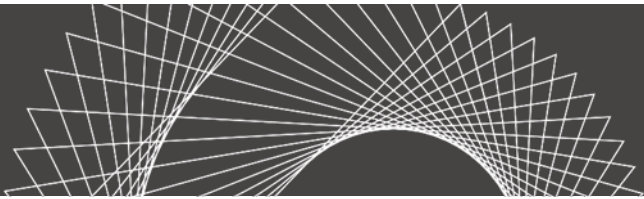


# Developments in U.S. Export Control Policies and Measures



**Akin Gump**  
STRAUSS HAUER & FELD LLP

October 6, 2020

---

Steven Emme

Akin Gump Strauss Hauer & Feld

# Topics

---

U.S. Policy Pertaining to China

Background on U.S. Export Controls

Increased Controls Affecting China

Entity List

Restrictions Related to Huawei

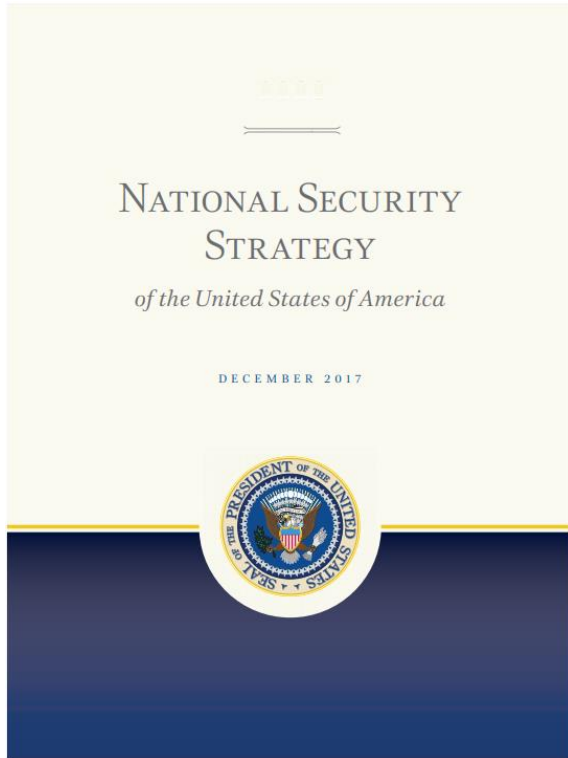
Changes Pertaining to Hong Kong

# U.S. Policy Pertaining to China



# 2017 National Security Strategy

---



For decades, U.S. policy was rooted in the belief that support for China’s rise and for its integration into the post-war international order would liberalize China. Contrary to our hopes, China expanded its power at the expense of the sovereignty of others. China gathers and exploits data on an unrivaled scale and spreads features of its authoritarian system, including corruption and the use of surveillance. It is building the most capable and well-funded military in the world, after our own. Its nuclear arsenal is growing and diversifying. Part of China’s military modernization and economic expansion is due to its access to the U.S. innovation economy, including America’s world-class universities.

# U.S. Government Concerns

---

## Military-Civil Fusion and the People's Republic of China

**“Military-Civil Fusion,” or MCF, is an aggressive, national strategy of the Chinese Communist Party (CCP). Its goal is to enable the PRC to develop the most technologically advanced military in the world. As the name suggests, a key part of MCF is the elimination of barriers between China's civilian research and commercial sectors, and its military and defense industrial sectors. The CCP is implementing this strategy, not just through its own research and development efforts, but also by acquiring and diverting the world's cutting-edge technologies – including through theft – in order to achieve military dominance.**

<https://www.state.gov/wp-content/uploads/2020/06/What-is-MCF-One-Pager.pdf>

# Background on U.S. Export Controls



# U.S. Export Controls

---

The United States implements export controls for commercial and dual-use items primarily through the Export Administration Regulations (“**EAR**”), 15 C.F.R. Parts 730-774

- Administered by the Bureau of Industry and Security (“**BIS**”), which is part of the Department of Commerce
- Includes the **Commerce Control List**, which classifies items based on Export Control Classification Numbers (“**ECCNs**”)
- Items include **commodities** (equipment, components, materials), **software** (source code, object code), and **technology** (certain information, data)
- License requirements based on four factors: the classification of the item, country of destination, end use, and parties involved in the transaction

# EAR Basics for Non-U.S. Entities

---

The EAR control reexports or certain in-country transfers of items subject to the EAR

- Reexports: shipment or transmission of items from one non-U.S. country to another
- Transfers (in-country): a change in end use or end user within a country outside of the U.S.

