

China Places Export Controls on Raw Materials Used in Semiconductor Manufacturing

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On July 3, 2023, the PRC Ministry of Commerce (“MOFCOM”) and the General Administration of Customs (“GAC”) announced the implementation of export controls on gallium and germanium items, effective August 1, 2023 (the “Announcement”).¹ The Announcement appears calculated to respond to semiconductor-related export controls imposed by the U.S. and its allies since 2022. In the near term, companies that obtain gallium- and germanium-based items from China should prepare for potential supply chain disruptions.

ELEMENTS OF AN APPLICATION FOR A LICENSE UNDER THE NEW CONTROLS

Pursuant to the Announcement, after August 1, 2023, certain gallium and germanium items, listed by customs commodity numbers, cannot be exported from China without a license for the export of dual-use items and technologies issued by the provincial-level MOFCOM. The license application requires the exporter to provide (i) the agreement between the parties; (ii) technical description of the item; (iii) end-use and end-user certification; (iv) documentation regarding the identity of the importer and end-user; and (v) information regarding the exporter. The GAC will review the export license before releasing the items for export.

GEOPOLITICAL CONTEXT

Prompted by supply shortages triggered by COVID-19, the U.S. government examined a variety of supply chains and determined action was needed with respect to semiconductors, a foundational and enabling technology. In 2022, the U.S. imposed controls on the export, reexport, and transfer of certain semiconductor substrates (gallium oxide and diamond) and Electronic Design Automation (a/k/a ECAD) software, as well as on advanced chips, manufacturing equipment, software, production and development technology, and the activities of U.S. persons. The U.S. hopes to halt China’s progress on advanced semiconductor manufacturing while pouring tens of billions of dollars into building domestic manufacturing capabilities under the CHIPS and Science Act. Since last year, the U.S. has successfully lobbied for additional national controls by key semiconductor players such as Japan and the Netherlands.

As the U.S. gained momentum on implementing policies to shore up its semiconductor supply chain, China enacted several laws and regulations that could be used as countermeasures in the growing competition with the U.S., including the Anti-Foreign Sanctions Law and the Export Control Law. This Announcement is one of the most notable and potentially potent uses of the Export Control Law since it went into effect on December 1, 2020.

WHAT TO EXPECT

Short term, companies that obtain gallium- and germanium-based items from China should prepare for potential supply chain disruptions as export license applications are processed and possibly denied. In addition, companies should be prepared to provide their counterparties with sufficient information, including the end-use and end-user, to allow for license approval. Long term, companies that rely on China-origin raw materials in key industries should assess their supply chain risk for key materials.

WINSTON'S SEMICONDUCTOR INDUSTRY REACH

Winston boasts a cross-disciplined team of attorneys with significant experience representing leading semiconductor and materials-science companies in a variety of matters in the U.S. and internationally, including assisting clients to navigate various intellectual property, securities, international trade, CFIUS, and antitrust issues. In addition, Winston has formed the YuandaWinston strategic alliance with a licensed Chinese law firm, which can advise on PRC law and represent companies in front of PRC government agencies.

Kai Zhan, former China diplomat from the Ministry of Foreign Affairs and senior counsel at Winston & Strawn's China-based strategic alliance partner, Yuanda China Law Offices, co-authored this blog post.

^[1] See MOFCOM Announcement 23 of 2023 (商务部公告2023年第23号), available at <http://www.mofcom.gov.cn/article/zcfb/zcdwmy/202307/20230703419666.shtml>.

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