

Trade Compliance Flash: U.S. Adds Huawei and Its Affiliates to the Entity List; Issues Landmark New Telecommunications Security Executive Order

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Effective May 16, 2019, the U.S. Department of Commerce, Bureau of Industry (BIS) has [added](#) the China-based telecommunications giant Huawei Technologies Co. Ltd (Huawei) and 68 of its affiliates to the Entity List, thereby prohibiting the export, re-export, or in-country transfer of items subject to the Export Administration Regulations (EAR). This broad prohibition covers, for example, the sales of U.S. goods to Huawei or its affiliates, sales of foreign-made items of more than a *de minimis* level of controlled U.S. content—generally 25 percent—to Huawei or its affiliates, and even the release of controlled U.S. technology to Huawei or its affiliates. The prohibitions apply to persons around the world, so long as the items in question are subject to the EAR, and therefore subject to U.S. jurisdiction. Providing a narrowly tailored temporary reprieve, BIS published a 90-day [Temporary General Licenses](#) (TGL), authorizing limited categories of exports, reexports, or transfers that are otherwise prohibited.

Huawei's inclusion on the Entity List follows the President's May 15, 2019 [issuance](#) of a new Executive Order on Securing the Information and Communications Technology and Services Supply Chain (the Telecom Security E.O.). The Telecom Security E.O. authorizes BIS to prohibit transactions that (i) "involve information or communications technology or services designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary" and that (ii) pose certain risks to U.S. information and communications technology, U.S. critical infrastructure, the U.S. digital economy, U.S. national security, or the security and safety of U.S. persons. Although the Telecom Security E.O. does not mention Huawei by name, its focus on information or communications technology developed by persons "subject to the jurisdiction or direction" of a "foreign adversary" are likely intended to target the telecommunications giant, which U.S. authorities have alleged has ties to the Chinese military and intelligence services.

Huawei's inclusion on the Entity List and the issuance of the Telecom Security E.O. illustrate the deteriorating relations between the United States and China, driven by China's recent economic and technological advancements and related U.S. national security concerns. Notably, Huawei's inclusion on the Entity List is based on "reasonable cause" that the U.S. government has to believe that Huawei "has been involved in activities determined to be contrary to the national security or foreign policy interests of the United States," which likely relates, at least in part, to Huawei's alleged violations of U.S. sanctions on Iran and trade secret theft that have resulted in [criminal charges](#) against the company. Similarly, the justification for the Telecom Security E.O. is a "national emergency" declared with respect to the threat that "foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services" in the United States.

The timing of these two actions also coincides with an announcement by the United States Trade Representative (USTR) that tariffs would be increased on \$200 billion worth of Chinese imports, following the break-down in U.S.-China negotiations to resolve the ongoing "trade war" between the two countries. Although some observers have asserted that these actions against Huawei were taken primarily to increase U.S. bargaining power in the U.S.-China trade negotiations, there is no guarantee that either measure will be rolled back if and when a trade deal is ever agreed upon.

We provide our analysis below of the impact that (i) Huawei's inclusion on the Entity List will have on its customers, supply chain partners, and other interested third parties around the globe, and (ii) the Telecom Security E.O. will have, once fully implemented, on the U.S. telecom landscape.

Practical Effects of Huawei and Its Affiliates Being Added to the Entity List

As a result of the inclusion of Huawei on the Entity List, both U.S. and non-U.S. persons are now prohibited from exporting any U.S.-origin goods, software, or technology to Huawei or its listed affiliates, as well as re-exporting certain foreign-made goods, software, technology that has above a *de minimis* percentage—generally 25 percent—of controlled U.S. content. While broad, the restrictions do not cover all dealings with Huawei or its affiliates on the Entity List. For example, U.S. persons and non-U.S. persons may continue to purchase goods and services from Huawei, as well as to provide services to the telecommunications giant, so long as those services do not constitute an "export of technology," as defined below.