The following items are “**subject to the EAR**” when located outside of the U.S.:

- U.S.-origin items, wherever located, if in their original form
- Non-U.S.-origin items that incorporate more than a de minimis amount of U.S.-origin controlled content
- Non-U.S.-origin items that are the direct product of (i) certain U.S.-origin technology or software or (ii) a plant or major component that itself is the direct product of certain U.S.-origin technology



# Increased Controls Affecting China



# Chinese Military End Users and End Uses

---

BIS expanded the license requirements pertaining to military end uses and military end users in China, Russia, and Venezuela – § 744.21

- **General license requirement:** you may not export, reexport, or transfer an item subject to the EAR and listed in Supp. No. 2 to Part 744 to China, Russia, or Venezuela if one has knowledge that the item is intended, entirely or in part, for a military end use or military end user
- **Changes:** effective June 29, 2020
  - Expanded the list of items in Supp. No. 2 to Part 744 that are subject to the control to include many items in the semiconductor, electronics, and aerospace industries
  - Added “military end users” in China to the license requirement (previously only applied to “military end uses” in China)
  - Expanded definition of “military end use” to include “any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, ‘development,’ or ‘production,’ of military items.”
  - Expanded definition of “military end user” to include any person or entity whose actions or functions are intended to support “military end uses” under the new expanded definition of that phrase; thus, this includes more than just a traditional military end user, such as a country’s army or navy
- **BIS:** the expansion in controls “will require increased diligence with respect to the evaluation of end users in China, particularly in view of China’s widespread civil-military integration.”

# Removal of License Exception CIV

---

License Exception Civil End Users (CIV) was available to authorize the export or reexport of certain items controlled for national security (NS) reasons to civil end users in countries in Country Group D:1 (includes China, Russia, Vietnam, and other countries)

Eligible items for CIV included certain field programmable gate arrays, telecommunications equipment, and semiconductor technology

CIV was removed from the EAR effective June 29, 2020

# Entity List



# Increased Use of Entity List

---

The Entity List is a list of non-U.S. entities for which the U.S. Government has reasonable cause to believe the entity “has been involved, is involved, or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States...”

- Supporting terrorists
- Actions that enhance the military capability or, or ability to support terrorism of certain governments
- Transferring, developing, servicing, repairing, or producing conventional weapons in manner contrary to U.S. national security or foreign policy
- Preventing accomplishment of end-use check by U.S. Government
- Engaging in conduct posing a risk of violating the EAR

# Entity List License Requirements

---

While the specific requirements can vary for each entity on the Entity List, a license will usually be required to export, reexport, or transfer any item subject to the EAR if the item is destined for an entity on the Entity List

On August 20, 2020, BIS clarified that the Entity List license requirements apply when an entity on the Entity List is a party to the transaction, including as an end user, ultimate consignee, purchaser, or intermediate consignee

# Entity List – Notable Recent Examples

Entity	Date Added	Rationale
<b>Fujian Jinhua Integrated Circuit Co., Ltd.</b>	October 2018	Department of Commerce press release: <i>Jinhua is nearing completion of substantial production capacity for dynamic random access memory (DRAM) integrated circuits. The additional production, in light of the likely U.S.-origin technology, threatens the long term economic viability of U.S. suppliers of these essential components of U.S. military systems</i>
<b>Huawei Technologies Co., Ltd.</b>	May 2019	U.S. criminal indictment – willfully causing the export, reexport, sale and supply, directly and indirectly, of goods, technology and services (banking and other financial services) from the United States to Iran without authorization
<b>FiberHome Technologies Group</b>	June 2020	Human rights violations related to repression, mass arbitration, detention, forced labor and high technology surveillance in the Xinjiang Uyghur Autonomous Region (“XUAR”)
<b>Hefei Bitland Information Technology Co. Ltd.</b>	July 2020	Forced labor involving members of Muslim minority groups in the XUAR
<b>Nanchang O-Film Tech</b>	July 2020	Forced labor involving members of Muslim minority groups in the XUAR
<b>China Communications Construction Company Dredging Group Co. Ltd.</b>	August 2020	Activities related to enabling China to militarize disputed outposts in the South China Sea

