

## BIS Closes Loopholes for Huawei

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Over the past year, the U.S. government has tightened export control restrictions on technology entities in China, most particularly phone and 5G infrastructure manufacturer Huawei Technologies Co., Ltd (Huawei). We have written about Huawei's addition to the Bureau of Industry and Security (BIS) Entity List [here](#) and [here](#).

In short, due to these designations any business or individual exporting, reexporting, or transferring goods and technology subject to BIS jurisdiction to Huawei requires a license from BIS. Pursuant to the Export Administration Regulations (EAR), BIS claims jurisdiction over U.S.-origin products, wherever located, and among other things, certain foreign-made commodities that incorporate more than a *de minimis* percentage of controlled U.S.-origin content. However, Huawei has still been able to source U.S. origin chipsets and schematics through holes in BIS jurisdiction due to the foreign direct product rule (FDPR) that places certain goods outside of the jurisdiction of BIS.

To help close these holes, BIS has expanded restrictions on General Prohibition Three, which describes the FDPR.<sup>[1]</sup> The FDPR extends BIS jurisdiction to certain foreign-made products that are created as a "direct product" of U.S.-origin goods. Though this prohibition generally applies only to a narrow band of items, on May 15, 2020, BIS announced that it was expanding the FDPR as it applies to Huawei to "narrowly and strategically target Huawei's acquisition of semiconductors that are the direct product of certain U.S. software and technology."<sup>[2]</sup>

The change applies newly-added "footnote 1" to certain entities (currently, only Huawei and related entities). Footnote 1 expands the FDPR to capture the export, reexport, or transfer of goods that may ultimately benefit Huawei that were not previously captured because those products, by the time they reached Huawei, fell outside of the jurisdiction of BIS under the EAR. Specifically, the rule "prohibits the reexport, export from abroad, or transfer (in-country) without a license, of certain foreign-produced items *when there is knowledge that the item is destined to an entity with a footnote 1 designation* [here, Huawei] *on the Entity List*."<sup>[3]</sup>

This newly expanded authority specifies two groups of items to which footnote 1 applies when there is "knowledge" that the foreign-produced item is destined to any entity with a footnote 1 designation. Group (a) includes items that are

- the direct products of certain "technology" or "software" subject to the EAR; *and*
- the foreign-produced item is produced or developed by any entity with a footnote 1 designation (i.e. Huawei)

Group (b) similarly includes direct products of plants or major components of plants. Specifically, it includes

- items produced by a plant or major component of a plant outside the United States
- when the plant or major component of a plant *itself* is a direct product of certain U.S.-origin technology or software; *and*
- the item is a direct product of software or technology produced by an entity with a footnote 1 designation (i.e. Huawei)

These categorizations, in effect, allow BIS to maintain jurisdiction over the products developed by Huawei itself, where before certain products would have fallen out of BIS jurisdiction before reaching Huawei, and therefore BIS could not require a license for a certain transaction. However, it is worth noting that this rule retains a “knowledge” requirement. The EAR defines “knowledge” as “not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person’s willful avoidance of facts.”

Exporters should perform appropriate due diligence to determine whether an export is ultimately destined for Huawei or one of its affiliates listed on the Entity List, and should not willfully ignore any red flags that such a destination is possible. The heightened scrutiny that Huawei has received, with BIS going so far as to create a new classification just to close the loopholes for Huawei in particular, demonstrates the hostile stance that the U.S. government has taken toward Huawei, and suggests that BIS will interpret its enforcement mandate broadly.

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[1] 15 C.F.R. § 736.2(b)(3).

[2] *Commerce Addresses Huawei’s Efforts to Undermine Entity List, Restricts Products Designed and Produced with U.S. Technologies*, U.S. Dept. of Commerce Office of Public Affairs,

[3] *Export Administration Regulations: Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule) and the Entity List*, 85 Fed. Reg. 29851 (May 19, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10856.pdf>.

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