



# US Export Controls (EAR) - Update

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# Export Controls in One Sentence

- Export controls are the rules that govern:
  - the export, reexport, and transfer by US and non-US persons
  - from the US and from outside the US
  - of US- and non-US-made commodities, technology, software, and services
  - to destinations, end uses, and end users
  - to accomplish various national security and **foreign policy** objectives.

# All Export Controls on One Page

<p><u>Actor:</u> US Person or Foreign Person (people and companies)</p> <p><u>Act:</u> Export, Reexport or Transfer</p>	<p><u>Physical Things</u> ("Goods," "Commodities," "Defense Articles")</p>	<p><u>Information</u> ("Technology," "Technical Data")</p>	<p><u>Software</u></p>	<p><u>Services</u> ("Defense service," WMD-related activities, US Person support for advanced node ICs in PRC)</p>
<p><u>Destinations</u> (Countries or regions, for listed items, or embargoed destinations for all else)</p>				
<p><u>End Uses</u> (e.g., WMD end uses regardless of item's classification or producing advanced node ICs in PRC)</p>				
<p><u>End Users</u> (e.g., SDNs or listed entities, regardless of item's classification)</p>				

# Other Controls - Economic Security

- Although economic security (or economic statecraft) policy objectives may overlap, export controls are not:
  - Financial sanctions
  - Import controls
  - Foreign direct investment controls
  - Outbound investment controls
  - Tariffs
  - Information and Communication Technology and Services controls

# The First Rule of Regulation Is ....

- *Define the problem to be solved.*
- So, how a government defines its national security and foreign policy objectives will determine the scope of what should be controlled for export.
- What specifically are the contemporary “national security” threats that can be addressed through regulating the flow of items?
- What are the current foreign policy objectives?
- Each new Administration decides the answers to these questions.

# Export Control Developments Last Week

# AI Diffusion Rule Will be Rescinded

- BIS announced its plan to rescind the Biden Administration's Framework for AI Diffusion and that, until the rule is formally revoked, it would not enforce its worldwide licensing and other requirements that required compliance on May 15, 2025.
- BIS did not announce any plans to change the pre-existing controls over advanced computing items, which, for example, require licenses to ship such items to most countries in the Middle East, China, and companies worldwide if headquartered in or with a parent in China.

# BIS Guidance

- BIS issued interpretive guidance that using or engaging in other activities involving Chinese-designed or -produced advanced computing ICs, including Huawei's Ascend ICs, “risks violating” the EAR and that parties should, before using them, confirm with the supplier that all required authorizations were and remain in effect.
- BIS issued a policy statement that providing advanced computing items or services to IaaS providers (e.g., data centers) headquartered in China or other arms embargoed countries to train AI models creates a red flag that prohibited WMD or military-intelligence end uses are possible.
- BIS stated that a foreign company's training of an AI model for companies headquartered in such countries that could support WMD or military-intelligence end uses could result in its being added to the Entity List.
- BIS issued compliance guidance about methods for preventing diversion of advanced computing items.

# Guesses About Other Trump Administration 2.0 Export Control Actions

(I will leave it to others to discuss tariffs and broader trade topics involving PRC, Russia, the allies, and the rest of the world.)

# Trump 2.0 and Export Control Actions

- “Personnel is policy,” so we will need to see who is appointed to key positions involved in export control policy thinking.
- Appointments so far suggest a hawkish, aggressive, de-coupling approach toward China, but others may be appointed later with opposing and more free trade views (which happened in Trump 1.0).
- Trump 2.0 likely to also take “transactional” approach, meaning that scope and impact of changes will be the subject of negotiations on unrelated topics.
  - Future of Russia-specific controls likely to be part of Ukraine-related negotiations.
- Significant turnover in key career personnel, so there will be much uncertainty in implementation and interpretations. (So, lots of work for compliance lawyers.)

# Topics to Follow and Questions to Ask

- Again, please, no one really knows what will happen. I am just guessing. I am not forecasting, predicting, betting, advocating, or opposing. My questions are not in any particular order of likelihood.
- That said, all the following topics and questions are those that have been mentioned in legislation, think tanks, conferences, testimony, or media commentary.
- Thus, they are not just my speculations. I am distilling the ideas for you in these highly simplified slide comments. Each topic could be the subject of its own conference.

# When Will the General Licensing Pause Be Lifted?

- I have no idea. Nothing has been announced. I've seen some licenses, but most normal business has ground to a halt.
- Classification requests seem to be moving, but slowly.
- Advisory opinions seem to be stopped.
- You, the industry, and trade association should ask BIS.

# Questions and Topics 1

- In addition to high-bandwidth memory, what additional controls will be imposed on hardware that is needed for data centers in China to run large language models? Or do do inference?
- What will the standards and conditions be for all the AI-related sales announced last week in the Middle East? Licenses? VEUs? Conditions? Access controls? With AI diffusion rescinded, what will be substitute?
- Will there be worldwide controls requiring country-by-country negotiations? Who will do the work? What will the policies be in the meantime? Will the controls be leverage on tariff issues?