More specifically, U.S. export controls now prohibit the "export," "re-export," or "in-country transfer" of any "item" that is "subject to the EAR" to Huawei or any of its 68 affiliates without a license from BIS. Each of these terms has a specific meaning under the U.S. export control law, which we set forth below:

- "Export," "re-export," and "in-country transfer" are defined broadly, to include: (i) an actual shipment or transmission out of the United States of an item subject to the EAR; (ii) an actual shipment or transmission of an item subject to the EAR from one foreign country to another foreign country; and (iii) a shipment, transmission, or release of items subject to the EAR from one person to another person that occurs outside the United State within a single foreign country. Notably, these terms are defined so as to apply to U.S. and non-U.S. persons equally. (BIS views its jurisdiction as *in rem*, which means that its jurisdiction is based on the thing itself. This contrasts with *in personam* jurisdiction, which requires the involvement of U.S. persons.)
- An "item" includes "commodities," "software," and "technology." Commodities means "[a]ny article, material, or supply, except technology or software." Software means "[a] collection of one or more programs or microprocessors fixed in any tangible medium of expression." And technology means "[i]nformation necessary for the development, production, use, operation, installation, maintenance, repair, overhaul, or refurbishing... of an item." In other words, the term "item" is very broad, covering both goods and software and the technology needed to make or operate goods and software.
- Items "subject to the EAR" include:
 - All items in the United States, regardless of origin;
 - All U.S.-origin items, wherever located;
 - Foreign-made commodities, that "incorporate" controlled U.S.-origin commodities above certain *de minimis* levels;
 - Foreign-made commodities that are "bundled" with controlled U.S.-origin technology above certain *de minimis* levels;
 - Foreign-made software that is commingled with controlled U.S.-origin software above certain *de minimis* levels;
 - Foreign-made technology that is comingled with controlled U.S.-origin technology; and
 - Certain foreign-made direct products of U.S.-origin technology or software.

Notably, for a foreign-made item to be subject to the EAR—and therefore subject to prohibition on sales to Huawei—the U.S.-origin content must generally be "controlled," *i.e.*, items that require a license or license exception for shipment to their ultimate destination. Generally, for shipment to Huawei and its affiliates in non-embargoed destinations such as China, this means items that are controlled because they are listed in the Commerce Control List (CCL) and have an Export Control Classification Number (ECCN). Only controlled U.S.-content counts towards the *de minimis* threshold for determining whether an item is subject to the EAR.

For most items, the *de minimis* threshold is 25 percent, such that items with U.S.-origin content below that threshold may be export, re-exported, or transferred to Huawei or its affiliates. However, for certain sensitive technologies and destinations, the threshold can be 10 percent or even zero percent. Generally, *de minimis* calculations are a fact-intensive endeavor that should be carefully documented.

The Federal Register [notice](#) makes clear that although a license is required to do business with Huawei or its affiliates, there will be a presumption of denial applied to any license application. Thus, licenses may be effectively unavailable for exports, re-exports, or in-country transfers for items subject to the EAR to Huawei or any of its affiliates.

The new prohibitions apply not only to Huawei, but also to 68 of its alleged affiliates, located in China, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Egypt, Germany, Hong Kong, Jamaica, Japan, Jordan, Lebanon, Madagascar, Netherlands, Oman, Pakistan, Paraguay, Qatar, Singapore, Sri Lanka, Switzerland, Taiwan, United Kingdom, and Vietnam. These affiliates are listed in draft Federal Register notice adding Huawei itself to the entity list.

