



FAQs for Interim Final Rule - Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification

87 Fed. Reg. 62186 (October 13, 2022)

Date FAQs Updated: January 25, 2023

The advanced computing and semiconductor manufacturing equipment (advanced computing) rule addresses U.S. national security and foreign policy concerns in two key areas. First, the rule imposes restrictive export controls on certain advanced computing semiconductor chips, transactions for supercomputer end-uses, and transactions involving certain entities on the Entity List. Second, the rule imposes new controls on certain semiconductor manufacturing items and on transactions for semiconductor development and production end uses.

The advanced computing rule was published as an interim final rule with a request for comments. This means that the advanced computing rule went into effect on the dates indicated, but that the Bureau of Industry and Security (BIS) will continue to accept public comments on the rule and, after reviewing those comments, will publish a final rule that will respond to the comments at a future date. Please note that while BIS will use the public comments it receives to revise or refine the rule if appropriate, BIS will also evaluate the questions it receives and add to or amend this set of FAQs for the benefit of the public's understanding of the rule for compliance purposes.

Comments on the rule may be submitted until January 31, 2023, at www.regulations.gov, under docket # BIS-2022-0025; please refer to RIN 0694-AI94 in all comments. Additional instructions for submitting comments are provided in the rule, including submitting comments containing business confidential information. Questions on the rule may be submitted to RPD2@bis.doc.gov.

I. General Questions

I.Q1: *Are the new restrictions on exports and reexports to China also applicable to Hong Kong and Macau?*

A1: Yes, the restrictions applicable to the People's Republic of China (China or PRC) in the October 7 advanced computing and semiconductor manufacturing equipment rule are also applicable to Hong Kong and, as of January 17, 2023 to Macau. Hong Kong has the same license requirements as China and is therefore subject to the requirements of the advanced computing rule.

BIS published an interim final rule on January 18, 2023 (88 Fed. Reg. 2821), making initial updates to the October 7 advanced computing and semiconductor manufacturing equipment rule, to more effectively achieve the identified policy objectives by adding the same controls implemented

on China to Macau. For purposes of the EAR, the January 17 rule does not change the status of Macau; it will continue to be treated as a separate destination from China. These changes are informed by BIS's review of the October 7 advanced computing and semiconductor manufacturing equipment rule and the questions BIS has received since October 7, 2022.

II. Definitions

I. Q1: *The term semiconductor fabrication “facility” is used a number of times in the advanced computing rule but is not defined in the Export Administration (EAR). Does this term refer to the fabrication “facility” at the beginning of the process, e.g., where the technology node is created, or to the Outsourced Semiconductor Assembly and Test (OSAT) facility at the end of the semiconductor manufacturing process?*

II.A1: Section 772.1 of the EAR defines “facilities” as “a building or outdoor area in which people use an item that is built, installed, produced, or developed for a particular purpose.” Thus, a semiconductor fabrication “facility” is a building where the production at the restricted technology level occurs. Subsequent steps at facilities, such as assembly, test, and/or packaging facilities, that do not alter the technology levels are not covered.

II.Q2: *Does the term fabrication “facility” include different production lines in the same building or lines in different buildings on the same company campus, such as a company campus where one building on the campus is doing the 14 nm work and another building on the same campus is doing the 28 nm work – are the two buildings considered the same facility or are they to be considered separate facilities?*

II.A2: Pursuant to the definition of “facilities” in § 772.1 of the EAR, each building is considered to be a separate facility. If an entity has a restricted and unrestricted line in the same building, that building/facility is subject to the new control. If an entity has multiple buildings located on the same campus with the same address and/or are part of the same legal entity, parties should exercise sufficient due diligence to ensure their item or activity is only for an unrestricted fabrication.

III. Deemed Exports/Reexports

III.Q1: *How does the advanced computing rule affect deemed exports/reexports?*

III.A1: Under § 742.6(a)(6)(ii) of the EAR, the regional stability (RS) controls placed on the new and revised ECCNs do not apply to deemed exports/reexports. However, all of the relevant Export Control Classification Numbers (ECCNs) and the associated technology/software controls are also controlled for anti-terrorism (AT) reasons, which are not exempt from deemed export/reexport requirements, and as a result a license is required for persons from AT-countries (Iran, North Korea, and Syria).

Consistent with BIS practice, which recognizes that once a person has received controlled

technology or software source code that person retains knowledge of that technology or software source code, a foreign person who lawfully received technology or software source code prior to the effective date of the new ECCNs does not need a new license or authorization. However, a new or additional authorization is required before that foreign person can receive controlled technology or software source code different from that previously received even if the technology or software source code is classified under the same ECCN.

IV. “U.S. Person”

IV.Q1: *Who is a “U.S. Person” subject to the license requirements in § 744.6(c)?*

IV.A1: Section 772.1 of the EAR applies a different definition for the term “U.S. person” depending upon the section of the EAR in which the term is used: For purposes of § 744.6(c) of the EAR, the term U.S. person includes:

- Any individual who is a citizen of the United States, a permanent resident alien of the United States, or a protected individual as defined by [8 U.S.C. 1324b\(a\)\(3\)](#);
- Any juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches; and
- Any person in the United States.

Also note the definition of “person” in § 772.1 of the EAR: “A natural person, including a citizen or national of the United States or of any foreign country; any firm; any government, government agency, government department, or government commission; any labor union; any fraternal or social organization; and any other association or organization whether or not organized for profit. This definition does not apply to part 760 of the EAR (Restrictive Trade Practices or Boycotts).”