# Questions and Topics 2

- Will companies in allied countries become subject to US sanctions if they legally sell items to China that US companies cannot?
- Given the “Economic Security is National Security” and “America First” policy themes, will controls be used to harm competitors of US companies for purely economic objectives?
  - In other words, will the “national security” objectives of controls be expanded to include the economic health of US companies regardless of relationship to the development or production of weapons?
- Will Japan, the Netherlands, and Korea implement under a Trump administration domestic controls over more production equipment? Or refuse because of the tariffs?

# Questions and Topics 3

- Will export control policy objectives be expanded to control the equipment and other inputs used to produce *legacy node* semiconductors in China to address over-supply issues?
- What data and other considerations will be used to measure effectiveness of new controls?
- Will effectiveness even be a consideration in face of the broader principle of not supporting PRC military-civil fusion efforts?
- Will allies willingly agree to any new plurilateral controls outside of “Wassenaar Minus One” approach?

# Questions and Topics 4

- Will controls be imposed on remote access to data centers in the US by PRC companies?
- Will “software as a service” become a controlled event?
- Will BIS focus more on tariff issues than export control issues? Will tariffs be used somehow to augment export control objectives? As leverage to get countries to impose their own controls?
  - How will that work since export control enforcement is against specific companies and tariffs are about specific products and countries?

# Questions and Topics 5

- Will the Entity List controls be expanded so that they apply automatically to all unlisted affiliates of the listed entities?
  - This would be to address a general concern about the “whack-a-mole” approach to listing and PRC evasion efforts (e.g., by setting up new companies after being listed).
- Will the various US sanctions lists be consolidated and thus expanded to impose general embargoes on specific PRC companies?
  - Section 889 list? Section 1260H list? NS-CMIC list? SDN lists? Military end user lists?
- Will new Entity List controls rely on the Foreign Direct Product rule to expand their extraterritorial application over foreign-made items that were produced from US technology or equipment?

# Questions and Topics 6

- Will expansion of extraterritorial controls result in a general design out of US-origin technology and equipment to avoid US jurisdiction?
- Will the general, expansive approach to export controls economically motivate even faster indigenous PRC development and production efforts that would not have occurred without the controls?
- Will any allied country agree to impose its own end-user-specific controls to level the playing field? Or will they take advantage of all the US unilateral controls to benefit their companies over US companies?
- Will the DeepSeek issue cause people to think more export controls are needed (or just require more time to work) or that they are ineffective?

# Questions and Topics 7

- Will the licensing policy on all dual-use items destined to China be changed to one of a “presumption of denial” given China’s military-civil fusion policies and new national security controls?
  - That is, will applicants need to convince the government that the proposed export would advance US national security interests rather than explaining why there is little risk that the export would harm national security interests?
- Will expansion of PRC’s national security controls and export controls provoke the US to take even more aggressive export control actions in response?

# Questions and Topics 8

- Will AUKUS be extended to remove controls on most trade with Japan? South Korea? Others?
- Will components and other inputs to produce in China commercial aircraft become subject to new controls?
- Will the Foreign Direct Product rules be expanded to control any non-US-made electronic item containing any type of semiconductor produced or tested, even in part, with US equipment if destined to specific PRC companies?
- Will the de minimis rules be expanded to control non-US products that contain any amount of controlled or uncontrolled US-origin components or software? Or any US-made semiconductor?

# Questions and Topics 9

- Will the Defense Department be given a veto of all licensing decisions? Or authority to impose new controls over objections of other agencies?
- Will the State Department (under a Secretary Rubio) take more of a lead in export control policy making? Will the White House and National Security Council continue to play a “top-down” policymaking role?
- Will Congress be given more information about individual license applications of specific companies? Will Congress impose congressional review requirements over specific licenses?
- Will the Commerce Department be given more budget to improve (i) licensing processes; (ii) analytical capabilities; and (iii) enforcement efforts?

# Questions and Topics 10

- Will Russia-specific enforcement be formally or informally de-emphasized?
- Will successful on-site end-use checks of recipients in China become a condition of getting licenses approved for exports to China?
- Will the definition of the “specially designed” control parameter be changed to control components and software common to both controlled and uncontrolled items?
- Will more Foreign Direct Product rules be created to control additional types of non-US-produced items to specific end uses or end users in China?

# Questions and Topics 11

- Will the Biden proposed expansion of the military end user and end use controls be implemented? Specifically:
  - Will the export of ANY type of US-origin item for a military end use or a military end user in China and other embargoed countries become prohibited?
  - Will the export of ANY type of US-origin item to entities that *support* such military end users become prohibited?
  - Will US companies be prohibited from providing ANY type of foreign-origin items to such end users from outside the US?