On May 21, 2019, BIS published a TGL that authorizes specific exports, re-exports, or transfers effective May 20, 2019, to August 19, 2019. The TGL authorizes four types of transactions, subject to the provision of the EAR:

- Engagement in transactions that are "necessary to maintain and support current operational networks and equipment, including software updates and patches, subject to legally binding contracts and agreements executed between Huawei and third parties or the 68 non-U.S. Huawei affiliates and third parties on or before May 16, 2019;"
- Engagement in transactions that are "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";
- "Disclosure to Huawei, and/or the 68 non-U.S. affiliates of information regarding security vulnerabilities in items owned, possessed, or controlled by Huawei or any of the 68 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 networks and equipment"; and
- Engagement with Huawei and its 68 non-U.S. affiliates "as necessary for the development of 5G standards as part of a duly recognized international standards body."

The TGL does not relieve persons of other obligations under the EAR. If a license was required prior to Huawei's designation, the export would not be authorized under the TGL. The TGL also does not authorize any activities or transactions involving Cuba, Iran, North Korea, Sudan, and Syria or persons from there.

It is imperative that companies doing business with Huawei anywhere around the world—in particular Huawei supply chain partners with pending or upcoming shipments—ensure that they have full clarity on the nature of the products being provided to Huawei, whether any may be subject to the EAR, and, if so, whether the TGL may apply. Failure to take this critical step may result in heightened BIS enforcement risk. Likewise, for customers of Huawei, it may also be advisable to determine whether there may be any disruptions to Huawei's supply chain that could adversely impact the products your company purchases from them.

Telecom Security E.O.

Although the [Telecom Security E.O.](#) has no immediate impact and will take some time to implement, it may potentially have far-reaching consequences for U.S. persons and the U.S. telecom landscape. Specifically, the Telecom Security E.O. authorizes the Department of Commerce to prohibit the acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service (*i.e.*, a "transaction") where the transaction involves "information and communications technology or services designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary" and where it is determined that the transaction:

- Poses an undue risk of sabotage to or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of information and communications technology or services in the United States;
- Poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the digital economy of the United States; or

- Otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons.

Although the Telecom Security E.O. does not mention China or Huawei by name, it is widely assumed that the Department of Commerce will use the authorities in the Executive Order to prohibit additional dealings with Huawei and its affiliates that fall within the scope of the E.O. If that is the case, Huawei's inclusion on the Entity List and the Telecom Security E.O. will operate in concert to prohibit certain sales or deliveries to Huawei from the U.S. as well as certain purchases or acquisitions *from* Huawei.

The Telecom Security E.O. also requires the Department of Commerce—which will likely delegate the task to BIS—to implement regulations within 150 days (*i.e.*, October 14, 2019) defining the various terms and contours of the prohibitions. These regulations will likely:

- Identify countries and persons that are "foreign adversaries" and persons who are owned by, controlled by, or subject to the jurisdiction or direction of "foreign adversaries";
- Identify particular technologies or countries with respect to which transactions involving information and communications technology or services warrant particular scrutiny;
- Establish procedures to license transactions that are otherwise prohibited;
- Establish criteria by which particular technologies or particular participants in the market for information and communications technology or services may be recognized as categorically included in or as categorically excluded from the new prohibitions; and
- Identify a mechanism and relevant factors for the negotiation of agreements to mitigate concerns raised in connection with the new prohibition.

Presumably, these regulations will also clarify the jurisdictional scope of the Telecom Security E.O. Notably the E.O. authorizes the Department of Commerce to prohibit covered actions "by any person, or with respect to any property, subject to the jurisdiction of the United States." Based on that language, BIS could conceivably interpret its jurisdiction to cover all U.S. persons and all subsidiaries of U.S. person incorporated abroad, as well as all "items" subject to the EAR, with no *de minimis* threshold. Alternatively, the agency could take a less aggressive stance, asserting jurisdiction over only companies incorporated in the United States—and not their foreign subsidiaries—and/or items above a certain U.S.-content threshold.

As Commerce rolls out the regulations later this year, especially during the public notice and comment period, it will be critical to monitor the manner in which this landmark new authority will be implemented. Miller & Chevalier will be tracking these developments closely and will provide future updates as this new regulatory regime begins to take shape.

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