IV.Q2: *What activities of “U.S. persons” require a license under § 744.6(c)(2) of the EAR?*

IV.A2: The “U.S. persons” control in § 744.6(c)(2) applies to persons who:

- 1) Authorize the shipment, transmittal, or in-country transfer (in-country) of items not subject to the EAR used in the “development” or “production” of integrated circuits to fabrication facilities in the PRC or Macau that fabricate integrated circuits meeting the criteria specified in § 744.6(c)(2)(i)(A)-(C) of the EAR;
- 2) Conduct the delivery, by shipment, transmittal, or transfer in-country, of items not subject to the EAR used in the “development” or “production” of integrated circuits to a fabrication “facility” in the PRC or Macau that fabricate integrated circuits meeting the criteria specified in § 744.6(c)(2)(i)(A)-(C) of the EAR; or
- 3) Service, including maintaining, repairing, overhauling, or refurbishing items not subject to the EAR used in the “development” or “production” of integrated circuits at a semiconductor fabrication “facility” located in the PRC or Macau that fabricate integrated circuits meeting the criteria specified in § 744.6(c)(2)(i)(A)-(C) of the EAR.

“U.S. persons” should conduct appropriate due diligence to assess whether a fabrication “facility” in the PRC or Macau fabricates integrated circuits meeting any of the criteria set forth in

§ 744.6(c)(2)(i)(A)-(C). Appropriate due diligence includes review of publicly available information, capability of items to be provided or serviced, proprietary market data, and end-use statements. U.S. persons should follow the “Know Your Customer” guidance in Supplement No. 3 to part 732 of the EAR. Additional guidance on due diligence can be found at <https://www.bis.doc.gov/index.php/all-articles/23-compliance-a-training/47-know-your-customer-guidance>. U.S. persons can also submit Advisory Opinion requests to BIS pursuant to § 750.2 of the EAR for guidance on specific fabrication facilities. To submit an Advisory Opinion request, go to <https://www.bis.doc.gov/index.php/component/rsform/form/22-advisory-opinion-request>, or email RPD2@bis.doc.gov.

As set forth in § 744.6(c)(2), these license requirements apply even when the “U.S. person” does not know whether the activity is for a facility that fabricates integrated circuits that meet the criteria in § 744.6(c)(2)(i)(A)-(C).

Given the policy objective of the rule, the U.S. persons criteria in § 744.6(c)(2)(i)-(vi) do not extend to U.S. persons conducting administrative or clerical activities (e.g., arranging for shipment or preparing financial documents) or otherwise implementing a decision to approve a restricted shipment, transmittal, or in-country transfer, or “development” or “production” activities that are not directly related to the provision of specific items to or servicing of specific items for advanced PRC or Macau fabs (i.e., those developing or producing integrated circuits meeting the criteria in § 744.6(c)(2)(i)(A)-(C)), absent evidence of knowledge of a violation by those persons.

Please note that this guidance only applies to § 744.6(c)(2). For example, this guidance does not limit the scope of § 744.6(b) or apply to other uses of the term facilitate or facilitation found elsewhere in the EAR. BIS also is considering appropriate revisions to the advanced computing rule to ensure that the rule provides maximum clarity to achieve its policy objective.

IV.Q3: *How should companies file applications for U.S. person support activities? Is it possible/appropriate to use SNAP-R for this?*

IV.A3: Yes, use SNAP-R for submitting a license application for U.S. person activities. Applicants should use the reexport designation on the SNAP-R form and include in the “Additional Information” section of the license application that a license is required for the transaction under § 744.6 of the EAR. In the special purpose field, you should input “U.S. person activity.”

V. Licensing and License Review Policy

V.Q1: *Do previously issued EAR license authorizations for items that are now captured under the parameters of one of the new ECCNs remain valid for the export, reexport, or transfer (in-country) of such items?*

V.A1: Yes, licenses previously issued for such items are valid until their expiration dates absent

license-specific action by BIS to suspend, revoke, or impose additional conditions on the previously issued licenses.

V.Q2: *There are reports BIS issued authorizations to multilateral companies operating in China to continue their activities for one year. There are also reports BIS issued authorizations to companies to allow exports to China related to their supply chain. Are these letters to be shared with suppliers and customers? How does a company confirm that these letters are authentic?*

V.A2: BIS has issued authorizations in limited circumstance to allow continued operations. The company who received the authorization from BIS should provide a copy to you directly. You and the holder of the authorization should jointly determine if the transactions you wish to undertake meet the terms and conditions of the authorization.

VI. Encryption

VI.Q1: *If an end item subject to the EAR has encryption functionality (i.e., 5A992.c), but it also meets or exceeds the parameters in 3A090 or 4A090, are they subject to the license requirements for 3A090 and 4A090 items?*

VI.A1: ECCN 5A992 and 5D992 items that meet or exceed the parameters of 3A090 or 4A090 are subject to the license requirement and review policy for 3A090 and 4A090 items (see §742.6(a)(9)), in addition to being subject to restrictions or requirements in Category 5 Part 2 (i.e., classification, licensing, and reporting requirements). In addition, computers, integrated circuits, “electronic assemblies” or “components” not specified in § 740.2(a)(9)(i)¹ that meet or exceed the parameters of 3A090 or 4A090 are subject to license exception restrictions in § 740.2(a)(9)(ii) of the EAR, i.e., may not be exported, reexported, transferred (in-country) using License Exception ENC.

¹ ECCNs 3A090, 3B090, 4A090, or associated software and technology in 3D001, 3E001, 4D090, and 4E001.