# Questions and Topics 12

- Will the Biden proposed controls over intelligence end users and foreign security end users be implemented? Specifically:
  - Will the export of ANY type of US-origin item to an intelligence agency, or an entity that supports an intelligence agency, in the Middle East, China, and other countries of concern become prohibited?
  - Will US companies be prohibited from providing support or shipping foreign-made items to such end users?
  - Will the controls over exports to foreign security end users in China be imposed or expanded to the Middle East?

# Questions and Topics 13

- Will controls over facial recognition systems and related components be imposed?
- Will other controls with a human rights focus be imposed, particularly those used for mass surveillance and genetic surveillance activities?
- Will such controls only be limited to China or imposed against other countries with bad human rights records?
- Will the carve-out in the controls for standards-related activities involving listed entities be removed?

# Questions and Topics 14

- Will there be significant enforcement actions against Chinese fabs and other companies that provide support to Huawei?
- Will there be additional controls against Huawei, ZTE, and other companies that engage in espionage against the US?
- Will economic sanctions be used against Huawei and other companies to expand the impact of export controls against the company?
  - That is, will transactions that involve US dollars or US persons become prohibited even when no controlled hardware, software, or technology is involved?

# Questions and Topics 15

- Will the coalition against Russia continue to have serious support from the US?
- Will the “Wassenaar Minus One” approach to new controls continue? That is, use of multilateral controls without Russia, India, or other countries that are not cooperating?
- Will the regulatory carve-out for the results of “fundamental research” be narrowed to address concerns about PRC company use of published information from universities and research institutions?
- Will there be more “deemed export” controls against Chinese nationals in the US or limitations on the type of research Chinese nationals can participate in?

# Questions and Topics 16

- How will China use its new export controls to retaliate against such actions to harm US and allied countries dependent on PRC sales or inputs?
- How will PRC threats to cut off the supply of critical minerals affect allied willingness to agree to participate in US control efforts?
- How will US companies dependent on sales to or components from China be encouraged to change such dependencies? New subsidies? New controls?
- Will unilateral US controls cause affected US companies to lose market share to their foreign competitors, thus harming the very US industrial base the controls were designed to protect?

# Questions and Topics 17

- Trump 1.0 identified the following as emerging technologies, but did not impose new unilateral controls over them. Thus, will Trump 2.0 impose controls over:
  - advanced gas turbine engine technologies;
  - advanced and networked sensing and signature management items;
  - clean energy generation and storage items;
  - data privacy, data security, and cybersecurity technology;
  - directed energy items;
  - highly automated, autonomous, and uncrewed systems and robotics items;
  - human-machine interfaces;
  - hypersonics-related items;
  - integrated communications and networking technologies; and/or
  - Positioning, Navigation, and Timing (PNT) technologies?

(Note that there have been many controls for years relevant to most of these technologies.)

# Questions and Topics 18

- Will BIS take a breath from all the changes and rationalize and harmonize internally the EAR to make all the various types of part of a coherent, consistent structure? At some point, complexity interferes with compliance and enforcement. It also imposes unnecessary regulatory compliance burdens unrelated to national security objectives.
- How will global controls over all advanced GPUs by and among literally everyone (whether by license, VEU, or exception) be effectively enforced?
- Will allied country companies that legally export to China be subject to sanctions if their US competitor is prohibited from the same export by unilateral US controls? (This is suggested in section 4(c) of the America First Trade Policy document.)
- Will the US work with the EU, Pacific, and other allies to improve enforcement efforts for Russia-specific diversion for controlled commercial items?

# Questions and Topics 19

- Will classification determinations, advisory opinions, licenses, and other traditional career staff decisions need to be reviewed and approved by political officials?
- Will the exemptions for allied country companies from some of the FDP rules be preserved or abandoned?
- Will the foundry due diligence rule be the beginning of a new kind of mandated due diligence in other settings? Thus, for example, will non-US companies need to get US or other trusted companies to confirm the classification status of a product before they can ship without a presumption the product is controlled at a higher level?
- Will the licensing policies on the gun controls be relaxed? Will human rights considerations for making such decisions change?

# Biden Administration's Definitions

- First. Continue classical non-proliferation focus on items controlled by multilateral regimes that have an identifiable relationship to the development, production, or use of WMD or conventional weapons.
  - Made more difficult with essential collapse of Wassenaar Arrangement because of Russian (and other) obstructionism and consensus-based requirements for changes.
  - Mandates not consistent with contemporary national security issues and country-specific (China and Russia) policy concerns.
- Second. Cut off the flow of any type of item Russia's industrial base needs to function - going far beyond classical non-proliferation objectives.

# NSA Sullivan's Answer to the Question

- NSA Jake Sullivan answered the question clearly in September 2022 --  
“**Computing-related technologies, biotech, and clean tech are truly ‘force multipliers’ through the tech ecosystem. And leadership in each of these is a national security imperative.**”
- With respect to export controls, “we have to revisit the longstanding premise of maintaining ‘relative’ advantages over competitors in certain key technologies. We previously maintained a ‘sliding scale’ approach that said we need to stay only a couple of generations ahead. That is not the strategic environment we are in today. Given the foundational nature of certain technologies, such as advanced logic and memory chips, we must maintain as large of a lead as possible.”

