Country where there is knowledge the item supported by the U.S. person will be used in the development or production of semiconductors at a facility of a Prohibited Entity. With limited exceptions, covered support activities include “authoriz[ing] the shipment, transmittal, or transfer (in-country) of items not subject to the EAR”; “conduct[ing] the delivery, by shipment, transmittal, or transfer in-country, of items not subject to the EAR;” and “service[ing], including maintaining, repairing, overhauling or refurbishing items not subject to the EAR.”
- **Expanded advanced computing Foreign Direct Product Rule:** The new rule expands the advanced computing Foreign Direct Product Rule to all Prohibited Countries, and adopts end-use controls where Prohibited Entities are parties to the transaction involving the foreign-produced items (including as purchasers, intermediate consignees, ultimate consignees or end users).
- **Temporary general license:** The rule establishes a temporary general license (TGL) authorizing integration, assembly (mounting), inspection, testing, quality assurance and distribution of certain advanced computing items when the ultimate end use of such items is (i) outside of the expanded destinations now subject to license requirements and (ii) by entities other than Prohibited Entities. This license is valid until December 31, 2025.
- **New due diligence requirements:** The rule creates new due diligence requirements and identifies red flags to assist parties in their assessment of whether foreign parties of concern are attempting to circumvent the controls.

### The Semiconductor Manufacturing Equipment Rule

The Semiconductor Manufacturing Equipment Rule includes four primary changes from the October 2022 Rule:

- **Additional controlled semiconductor manufacturing equipment:** The rule imposes new controls on additional types of semiconductor manufacturing equipment by replacing ECCN 3B090 and expanding provisions in ECCNs 3B001 and 3B002. Additional conforming changes are made elsewhere in the EAR.

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- **Expansion of controls beyond China:** Like the Advanced Semiconductors Rule, the Semiconductor Manufacturing Equipment Rule expands license requirements beyond China, to all Prohibited Countries.
- **Expansion of restricted support activities by U.S. persons:** The rule refines the U.S. person support restrictions related to semiconductor manufacturing. Among other things, the changes clarify that advanced-node semiconductor production facilities include those where certain late-stage product engineering and early-stage manufacturing steps occur, as well as R&D facilities that house development and product engineering activities but that may not be engaged in volume manufacturing of semiconductors. The rule excludes from the restrictions: (i) “back-end” production steps, such as assembly, testing or packaging steps that do not alter the technology level of semiconductors, consistent with previously released FAQ guidance; and (ii) U.S. persons employed or working on behalf of a company headquartered in the United States or a destination specified in Country Group A:5 or A:6 and not majority-owned by an entity that is headquartered in a destination specified in Country Group D:5 or Macau.
- **Temporary general license:** The rule establishes a TGL to provide U.S. and other semiconductor manufacturing equipment producers additional time to identify alternative sources of supply outside of Country Group D:5 countries, or to acquire individually validated licenses. This license is valid until December 31, 2025.

### No Broad Cloud Computing Restrictions ... Yet

While the new rules include some restrictions indirectly targeting some cloud computing services (most notably the advanced semiconductor end-use controls for Prohibited Entities), the rules do not attempt to control the provision of cloud computing services (Infrastructure as a Service, or IaaS) in a more comprehensive

manner. In commentary accompanying the rules, BIS notes that the agency is “concerned regarding the potential for China to use IaaS solutions to undermine the effectiveness” of the semiconductor rules, and that the agency “continues to evaluate how it may approach this through a regulatory response.” Among other topics, the new rules seek comments from IaaS providers “on the feasibility for them in complying with additional regulations in this area, how they would identify whether a customer is ‘developing’ or ‘producing’ a dual-use AI foundation model, and what actions would be needed to address this national security concern while minimizing the business process changes that would be required to comply with these regulations.”

### Entity List Additions

Finally, BIS issued a third rule adding 13 China-based entities to the Entity List for their alleged involvement in the development of advanced computing ICs. These 13 listings all include a “footnote 4” designation, which restricts exports, reexports or transfers (in country) to these entities or when these entities are a party to the transaction under the Entity List Foreign Direct Product Rule implemented in the October 2022 Rule.

### Takeaways

With the Advanced Semiconductors Rule and Semiconductor Manufacturing Equipment Rule, BIS delivered on its public statements that the agency would expand and clarify the October 2022 Rule. Companies throughout the semiconductor supply chain should carefully evaluate the new rules, which cover jurisdictions well beyond China and address additional equipment and support not covered by the October 2022 Rule.

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### Appendix 1: Restricted Countries

- Afghanistan
- Armenia
- Azerbaijan
- Bahrain
- Belarus
- Burma
- Cambodia
- Central African Republic
- China and Macau
- Democratic Republic of Congo
- Cuba
- Eritrea
- Georgia
- Haiti
- Iran
- Iraq
- Jordan
- Kazakhstan
- North Korea
- Kuwait
- Kyrgyzstan
- Laos
- Lebanon
- Libya
- Moldova
- Mongolia
- Oman
- Pakistan
- Qatar
- Russia
- Saudi Arabia
- Somalia
- South Sudan
- Sudan
- Syria
- Tajikistan
- Turkmenistan
- United Arab Emirates
- Uzbekistan
- Venezuela
- Vietnam
- Yemen
- Zimbabwe

### Appendix 2: Prohibited Countries

- Afghanistan
- Belarus
- Burma
- Cambodia
- Central African Republic
- China and Macau
- Democratic Republic of Congo
- Cuba
- Cyprus
- Eritrea
- Haiti
- Iran
- Iraq
- North Korea
- Lebanon
- Libya
- Russia
- Somalia
- South Sudan
- Sudan
- Syria
- Venezuela
- Zimbabwe

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