EXPORT CONTROLS

CLIENT ALERT · NOVEMBER 2026

BIS Issues Rule to Limit Remote Access to Advanced Chips

On November 16, 2026, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) issued an interim final rule, "Addressing Remote Access to Advanced Semiconductors," amending the Export Administration Regulations (EAR). The rule restricts the use of overseas data centers to supply computing power generated from certain EAR-controlled items to companies headquartered in Macau or a Country Group D:5 destination (which includes China), or whose ultimate parent company is so headquartered. The rule also requires a license for those controlled items destined to five named countries, amends the presumptions that chip fabricators and packagers face, and effectively rescinds the AI Diffusion Rule.

This alert summarizes the principal provisions of the rule based on the pre-publication text released by BIS; the rule takes effect on the date of its publication in the Federal Register, which is scheduled for November 19, 2026. (In an unusual show of accountability-shifting among executive agencies, the BIS press release stated that the rule was "written by and at the direction of the Department of Treasury and the National Security Council.")

Effective Date

- The rule takes effect on the date it is published in the Federal Register. The Federal Register has listed the rule for public inspection, with publication scheduled for November 19, 2026. Comments are due 60 days after publication; BIS issued the rule without prior notice and comment, relying on Section 1762 of the Export Control Reform Act of 2018.
- A savings clause covers shipments that lose eligibility for a license exception, or for export without a license, by virtue of the rule: If such a shipment was en route aboard a carrier to a port of export, reexport, or transfer (in-country) on the publication date, pursuant to actual orders, it may proceed under the previous eligibility so long as it is completed within 30 days of publication.

The New Data Center Control

- The rule prohibits the unlicensed export, reexport, or transfer (in-country) of specified advanced computing items where there is "knowledge" at the time that the item is destined to a data center that is providing, or will provide, access to more than 12,000,000 "aggregate TPP" to or for D:5 or Macau companies. The data center may be in any destination worldwide. The items covered are those in ECCNs 3A090 (except 3A090.c) and 4A090, the related .z items, and the associated software and technology, each as listed in § 744.24(a)(1).
- "Aggregate TPP" is the sum of the total processing performance (TPP), as defined in the Technical Notes to ECCN 3A090, of the covered integrated circuits or commodities in a group. The threshold may be reached at one data center or through "linked data centers," i.e., data centers joined by networking infrastructure (whether digitally or physically linked) that allows physical and virtual facilities to share resources, balance workloads, and replicate data as a unified whole.
- Indirect access is also covered. According to the preamble, the term "for an entity" applies where there is "knowledge" that a data center is providing remote access to a non-D:5 customer that is, in turn, training models for, participating in the training of models for, or providing models to a D:5 company.
- The prohibition applies whether or not the person in possession of the item was a party to the original export, reexport, or transfer. Moreover, reexporters and transferors may not rely on *de minimis* provisions where there is knowledge that a U.S.-origin item incorporated into a foreign-made item will be used in the prohibited end use.

- Note 3 addresses what an exporter must do to show that it lacks knowledge. The exporter is expected to obtain, and be able to provide, sufficient information from the overseas data center about its "know your customer" (KYC) due diligence checks, including whether any customer is subject to direct or indirect ownership or control by people or entities located in, headquartered in, or whose ultimate parent is headquartered in, Macau or a Country Group D:5 destination. If the data center refuses or is unable to provide such information, that constitutes a red flag that presumptively gives the exporter sufficient "knowledge" unless it is resolved before the transaction proceeds.
- License applications will be reviewed case by case.

Changes in End Use and Data Centers Already Operating

- The control continues to apply after the items are delivered. The preamble treats a change from a *non-prohibited* end use to a *prohibited* end use as a "transfer (in-country)" requiring authorization under § 744.24, and states that the owner or operator of the data center (or other party making the transfer) will be required to obtain a license.
- Section 744.24(e) imposes a notification requirement on any export, reexport, or transfer made without authorization on or after the publication date (i.e., because there was no "knowledge" of a prohibited end use and no other EAR license requirement applied). The exporter, reexporter, or transferor must inform the recipient that BIS authorization is required if the items will be used at a data center to provide access above the 12,000,000 aggregate TPP threshold to or for D:5 or Macau companies; that the transferor (e.g., the data center operator) must obtain authorization for that change in end use; and that the transferor must follow the KYC guidance in supplement no. 3 to part 732 of the EAR.
- Data centers already serving D:5 or Macau companies are given 90 days to comply. Under § 744.24(b)(3), any data center that was providing a "significant volume of compute power" to such companies before the publication date, and that wishes to continue, must obtain a license within 90 days of the effective date "or face future export restrictions."

Commercial Recommender Systems

- The prohibitions of § 744.24 do not apply when the computing access is being provided only for a "commercial recommender system" and specified information is submitted to BIS at the web address given in the rule. The information required is the name of the D:5 or Macau company; the sum of the TPP of the covered items provided to or for that company; and the due diligence performed to ensure that the access is exclusively being provided for a commercial recommender system. This information will be shared with the End User Review Committee.
- A "commercial recommender system" is a 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. The term does not include any system designed or used to generate novel text, image, audio, video, software, or other content in response to user inputs, or any system that incorporates such a model, regardless of whether the system also performs recommendation functions.
- The preamble adds that bona fide operators of data centers who are otherwise engaged in activities consistent with the EAR, and who were providing remote access used for commercial recommender systems, may continue providing those services for 90 days but must obtain a license to continue thereafter. The text of § 744.24(b)(2) does not state a time limit on the exclusion.