# Biden Administration's Definitions

- Third. Use novel and extraterritorial regulatory tools to cut off the flow of US and non-US items and services needed to develop or produce in China and by PRC companies outside the PRC of:
  - advanced node integrated circuits (DRAM of a specific density, 128 layer NAND, and 16/14 nm logic, or better);
  - compute needed for large language models for advanced AI applications (GPUs and HBM);
  - front-end semiconductor production equipment; and
  - supercomputers.
- In addition, add to the Entity List the PRC companies involved in these 4 sectors.
- **Sum: The ability of PRC companies to develop or produce these four technologies is a per se national security threat.**

# Biden Administration's Definitions cont.

- Fourth. Although the January 15, 2025 AI Diffusion Rule includes earlier China-focused policy objectives, policy objectives are far broader -- to address concerns about how AI could bolster authoritarianism, undermine democracies, facilitate human rights abuses, and weaken rules-based international order.
- Additional goals are to maintain US technological leadership in AI and to address risk of diversion of models and ICs.
- Allow USG to have more information about where models created and where GPUs are sent.

# Biden Administration's Definitions cont.

- First rule to control globally every foreign-made item of a specific type (advanced GPUs) through extraterritorial jurisdictional hook of being produced by equipment at fabs that is the direct product of US technology.
- Global control over advanced GPUs and advanced AI models, but with many novel exceptions and licensing authorizations available - each with their own conditions and limitations.
- Control over frontier AI models weights (4E091)
- Worldwide licensing requirements for advanced GPUs and equipment containing them (3A090.a, 4A090.a, and related .z items)
- For destinations and end users that are low risk or have security standards in place:
  - License Exceptions ACA, AIA, ACM, and LPP available
  - Creating Universal Validated End Users and National Validated End User Authorizations

# Big Picture Themes of Novel Unilateral Controls

- **List-Based.** Created lists of specific items to control outside the multilateral regime process.
- **End-Use Controls.** Created new unilateral “end use” controls over unlisted items if for use in one of the technology sectors of concern.
- **End-User Controls.** Expanded scope of unilateral “end user” controls (e.g., the Entity List) against companies in the technology sectors of concern.
- **Extraterritorial Controls.** Expanded use of “extraterritorial” US jurisdiction and controls over foreign-made items that are (i) made from US technology; (ii) produced with US equipment; or (iii) contain certain types of US-origin content.
- **US Person Controls.** Imposed controls on *activities* by US companies and US persons involving foreign-origin items if in support of the development or production of advanced node ICs or SME in China.
- Where a company is **headquartered or has an ultimate parent** determines whether a license is required in many cases.

# 4 Ways In Which an Item can be “Subject to the EAR”

- US-origin;
- Export from or through the US;
- Foreign-produce and contains more than a de minimis amount of “controlled” US-origin content; and
- Foreign-produced and within the scope of one of the foreign direct product rules.

# Foreign Direct Product Rules

There are now 13-ish or so Foreign Direct Product rules that make non-US-made items outside the United States “subject to the EAR.”

- National Security (1959 originally)
- 600 Series (for military related-items) (2014)
- 9x515 Series (for satellite-related items) (2015)
- Entity List (Footnote 1) - Huawei companies worldwide (2020)
- Entity List (Footnote 4) - (e.g., Inspur Group and Biren Technology) (2022 and 2023)
- Russia/Belarus/Crimea (2022)
- Russia/Belarus Military End-User (Footnote 3) (2022)
- Global! -- Advanced Computing (2022 (China-focused) and expanded in 2023 and 2025)
- China - Supercomputing (2022)
- Iran / UAVs (2023)
- Macau/D5 (China) - Footnote 5 and Advanced Node IC Fabs (2024 and 2025)
- Macau/D5 (China) - Semiconductor Manufacturing Equipment (2024)
- Global! - AI Model Weights (2025)

# FDP Rules cont.

- Each rule contains subtle and significant differences.
  - Scopes significantly different, e.g., depending on whether phrase “direct product” or “produced by” is used.
- But all have the same approach - Foreign-produced items that are either the direct product of different types of US technology or software OR produced by, even in part, equipment that is the direct product of such technology of software are “subject to the EAR” -- **depending upon what knowledge exists regarding the end user, end use, or destination at issue in that rule.**
- The FN5 and the SME FDP rules go even further and say that a foreign-made item that merely “contains” a foreign-origin integrated circuit causes it to be subject to the EAR. (A 0% de minimis rule catches if contains a US-origin IC.)
  - Created a see-through rule using integrated circuits as the per se jurisdictional hook.
- Click on this link to scroll through all the FDR rules: <https://www.ecfr.gov/current/title-15/section-734.9>

