

TRUMP ADMINISTRATION SIGNIFICANTLY ENHANCES EXPORT CONTROL SUPPLY CHAIN RESTRICTIONS ON HUAWEI

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INTRODUCTION

The U.S. Department of Commerce's Bureau of Industry and Security ("BIS") recently adopted measures substantially impacting Huawei-affiliated companies and their non-U.S. supply chains. Earlier this year, on May 15, 2020, BIS issued a proposed, but immediately effective, amendment to the Foreign Direct Product Rule (hereafter, the "FDPR") of the Export Administration Regulations ("EAR"; 15 CFR part 730 et seq.) that substantially restricted the supply of certain non-U.S. produced products to Huawei companies on the U.S. Entity List ("Huawei"). Under the amendment, a non-U.S. produced product that was the direct product of certain designated U.S. software or technology (or produced by plant facilities that were the direct product of such software or technology), was considered "subject to the EAR," and thereby subject to a U.S. export license requirement, even if transferred from outside the United States, if the non-U.S. product was: (1) designed or produced by Huawei; and (2) being supplied to Huawei (hereafter, the "Huawei Direct Product Rule" or the "Rule").

On August 17, BIS adopted the amendment as a final rule, but substantially expanded the scope of the FDPR with respect to Huawei by extending coverage to any subject non-U.S. produced product, even if not designed or produced by Huawei (such as off-the-shelf products), if either: (1) Huawei is a party, in any capacity, to the supply transaction; or (2) the product is supplied with knowledge that the product will be incorporated in a product that will be supplied to Huawei (directly or indirectly) or used in the "production" or "development" of any part, component, or equipment produced, purchased, or ordered by Huawei. In conjunction with the final adoption of this new Rule, BIS also placed additional Huawei companies on the Entity List and terminated the Temporary General License ("TGL") which had previously authorized certain activities with Huawei relating to cyber security and product development.

MAY 15 AMENDMENT TO THE DIRECT PRODUCT RULE

On May 15, 2020, BIS amended the FDPR (General Prohibition Three of the EAR) as applied to Huawei entities designated on the Entity List. The FDPR generally provides that any non-U.S. produced item that is produced using national security-controlled U.S. software or technology is considered subject to the EAR and, thereby, to any export license requirement that would be applicable if the product was produced in the United States. Under the May 15 amendment, an add-on to the FDPR was adopted in connection with the supply of certain items to Huawei companies on the Entity List (this was implemented through a new footnote 1 to the Entity List which

applies to all the Huawei companies included on the Entity List). The new Rule potentially applied to any non-U.S. produced product that: (1) was the direct product, or was produced by a plant (or major equipment of a plant) that was the direct product, of U.S. software or technology enumerated in the new Rule (“subject product”); and (2) was produced or developed by, and being supplied to, Huawei.

Subject Products. As implemented on May 15, the Rule potentially applied to any non-U.S. produced product that:

- is the direct product of technology or software subject to the EAR and specified in the following Export Control Classification Numbers (“ECCNs”) of the EAR’s Commerce Control List: 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991; or
- is produced by any non-U.S. plant or major component of a plant that is a direct product of U.S.-origin technology or software subject to the EAR that is specified in ECCNs 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991.

However, as implemented on May 15, a product was subject to the EAR and required a U.S. export license only if it was a product that was produced or developed by Huawei and was being sold to Huawei.

AUGUST 17 FINAL HUAWEI DIRECT PRODUCT RULE

When adopting the final Huawei Direct Product Rule on August 17, however, BIS implemented amendments to the Rule to further “prevent Huawei’s attempts to circumvent U.S. export controls to obtain electronic components developed or produced using U.S. technology.” As described by BIS, “[t]his amendment further restricts Huawei from obtaining foreign made chips developed or produced from U.S. software or technology to the same degree as comparable U.S. chips.” Under the final, amended Rule, although the scope of subject products potentially subject to the new Rule remains the same (the direct product, or a product produced by a plant or major component that is the direct product, of U.S. software or technology specified in the enumerated ECCNs), there is no longer a requirement that the subject product have been produced or developed by Huawei.

Instead, as finally adopted, the Huawei Direct Product Rule now applies to any subject product when the company exporting, reexporting, or transferring the item (including transfers within the same country) has “knowledge” that either: (1) a Huawei company on the Entity List will be a party to a transaction involving the item (including as a purchaser, consignee, or end-user); or (2) the item will be incorporated into or used in the production or development of any part, component, or equipment produced, purchased, or ordered by Huawei. “Knowledge” is defined as actual knowledge or reason to know based on the circumstances of a transaction.

As a result of this revision to the Huawei Direct Product Rule, non-U.S. manufacturers and other suppliers involved in Huawei supply chains must carefully determine which, if any, of their products are within the scope of the Rule and ensure such products are only exported, reexported, or otherwise transferred in compliance with the new Rule. The changes to the Rule became effective immediately upon its issuance on August 17, 2020. However, there is a savings clause that allows for shipment without a license of items that are within the scope of the Rule because they are the direct product of covered “plants or major components of plants,”

provided: (1) production of those items started by August 17, 2020; and (2) they are exported, reexported, or transferred before midnight (local time) on September 14, 2020.

OTHER MEASURES IMPACTING HUAWEI

Huawei Affiliates Added to Entity List. The Rule also further expands the scope of Huawei export restrictions by adding 38 additional entities affiliated with Huawei to the Entity List, bringing the total to 153 Huawei companies. As a result of these designations, companies must obtain a BIS export license before exporting, reexporting, or transferring to these entities any item, software, or technology that is “subject to the EAR.” This includes any item (commodity, software, or technology) that is: (1) U.S.-origin; (2) located in the United States; (3) non-U.S.-origin but incorporating more than a *de minimis* percentage of controlled U.S. content; or (4) non-U.S.-origin but subject to the EAR as a result of the direct product rules discussed above. License applications in this context are subject to a general policy of denial by BIS.

Export restrictions for the 38 Huawei affiliates added to the Entity List became effective on August 17, 2020, although shipments that were already in transit by August 17 can be delivered without a license.

Temporary General License. The Rule also expands the Huawei export restrictions by providing for the expiration of a TGL issued originally in May 2019 that authorized certain transactions with Huawei related to cybersecurity research, ongoing support and operations of networks and equipment, and 5G standards conducted by an established standards body.

The original TGL, which has been renewed and modified over time, expired effective August 17, 2020. However, BIS has issued a more limited authorization by adding a footnote to the license requirements for designated Huawei entities on the Entity List which authorizes the export, re-export, or transfer of items subject to the EAR, provided it is limited to “information regarding security vulnerabilities in items owned, possessed, or controlled by Huawei or any of its non-U.S. affiliates when related to the process of providing ongoing security research critical to maintaining the integrity and reliability of existing and currently ‘fully operational network’ and equipment.”

CONCLUSION

These actions by BIS represent the latest in a series of measures by the U.S. government to cut off Huawei from U.S. commodities, software, and technology, most recently by focusing on preventing reliance on U.S. software and technology in producing products outside the United States for Huawei supply chains. These measures are intended to send a signal, not only to Huawei’s suppliers who are most directly impacted by the new BIS Rule, but also to Huawei’s customers who are being urged by the United States to develop non-Huawei sources for technology and equipment.

As Huawei-related and other U.S. export controls evolve, K&L Gates continues to work with our clients to meet the business challenges presented by the new export Rule. If you have any questions about the Huawei-related export restrictions and what they may mean for your business, please contact a member of the K&L Gates Trade Practice.

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