# EAR Restrictions Related to Huawei





# Huawei

---

Huawei and 152 of its non-U.S. affiliates are currently on the Entity List

Huawei is generally subject to the same scope of license requirements as most other entities on the Entity List, with some very important differences

A limited number of items subject to the EAR do not require a license for Huawei:

- Technology classified as EAR99 or under an ECCN controlled for anti-terrorism reasons only when released to members of a “standards organization” for the purpose of contributing to the revision or development of a “standard”
- Cybersecurity research and vulnerability disclosure when the disclosure to Huawei and/or to its listed non-U.S. affiliates 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

# Huawei and Changes to Foreign Direct Product Rule

---

As of August 17, more items produced outside of the U.S. are now subject to the EAR if Huawei is directly or indirectly involved in reexports or transfers of such items

Timeline:

- May 15, 2020: BIS first revised the Foreign Direct Product Rule (“FDPR”)
- August 17, 2020: BIS further revised the FDPR to significantly expand its scope
- September 14, 2020: end of savings clause to allow certain items to continue to be reexported or transferred to Huawei

# Huawei and Changes to Foreign Direct Product Rule

---

For a non-U.S.-produced item to be subject to the EAR under this expansion to the FDPR, the following requirements must be met:

1. The item must be described in either paragraph (a) or (b) in Footnote 1 to the Entity List, and
2. One has knowledge at the time of reexport or transfer that:
  - a. The 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 a listed Huawei entity, or
  - b. A listed Huawei entity is a party to a transaction involving the item (e.g., the listed Huawei entity is a purchaser, intermediate consignee, ultimate consignee, or end user)

# Huawei and Changes to Foreign Direct Product Rule

Paragraph (a): direct product of “technology” or “software” subject to the EAR and specified in certain Category 3, 4 or 5 ECCNs.

The foreign-produced item is a **direct product** of “technology” or “software” **subject to the EAR** and specified in Export Control Classification Number (ECCN) 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991

- The connection to the U.S. that allows BIS to assert jurisdiction is the use of certain software or technology subject to the EAR to produce the non-U.S. item.
- A common example cited by BIS is the use of 3D991 electronic design automation (EDA) software to produce non-U.S. design files
- Only the “direct product” is captured – it must be the *immediate* item that is produced directly by the use of the technology or software

# Huawei and Changes to Foreign Direct Product Rule

Paragraph (b): direct product of a plant or major component of a plant.

The foreign-produced item is **produced by** any plant or major component of a plant that is located outside the United States, **when the plant or major component of a plant**, whether made in the U.S. or a foreign country, **itself is a direct product of U.S.-origin “technology” or “software”** subject to the EAR that is specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991

- BIS defined “major component” to mean equipment that is essential to the production of the item, including test equipment, and later clarified that any equipment used during the production process is “essential”
- The connection to the U.S. that allows BIS to assert jurisdiction is that U.S.-origin technology or software is used to produce equipment that is then used to produce the non-U.S. item
- Note that the non-U.S. item does not have to be a “direct product;” it merely has to be “produced by” the equipment

# Huawei and Changes to Foreign Direct Product Rule

---

## Impact of recent changes to the FDPR:

- Equipment made from U.S. technology described in paragraph (b) is widely used in fabs around the world, so it is likely that almost all wafers produced around the world could potentially be subject to the expanded FDPR for Huawei
- Thus, the semiconductor industry is heavily impacted
- However, the new controls can impact any industry and are not limited to semiconductors

# Hong Kong



# Changes Related to Hong Kong

---

Following China's passage of the national security law affecting Hong Kong, the U.S. Government took a number of steps addressing concerns about Hong Kong's autonomy

- **June 30, 2020:** BIS published a website notice suspending the use of EAR license exceptions for Hong Kong when such exceptions provide differential treatment for Hong Kong as compared to China
- **July 14, 2020:** Executive Order 13936 – The President's Executive Order on Hong Kong Normalization
- **July 31, 2020:** BIS published a final rule implementing the website notice in the EAR – see § 740.2 (restrictions on the use of license exceptions)



Thank you.

Any questions?

*Please note that the information described in this presentation does not constitute legal advice.*

