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## U.S. Department of Commerce Tightens Entity List Restrictions and Adds Huawei Entities

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**August 20, 2020** – On August 17, 2020, the U.S. Department of Commerce, Bureau of Industry and Security (“BIS”) released two rules that (1) broaden the licensing requirements applicable to parties on the Entity List when those Entity-listed parties have any role in a transaction, and (2) make certain regulatory amendments targeting Huawei specifically by adding additional Huawei affiliates to the Entity List, replacing a temporary general license with a narrower permanent authorization, and further amending the foreign-produced direct product rule to expand the licensing requirements applicable to footnote 1 entities (i.e., Huawei and its affiliates). In [announcing](#) these regulatory changes, BIS highlighted that as the U.S. has “restricted its access to U.S. technology, Huawei and its affiliates have worked through third parties to harness U.S. technology in a manner that undermines U.S. national security and foreign policy interests,” and explained that these rules are a “multi-pronged action [to] demonstrate [BIS’s] continuing commitment to impede Huawei’s ability to do so.” Both actions are final rules, and are effective as of August 17, 2020.

### Entity List Licensing Requirements

As stated in the Federal Register notice, the [first rule](#) seeks to “clarify” the licensing requirement applicable to parties on the Entity List. Specifically, the rule notes that since 2008, Federal Register notices that make additions to the Entity List have included a sentence in the background section explaining that the licensing requirements apply to any transaction in which the Entity List party “act[s] as purchaser, intermediate consignee, ultimate consignee, or end-user.” However, the Export Administration Regulations (“EAR”) did not explicitly address circumstances in which a listed entity may be playing a role other than consignee or end-user in the transaction, e.g., a purchaser or intermediate consignee. BIS had previously, however, issued an [FAQ](#) that sought to clarify rule, albeit in a different direction, explaining that “a transaction that involves a listed entity in which that entity is not the consignee of the goods is not a transaction subject to a license under the entity’s listing on the Entity List.”

In any event, the new rule amends the EAR to make clear that the Entity List licensing requirements apply when an Entity List party plays any role in a transaction resulting in an export, reexport, or in-country transfer, including transactions where the Entity List party does not take possession of the EAR-controlled item (e.g., as the purchaser or intermediate consignee).

The purpose of the rule change, as explained by BIS, is because “when a person is listed on the Entity List, that person’s participation as a purchaser or intermediate consignee in an export, reexport, or transfer (in-country) of items subject to the EAR presents a risk that the person’s involvement in a transaction may circumvent the basis for their inclusion on the Entity List.”

The explanatory description of the rule makes clear that this expanded licensing requirement “will apply to all current entities on the Entity List and subsequent additions and modifications to the Entity List.” Further, where an Entity List party is involved in a transaction, license exceptions may not be used unless those license exceptions would be authorized for the Entity List party. Notably, the rule does not contain a “savings clause,” meaning that it is immediately effective, even for shipments en route when the rule was announced.

### **Huawei-Specific Rule Amendments**

The second rule specifically targets Huawei and its affiliates, and makes three regulatory changes. First, the rule amends the foreign-produced direct product rule to expand and clarify which foreign-produced items are subject to the EAR and therefore require a license when exported to a listed Huawei entity. The foreign-direct product rule applies to certain items produced outside of the United States that are the direct product of U.S. technology or software, or made from a manufacturing plant using components that are the direct product of U.S. technology subject to U.S. export controls. As we previously summarized, in May 2020, BIS expanded the foreign-direct product rule to require a license for broad categories of items – including, notably, semiconductors – when the items are produced or developed by Huawei and the non-U.S. manufacturer has knowledge that item is destined for Huawei.

The new rule expands that licensing mandate by, most notably, removing the prerequisite that the foreign-produced item be “produced or developed by Huawei” and now requires a license when the non-U.S. manufacturer has knowledge that either (1) the foreign-produced item will be incorporated into, or will be used in the production or development of any part, component, or equipment produced, purchased, or ordered by Huawei; or (2) Huawei is a party to any transaction involving the foreign-produced item, e.g., as a purchaser, intermediate consignee, ultimate consignee, or end-user. The new rule clarifies that this licensing requirement applies regardless of whether the manufacturing equipment or major component are made in a foreign country or the United States, and regardless of whether a foreign-produced wafer is finished or unfinished. However, this requirement will not apply to foreign-produced items that had started “production” prior to August 17, 2020, so long as those items are exported, reexported, or transferred (in-country) on or before September 14, 2020.

The rule also includes a new license review policy noting that “[s]ophistication and capabilities of technology in items is a factor in license application review” and indicates that license applications for foreign-produced telecom equipment for systems below the 5G level (e.g., 4G, 3G, etc.) will be reviewed on a case-by-case basis (i.e., without a presumption of denial).

Second, the rule adds an additional thirty-eight non-U.S. Huawei affiliates to the Entity List (and amends the entries for three existing Huawei parties). The newly-added Huawei affiliates are in twenty-one jurisdictions. The rule notes that the interagency End-User Review Committee, which makes decisions regarding additions to the Entity List, determined that “[w]ithout the imposition of a license requirement to these affiliated entities, there is reasonable cause to believe that Huawei would seek to use them to evade the restrictions imposed by its addition to the Entity List.”

Third, the rule replaces the existing temporary general license regarding Huawei with a permanent, narrower set of authorizations set forth in a new “footnote 2” to the Entity List. Specifically, only the authorizations under the temporary general license regarding “cybersecurity research and vulnerability disclosure” remain. BIS allowed the prior authorizations for “continued operation of existing networks and equipment” and “support to existing ‘personal consumer electronic devices’ and ‘customer premises equipment’ (CPE)” to expire effective August 13, 2020.

### **Likely Practical Effects**

The new rules represent the latest escalation of U.S. trade controls targeting China generally and Huawei specifically. In response to Huawei and an increasing list of Chinese companies being added to the Entity List, allowances to work around licensing requirements – such as the use of non-listed affiliates – are no longer available. It remains to be seen whether Entity List parties will be able to develop non-U.S. sources of supplies. Depending on the Entity Listed parties’ and/or U.S. supplier reactions regarding the impact of these rules, it is possible that BIS may offer additional guidance or, potentially, offer temporary relief from restrictions in the near term.

The practical effect of the first rule will likely cause suppliers, including many outside of the U.S., to avoid any transactions involving Entity List parties in any way. The rule may effectively have the same impact as a designation on the Specially Designated Nationals list, at least from the perspective of U.S. based businesses and their foreign subsidiaries.

The second rule will prohibit foundries and other third-parties involved in the production of semiconductors and wafers for Huawei and its chip division, HiSilicon, from using equipment produced by U.S. technology to directly or indirectly assist the listed companies. Relatedly, while the foreign-produced direct product rule restrictions described in footnote 1 to the Entity List currently only apply to Huawei affiliates, those restrictions could potentially be expanded to other Entity List companies in the coming months and so due caution is urged. There is little question, at least through the end of President Trump’s current term, that the Entity List will continue to be the go-to foreign policy and national security tool used to target China by denying direct and indirect access to U.S. goods, software, and technology to entities of concern.

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