# Compliance Program Implications of FDP and Other Novel Rules

- “Subject to EAR” jurisdiction over foreign-produced items can flip back and forth transaction by transaction by transaction.
- Companies can no longer just have internal systems with (i) lists of items with notes regarding whether they are subject to the EAR and what their ECCNs are that are (ii) screened against the Country Chart and (iii) screened against shipments to proscribed parties.
- Due diligence must occur on a transaction-by-transaction basis regarding each end user and each end use.
- Cannot just screen against shipments on purchase orders to proscribed parties, but to ANYONE if listed party would be a “party to the transaction,” which is defined differently.
- The end-use controls also apply to shipments to any destination with knowledge of the listed end use at issue.
- Many new “red flags” that are explicit.
- **Companies must fundamentally re-think compliance programs to account for end use and end user controls.**

# There are Many Different Export Controls

- No longer one, coherent EAR structure for all controls. Many different types of controls each with their own structures, scopes, objectives, and definitions. Extraordinary degree of complexity and novelty.
  - Old-fashioned, classical, non-proliferation-focused, regime-based dual-use export controls.
  - The encryption controls.
  - The ITAR, 600 series, and satellite-related controls.
  - Semiconductor production equipment rules.
  - Russia-specific controls.
  - AI and GPU global controls.
  - Extraterritorial footnoted entity controls.
  - End-use controls.
  - US Person controls.

# Now, Four Ad Hoc Plurilateral Arrangements

- In addition to the four multilateral regimes (MTCR, AG, WA, and NSG), now also have:
  - AUKUS;
  - Japan-US-Netherlands semiconductor manufacturing equipment controls;
  - “Wassenaar Minus One” controls (e.g., over quantum computers); and
  - GECC coalition of 38 countries against Russia.

# Specific Year-in-Review Comments - 1

- Additions and deletions to Unverified List to encourage compliance with end use checks.
- Regular refinements of Russia-specific controls, including expansions of lists of items in Russia-specific supplements.
- Tweaks regarding controls over night-vision cameras.
- Clarification on when integrated circuits that are tested for rad-hard properties for US government do not become controlled under 3A001 rad-hard controls.
- Addition of Nicaragua to list of arms embargoed countries -- for largely human rights-related reasons, but also because of support for Russia.

# Specific Year-In-Review Comments - 2

- Creation of a license exception for medical devices to Russia, Belarus, and occupied Ukraine.
- Creation of broad exclusions from controls for almost all EAR items by and among Australia, UK, and the US (and thus Canada).
- Significant revision of licensing policies for firearms (after a licensing pause) to address diversion issues of human rights concern, criminal activities, political assassinations, diversions to Russia, trafficking etc. Creation of new ECCNs for firearms-related items. Policies of denials for list of countries. New document requirements for applications.
- Consolidation of Russia-specific controls in a single section.
- Addition of EAR99 enterprise, engineering, other specific software to Russia-specific controls.

# Specific Year-in-Review Comments - 3

- Completion of standards-related activities carve-out from EAR controls.
- Creation of Wassenaar Minus One controls on quantum computing items, additive manufacturing items, and semiconductor production equipment with novel License Exception IEC for the WA countries that adopt the same controls.
- Incorporated into EAR voluntary self-disclosure policies and changed penalty guidelines.
  - Deliberate decision not to file a voluntary disclosure is an aggravating factor.
  - Creation of separate process to handle minor or technical violations.

# Specific Year-in-Review Comments - 4

- New Russia-specific controls for chemical precursors for production of chemical riot control agents.
- Creation of new red flag regarding advanced node ICs and fabs.
- Two amendments (within a month) to the definition of “advanced node” DRAM.
- Creation of the Semiconductor Manufacturing Equipment FDP rule.
- Creation of the Footnote 5 FDP rule.
- Creation of novel licensing requirements for FN5 entities (that factor in where the company is headquartered and from where the item is sent) and a novel company-specific license exception RFF.

**FN5 Controls on 3B001 (except 3B001.a.4, c, d, f.1, f.5, f.6, g, h, k to n, p.2, p.4, r), 3B002 (except 3B002.c), 3B903, 3B991 (except 3B991.b.2.a through 3B991.b.2.b), 3B992, 3B993, and 3B994**

