

## U.S. Government Tightens Export Control of Direct Products of U.S. Technologies to Huawei and Dual-Use Items to China, Russia, and Venezuela

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On May 15, 2020, the Bureau of Industry and Security (**BIS**) of the U.S. Department of Commerce announced an expansion of General Prohibition No. 3 of the Export Administration Regulations (**EAR**) to restrict Huawei's access to semiconductor designs and chipsets that are direct products of certain technology and semiconductor manufacturing equipment on the Commerce Control List (**CCL**).<sup>1</sup> Under this new restriction, export, re-export, and in-country transfer of the covered semiconductors and chipsets to Huawei would require a license from BIS.<sup>2</sup> The May 15 action follows BIS's April 28 publication of two interim final rules and one proposed rule that will tighten the export control of dual-use items to several countries, including China, Russia, Venezuela, Iraq, and others. The amendment of General Prohibition 3 is effective immediately. The two final rules are effective on June 29, 2020. Comments on the General Prohibition 3 amendment may be submitted until July 14; comments on the proposed rule regarding dual-use items are due on June 29, 2020. Each of the new rules is summarized below.

### **Final Rule: Amendment of General Prohibition 3**

General Prohibition 3 prohibits the export, re-export or in-country transfer of goods or technology that are the foreign-made direct products of U.S. software, technology, factories (including chip foundries), or key manufacturing equipment. BIS has

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<sup>1</sup> See Commerce Addresses Huawei's Efforts to Undermine Entity List, Restricts Products Designed and Produced with U.S. Technologies, Press Releases, *U.S. Department of Commerce*, May 15, 2020, available at <https://www.commerce.gov/news/press-releases/2020/05/commerce-addresses-huaweis-efforts-undermine-entity-list-restricts>.

<sup>2</sup> See 15 C.F.R. §736.2(b)(3).

amended the general prohibition to clarify that Huawei and 114 of its affiliated companies, which have been on BIS's "Entity List" since May or August 2019 (our blogpost and memo on Huawei's addition to the "Entity List" are available [here](#) and [here](#)), are not eligible to receive specified products subject to the EAR if the products are manufactured outside the United States but use U.S.-origin software, designs, factory designs, or significant equipment.<sup>3</sup> U.S. officials characterized the amendment as closing a "loophole" in the EAR that was being exploited by Huawei to allow it access to chipsets that would require a license if manufactured in the United States or containing more than *de minimis* amounts of U.S.-origin content.<sup>4</sup> The Chinese foreign ministry labeled the U.S. action an "unreasonable suppression against Huawei" while unofficial sources in China suggested that the Chinese government could respond by placing selected U.S. manufacturers on a list of "unreliable suppliers."<sup>5</sup> Huawei characterized the U.S. action as "arbitrary and pernicious" and said that it "will impact the expansion, maintenance and continuous operations of networks worth hundreds of billions of dollars" in more than 170 countries.<sup>6</sup>

The rule went into force upon its May 15 publication, requiring future shipments to the Huawei entities to be licensed on a case-by-case basis. Since the 114 Huawei entities are on the BIS Entity List, any license application would face a presumption of denial, although at least some U.S. officials reportedly sought to soften the expectation that all licenses for sales to Huawei would automatically be denied.<sup>7</sup> To mitigate the financial harm to non-U.S. foundries that might already be contractually

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<sup>3</sup> See Export Administration Regulations: Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule) and the Entity List, Docket No. 200514-0100, *Bureau of Industry and Security, Department of Commerce*, available at: <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-10856.pdf>.

<sup>4</sup> See Michael R. Pompeo, "The United States Protects National Security and Integrity of 5G Networks," Press Statement, *U.S. Department of State*, May 15, 2020, available at <https://translations.state.gov/2020/05/15/the-united-states-protects-national-security-and-integrity-of-5g-networks/>.

<sup>5</sup> See Bob Davis and Katy Stech Ferek, "U.S. Moves to Cut Off Chip Supplies to Huawei," *The Wall Street Journal*, May 15, 2020, available at <https://www.wsj.com/articles/u-s-moves-to-cut-off-chip-supplies-to-huawei-11589545335>.

<sup>6</sup> See Foreign Direct Product Rule Changes Made by US Government, Press Release, *Huawei*, May 18, 2020, available at: <https://www.huawei.eu/press-release/foreign-direct-product-rule-changes-made-us-government>.