Five Countries Added

- A license is now required for exports, reexports, and transfers (in-country) of covered advanced computing items to or within **Indonesia**, **Malaysia**, **Singapore**, **Brazil**, and **Thailand**. The rule describes these as countries presenting a higher-than-normal risk of diversion, and its summary provides that the Secretary of Commerce may designate additional countries in consultation with the Secretary of State or the Assistant to the President for National Security Affairs.
- The requirement does not apply where the ultimate consignee or end user is headquartered in the United States, or has an ultimate parent company headquartered there, provided the exporter, reexporter, or transferor complies with the reporting requirements of new § 743.10. This exclusion appears in Note 1 to § 742.6(a)(6)(iii)(A)(1) and applies to the license requirement of that paragraph; § 744.24 contains no corresponding exclusion.

- Reports under § 743.10 are monthly and are due no later than the first business day of the month following the transaction. Each report must identify the parties to the transaction and the ultimate parents of the ultimate consignee and end user (incl. the name, address, and phone number of each parent company headquarters); the ultimate destination and any end users other than the ultimate consignee; the ECCN, product name and SKU, TPP, and quantity of each product; and the date of each export, reexport, or transfer.
- License applications will be reviewed case by case to determine whether the transaction is contrary to U.S. national security or foreign policy interests, taking into account the effectiveness of the destination's export control regime and its coordination with BIS on enforcement.

Other Destinations

- The worldwide Regional Stability license requirement is replaced by one tied to listed destinations. A license is required for exports, reexports, and transfers (in-country) to or within destinations in Country Groups D:1, D:4, and D:5 (excluding destinations also specified in Country Groups A:5 or A:6) and the United Arab Emirates (UAE); no license is required where the ultimate consignee and all end users are approved UAE entities listed in supplement no. 8 to part 740 and specified as approved to receive the covered items.
- Applications to export commodities with a TPP of less than 21,000 and a total DRAM bandwidth of less than 6,500 GB/s to end users located in China or Macau will be reviewed case by case, provided the applicant supplies the additional information described in paragraph (dd) of supplement no. 2 to part 748. All other applications to or within Country Group D:5 and Macau, or for a D:5 or Macau company, face a presumption of denial, and all other applications to or within Country Groups D:1 and D:4 (excluding destinations also specified in Country Groups A:5 or A:6) and the UAE face a presumption of approval.

The Existing Control in § 744.23

- As a conforming change to the removal of the worldwide license requirement, the rule returns to § 744.23(a)(3)(i)(A) the license requirement for advanced computing items destined to any destination other than those specified in Country Groups D:1, D:4, or D:5 (excluding any destination also specified in Country Groups A:5 or A:6) "for an entity" that is a D:5 or Macau company. Section 744.23(a)(3)(i)(B), as set out in the rule, applies to ECCN 3A090.c items destined to any destination other than Macau or Country Group D:5 for such a company.
- BIS states that the "for an entity" end-use control "is not, and has never been limited only to" exports, reexports, and transfers (in-country) destined to such entities as ultimate consignees or end users; it extends to transactions on behalf of these entities, e.g., where the entity was the purchaser (directly or indirectly) or was the exclusive or primary (greater than 50 percent of total compute) remote end user of the data center computing capacity.
- Exporters, reexporters, and transferors are encouraged to examine both § 744.23(a)(3) and new § 744.24 where a transaction involves a data center outside the United States and there is knowledge that a D:5 or Macau company will be an intended remote end user. BIS states that any entity in violation of the § 744.23 requirement should submit a voluntary self-disclosure under § 764.5 of the EAR.

Chip Fabricators and Packagers

- Note 1 to ECCN 3A090.a creates a presumption that an "applicable advanced logic integrated circuit" exported by a "front-end fabricator" or "OSAT" company is specified in 3A090.a. Paragraphs b. and c. of that note, which provide two of the ways to overcome the presumption, are amended so that they are not available where the integrated circuit designer is located in, or has an ultimate parent headquartered in, a destination specified in Country Groups D:1, D:4, or D:5 or one of the five countries named in § 742.6(a)(6)(iii)(A)(1).
- New § 744.23(a)(3)(i)(C) requires a license for an "applicable advanced logic integrated circuit" specified in 3A090.a that is designed by a company that is neither an approved integrated circuit designer (supplement no. 6 to part 740) nor an authorized integrated circuit designer (Note 1 to 3A090.a), and that is exported, exported from abroad, reexported, or transferred (in-country) by a "front-end fabricator" or "OSAT" to or within any destination.

The AI Diffusion Rule

- The rule formally rescinds the regulations implementing the “Framework for Artificial Intelligence Diffusion” (90 FR 4544, January 15, 2025). According to the rule’s summary, the AI Diffusion Rule has never been enforced, and BIS announced its rescission in May 2025.
- The provisions removed include the controls on model weights (ECCN 4E091 and the related foreign direct product rule in § 734.9(l)); the country tiers; License Exception Artificial Intelligence Authorization (§ 740.27); License Exception Low Processing Performance (§ 740.29); and the Data Center Validated End-User Authorization.
- BIS is retaining License Exception Advanced Compute Manufacturing (§ 740.28) and the worldwide destination scope of the advanced computing foreign direct product rule in § 734.9(h)(2)(i). With respect to the latter, the preamble states that if a foreign-produced item is subject to the EAR pursuant to § 734.9(h), BIS retains jurisdiction over that item after its incorporation into another foreign-produced item (e.g., an ECCN 3A090 integrated circuit incorporated into a server).

This alert is provided for general informational purposes only and is not legal advice. Please contact Brian Burke (brian@burkelawstrategy.com) to discuss how these developments may apply to your situation.