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BIS Issues Significant New Round of Semiconductor Export Controls: Six Notable Changes

Anthony Rapa, Alan G. Kashdan, and Brendan S. Saslow*

In this article, the authors set out key points from an interim final rule issued by the U.S. Department of Commerce, Bureau of Industry and Security aimed at further restricting semiconductor manufacturing in China.

The U.S. Department of Commerce, Bureau of Industry and Security (BIS) recently issued significant new export controls under the Export Administration Regulations (EAR) aimed at further restricting semiconductor manufacturing in China, with a particular focus on new controls[1] for semiconductor manufacturing equipment (SME) and items that are the "direct product" of U.S. technology or software. In a coordinated action, BIS also designated 140 companies on the Entity List.[2] All companies in the semiconductor value chain worldwide should heed the new rules, which have global effect in certain key respects, and should monitor future developments in this area.

The relevant Federal Register notice,[3] comprised of 40 pages of rulemaking in the form of an interim final rule (IFR), is worth reading in its entirety in order to gain valuable insights regarding interpretational points and BIS's overall policy approach.

This article sets out key points regarding the IFR.

BIS Has Issued Two New Foreign Direct Product Rules

BIS's use of various Foreign Direct Product Rules (FDPRs)—that is, rules that exercise EAR jurisdiction over non-U.S. items that are based on certain U.S. technology or software—has been a staple of its rulemaking in the semiconductor export control context dating back to October 2022, and the new measures expand on that approach.

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- The first new FDPR extends EAR jurisdiction to non-U.S. SME that:
  - Meets the description of export control classification numbers (ECCNs) ECCN 3B001.a.4, c, d, f.1, f.5, k to n, p.2, p.4, r, or 3B002.c; and
  - Is the direct product of technology or software subject to the EAR and controlled under ECCNs 3D001 (for 3B commodities), 3D901, 3D991 (for 3B991 and 3B992), 3D992, 3D993, 3D994, 3E001 (for 3B commodities), 3E901 (for 3B903), 3E991 (for 3B991 or 3B992), 3E992, 3E993, or 3E994, or of a plant or plant equipment that is the direct product of such technology or software.
- The second new FDPR applies to entities designated on the BIS Entity List with a "footnote 5" designation (a newly created designation). For transactions with such entities, any item made outside the United States will be subject to the EAR if it is the direct product of technology or software subject to the EAR and controlled under ECCNs 3D001, 3D901, 3D991, 3D992, 3D993, 3D994, 3E001, 3E002, 3E003, 3E901, 3E991, 3E992, 3E993, 3E994, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991, or of a plant or plant equipment that is the direct product of such technology or software.

Notably, the new FDPRs also provide that they apply where the non-U.S. item contains a commodity (i.e., physical content) that is the direct product of technology or software subject to the EAR and controlled under ECCNs 3D001 (for 3B commodities), 3D901, 3D991 (for 3B991 and 3B992), 3D992, 3D993, 3D994, 3E001 (for 3B commodities), 3E901 (for 3B903), 3E991 (for 3B991 and 3B992)), 3E992, 3E993, or 3E994, or of a plant or plant equipment that is the direct product of such technology or software. The IFR makes clear that this applies to items that contain any integrated circuit, regardless of where it is manufactured, based on the pervasiveness of U.S. technology and software throughout the semiconductor manufacturing value chain. This concept also extends to any U.S.-origin integrated circuits incorporated into the item.

Furthermore, it should be noted that certain exclusions can apply based on the country from which the item is exported,

including whether BIS specifically has excluded the exporting country in Supplement No. 4 of Part 742 of the EAR, or the country otherwise has enacted export controls over the relevant item "equivalent" to U.S. controls. These exclusions are highly complex and should be reviewed carefully.

The IFR Sets Out Several New ECCNs, Revises Other ECCNs, and Establishes New Export Licensing Requirements Under Its "National Security" and "Regional Stability" Controls

The IFR newly controls various items, revises existing controls, and provides for new export licensing requirements, as follows:

- *New ECCN 3A090.c*. The IFR controls certain high-bandwidth memory (HBM) items.
- *Revisions to various SME ECCNs*. The IFR adjusts ECCNs for several SME items, including 3B001, 3B002, 3B991, 3B992, and 3D002.
- *New ECCNs 3B993 and 3E993*. These control certain SME items released from stricter controls under ECCN 3B001, and related technology.
- *New ECCNs 3B994, 3D994, and 3E994*. These control certain SME items that can support "advanced-node" integrated circuit production, but do not warrant the strict controls set out in ECCN 3B001, along with related software and technology.
- *New ECCNs 3D992 and 3D993*. These control certain electronic computer-aided design (ECAD) software.
- *New ECCN 3E992*. This controls certain technology relating to certain 3B001 items.

