Commerce Department Publishes Artificial Intelligence "Diffusion" Rulemaking

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On January 13, 2025, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) published an interim final rule (IFR) announcing (1) updated controls for advanced computing chips and associated license exceptions; (2) updates to the Validated End User (VEU) Program for Data Centers (DCs); and (3) new controls on the model weights of the most advanced closed-weight artificial intelligence (AI) models. Given the breadth of changes included with this announcement, the IFR will be open for public comment until May 15, 2025.

License Review Process and New License Exceptions

The IFR creates a worldwide licensing requirement for the export, reexport, or transfer (in-country) of advanced computing integrated circuits (ICs) or the model weights of the most advanced AI models to any end user in any destination. For many countries, license applications will be considered under a presumption of approval up to a cap per country, while more sensitive countries will be subject to a presumption of denial. The IFR also includes the following license exceptions and authorizations to help ensure that commercial transactions that do not pose heightened national security risks can proceed and the benefits of AI can be broadly shared.

- License Exception Artificial Intelligence Authorization (AIA): allows the export, reexport, or transfer (in-country) of advanced computing chips, without an authorization, to a set of allies and partners, which are: Australia, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Netherlands, New Zealand, Norway, Republic of Korea, Spain, Sweden, Taiwan, the United Kingdom, and the United States.

- License Exception Advanced Compute Manufacturing: authorizes the export, reexport, and transfer (in-country) of eligible items to private sector end users located in a destination not listed in Country Group D:5 or Macau, provided the end user's company is not headquartered in, and does not have an ultimate parent company headquartered in, Macau or a destination specified in Country Group D:5, and only if the ultimate end use is the "development," "production," or storage of such eligible items.

- License Exception Low Processing Performance: authorizes the export and reexport of low amounts of compute that do not present significant national security risks, up to 26,900,000 Total Processing Performance of advanced computing ICs per-calendar year to any individual ultimate consignee. There is no restriction on the number of shipments from exporters or re-exporters, provided the volume limit is not exceeded.

Update to Data Center Validated End User Program

The IFR also split the DC VEU program into two separate programs to better delineate that advanced compute DCs may involve corporate relationships in which different parties own the data center, provide physical security, own the advanced compute assemblies, provide logical security, and are able to access the compute. Specially, BIS created:

- Universal VEUs (UVEU): provides U.S. and certain allied and partner country entities with the opportunity to obtain a single authorization that will allow the company to build DCs around the world without additional authorizations, except in arms-embargoed countries; and
- National VEUs (NVEU): provides entities headquartered outside arms-embargoed countries the opportunity to obtain an authorization that will allow the company to build DCs in specified locations, and up to a specified scale, without additional authorizations, except in arms-embargoed countries.

Both the UVEU and NVEU programs contain eligibility requirements and restrictions on the kinds of activities that can be performed under the program, as well as certain reporting requirements to BIS. For example, authorized UVEUs will be required to keep at least 75% of their controlled advanced chips within the United States and certain allied and partner countries, and will be prohibited from installing more than 7% of their controlled chips in any single other country. To that end, companies should carefully review the new UVEU and NVEU requirements if they plan on exporting in the AI market.

New Controls on Model Weights of the Most Advanced Closed-Weight AI Models

Lastly, the IFR requires a license to export, reexport, or transfer (in-country) the model weights of any closed-weight AI model – i.e., a model with weights that are not published – that has been trained on 10^26 computational operations or more. Additionally, the rule creates a new foreign direct product rule that applies these controls to certain model weights produced abroad using advanced computing chips made with U.S. technology or equipment. Two exceptions are available for theses weight-based controls. The first, available through License Exception AIA, allows for the export, reexport, or transfer (in-country) of otherwise controlled closed AI model weights, without an authorization, by companies headquartered in the United States and certain allies and partners, except to an arms-embargoed country. The second applies to AI models with widely available model weights (i.e., open-weight models), which are not subject to controls.

This IFR is the culmination of the Biden Administration’s efforts to curtail the use of advanced AI by adversaries who threaten U.S. national security, and as such, it is a complicated piece of economic rulemaking. Our export controls and sanctions team is tracking this issue closely and can help navigate these new developments. Please contact us if you have any questions.