

Commerce Ramps Up Huawei Export Restrictions; Foreign Suppliers Beware

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On Friday, May 15, 2020, the U.S. Department of Commerce (Commerce) announced a new rule expanding U.S. export controls on certain foreign-manufactured products if a company knows or has reason to know that an item is destined for Huawei or its affiliates. The new rule primarily targets foreign-made chips that are manufactured using U.S. chipmaking equipment and technology.

The measure is part of the Trump Administration's larger effort to restrict transactions with Chinese telecommunications giant Huawei. In May 2019, Commerce added Huawei to its Entity List, effectively banning nearly all U.S.-origin exports to Huawei without a license. Commerce's ban covers exports of U.S. hardware, software, and technology to Huawei, including software and software updates/patches (unless the software is publicly available), electronic parts and components such as chips and routers, and related technology. There are limited exceptions to the prohibitions that are authorized by a Temporary General License (TGL), which currently is valid through August 13, such as certain transactions with Huawei that are necessary to maintain and support existing and currently fully operational networks and equipment.

In addition to all U.S.-origin items, certain foreign-produced items are subject to Commerce's export controls if they contain a certain percentage of controlled U.S.-origin content (*i.e.*, the *de minimus* rule) or are subject to the direct product rule. Historically, the scope of the foreign direct product rule has been quite limited, requiring that both the U.S. items at issue as well as the final foreign-manufactured products be controlled for "national security" reasons under U.S. law, a control that covers a relatively small subset of products and technology that are treated as quite sensitive from a U.S. export

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Export Controls and Economic Sanctions
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control perspective.

In an effort to close this perceived loophole, the new rule expands when the foreign direct product rule applies to Huawei and its affiliates on the Entity List to include the following two categories of products:

- Foreign-manufactured items produced or developed by Huawei or a designated Huawei affiliate that are the direct product of U.S. technology or software specified in the following Export Control Classification Numbers (ECCNs):
 - **3D001, 3D991, 3E001, 3E002, 3E003, or 3E991:** These controls apply to technology and software related to electronics, such as certain integrated circuits, microcircuits, semiconductors, storage integrated circuits, field programmable logic devices, and custom integrated circuits.
 - **4D001, 4D993, 4D994, 4E001, 4E992, or 4E993:** These are computer-related controls, including program proof and validation software, software allowing for automatic generation of source codes from data acquired from external sensors, and operating system software specially designed for real-time processing equipment.
 - **5D001, 5D991, 5E001, or 5E991:** These controls apply to certain telecom-related software and technology.
- Foreign-produced items that (a) are produced by any plant or major component of a plant that is located outside the United States, when the plant or major component of the plant itself is a direct product of the U.S.-origin technology or software highlighted above (*i.e.*, the ECCNs above) and (b) are a direct product of software or technology produced or developed by Huawei or a designated Huawei affiliate.

For example, if a non-U.S. company produces integrated circuits outside the United States in a foundry containing U.S.-origin or foreign-produced equipment (which is a direct product of U.S.-origin technology or software controlled by the ECCNs identified above) that is essential to the production of the integrated circuit to meet the design specifications, and the design for the integrated circuit was produced or developed from software or technology by Huawei, then that foreign-produced integrated circuit is subject to the new prohibition. Note that BIS considers testing equipment, among other items, to be “essential” to the production of an item.

The new rule includes a safe harbor for the second category of foreign-produced items such that if the items (*e.g.*, semiconductors) were in production prior to May 15, 2020, these items can be exported, reexported, or transferred to Huawei before September 14, 2020 without a license from Commerce. This authorization is aimed at preventing undue hardship and allowing some adjustment time for foreign foundries and other companies impacted by the rule. Nonetheless, the rule represents a sea change for certain industries and will require that U.S. companies fully understand how any manufacturing equipment, software, and technology that is being licensed is controlled for U.S. export purposes. Non-U.S. companies, on the other hand, likely will need to work closely with their U.S. suppliers and licensors to ensure that they are fully complying with the enhanced restrictions on Huawei.

In response to the rule, reports indicate that China is considering retaliating by placing certain U.S. companies on an “unreliable entity list,” which would result in investigations and ultimately could limit the extent to which they could do business in China. Wiley continues to closely monitor Huawei-related developments and the impacts and unintended consequences of the U.S. government’s crackdown on Chinese telecom companies. Should you have any questions, please do not hesitate to contact one of the attorneys listed on this alert.

Nicole Hager, a Law Clerk in Wiley's International Trade Practice, contributed to this alert.