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Client Alert: BIS Announces Advanced Semiconductor End-Use Restrictions

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The Bureau of Industry and Security, Department of Commerce ("BIS") has announced an interim final rule (the "Remote Access Rule") changing the license requirements of the Export Administration Regulations ("EAR") that apply to the end-use of certain advanced chips and servers ("Covered Items"), primarily for artificial intelligence applications (referred to in the rule as "super intelligence" in accordance with a recent Executive Order). The Remote Access Rule will become effective when published in the Federal Register, likely on November 19, 2026.

The rule's primary objective is to prevent remote use by end-users located or headquartered in EAR Country Group D:5 + Macau of significant computing capacity provided by such items, when hosted in foreign datacenters. Country Group D:5 includes countries such as China/Hong Kong, Russia, Iran, North Korea, and other countries subject to U.S. arms embargoes. Until this regulation change, the EAR prohibited remote use of Covered Items only if there was knowledge of use in the development or production of weapons of mass destruction, by military intelligence end-users, or in support of certain advanced semiconductor applications.

Under new EAR § 744.24, a license is required to export, reexport, or transfer (in-country), any Covered Items with knowledge that the foreign datacenter provides more than 12 million aggregate total processing performance ("TPP") – either at one data center or through linked data centers – to companies headquartered, or whose ultimate parent company is headquartered, in Country Group D:5 + Macau. "Aggregate TPP" is the sum of the processing performance of the covered chips/servers, as calculated in accordance with the technical notes of EAR ECCN 3A090.

The Remote Access Rule imposes a notification and authorization requirement for post-export changes to end-use/end-user and imposes "know your customer" due diligence requirements on foreign data centers to vet remote users – even if the data center does not have a direct contractual relationship with the end-user. This will include diligence on whether any data center customers are directly or indirectly owned or controlled by persons located, headquartered, or whose ultimate parent is headquartered, in Country Group D:5 + Macau. A foreign data center that declines or is unable to provide this information will be considered a red flag that presumptively provides you with "knowledge" unless you are able to resolve that red flag before proceeding with the transaction. Accordingly, those who control the Covered Items must not only conduct due diligence on end-users that are permitted to use the items, but also to ensure that the data center is conducting its own adequate due diligence on the end-users.

The Remote Access Rule formally revokes almost all the provisions of the AI Diffusion Rule, which was published on January 15, 2025, in the final days of Biden Administration. Despite the AI Diffusion Rule's provisions remaining in the Code of Federal Regulations, it has never been enforced by the Trump Administration, causing significant confusion by industry and law enforcement regarding applicable export license requirements.

Specifically, the Remote Access Rule eliminates the worldwide license requirement for Covered Items. In its place, the rule confirms licenses remain required for exports,

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reexports and in-country transfers to Country Groups D:1, D:4, and D:5 (other than countries also listed in Country Groups A:5 and A:6) and to the UAE, except for authorized end-users. (See BCR's alert on UAE License requirements.) The Remote Access Rule also confirms that a license remains required for exports, reexports, and in-country transfers to any destination, if the recipient is an entity headquartered, or whose ultimate parent is headquartered, in Country Group D:5 + Macau.

The Remote Access Rule expands license requirements to apply to exports, reexports, and transfers of covered items to Brazil, Indonesia, Malaysia, Singapore, and Thailand, identifying these countries as being high risk locations for diversion of AI chips/servers to countries of concern, such as China. License requirements for these five new destinations do not apply to end-users that are headquartered in the United States, subject to compliance with a new reporting requirement.

BIS can subject additional countries to license requirements in the future if enhanced diversion risk is identified, warning that "Commerce will be actively monitoring for countries that tolerate evasion of this IFR and will consider a range of consequences for such countries, such as import restrictions, new license requirements on advanced semiconductor exports, downgrading the country's status in the U.S. export control regime, and Entity List designations and temporary export prohibitions for foreign persons involved in such activities."

The new rule retains License Exception ACM from the AI Diffusion Rule, which permits certain exports, reexports, and transfers within the supply chain for covered items that are not intended for end-users in Country Group D:5 + Macau.

The Remote Access Rule retains and modifies the license and due diligence requirements for front-end fabricators and outsourced assembly and test ("OSAT") facilities relating to the fabrication and packaging of chips, which were instituted in the Biden Administration's AI Due Diligence Rule, also published on January 15, 2025.

The AI Due Diligence rule imposes a presumption that advanced-node chips are subject to control under ECCN 3A090.a (the highest level of control) when exported/reexported/ transferred by foreign fabricators and OSATs, unless certain due diligence steps are taken. The presumption can be overcome by a classification ruling issued by BIS, an attestation by an approved (or authorized) integrated circuit designer ("AIDC"), or determination by the foreign fabricator or OSAT that the chip does not meet specified technical criteria.

The Remote Access Rule eliminates the ability of the foreign fabricator or OSAT to reach such determinations if the integrated circuit designer is located in or has an ultimate parent headquartered in Country Groups D:1, D:4, or D:5. This means that the only path to overcoming this presumption is a formal classification by BIS, or approval by BIS of the relevant integrated circuit designer as an AIDC.

While the interim final rule will take effect upon publication in the Federal Register, BIS is accepting public comments, which will be due 60 days following publication.

Please contact Dan Fisher-Owens (415-839-9201 or dfo@bcrlaw.com) or other members of the BCR Export Controls & Sanctions Group if you have questions about this issue.

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