

Huawei Entity List Guide

Chinese telecommunications giant Huawei Technologies Co., Ltd. (Huawei) has a long history of accusations of corporate espionage and theft, ties to the Chinese military and government, and national security threats to foreign countries. Huawei acquisitions have been blocked on two occasions by the U.S. Government, and U.S. military and government officials have warned companies against working with Huawei on multiple occasions in recent years.

In this guide, we provide a snapshot of the U.S. response to concerns about Huawei through a review of the various rules and regulation revisions published by the U.S. Department of Commerce Bureau of Industry and Security (BIS). BIS is tasked with protecting U.S. national security and foreign policy interests through the administration of the Export Administration Regulations (EAR), which describe, in part, export licensing policies and procedures.

Original Huawei Listing on Entity List

On May 21, 2019, BIS published a [final rule](#),¹ effective on May 16, 2019, adding Huawei and 68 non-U.S. Huawei affiliates, located in 26 countries, to the Entity List. The Entity List is a list of certain foreign legal persons – including businesses, research institutions, government and private organizations, and individuals – that are subject to specific license requirements for the export or reexport of certain items.²

BIS added the Huawei entities based on a determination that there is reasonable cause to believe that Huawei has been involved in activities contrary to the national security or foreign policy interests of the United States. Specifically, the U.S. Government alleges that Huawei violated U.S. sanctions on Iran. For Huawei and its listed affiliates, BIS imposed a license requirement for all items subject to the EAR and a license review policy of presumption of denial. Additionally, no license exceptions are generally available for exports, reexports, or transfers (in-country) to the Huawei entities added to the Entity List.

¹ Addition of Entities to the Entity List, 84 Fed. Reg. 22,961 (May 21, 2019), *available at* <https://www.bis.doc.gov/index.php/documents/regulations-docs/2394-huawei-and-affiliates-entity-list-rule/file>.

² The Entity List is found at Supplement No. 4 to 15 C.F.R. § 744. Exporters and reexporters should check the Entity List to confirm whether parties to a transaction are listed therein. For more information, see Torres Law's *Guide to Denied Party Lists* (available in the Mondaq Advice Centre).

Listing of Additional Huawei Affiliates

Effective August 19, 2019, [BIS added an additional 46 non-U.S. Huawei affiliates to the Entity List](#),³ claiming that these entities also posed a significant risk to U.S. national security and foreign policy interests. Specifically, BIS concluded that without the listing of the 46 additional affiliates, and imposition of a license requirement, there is reasonable cause to believe that Huawei would seek to use them to evade the restrictions placed on Huawei and its 68 affiliates listed on May 16, 2019.

Of the 46 affiliates added to the Entity List, 27 affiliates are added under new, separate entries, while the remaining 19 affiliates are added under the existing entry for Huawei. Similar to the listing of Huawei and the original 68 affiliates, the listing of the 46 additional entities imposes a license requirement for all items subject to the EAR, a license review policy of presumption of denial, and the inability to use license exceptions.

Temporary General License

However, on May 22, 2019, BIS published a [Temporary General License \(TGL\)](#),⁴ which was initially valid May 20, 2019 through August 19, 2019. The TGL temporarily authorized engagement in certain transactions, involving the export, reexport, and transfer (in-country) of items subject to the EAR to Huawei and its 68 affiliates then listed on the Entity List, subject to certain conditions.

The TGL authorized the following transactions:

1. *Continued Operation of Existing Networks and Equipment*: BIS authorized transactions necessary to maintain and support existing and currently fully operational networks and equipment, including software updates and patches, subject to legally binding contracts and agreements executed between Huawei or its listed affiliates and third parties on or before May 16, 2019.
2. *Support to Existing Handsets*: BIS authorized transactions necessary to provide service and support, including software updates or patches, to existing Huawei handsets that were available to the public on or before May 16, 2019.
3. *Cybersecurity Research and Vulnerability Disclosure*: BIS authorized the disclosure to Huawei and/or its listed affiliates of information regarding security vulnerabilities in items owned, possessed, or controlled by Huawei or its listed affiliates when related to the process of providing ongoing security research critical to maintaining the integrity and reliability of existing and currently fully operational networks and equipment, as well as handsets.

³ Addition of Certain Entities to the Entity List and Revision of Entries on the Entity List, 84 Fed. Reg. 43,493 (Aug. 21, 2019), available at <https://www.bis.doc.gov/index.php/documents/regulations-docs/federal-register-notices/federal-register-2019/2438-huawei-affiliates-additions-and-modifications-entity-list-rule-on-public-dispaly-and-effective-8-19-21-and-to-publish-in-fr-on-8-21-19/file>.

⁴ The TGL was published as Supplement No. 7 to 15 C.F.R. § 744. Temporary General License, 84 Fed. Reg. 23,468 (May 22, 2019), available at <https://www.bis.doc.gov/index.php/documents/regulations-docs/federal-register-notices/federal-register-2019/2397-84-fr-23468-temporary-general-license-rule/file>.