<sup>7</sup> See Alex Lawson, "US Aims To Muscle Huawei Out Of Global Chip Supply Chain," *Law360*, May 15, 2020, available at [https://www.law360.com/aerospace/articles/1273978/us-aims-to-muscle-huawei-out-of-global-chip-supply-chain?nl\\_pk=461af435-a4ab-4457-8b01-54bb521c1625&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=aerospace](https://www.law360.com/aerospace/articles/1273978/us-aims-to-muscle-huawei-out-of-global-chip-supply-chain?nl_pk=461af435-a4ab-4457-8b01-54bb521c1625&utm_source=newsletter&utm_medium=email&utm_campaign=aerospace).

committed to certain chip supplies in reliance on the pre-May 15 licensing regime, BIS will not apply the rule to production initiated before the rule's effective date and shipped no more than 120 days after the effective date.

## **Final Rule: Elimination of License Exception Civil End Users (CIV)**

On April 28, BIS amended the EAR by removing License Exception CIV and requiring a license for items on the CCL to countries in Group D:1 of the EAR's Country Group List.<sup>8</sup> License Exception CIV had previously permitted the export, re-export, and in-country transfer of a wide range of products and technologies, including bearings, semiconductors, semiconductor production equipment, telecommunication equipment, radar systems, marine equipment, and aircraft engine production equipment, to most civil end users for civil end uses in countries listed in Country Group D:1, which includes China, Iraq, Russia, Ukraine, Venezuela, and others.<sup>9</sup>

In contrast to the amendment to General Prohibition 3, which is specific to Huawei, the revocation of License Exception CIV applies to all Group D:1 countries, based on U.S. government concerns about the increasing integration of civilian and military technology development in those countries.<sup>10</sup> Therefore, export, re-export, and in-country transfer of these items to civil end users for civil end uses in these countries will require a license from BIS, effective on June 29, 2020. The licensing requirement does not necessarily mean that items controlled for export to civilian end-users in Group D:1 countries will be denied – BIS did not indicate a presumption of denial – only that such exports will require a license reviewed and approved on a case-by-case basis. The general policy guidelines for Group D:1 countries<sup>11</sup> describes the terms under which exports, re-exports or in-country

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<sup>8</sup> See Elimination of License Exception Civil End Users (CIV), 85 Fed. Reg. 23470, April 28, 2020, available at <https://www.federalregister.gov/documents/2020/04/28/2020-07240/elimination-of-license-exception-civil-end-users-civ>. The Country Group List can be found at 31 C.F.R. Part 740, Supp.1. <https://www.bis.doc.gov/index.php/documents/regulation-docs/2255-supplement-no-1-to-part-740-country-groups-1/file>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See 31 C.F.R. § 742.4, which describes a general policy of approval for civilian end uses if BIS is able to determine that the exported or re-exported items or technology would not contribute to the military potential of the recipient country to the detriment of U.S. national security. The revocation of License Exception CIV underscores BIS's determination that ensuring products do not contribute to military end uses requires case-by-case review, as described in section 742.4.

transfers formerly eligible for License Exception CIV will now be reviewed. Companies in the semiconductor sector that have export relationships with China and that have been relying on License Exception CIV will have to apply for a license after June 29, 2020.

## **Final Rule: Expansion of Export Controls for Military End Use or Military End Users in China, Russia, or Venezuela**

On April 28, BIS also amended the EAR to (1) expand the licensing requirements for China to include “military end users,” in addition to “military end use”; (2) broaden the list of items for which the licensing requirements and review policy apply; (3) expand the definition of “military end use”; and (4) add Electronic Export Information (EEI) filing requirements in the Automated Export System for exports to China, Russia, and Venezuela.<sup>12</sup> This rule adopts a license review policy of presumption of denial for such military end-users and military end-uses.

Currently, BIS requires licenses on exports, re-exports, and in-country transfer of items for military end-uses in China<sup>13</sup> and items intended for military end-uses and end-users in Russia and Venezuela.<sup>14</sup> The new rule expands the license requirement for military end-uses in China to include military end-users in China. The EAR’s definition of military end users includes the army, navy, air force, marines and coast guard, plus the national guard/police, government intelligence and reconnaissance organizations. The new rule broadens the definition of military end-use beyond any item for the “use,” “development,” or “production” to include any item that *supports or contributes to* the operation, installation, maintenance, repair, overhaul, refurbishing, “development,” or “production” of military items.

