

Regulatory Alert

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BIS Celebrates Anniversary of Huawei Sanctions with Gift of More Sanctions[Export Controls and Sanctions Group](#)

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The Bureau of Industry and Security (“BIS”) published an interim final rule on May 19, 2020, expanding the applicability of the Export Administration Regulations (“EAR”) for certain transactions involving Huawei Technology Ltd. and its affiliates (“Huawei”). See [85 Fed. Reg. 29849 \(May 19, 2020\)](#). The stated goal is to restrict Huawei’s ability to develop or produce their own products using certain US-origin software or technology, or to have those items manufactured using certain US-origin production or testing equipment. These sanctions expand existing Entity List license requirements targeting Huawei, which have been in place since May 16, 2019.

This change comes after months of interagency discussions, and input from US industry, about how to close perceived “loopholes” in the EAR’s Entity List restrictions on Huawei. Many in US industry were concerned that initial proposals to change the EAR’s foreign direct product (“FDP”) rules and/or de minimis US-origin content rules to try to restrict Huawei further could have broader negative collateral effects, so the US Government took a more “surgical” approach, making changes to the FDP rules targeted at Huawei only.

A preliminary review suggests a relatively narrow impact, but which may not fully achieve the objective of restricting Huawei’s use of non-U.S. semiconductor foundries, such as Taiwan Semiconductor Manufacturing Corporation (“TSMC”).

1. Structure. As with many aspects of the EAR’s Huawei-related sanctions, the BIS approach is novel. The rule modifies General Prohibition 3 (See EAR 736.2(b)(3)) (“GP 3”) to point to a new “Footnote 1” to the Entity List, which currently applies only to Huawei Entity List companies.

Footnote 1 lays out two ways foreign-produced items can become subject to the EAR, but only when such items are exported, reexported, or transferred to identified Huawei Entity List companies. Paragraph (a) applies jurisdiction to foreign-made items that are:

- (1) produced or developed by an identified Huawei Entity List company, and
- (2) the “direct product” of US-origin software or technology classified under ECCNs 3E001, 3E002, 3E003, 3D001, 3E991, 3D991 (relating to electronics), 4E001, 4E992, 4D993, 4D994 (relating to computers) and 5E001, 5D001, 5E991, 5D991 (relating to telecom items).

The primary impact of Paragraph (a) is likely on the design files created by identified Huawei Entity List companies, since US-origin design tools lead the market.

That said, for a license requirement to apply, the item must be not only developed or produced by an identified Huawei Entity List company, but also destined to an identified Huawei Entity List company. While this may inhibit collaboration within the Huawei group, the new rule does not prohibit export, reexport, or transfer of such files to an unaffiliated manufacturer, such as TSMC.

Paragraph (b) is intended to address this, by imposing a license requirement if a foreign produced item is both:

(1) produced in a non-US facility where the plant or a “major component” of the plant is a “direct product” of US-origin technology or software controlled under the above-mentioned ECCNs and

(2) the item being manufactured is a “direct product” of software or technology that was produced or developed by an identified Huawei Entity List company.

Based on US Government statements, the primary intent of Paragraph (b) is to inhibit non-US manufacturers, such as TSMC, from producing integrated circuits for Huawei, but it is not clear the extent to which this goal was achieved.

Most, if not all, foreign electronics manufacturers do incorporate capital equipment based on US-origin technology in their process flow. However, based on past BIS interpretation of GP 3, the license requirement limits EAR jurisdiction to the immediate direct products of Huawei’s design files or technical data.

For example, integrated circuit production involves several discrete stages, and frequently multiple manufacturers. BIS has advised, in applying GP 3, that finished integrated circuits are “indirect” products of the circuit design files. However, an example in the Federal Register notice preamble implies the opposite - that a finished integrated circuit is the “direct” product of an identified Huawei Entity List company’s design. See 85 Fed. Reg. 29849 at 29850. There is no reason to interpret these new Huawei-specific direct product rules differently than past interpretations of the standard FDP rules, as they use the same terminology and rely on the same EAR authority.

Further limiting the scope, and like Paragraph (a) products, an EAR license requirement would apply to Paragraph (b) “direct products” only if exported, reexported, or transferred to an identified Huawei Entity List company. This limits the potential impact, as intermediate-stage and finished electronics are frequently transferred to additional manufacturers for incorporation into higher-level assemblies, and ultimately go directly to customers, and may not be sent back to Huawei.

2. Effective Date. The rule indicates it came into effect on May 15, 2020, when posted on the Federal Register Public Inspection website. This continues an unfortunate trend of BIS asserting rule changes are effective before Federal Register publication, playing a game of “gotcha” with exporters who are not constantly hitting “refresh” on the Federal Register website. The rule is in effect now, although BIS solicited industry input on the impact, requesting comments by July 14, 2020.

3. Savings Clause. There is a limited savings clause, allowing completion of shipment of items that became subject to the new license requirement under Paragraph (a), if they were in the process of being delivered by May 15, 2020. Items subject to new license requirements under Paragraph (b) can be delivered if they were in production as of May 15, 2020, and delivery is completed by September 14, 2020.

4. Extension of Temporary General License. In other Huawei news, BIS published an amendment to the existing Temporary General License (“TGL”), without other modifications, extending validity until August 13, 2020. See 85 Fed. Reg 29610 (May 18, 2020). The TGL has been renewed on several occasions since the original sanctions were imposed a year ago, but is limited to certain maintenance-related activities involving exports to Huawei that are required to maintain third-party networks that use Huawei equipment, and the limited ability to provide security and stability updates for installed base items that were in service prior to May 16, 2019.