By Company HQ or Ultimate Parent	From Korea or India to FN5 Entity or Advanced Fab	From countries (e.g., Singapore, Israel or Taiwan) to FN5 Entity or Advanced Fab	From countries (e.g., NL, NJ, or DE) to FN5 Entity or Advanced Fab	Transfer within China to FN5 Entity or Advanced Fab
HQ'd in US or that has ultimate parent company in US - EAR	License required for only 3B993. <u>744.11(a)(2)(v)(A)(2)</u>	License required for all FN5 / Advanced Fab ECCNs. <u>744.11(a)(2)(v)(A)(3)(i)</u>	No EAR license required. (Requirement is in <u>734.9(e)(3)</u> , but not within scope of one of the four referenced licensing requirement subparagraphs in <u>744.11(a)(2)(v)(A)</u> )	License required for all FN5 / Advanced Fab ECCNs <u>744.11(a)(2)(v)(A)(4)(i)</u>
HQ'd in, or with ultimate parent in, JN, NL, EU, or other countries - EAR	License required for only 3B993. <u>744.11(a)(2)(v)(A)(2)</u>	License required for only 3B993. <u>744.11(a)(2)(v)(A)(3)(ii)</u>	No EAR license required. (Requirement is in <u>734.9(e)(3)</u> , but not within scope of one of the four referenced licensing requirement subparagraphs in <u>744.11(a)(2)(v)(A)</u> )	License required for only 3B993. <u>744.11(a)(2)(v)(A)(4)(ii)</u>
HQ'd in, or with ultimate parent in, Taiwan, Singapore, Israel, Korea, India or other non- <u>Supp 4</u> countries - EAR	License required for only 3B993. <u>744.11(a)(2)(v)(A)(2)</u>	License required for all FN5 / Advanced Fab ECCNs. <u>744.11(a)(2)(v)(A)(3)(i)</u>	No EAR license required. (Requirement is in <u>734.9(e)(3)</u> , but not within scope of one of the four referenced licensing requirement subparagraphs in <u>744.11(a)(2)(v)(A)</u> )	License required for all FN5 / Advanced Fab ECCNs <u>744.11(a)(2)(v)(A)(4)(i)</u>
Macau/D5 HQ'd or ultimate parent in Macau/D5 - EAR	License required for all FN5 / Advanced Fab ECCNs <u>744.11(a)(2)(v)(A)(1)</u>	License required for all FN5 / Advanced Fab ECCNs. <u>744.11(a)(2)(v)(A)(1)</u>	License required for all FN5 / Advanced Fab ECCNs <u>744.11(a)(2)(v)(A)(1)</u>	License required for all FN5 / Advanced Fab ECCNs <u>744.11(a)(2)(v)(A)(4)(i)</u>

# Specific Year-in-Review Comments - 5

- Expansion of end-user controls against most Specially Designated Nationals as a backstop if OFAC sanctions wouldn't apply. (remember to work into internal screens)
- Corrections rules - which contain a lot of content and commentary.
- Creation of a Data Center Validated End User Authorization (later expanded to include Universal Validated End Users and National Validated End Users).
- Removal of Canada, UK, and Australia from worldwide satellite-related controls.
- Reduction of satellite-related controls for close allies.
- Clarification that ECAD/TCAD software sent to 3rd countries to design advanced node ICs to be produced in PRC within the scope of the 744.23 end use controls.

# Specific Year-in-Review Comments - 6

- Extensions of temporary general licenses to continue production with Chinese companies of SME.
- Addition of controls over High-Bandwidth Memory (HBM) similar to GPU controls - and a narrow license exception for some HBM.
- Creation of many new SME-specific ECCNs and ECAD/TCAD software controls.
- Beginning effort to regulate combination of biotech and AI issues, modified or created controls on high-parameter flow cytometers and mass spectrometry equipment.

# Specific Year-in-Review Comments - 7

- Amendment to 734.19(b) so that it reads: “Software keys, also called software license keys, that allow users the ability to use the “software” or hardware, or software keys that renew existing “software” or hardware use licenses, are classified and controlled under the same ECCNs on the CCL as the corresponding “software” or hardware to which they provide access. **If authorization is required for the export, reexport, or transfer (in-country) of the “software” or hardware, the same level of authorization is required for the software key. If authorization is obtained for the export, reexport, or transfer (in-country) of the “software” or hardware, that authorization also applies to the corresponding software license key.** If no authorization was required for the initial export of the “software” or hardware and the associated software key, but a license requirement is later imposed on the “software” or hardware, (e.g., a license requirement is imposed because the end user becomes listed on the Entity List in supplement no. 4 to part 744), then subsequent exports, reexports, or transfers (in-country) of both the “software” and hardware, and the associated software license key will be subject to the new license requirement.”
- “Note 2 to paragraph (b): This paragraph does not apply to keys that unlock dormant functionality in an item. However, in some cases, changes to, or the addition of, features may impact the classification of the item.”

# Specific Year-in-Review Comments - 8

- Creation of novel foundry and OSAT due diligence requirements. When a fab or an OSAT is going to ship at 16/14 nm or non-planar logic, then there is a presumption that it is 3A090.a and designed/marketed for data centers. (compliance required on January 31st)
  - Only can be overcome by attestation from (i) listed Approved IC Designers or Approved OSAT company; or (ii) “Authorized IC Designer,” which requires additional KYC and BIS reporting. (Authorized IC Designers must be from Taiwan, or A1/A5 country without an ultimate parent in Macau/D5).

