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U.S. Department of Commerce Imposes Further Restrictions Directed at Huawei

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On May 15, 2020, the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”) issued an [interim final rule](#) to expand the prohibitions on items that can be provided to Huawei and its Entity List-designated affiliates (collectively, “Huawei”). The long-expected move to amend the foreign direct product rule further restricts the ability of Huawei to use certain U.S. technology and software to design and manufacture its semiconductors, and is the latest in a succession of U.S. regulatory, law enforcement and diplomatic actions that may have the cumulative effect of significantly curtailing Huawei’s ability to operate around the world.

Prior to this amendment, the Export Administration Regulations’ (“EAR”) foreign direct product rule largely prohibited companies from providing Huawei with items that were the direct product of certain U.S.-origin technology, but the scope of the rule was limited to specified U.S.-origin equipment and certain foreign direct products that were restricted for national security reasons. For example, depending on the type of equipment used to produce the chips, items such as integrated circuits produced by foreign semiconductor foundries still could be provided to Huawei. Now, because of the amended rule, foreign manufacturers of semiconductor chips whose operations use equipment that is the direct product of most relevant U.S. designs cannot ship products to Huawei without a license from BIS. According to BIS, any such license requests would be subject to a presumption of denial.

Specifically, BIS amended Prohibition Three of the EAR’s general prohibitions and simultaneously amended the Entity List. BIS amended the Entity List by adding a footnote (“Footnote 1”) imposing additional restrictions on items sent to any entity designated with such a footnote notation. Currently, all Huawei entities and their affiliates on the Entity List are designated with Footnote 1 and no other entities are subject to Footnote 1. The result of this action is to make two new types of items subject to the EAR: (i) items, such as semiconductor designs, when produced by Huawei that are the direct product of specified software and technology that are subject to the EAR; and (ii) items, such as chipsets, when produced from Huawei design specifications, that are the direct product of manufacturing equipment located outside the United States.

BIS stated in its [press release](#) announcing the new rule that the amendments are intended to restrict “Huawei’s ability to use U.S. technology and software to design and manufacture its semiconductors abroad.” It logically follows that one purpose of the rule is to eliminate the ability of foreign integrated circuit foundries that use U.S.-origin equipment to produce chips for Huawei. It has been reported that, prior to the latest changes, certain foundries were still able to produce chips for Huawei because



neither the *de minimis* standard—which renders certain items subject to U.S. export control restrictions when they incorporate more than a certain percentage of U.S.-origin content—nor the application of the previous foreign direct product rule captured the integrated circuits that certain producers were making for Huawei. However, by making Huawei-designed chips produced by U.S.-designed equipment subject to the EAR, no other foundry using U.S.-designed semiconductor manufacturing equipment can supply the chips to Huawei without a license from BIS with the presumption that such requests will be denied.

Although this rule became effective on May 15, 2020, there is a limited transition period that applies to certain items already in production. BIS has also invited public comments on the impact of the rule. Any person wishing to submit a comment must do so on or before July 14, 2020.

The latest Department of Commerce action is a reminder that the Trump Administration remains aggressive and active (even during the COVID-19 pandemic) on multiple fronts in actions against Huawei and potentially other Chinese technology manufacturers. Companies (including semiconductor foundries) should carefully review these rules to ensure their existing business and supply chains are in compliance with the new rules and regulations, and may wish to consider the regulatory and other risks of doing business with a company under such intense scrutiny by the United States and certain other Western countries.



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