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ALERT

International Trade

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BIS Targets Remote Access to Advanced Computing with New Export Controls

On November 16, the U.S. Department of Commerce, Bureau of Industry and Security ("BIS") issued an interim final rule ("IFR") under the Export Administration Regulations ("EAR") implementing long-awaited export controls regarding remote access to highly controlled superintelligence ("SI")[1] chips and advanced computing items, and formally rescinding the Biden Administration's "AI Diffusion Rule," which BIS had suspended in May 2025. The new controls are intended to significantly limit China's ability to remotely access the computing power of highly controlled SI graphics processing units ("GPUs"), particularly in Southeast Asia. The IFR will have a significant impact on GPU and server exporters, overseas data center operators, and investors and financers on data center projects.

BACKGROUND

BIS, through rules issued in October 2022 and October 2023, has established sweeping export controls over advanced GPUs and computing items that power the SI tech stack, as described in Export Control Classification Numbers ("ECCNs") 3A090 and 4A090. Pursuant to these rules, a BIS license is required to export, reexport, or transfer (in country) such items to or within BIS Country Groups D:1, D:4, or D:5—mainly consisting of China and certain countries in the Middle East and Central Asia—as well as to or for companies headquartered in, or with an ultimate parent headquartered in, China or other "D:5" countries. For more background on these rules and the EAR control regime for advanced computing items, see our prior pieces here, here, here, and here.

In January 2025, the Biden Administration sought to expand this control regime by issuing the "AI Diffusion Rule," which established worldwide export controls over advanced computing items and provided for the "diffusion" of such items through a series of country tiers, export quotas, and license exceptions. However, the Trump Administration suspended the rule before it was scheduled to go into effect in May 2025. For more information on the suspension of the AI Diffusion Rule, see our prior alert.

1. President Trump's September 29, 2026 Executive Order, "*Inaugurating the Era of Super Intelligence*," directs executive branch agencies to use the term "super intelligence" or "SI" in the place of "artificial intelligence" or "AI."

Two significant issues of concern emerged in the years since the establishment of the control regime for advanced computing items:

- smuggling and diversion of controlled GPUs, mainly to China; and
- a perceived loophole in the rules seemingly enabling Chinese end users to remotely access the computing power of controlled GPUs located in data centers in non-restricted countries, particularly in Southeast Asia, to train SI models.

SUMMARY OF NEW RULES

To address the concerns highlighted above, the IFR:

- establishes a licensing requirement for export, reexport, and in-country transfer of controlled advanced computing items to any data center worldwide when there is "knowledge" that the data center provides a significant amount of computing power to a company headquartered in, or with an ultimate parent company is headquartered in, China or another D:5 country;
- establishes a licensing requirement for export, reexport, and transfer of controlled advanced computing items to or within Indonesia, Malaysia, Singapore, Thailand, or Brazil; and
- clarifies that existing controls over exports, reexports, and transfers for companies headquartered in, or with an ultimate parent company headquartered in, China or another D:5 country already prohibited certain transactions resulting in remote access to computing capacity by such parties.

Furthermore, the IFR rescinds the AI Diffusion Rule, while preserving certain aspects of the rule determined to be consistent with Trump Administration policy.

DATA CENTER RESTRICTIONS

The IFR adds a new Section 744.24 to the EAR that provides for a BIS licensing requirement for any person that exports, reexports, or transfers controlled advanced computing items with knowledge that the items are destined for any data center worldwide that provides access to more than 12 million "aggregate total processing performance ("TPP")" to or for companies headquartered in, or with an ultimate parent company headquartered in, China or another D:5 country.

Some key points regarding this restriction:

- The provision looks to "aggregate TPP" across the destination data center and any "linked" data centers (i.e., data centers using network infrastructure to "share resources, balance workloads, and replicate data as a unified whole").
- "Aggregate TPP" is the "total processing performance" (as defined in Technical Note 2 to ECCN 3A090.a and .b) aggregated across all controlled advanced computing items at the destination data center and linked data centers.
- BIS notes that exporters, reexporters, and transferors are expected to conduct certain baseline due diligence in order to establish that they do not have "knowledge" of prohibited end use at the end data center, including diligence with respect to the data center's ownership and its "know your customer checks". Where a data center declines to provide this information, there is presumed to be knowledge of a prohibited end use and the transaction cannot proceed unless this red flag is cleared.
- The restriction does not apply where the computing power is entirely provided for a "commercial recommender system."
    - A "commercial recommender system" is defined as an SI tool "exclusively designed and exclusively

used to rank, filter, or suggest commercial products, services, or content to users based on user behavior, transaction history, or item attributes."

- This does not include any SI system "designed or used to generate novel text, image, audio, video, software, or other content in response to user inputs."

- Where this "commercial recommender system" exclusion applies, the exporter, reexporter, or transferor is required to file a notification to BIS regarding certain transaction information.

- Where an exporter, reexporter, or transferor provides controlled advanced computing items to a non-U.S. data center without knowledge of a prohibited end use—and thus with no license required—the party must inform the recipient that a license is required for any change in end use that results in prohibited access to more than 12 million aggregate TPP by a restricted D:5-headquartered end user.

- This means that a non-U.S. data center is subject to a BIS licensing requirement where it receives a controlled item without a BIS license in place, and then changes its end use—i.e., "transfer it" as defined in the EAR—by allowing access to more than 12 million TPP by a restricted D:5-headquartered end user.

- BIS will review license applications under Section 744.24 under a case-by-case licensing policy, rather than a presumption of denial, leaving open the possibility that BIS could issue licenses.