# Specific Year-in-Review Comments - 9

- There are now 28 specific red flags in the Know Your Customer Guidance.
  - <https://www.ecfr.gov/current/title-15/subtitle-B/chapter-VII/subchapter-C/part-732/appendix-Supplement%20No.%203%20to%20Part%20732>
- Thus, it is more critical than ever that companies have systems, including regular training of the relevant personnel, to aggregate the knowledge of the company and to ensure that all involved know how to spot red flags. The knowledge of a company's employees is imputed to the company.
- If there is a red flag, specific or general, that cannot be resolved, the KYC guidance says company “should either refrain from the transaction” or get permission from BIS. (Para. (a)(6))

# Hundreds of Additions to the Entity List (and a few removals)

- Supporting Russian military industrial base or UAV acquisition/production efforts.
- Evasive behavior regarding US-origin items or evading US sanctions against Russia.
- Acquiring items in support of Russian military or sending items to Russia.
- Acquiring items on behalf of PRC listed entities.
- Supplying deep packet inspection technology to Egypt to be used in human rights violations.
- Violations of sanctions against Iran, including with respect to UAV production.
- Acquiring items in support of PRC's military modernization efforts.
- Entities that supported the high-altitude balloon that flew over the US.
- Additions of specific addresses to Entity List to address corporate shells engaging in diversion.
- Not cooperating with UVL end-use checks.
- Procuring items for Pakistan-based company of concern re military, missile, and UAV issues.
- Companies in China that develop or produce SME or EDA software.

# Entity List Additions cont.

- Entities that provide support or might provide support to Huawei or other listed entities.
- Entities that support PRC investments in semiconductor manufacturing.
- Providing support to Russia's mass surveillance efforts.
- Providing support to the Burmese military.
- Developing advanced node ICs in the PRC.
- Developing AI in PRC.

# Proposed End Use, End User, and US Person Controls

- Expand controls over US person activities and shipment of otherwise uncontrolled items if military, military-support, intelligence, or foreign-security end users would be involved.
- DDTC also published a proposed complementary definition of “defense services.”
- Would require significant changes to global end-use and end-user controls.
- <https://www.akingump.com/en/insights/alerts/bis-proposes-significant-amendments-to-the-ears-us-person-and-end-user-controls-and-a-control-on-facial-recognition-items>
- Something to watch for in 2025 to see what happens.

# Other Proposed Rules

- Proposed rule to create notification requirement for companies developing foundation AI models and those that acquire computing clusters. (Not an export control rule. Uses BIS survey authority.)
- Various proposed changes to the 9x515 space-related controls. Would create new License Exception Commercial Space Activities.
- Most other rules went straight to final with comments sought after effective dates, which makes compliance program implementation very difficult and fails to catch errors or unintended impacts that could have been caught with a regular order proposed rule, notice-and-comment process.
- December 2<sup>nd</sup> rule, foundry due diligence, and AI Diffusion rule each had novel delayed compliance dates.

# Historical Role of Economic Considerations

- (In my day), economic considerations of lost sales were never studied or considered because of a view that the government should not:
  - compromise national security or foreign policy objectives for profit; or
  - use export controls to achieve economic advantage for specific companies. (“Export controls don’t pick economic winners and losers.”)
- Effectiveness of the multilateral system depended upon a common understanding among the allies that controls would be used to achieve non-proliferation objectives and not for domestic economic protectionist reasons.
  - In other words, use of unilateral controls to achieve economic gains almost always have exactly the opposite impact because foreign competitors would not be subject to the same controls and would take away the market share of the US companies.

# Historical Role of Economic Considerations cont.

- Any economic benefits for exporters would come from:
  - keeping the lists of controlled items current (so as not to over-control items that no longer meet the standards);
  - the efficient operation of the licensing system in the least regulatory burdensome way possible to achieve the national security and foreign policy objectives;
  - revising regulations to ensure that they were clear, reliable, and understandable to non-experts; and
  - having multilateral controls that also applied to competitors in allied countries.

# Were Biden's Export Controls Domestic Protectionism?

- No, mostly, but most media and think tank commentary suggest motivations other than pure, but expansive, national security objectives.
  - Motives often get attributed to CHIPS Act and Inflation Reduction Act (IRA) support for US industry.
- Because, however, the controls are (i) unilateral; (ii) focused on the entire PRC semiconductor ecosystem; and (iii) items that do not have a direct or clear relationship to weapons, the impact on commercial activities and supply chains was inevitable.
- The requirement to keep 50% of compute power in the US as a condition of being a UVEU is also clearly mixes industrial policy with national security concerns.
- Controls provoked a broad policy discussion of what common security interests are among allies involving control over essentially commercial items that are important to the PRC's military modernization but not clearly directly related to specific weapons or military items.

