

Client Alert

BIS Publishes Final "Direct Product" Rule for Huawei and Entity List Compliance Obligation Clarifications

August 21, 2020

On Monday, August 17, 2020, BIS released two rules arising out of the ongoing effort to restrict Huawei's access to items subject to the EAR. The first rule has three parts: (1) the addition of 38 new Huawei affiliates to the Entity List; (2) the removal of the Temporary General License (TGL) and replacement with a more limited permanent general license; and, (3) amendments to the direct product rule (DPR). The second rule announced clarifications to the Entity List, indicating that the presence of an Entity List party in any way in a transaction involving items subject to the EAR means the export is covered.

1. **Addition of New Huawei Affiliates and Entity List Clarifications.** The first part of the final rule added the new Huawei affiliates to prevent Huawei from using them "to evade the restrictions imposed by its addition to the Entity List." Addressing a related concern, BIS also released a new rule clarifying that compliance obligations arise, "not only when they [an Entity List party] are party to a transaction as either an ultimate consignee or end-user, but also when they are party as a purchaser or intermediate consignee." This rule applies to more than Huawei – it covers all parties on the Entity List – and attempt to mitigate a risk that the Entity List party's participation as a party in an export, reexport, or transfer of items subject to the EAR "may circumvent the basis for their inclusion on the Entity List." Part of the rationale for this new rule appears in the Huawei-specific rule, in which BIS repeatedly refers to Huawei's role, "e.g., as a "purchaser," "intermediate consignee," "ultimate consignee," or "end-user."
2. **Removal of the TGL.** The temporary general license for Huawei and its non-U.S. affiliates has been replaced with a permanent carve out from licensing requirements via a new footnote 2 to the Entity List that applies to only one part of the scope of the former TGL – information on security vulnerabilities in its network.
3. **DPR Amendments.** Expressing concern that parties were "evading" the Huawei-specific DPR, BIS further expands the scope of the rule to capture additional foreign-produced items, making them "subject to the EAR." Previously, the expanded DPR for designated Huawei entities captured only those foreign-produced items that had been "produced or developed" by a designated Huawei entity *and* were destined for such an entity. The final rule eliminates the first condition and significantly broadens the second. Now, no person may re-export, export from abroad, or transfer (in-country) the specified foreign-produced items with "knowledge" that either (a) any designated entity is a party to any transaction involving the foreign-produced item or (b) the foreign-produced item will be incorporated into or used in production or development of any part, component or equipment produced purchased or ordered by one of the designated Huawei entities. The foreign-produced items subject to this rule are items that are either the:

Direct product of “technology” or “software” subject to the EAR and specified in certain Category 3, 4, or 5 ECCNs. The foreign-produced item is a direct product of “technology” or “software” subject to the EAR and specified in Export Control Classification Numbers (ECCN) 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the Commerce Control List (CCL) in supplement no. 1 to part 774 of the EAR.

or the

Direct product of a plant or major component of a plant. The foreign-produced item is produced by any plant or major component of a plant that is located outside the United States, when the plant or major component of a plant, whether made in the U.S. or a foreign country, itself is a direct product of U.S.-origin “technology” or “software” subject to the EAR that is specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the CCL.

Although the Huawei rule became effective upon publication, it includes a savings clause for items en route, and for certain foreign-produced direct products “in production.”

The complexity of the new rule will no doubt generate yet another round of transaction analysis and interpretive questions, as well as new compliance challenges for those doing business with Huawei, particularly for those supplying captured semiconductor and telecommunications items.

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