

Professional Perspective

More Restrictions on Global Sales of Goods & Technology to Huawei

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On May 15, 2020, U.S. Department of Commerce, Bureau of Industry and Security (BIS) announced [changes](#) to the foreign direct product rule that impose restrictions on transfers of certain non-U.S. products that are made using certain U.S. origin technology, equipment, or software to Huawei Technologies Company, Ltd. and its affiliates that are listed on the U.S. Entity List. Although the rule appears narrower than a range of other proposals under consideration by the administration, it has the potential to broadly restrict non-U.S. foundries' supply to Huawei listed entities of semiconductors and other goods that meet specified criteria. This new rule is intended to eliminate a perceived "loophole" in exports of certain non-U.S. products to Huawei.

The new rule amends the General Prohibition Three and the Entity List under the Export Administration Regulations (EAR). The new rule went into effect on May 15, 2020, without prior opportunity to comment, but provides a 120-day period during which a part of the new restrictions does not apply if certain conditions are met.

The new rule may result in broad restrictions on sales of non-U.S. made semiconductors and other goods that are produced using (1) specified U.S. origin technology, equipment, or software and (2) Huawei and affiliates' design specifications. Therefore, a very fact specific analysis would be necessary to determine whether non-U.S. made products that were previously not subject to the EAR, are now subject to (and restricted from export under) the EAR when sold to Huawei and/or its affiliates.

In addition, the new rule creates a new compliance risk for specified U.S. origin technology or software suppliers that may be a few steps removed from the ultimate manufacture and sales of semiconductors and other goods to Huawei and its affiliates—especially if it is determined that the supplier has actual knowledge or reason to know that the recipient will make and sell semiconductors or other goods to Huawei and its affiliates.

Existing Restrictions

Under restrictions already in place, exports, reexport, and transfers of any items subject to the EAR are restricted to Huawei listed entities without a license. However, only certain non-U.S.-made products that are developed or produced with U.S. origin technology, software, or equipment are subject to these restrictions.

New Restrictions

The new rule expands these restrictions to cover certain additional non-U.S.-made items when destined to Huawei listed entities that are now given a special designation on the Entity List. Importantly, the new rule only applies to non-U.S.-made items in which Huawei listed entities had some direct or indirect hand in developing or producing. In other words, it does not apply to the sales of non-U.S.-made "off the shelf" items to Huawei listed entities (that are otherwise not subject to the EAR).

Specifically, the new rule restricts the reexport from abroad or transfer in country without a license of the following non-U.S.-made items when there is knowledge or reason to know that the item is destined to Huawei listed entities:

- A non-U.S. made item that is "produced" or "developed" by Huawei listed entities and is a direct product of certain U.S. origin "technology" or "software"
- A non-U.S. made item that is a direct product of software or technology "produced" or "developed" by Huawei listed entities and "produced" by a foreign plant or major component of a plant located that is a direct product of certain U.S. origin "technology" or "software"

The term "development" under the EAR is defined broadly to include "all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts." The term "production" is also broadly defined as "all production stages, such as: product engineering, manufacture, integration, assembly (mounting), inspection, testing, quality assurance."

Because many covered products, in particular many semiconductor products, are tailored to certain specifications or designs provided by customers, the new rule may result in broad restrictions on sales of non-U.S. made semiconductors and other goods that are produced in some way, in whole or in part, from Huawei and its affiliates' specifications or otherwise utilize Huawei technology or software. Thus, a very fact-specific analysis would be necessary to determine whether any given product sold to Huawei may be covered by this new rule.

This new rule appears to seek to control non-U.S. made items made using U.S. origin software or technology that has already been exported, potentially long before Huawei listed entities were even added to the Entity List in 2019. These controls, which expand restrictions on a foreign company's ability to use legitimately exported U.S. origin technology beyond such restrictions already in place for national security controlled plant and equipment constitutes an unprecedented expansion of U.S. jurisdiction over non-U.S. origin items at lower levels of export classification and may raise concerns and uncertainty in the market about the risks of using U.S. software/technology in light of such regulatory uncertainty.

Moreover, under the new rule, U.S. persons would also be in compliance risk if they provide the covered U.S. origin software or technology to any non-Huawei entity with knowledge or reason to know that the recipient will make semiconductors that are subject to this new restriction and sell to Huawei. Such U.S. persons would potentially be in violation of General Prohibition Ten, which prohibits sale, transfer, export, reexport, and other dealings and transactions with a knowledge or reason to know that a violation of the EAR has occurred or is about to occur. Therefore, U.S. suppliers may wish to seek assurances from foreign manufacturers that they would not sell covered products to Huawei listed entities.

Effective Date

The new rule was effective as of May 15, 2020. However, to reduce immediate adverse impact on foreign producers, BIS provided a 120-day period during which the new restrictions set forth in Paragraph (b) do not apply.

Specifically, the restrictions contained in Paragraph (b) (i.e., a non-US made item that is "produced" by a foreign semiconductor plant or major component of a plant located that is a direct product of certain U.S. origin semiconductor "technology" or "software" and is a direct product of software or technology "produced" or "developed" by an entity with a footnote 1 designation) do not apply provided that the "production" of the items was started prior to May 15, 2020, and the export, reexport, or transfer occurs before Sept. 14, 2020. However, if the item is not exported from abroad, reexported, or transferred before midnight on Sept. 14, 2020, the item would be subject to the EAR and may not be exported to Huawei or any of its listed affiliates without authorization from BIS.

Although the rule went into effect without prior opportunity to comment, BIS is requesting comments on the impact of this rule. Interested parties may submit their comments on or before July 14, 2020.

Junghyun Baek contributed to this article.