4. *Engagement as Necessary for Development of 5G Standards by a Duly Recognized Standards Body*: BIS authorized engagement with Huawei and/or its listed affiliates as necessary for the development of 5G standards as part of a duly recognized international standards body.

To rely on the TGL, the exporter, reexporter, or transferor was required to create a certification statement that specifies how the transaction meets the scope of the TGL. The party drafting the statement must keep the certification statement pursuant to the EAR recordkeeping requirements at 15 C.F.R. § 762, which is generally five years from the date of export. The TGL does not relieve parties of other obligations under the EAR, including but not limited to licensing requirements to China or elsewhere or the requirements under part 744 of the EAR.

The TGL was extended multiple times on August 21, 2019, November 18, 2019, February 18, 2020, March 12, 2020, and May 18, 2020. The [TGL extension of August 21, 2019](#) added the 46 Huawei affiliates added on August 19, 2019 to the TGL and made changes to the certification requirements.⁵ Importantly, the August 21, 2019 TGL extension also removed authorization number 4 above (*Engagement as Necessary for Development of 5G Standards by a Duly Recognized Standards Body*). Subsequent TGL extensions were only extensions of validity and did not include any other substantive changes.

Revisions to EAR General Prohibition Three (Foreign-Produced Direct Product Rule)

On May 19, 2020, BIS published an [interim final rule](#)⁶ and request for comments in which it modified EAR General Prohibition Three, also known as the Foreign-Produced Direct Product Rule, to impose two new controls over certain foreign-produced items. Whether a foreign-produced item is subject to the new controls is set forth in the Entity List by designating such affected listed parties with footnote 1 to the Entity List (Footnote 1). The new controls apply to foreign-produced items based on (1) the classification of the U.S. technology or software and (2) whether there is knowledge that the foreign-produced item is destined to a designated entity listed on the Entity List. At the time of the publication of this interim final rule, Huawei and its 114 listed affiliates were the only entities on the Entity List with the Footnote 1 designation.

One control pursuant to Footnote 1 designation is imposed on the direct product of technology or software produced or developed by a listed Huawei entity. To be subject to the new control, the software or technology must be subject to the EAR and specified in certain enumerated Export Control Classification Numbers (ECCNs). The enumerated ECCNs are as follows: 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, and 5E991.

⁵ Temporary General License: Extension of Validity, Clarifications to Authorized Transactions, and Changes to Certification Statement Requirements, 84 Fed. Reg. 43,487 (Aug. 21, 2019), *available at* <https://bis.doc.gov/index.php/documents/regulations-docs/federal-register-notices/federal-register-2019/2436-temporary-general-license-rule-on-public-display-and-effective-8-19-19-and-to-publish-in-fr-on-8-21-19/file>.

⁶ Export Administration Regulations: Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule) and the Entity List, 85 Fed. Reg. 29,849 (May 19, 2020), *available at* <https://www.bis.doc.gov/index.php/documents/regulations-docs/federal-register-notices/federal-register-2020/2551-amendments-to-general-prohibition-three-foreign-produced-direct-product-rule-and-the-entity-list/file>.

In the interim final rule, BIS provided the following example:

If [a listed Huawei entity] produces or develops an integrated circuit design utilizing specified Category 3, 4 or 5 technology or software such as Electronic Design Automation software, whether the technology or software is U.S.-origin or foreign-produced and made subject to the EAR pursuant to the de minimis or foreign-produced direct product rule, that foreign-produced integrated circuit design is subject to the EAR.

Footnote 1 also applies a control to any foreign-produced item (1) that is the direct product of a plant or major component of a plant located outside the United States when the plant or major component of a plant itself is a direct product of U.S.-origin technology or software specified in the same 16 ECCNs designated above; and (2) such item is a direct product of software or technology produced or developed by a listed Huawei entity. Per the rule, a major component of a plant located outside the United States means “equipment that is essential to the production of an item to meet the specifications of any design produced or developed by designated entities, including testing equipment.”

For the application of the second control, BIS provided the following example:

If a foreign company produces integrated circuits outside the United States in a foundry containing U.S.- origin or foreign-produced equipment (which itself is a direct product of U.S.- origin technology or software in specified Category 3, 4, or 5 ECCNs) that is essential to the production of the integrated circuit to meet the specifications of their design, including testing equipment (i.e., a major component of a plant), and the design for the integrated circuit was produced or developed from software or technology by [a listed Huawei entity], whether or not such design is subject to the EAR, then that foreign-produced integrated circuit is subject to the EAR.

Authorization of Release of Certain Technology to Listed Huawei Entities in the Context of Standards Organizations

On June 18, 2020, BIS published an [interim final rule](#),⁷ amending the Entity List and authorizing U.S. companies to share certain technology with Huawei and its listed affiliates without a license if the release of such technology contributes to the revision or development of a “standard” in a “standards organization,” as these terms are defined in the Office of Management and Budget (OMB) Circular A–119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities.