CLARIFICATION REGARDING BIS POSITION ON REMOTE ACCESS

Significantly, BIS indicates in the IFR that it has always been BIS's position that Section 744.23 of the EAR—which has been in place since October 2023—restricts remote access by D:5-headquartered companies under certain circumstances.

Specifically, that provision requires a license to export, reexport, or transfer controlled advanced computing items "for an entity" that is headquartered in, or with an ultimate parent headquartered in, BIS Country Group D:5. BIS explains in the IFR that the term "for an entity" encompasses a broader range of transactions beyond those in which a D:5-headquartered party is an ultimate consignee or end user, and includes transactions "on behalf of" such parties. BIS provides the examples of transactions in which such a restricted party was the "purchaser in the transaction" or was the remote end user of more than 50 percent of the total compute at the recipient data center.

BIS goes on to provide the following guidance to parties currently in violation of this provision:

- Parties in violation should submit a voluntary disclosure to BIS.

- "Bona fide" data center operators caught by this provision that are providing remote access for "commercial recommender systems" may continue to provide these services for 90 days, but must obtain a BIS license by the end of the 90 days.

Therefore, in seeking to export controlled advanced computing items, it is important to take into consideration not only new Section 744.24, but BIS's interpretation of 744.23 as set out in the IFR.

NEW DESTINATION-BASED CONTROLS

The IFR amends Section 742.6(a)(6)(III)(A) to add a new destination-based control for exports, reexports, and transfers of certain advanced computing items to or within Indonesia, Malaysia, Singapore, Thailand, and Brazil. BIS has identified these countries as presenting an elevated risk of diversion.

BIS will review license applications under the new destination-based control on a case-by-case basis. The assessment specifically will cover whether a transaction is contrary to U.S. national security or foreign policy

interests, including with respect to the effectiveness of the destination country's export control regime and coordination with BIS.

Notably, the restriction does not apply to exports, reexports, or transfers to companies headquartered in, or with an ultimate parent headquartered in, the United States, subject to certain reporting requirements.

WORLDWIDE EXPORT CONTROL ON CERTAIN FABRICATOR / OSAT TRANSACTIONS

New Section 744.23(a)(3)(i)(C) imposes a worldwide control requirement for exports, reexports, or transfers by front-end fabricators and outsourced semiconductor assembly and test ("OSAT") companies of 3A090.a integrated circuits designed by a party that is not an "approved IC designer" (as specified in Supplement No. 6 to Part 740 of the EAR) or an "authorized IC designer (as described in Note 1 to ECCN 3A090.a).

REMOVAL OF PATHWAY FOR D:1, D:4, AND D:5 IC DESIGNERS TO OVERCOME PRESUMPTION OF 3A090.A CLASSIFICATION

The IFR amends Note 1 to ECCN 3A090 to remove the ability of integrated circuit designers headquartered in, or with an ultimate parent headquartered in, Country Groups D:1, D:4, or D:5 or Indonesia, Malaysia, Singapore, Thailand, or Brazil to overcome the presumption that their "applicable advanced logic integrated circuits" are classified under the highly restrictive 3A090.a classification for data center chips, except for those that are "approved" or "authorized" IC designers.

RESCISSION OF AI DIFFUSION RULE

Eighteen months after announcing a policy of non-enforcement of the AI Diffusion Rule, BIS formally rescinds the rule in the IFR. Specifically, the IFR removes from the EAR most aspects of the AI Diffusion Rule, including its worldwide export control for advanced computing items, system of country tiers and quotas, and certain license exceptions.

However, the IFR retains License Exception Advanced Compute Manufacturing, which authorizes certain transactions supporting the supply chains of advanced computing items destined for end users outside of D:5 countries.

CONCLUSION

The IFR ushers in long-awaited controls addressing concerns relating to remote access to controlled advanced computing items and diversion pathways. The following points are particularly noteworthy:

- It will be critical for any party dealing in controlled items to conduct appropriate due diligence when exporting, reexporting, or transferring to a non-U.S. data center.
- Relatedly, it will be incumbent on such non-U.S. data centers to cooperate with due diligence requests and, when receiving items without a license in place, to be aware of their own obligations in the event they provide remote access to D:5-headquartered parties.
- Companies should consider the implications of BIS's interpretation of the applicability of Section 744.23 to remote access, including whether it triggers a voluntary disclosure and how it interacts with Section 744.24 from a licensing perspective.
- The new destination-based controls targeting Southeast Asia will have a significant impact on data center projects in that region.
- The case-by-case licensing policy in Section 744.24 and the new destination-based controls leave open the possibility that BIS could issue licenses in this area.
- Investors and finance parties on data center projects should take note of the IFR and factor its impact into their assessment of the viability of any project impacted by the rule.
- The restriction on the ability of integrated circuit designers in Country Groups D:1, D:4, or D:5 and

Indonesia, Malaysia, Singapore, Thailand, and Brazil to overcome the presumption that their chips are highly controlled 3A090.a could significantly limit their engagement with fabricators and OSAT companies outside of those countries.

- Exports, reexports, and transfers of SI chips and servers that previously qualified for a license exception or as NLR may proceed to the intended destination so long as the affected shipments: (i) were en route abroad a carrier to a port of export, reexport, or transfer on November 19, 2026 and (ii) completed no later than December 21, 2026.

- Parties may submit comments to BIS on or before January 19, 2027.

Blank Rome's International Trade group is well equipped to assist clients in navigating these developments. For further analysis, please contact Anthony Rapa, Kenneth J. Nunnenkamp, Alan G. Kashdan, Brendan S. Saslow, or Rachel D. Evans.

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