

Insights

BIS TARGETS HUAWEI WITH EXPANDED LICENSE REQUIREMENT FOR FOREIGN-PRODUCED DIRECT PRODUCTS

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Effective May 15, 2020, the US Department of Commerce's Bureau of Industry and Security (BIS) announced an interim final rule that introduces two new circumstances under the Export Administration Regulations (EAR) in which a license is required for foreign-produced direct products. The rule, which targets supply chains in the telecommunications, semiconductor, and computer industries, was effective immediately, with delayed implementation for certain products already under production at the time of its release. Although the rule is already in effect, BIS is accepting public comments on the impact of its changes through July 14, 2020.

The interim final rule amends both General Prohibition Three at EAR § 736.2(b)(3) and the Entity List, including Entity List entries related to Huawei Technologies Co., Ltd. (Huawei) and its non-US affiliates. Specifically, the rule adds a footnote 1 to the Entity List that imposes a knowledge-based license requirement with respect to certain foreign-produced items destined for an entity designated under the footnote (a "Designated Entity"), limited by certain Export Control Classification Numbers (ECCNs) in Categories 3, 4, and 5 of the Commerce Control List.

The new control applies to two situations in which a party has knowledge that a foreign-produced direct product is destined for a Designated Entity:

1. The foreign-produced item is
 - a. Produced or developed by a Designated Entity (i.e., produced using "technology" from a Designated Entity), and
 - b. A direct product of "technology" or "software" that is subject to the EAR and classified under certain specified ECCNs; or
2. The foreign-produced item is
 - a. Produced by any non-US plant or major component of a non-US plant, when the plant or major component is itself a direct product of US-origin "technology" or "software" that is

classified under certain specified ECCNs, and

b. A direct product of “technology” or “software” produced or developed by a Designated Entity (regardless of whether that “technology or “software” is subject to the EAR).

The specified ECCNs relevant to both situations include 3D001, 3D991, 4D001, 4D993, 4D994, 5D001, 5D991, 3E001, 3E002, 3E003, 3E991, 4E001, 4E992, 4E993, 5E001, and 5E991.

In addition, a note to the new Entity List footnote 1 indicates that a “major component” of a plant is one that “is essential to the ‘production’ of an item, including testing equipment.” The terms “produced” and “developed” are to be read consistently with the EAR definitions of “production” and “development” provided at § 772.1.

Notably, as reflected in the amendment to General Prohibition Three, the new control is a knowledge-based license requirement, meaning the exporting party must know or have reason to know that the item is destined to a Designated Entity. Such a restriction may limit the applicability of the provisions but likely also requires adjustments to current compliance processes in order to ensure that adequate information is being collected and reviewed to determine when the rule applies to a particular transaction.

Finally, although the rule is effective now, it has a rolling implementation date and provides an exception for items identified in the second situation (produced by a plant or major component of a plant) that were already under production. The rule does not apply to shipments of these foreign-produced direct products, so long as production started prior to May 15, 2020, and the items are exported, reexported, or transferred (in-country) prior to September 14, 2020. There is no indication that BIS will extend this period.

Again, the new control applies to items that meet at least one of the two situations described above **and** that are destined to a Designated Entity. At present, only Huawei and its non-US affiliates have been so designated. Nonetheless, companies with international operations should take note of these new license triggers and ensure that any necessary updates to compliance programs, including additional diligence procedures or training for compliance or other personnel, are implemented in a timely manner. In particular, companies should be sure to perform a sufficient diligence review with respect to transactions to understand clearly what parties are involved, and whether a Designated Entity may eventually receive items that otherwise fall within these new controls.

RELATED CAPABILITIES

- International Trade

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