BIS recognized the necessity of providing clarity on this point after receiving numerous questions and comments from U.S. companies regarding the sharing of technology for the development of standards where Huawei or listed affiliates participate in the relevant international standards organization. Pursuant to the revision to the Entity List, technology classified as EAR99 or in an ECCN controlled only for anti-terrorism (AT) reasons may be shared with members of international standards organizations, including Huawei and its

⁷ Release of “Technology” to Certain Entities on the Entity List in the Context of Standards Organizations, 85 Fed. Reg. 36,719 (June 18, 2020), available at <https://www.bis.doc.gov/index.php/documents/regulations-docs/federal-register-notices/federal-register-2020/2565-85-fr-36719/file>.

affiliates, without an export license when for the purpose of contributing to the revision or development of international standards.

Addition of Huawei Affiliates to Entity List, Removal of TGL, and Further Revision of General Prohibition Three

On August 20, 2020, BIS published a [final rule](#) adding 38 more Huawei affiliates to the Entity List.⁸ The affiliates are located in 21 countries; entities located in Hong Kong are listed under the Entity List heading for China pursuant to Executive Order 13936, dated July 14, 2020, revoking Hong Kong's special status. Similar to the additional 46 entities added on August 21, 2019, the additional 38 entities were listed to prevent Huawei and its listed affiliates using them to evade the Entity List restrictions. Again, the 38 Huawei affiliates added to the Entity List will require a license to export, reexport, or transfer all items subject to the EAR, a license review policy of presumption of denial, and the inability to use license exceptions.

The final rule also removed the TGL and replaced it with a more limited permanent authorization. Namely, BIS added footnote 2 to the Entity List, which preserved only the third authorization from the TGL, *Cybersecurity Research and Vulnerability Disclosure*. TGL certification statements and any support documentation must continue to be retained pursuant to EAR recordkeeping requirements.

Lastly, the final rule further revises General Prohibition Three as it relates to entities designated with Footnote 1 on the Entity List, which continues to be only Huawei and its listed affiliates. The controls imposed in the May 19, 2020 interim final rule are expanded to apply to foreign-produced items when there is knowledge that:

- (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 any entity with a Footnote 1 designation; or
- (2) Any entity with a Footnote 1 designation is a party to any transaction involving the foreign-produced item, *e.g.*, as a "purchaser," "intermediate consignee," "ultimate consignee," or "end-user," as defined in the EAR.

The revision also changes the controls of the Footnote 1 designation to no longer require the foreign-produced item to have been developed or produced by Huawei or its listed affiliates, or that the foreign-produced item is the product of software or technology developed or produced by Huawei or its listed affiliates. Instead, the control applies where the foreign-produced item is a direct product of technology or software classified under the same 16 designated ECCNs, regardless of the developer or producer, or the direct product of a plant where a major component of the plant is the direct product of one of the 16 designated ECCNs.

⁸ Addition of Huawei Non-U.S. Affiliates to the Entity List, the Removal of Temporary General License, and Amendments to General Prohibition Three (Foreign-Produced Direct Product Rule), 85 Fed. Reg. 51,596 (Aug. 20, 2020), available at <https://www.bis.doc.gov/index.php/documents/regulations-docs/federal-register-notices/federal-register-2020/2593-85-fr-51596/file>.

BIS stated that this revision protects U.S. national security by further controlling the design and production of items outside the U.S. using items subject to the EAR for entities that pose a significant risk of involvement in activities contrary to U.S. interests. Importantly, the final rule also revises Footnote 1 to add a case-by-case license review policy for foreign-produced items that are capable of supporting the development or production of telecom systems, equipment, and devices below the 5G level.

Recommendations

Companies should generally screen all parties to a transaction against the Entity List as part of an established export compliance program. Now, it is more important than ever to screen parties against the Entity List to determine whether the entity has a Footnote 1 designation and is subject to the revised Foreign Direct Product rule. This is especially important for companies that know Huawei or its affiliates are part of their supply chain or possible users or purchasers of their products or technology.

Exporters, reexporters, and transferors should also confirm the ECCNs of their products and related technology. When classifying technology, companies should classify for development, production, and use. For companies with a relationship with a Footnote 1 designated entity, the classification confirmation exercise should not be limited to end products but should also include equipment and related technology used for development and manufacturing. This classification analysis should also be conducted for all products and technology subject to the EAR for a company's U.S. and foreign subsidiaries and affiliates.

If any transaction involves one of the above-listed ECCNs and is destined for an entity on the Entity List designated with Footnote 1, the transaction is subject to the restrictions outlined above. Such a transaction will require a BIS export license, but such a license application will be reviewed with a presumption of denial unless it involves telecom systems, equipment, or devices below the 5G level.

If your company does business with Huawei or one of its listed affiliates and you need assistance interpreting the above regulations and developing a plan of action, please do not hesitate to contact the attorneys at Torres Law, PLLC.

1201 Main St. Suite 1350, Dallas, TX 75202 • Phone: 214.295.8473 • Fax: 214.396.1583
1050 Connecticut Avenue NW, Suite 500, Washington, DC 20036 • Phone: 202.851.8200
© 2020 Torres Law, PLLC. All rights reserved.