Additionally, this rule adds items to the list of items subject to the military end-use and end-user license requirements in **Supplement No. 2** to part 744.<sup>15</sup> This

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<sup>12</sup> See Expansion of Export Controls for Military End Use or Military End Users in China, Russia, or Venezuela, 85 Fed. Reg. 23459, April 28, 2020, available at: <https://www.federalregister.gov/documents/2020/04/28/2020-07241/expansion-of-export-reexport-and-transfer-in-country-controls-for-military-end-use-or-military-end>.

<sup>13</sup> See 72 Fed. Reg. 33646.

<sup>14</sup> See 79 Fed. Reg. 55608; 79 Fed. Reg. 66288.

<sup>15</sup> Specifically, this rule adds the following Export Control Classification Numbers (ECCNs) 2A290, 2A291, 2B999, 2D290, 3A991, 3A992, 3A999, 3B991, 3B992, 3C992, 3D991, 5B991, 5A992, 5D992, 6A991, 6A996, and 9B990. Additionally, this rule expands the range of items under ECCNs 3A992, 8A992, and 9A991. See 85 Fed. Reg. 23459.

expansion significantly affects companies in the semiconductor sector that export to China, Russia, and Venezuela.

Effective on June 29, 2020, BIS's new rules will require case-by-case review and licensing for exports, re-exports and in-country transfers of a widening group of goods, technology, and technical data that could contribute to the military capabilities of Group D:1 countries and which might threaten the national security of the United States. Application of a license for military end-uses in such countries will face a presumption of denial. The rules will also require increased diligence with respect to the evaluation of end users in China, especially where there may be civil-military integration. It remains to be seen whether the expressed concerns about the extent to which civilian and military interests are integrated in the economies of Group D:1 countries will effectively terminate exports to end-users in those countries formerly eligible for unlicensed exports under License Exception CIV.

## **Proposed Modification of License Exception Additional Permissive Re-exports (APR)**

Finally, on April 28, BIS proposed to remove authorization under License Exception APR to re-export selected dual-use items to destinations in Country Group D:1.<sup>16</sup> Revoking this aspect of License Exception APR would require case-by-case review of covered re-exports to Group D:1 countries.

Currently, paragraph (a) of License Exception APR authorizes the re-export of national security-controlled items from a country in Country Group A:1 or Hong Kong (the "**Group A:1+ Jurisdictions**") to certain destinations, provided that the re-export is consistent with an export authorization from the country of re-export, and that the item is not subject to certain other reasons for control,<sup>17</sup> including missile technology and nuclear nonproliferation controls.<sup>18</sup> The proposed rule would make Group D:1 countries ineligible for License Exception APR.<sup>19</sup> In proposing the

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<sup>16</sup> See Modification of License Exception Additional Permissive Re-exports (APR), 85 Fed. Reg. 23496, April 28, 2020, available at: <https://www.federalregister.gov/documents/2020/04/28/2020-07239/modification-of-license-exception-additional-permissive-reexports-apr>.

<sup>17</sup> The reasons include nuclear nonproliferation, chemical and biological weapons, missile technology, significant item, and crime control. See 15 C.F.R. § 740.16(a).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

amendment, BIS noted differences in licensing review standards between a number of Group A:1+ Jurisdictions and the United States. Specifically, BIS noted evidence of approvals by some of the A:1+ Jurisdictions for the re-export to destinations in Country Group D:1 of national security-controlled items that the United States would not have approved for direct export.<sup>20</sup>

The proposed rule is open for public comment until June 29, 2020. It is expected that the rule will be adopted with little or no change and that it may have a significant effect on the provision of a range of items, including certain telecommunications technology equipment, components, and accessories, to China, with proportionately less impact on other Group D:1 countries.

Collectively, the new restrictions reflect heightened U.S. determination to tighten controls on national security-related products and technology anywhere within the reach of U.S. jurisdiction. They will complicate global supply chains and may well affect U.S. companies as important vendors to global manufacturers and non-U.S. chip foundries, as well as to foreign manufacturers of end-products ultimately destined for the U.S. market.

*Law Clerk Brooke Zheng contributed to this post.*

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<sup>20</sup> *Id.*