

Alerts & Publications



United States Expands Export Controls Targeting Huawei's Access to US Technology

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The US Commerce Department's Bureau of Industry and Security ("BIS") has [announced](#) an expansion of US export control restrictions on Huawei that will further limit Huawei's ability to produce or develop products using certain US software and technology, and to acquire foreign-produced semiconductors that are manufactured using certain US-designed manufacturing equipment. Though limited to Huawei and many of its affiliates, including HiSilicon, Huawei's semiconductor design company, BIS's new rule effectively broadens the United States' assertion of jurisdiction over some foreign products that are directly produced from US software and technology or US-designed manufacturing equipment. This action is one of a series of recent measures circumscribing US trade with Huawei. With respect to inbound trade, Huawei is also one of the targets of Trump Administration and congressional actions addressing perceived national security threats related to information technology posed by foreign actors. These measures include new federal contracting restrictions, and potential restrictions on [the use of certain foreign technology in the United States through the creation of a national security review process for the information and communications technology supply chain](#). US firms that have business arrangements with Huawei will need to ensure that they remain compliant with US law as restrictions expand, and also be mindful that future measures may disrupt these arrangements further.

Restrictions on Huawei Access to US Technology

The Commerce Department first restricted Huawei's access to US products in May 2019, when Huawei and 68 of its affiliates were [designated](#) on the BIS Entity List, followed by 46 additional Huawei affiliates in [August 2019](#). As a result of these designations, BIS imposed a license requirement on exports to those Huawei entities of all items (commodities, software, and technology) "subject to the Export Administration Regulations ("EAR")" with a presumption that any license application would be denied. At the same time, BIS issued a temporary general license, [currently extended through August 13, 2020](#), authorizing limited activities, including those necessary for the continued operations of existing networks and equipment as well as the support of existing mobile services, including cybersecurity research critical to maintaining the integrity and reliability of existing and fully operational networks and equipment. In addition, in July 2019, Secretary of Commerce

Wilbur Ross [announced](#) that the Commerce Department would issue licenses for exports to Huawei where there is no threat to US national security, and BIS has issued a limited number of licenses as a result of that policy change.

A key limitation of these restrictions is that they apply only to items that are “subject to the EAR.” Under current rules, this includes items physically in the United States, US-origin items anywhere in the world, foreign-made items that incorporate more than a *de minimis* amount of controlled US-origin items, and foreign-made items that are either (i) the direct (i.e. immediate) product of US national security (“NS”) controlled software or technology, or (ii) made in a plant or with a major component of a plant outside the United States that is itself a direct product of US NS-controlled technology or software. Importantly, foreign-made items that are direct products of US technology that are not NS-controlled are not “subject to the EAR.” As a result, Huawei’s Entity List designation did not prevent it from acquiring semiconductors produced in foundries outside the United States that are the direct products of US-origin equipment and technology that are not NS-controlled. BIS’s action is intended to address that gap.

Expansion of Foreign Direct Product Rule Targeting Huawei

The [interim final rule](#) extends the jurisdiction of the EAR to items made outside the United States if they fall into one of two different categories of items where it is known that the items are destined for a Huawei entity:

Items Produced or Developed by Huawei Listed Entities: Items produced or developed by a Huawei-listed entity (most notably, HiSilicon) if they are the direct product of certain US software or technology. The restriction applies to US software and technology that are used to design and produce integrated circuits, electronic devices, computers, and telecom systems and equipment as specified by a list of sixteen Export Control Classification Numbers (“ECCNs”).

Items Produced in Non-US Manufacturing Facilities: Items made outside the United States from a plant or a major component of a plant, if:

(a) that plant or major component is itself the direct product of US software or technology on the list of sixteen ECCNs; **and**

(b) the item is the direct product of a listed Huawei entity’s software or technology, such as an integrated circuit design.

A “major component of a plant” means any equipment that is “essential to the ‘production’ of an item, including testing equipment.” Thus, even if only one piece of US semiconductor manufacturing equipment is used, the new control is potentially applicable.

Of perhaps equal importance to what the rule covers is what it does not cover: the rule does not capture all foreign items that are the direct product of US technology. Rather, it appears to be focused on first ensuring that a Huawei entity such as HiSilicon cannot use certain US software and technology to develop its own designs. Second, it seeks to prevent Huawei from using a non-US manufacturing plant (such as TSMC in Taiwan, which currently manufactures for Huawei) to make its chips, if the chips are being made to a Huawei design and the plant uses equipment that is itself the direct product of certain US technology.

The rule became effective on May 15 (prior to its publication in the Federal Register), but with two exceptions. First, the rule related to items produced or developed by Huawei entities does not apply to items otherwise covered that had already been shipped on May 15. Second, the rule for items designed by Huawei that are the direct product of a US-designed plant or US-designed major component of a plant, does not apply to items that were in production prior to May 15, if they are shipped before September 14 — 120 days from the rule's effective date.

Upcoming Restrictions on Huawei

In addition to the expanded export controls targeting Huawei, the Trump Administration is expected to soon issue new regulations implementing other national security authorities related to federal contracting and information and communications technology supply chain that will also target Huawei and other Chinese companies.

Procurement Restrictions. Pursuant to Section 889(a)(1)(B) of the FY2019 National Defense Authorization Act, as of August 13, 2020, the federal government will be prohibited from entering into a contract with any entity that **uses** “covered telecommunications equipment or services,” defined as telecommunications equipment or services provided by Huawei Technologies Company, ZTE Corporation, Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, and Dahua Technology Company, as well as their subsidiaries and affiliates. The language of the law is broad, and the prohibition potentially could apply to any company that uses “covered telecommunications equipment or services” in any part of its organization, including subsidiaries and parents, from having any contractual relationship with the US Government, regardless of the services provided to the US Government.

The US Government has not yet issued a proposed or final rule to implement this requirement, and both industry and some US Government officials have publicly raised concerns that a broad rule will present significant challenges to the federal contracting process. It is possible that implementing regulations could adopt a narrower approach or that new legislation could modify the existing requirements, but the prospects for either approach remain unclear.

Supply Chain Restrictions. A revised set of proposed rules is also expected in the near term related to the implementation of the May 15, 2019 Executive Order on Securing the Information and Communications Technology and Services Supply Chain (“Supply Chain Executive Order”). In November 2019, the Commerce Department issued a Notice of Proposed Rulemaking (“NPRM”) proposing a national security review process to implement the Supply Chain Executive Order, which prohibited information and communications technology transactions that pose an undue or unacceptable risk to national security. In the face of significant opposition from industry, the Commerce Department has reportedly revised the proposed regulations and a new NPRM is expected to be issued soon.

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Greta Lichtenbaum, an O’Melveny partner licensed to practice law in the District of Columbia, Theodore W. Kassinger, an O’Melveny of counsel licensed to practice law in the District of Columbia and Georgia, David J. Ribner, an O’Melveny counsel licensed to practice law in the District of Columbia and New York, John Dermody, an O’Melveny counsel licensed to practice law in California, and Mary Pat Dwyer, an O’Melveny counsel licensed to practice law in the District of Columbia and Pennsylvania, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.

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