The above controls mainly are aimed at exports, reexports, and transfers (in country) to parties in China and other destinations in Country Group D:5.

As under the FDPRs described above, certain highly complex exclusions apply, which should be reviewed closely.

The IFR Sets Out New License Exceptions and a New Temporary General License and Revises Other Temporary General Licenses

The new rule sets out the following exceptions and authorizations for exporters:

- *License Exception HBM (EAR § 740.25).* This authorizes exports of HBM items newly controlled under ECCN 3A090.c by companies headquartered in the United States or A:5 countries (and not headquartered in China or other D:5 countries), subject to extensive conditions, restrictions, and reporting requirements.
- *License Exception Restricted Fabrication Facility (EAR § 740.26).* This authorizes certain exports of items subject to the EAR (other than those controlled under ECCNs 3B001, 3B002, 3B993, 3B994, 3D992, 3D993, 3D994, 3E992, 3E993, or 3E994) to certain fabrication facilities associated with entities on the Entity List that have a "740.26" notation in the relevant listing, so long as other controls (such as destination-based controls or other Part 744 end-use/end-user controls) do not apply, and subject to certain restrictions and notification and reporting requirements.
- *Temporary General Licenses (TGLs) (Supplement No. 1 to Part 736 of the EAR, General Order No. 4).* The EAR provides for certain TGLs temporarily authorizing export of certain "less restricted" SME items and advanced computing items, subject to certain conditions. The IFR amends these as follows:
  - Adds references to certain newly controlled SME and HBM items.
  - Extends the validity period for the SME TGL from December 31, 2025, to December 31, 2026. (There is no such extension for exports of advanced computing items.)
  - Provides for a validity period for HBM exports through December 31, 2026.

BIS Has Revised the End-Use Controls Set Out at Section 744.23 of the EAR

The new rule has revised the controls at Section 744.23 of the EAR, which address the export of items subject to the EAR in support of certain end-uses involving supercomputers, advanced computing items, and SME in China and other restricted countries. Among other changes, the revisions include:

- A new control for the export of ECAD and Technology Computer-Aided Design technology and software in support of the design of "advanced node"–integrated circuits that will be produced in China or a D:5 country.
- Removal of the "back-end" exclusion for exports in support of SME development or production.

The IFR Amends the Definition of "Advanced Node" for DRAM-Integrated Circuits

The definition of the term "advanced node" is the touchstone of many of the semiconductor-related export controls in the EAR, and with respect to dynamic random-access memory (DRAM)–integrated circuits, BIS has amended the definition in order to control items that had avoided control under the previous definition. Specifically, with respect to DRAM-integrated circuits, BIS is discarding the prior reference to the "18 nanometer half-pitch or less" node, and replacing it with the following parameters:

- A memory cell area of less than 0.0019 μm^2, or
- A memory density greater than 0.288 gigabits per square millimeter.

Conclusion

Following BIS's imposition of generationally significant, path-breaking new export controls for advanced computing items and

SME in October 2022, the IFR marks the third occasion in which BIS has updated the restrictions and imposed significant new controls, after other measures in October 2023 and April 2024. BIS has made clear, both in the IFR and in public comments made by BIS officials, that it continues to take into account industry perspectives, the evolution of the subject technology, and typologies for export control evasion as it crafts its approach to the rules and related national security challenges.

It will be important for all industry participants worldwide to monitor developments in this area, as the U.S. controls increasingly apply to activities outside the United States and to non-U.S. items.

Notes

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1. https://www.federalregister.gov/documents/2024/12/05/2024-28270/foreign-produced-direct-product-rule-additions-and-refinements-to-controls-for-advanced-computing.

2. https://www.federalregister.gov/documents/2024/12/05/2024-28267/additions-and-modifications-to-the-entity-list-removals-from-the-validated-end-user-veu-program.

3. https://www.federalregister.gov/documents/2024/12/05/2024-28270/foreign-produced-direct-product-rule-additions-and-refinements-to-controls-for-advanced-computing.