# Export Control Bills that Did Not Make it Through Previous Congress

(and are thus topics to watch for in the new Congress)

# Export Control Bills - 1

- Clarification (or creation) of the authority for the EAR's Foreign Direct Product rules at: <https://www.congress.gov/amendment/118th-congress/senate-amendment/3152/text>
- Section 124 of this bill would have created a Special Envoy for Critical and Emerging Technology: <https://www.congress.gov/bill/118th-congress/senate-bill/5131/text>
- Text of a bill to change the Operating Committee license review/approval process a bit is at: <https://www.congress.gov/bill/118th-congress/house-bill/6602/text>
- Text of the "Maintaining American Superiority by Improving Export Control Transparency Act" at: <https://www.congress.gov/bill/118th-congress/house-bill/6614/text>

# Export Control Bills - 2

- Bill to require consideration of controls on the export of items that would support undersea cables: <https://www.congress.gov/bill/118th-congress/house-bill/1189/text>
- Text of a bill to add IP protection into the policy scope of the export control authorities is at: <https://www.congress.gov/bill/118th-congress/house-bill/6606/text>
- Text of bill to change Entity List listing process:  
<https://www.congress.gov/bill/118th-congress/house-bill/7151/text>
- Text of the sanctions list harmonization bill is at:  
<https://www.congress.gov/bill/118th-congress/house-bill/5613/text>

# Export Control Bills - 3

- Text of Economic Espionage Prevention Act at: <https://www.congress.gov/bill/118th-congress/house-bill/8361/text>
- The text of the BIS IT Modernization bill at: <https://www.congress.gov/bill/118th-congress/house-bill/9247/text>
- Bill that would give BIS authority to regulate remote access into data centers at: <https://www.congress.gov/bill/118th-congress/house-bill/8152/text>

# Commentary for Additional Reading

- May 23, 2024 Wolf testimony before US-China Economic and Security Commission at: [https://www.uscc.gov/sites/default/files/2024-05/Kevin\\_Wolf\\_Testimony.pdf](https://www.uscc.gov/sites/default/files/2024-05/Kevin_Wolf_Testimony.pdf)
- September 8, 2021 Wolf testimony before US China Economic and Security Review Commission at: [https://www.uscc.gov/sites/default/files/2021-08/Kevin\\_Wolf\\_Testimony.pdf](https://www.uscc.gov/sites/default/files/2021-08/Kevin_Wolf_Testimony.pdf)
- May 1, 2022 Wolf-Weinstein article - *COCOM'S Daughter* at: <https://cset.georgetown.edu/wp-content/uploads/WorldECR-109-pp24-28-Article1-Wolf-Weinstein.pdf>
- January 14, 2022 article on US - EU control issues at: <https://s3.us-east-1.amazonaws.com/files.cnas.org/backgrounds/documents/011422.US-EU.TTC.Wolf.Kilcrease.Helder.FINAL.pdf>

# Additional Materials on Recommendations

- June 2023 article -- *Authorities for Plurilateral Controls and a Multilateral Export Control Regime are Needed to Address Contemporary National Security and Human Rights Issues* at <https://www.akingump.com/a/web/agberRBPWLqiwQGkezrAKk/plurilateral-controls-idea-korea.pdf>
- May 11, 2023 Wolf testimony before House Committee on Foreign Affairs at: <https://docs.house.gov/meetings/FA/FA17/20230511/115902/HHRG-118-FA17-Wstate-WolfK-20230511.pdf>
- February 28, 2023 Wolf testimony before Senate Banking Committee at: <https://www.banking.senate.gov/imo/media/doc/Wolf%20Testimony%202-28-23.pdf>
- December 7, 2022 Wolf testimony before UK Parliament, Committees on Arms Export Controls at: <https://committees.parliament.uk/writtenevidence/114084/pdf/>

# Audio Commentary

<https://twitter.com/foreignpolicy/status/1704862723920765142?s=42&t=OlmIEYHfuRcCobqh94a3lQ>

<https://tradetalkspodcast.com/podcast/170-national-security-semiconductors-and-the-us-move-to-cut-off-china/>

<https://tradetalkspodcast.com/podcast/146-semiconductors-and-us-export-bans-from-huawei-to-smic/>

[https://www.youtube.com/watch?v=WX8v74y\\_Mx8](https://www.youtube.com/watch?v=WX8v74y_Mx8)

<https://merics.org/en/podcast/whats-next-us-export-controls-targeting-china-kevin-wolf-and-rebecca-arcesati>

# Articles and Alerts on Export Control Topics

<https://www.akingump.com/en/insights/alerts/commerce-imposes-significant-new-controls-on-advanced-semiconductors>

<https://www.akingump.com/en/insights/alerts/first-significant-changes-in-over-a-decade-to-us-export-controls-on-space-related-items-and-activities>

<https://www.akingump.com/en/insights/alerts/bis-proposes-significant-amendments-to-the-ears-us-person-and-end-user-controls-and-a-control-on-facial-recognition-items>

<https://www.akingump.com/en/insights/alerts/bis-announces-key-updates-to-voluntary-self-disclosure-process>

<https://www.akingump.com/en/insights/alerts/bis-imposes-new-controls-to-limit-the-development-and-production-of-advanced-computing-and-semiconductor-capabilities-in-china>