Consistent with the ongoing United States (US) strategy of limiting engagement with China in the high-tech sector (especially telecommunications) on national security grounds, the US Department of Commerce’s Bureau of Industry and Security (BIS) targeted Chinese telecommunications giant Huawei Technologies Co. Ltd. (Huawei) and 68 of its non-US affiliates (together, Huawei Companies) by placing them on the “Entity List.” As a consequence, US persons are prohibited from exporting to the Huawei Companies, any technology, software or services that are subject to US export jurisdiction, i.e., that are subject to the Export Administration Regulations (EAR).1

Concurrently, the President issued an Executive Order on Securing the Information and Communications Technology and Services Supply Chain (EO 13873). In the event that the US determines that a transaction poses a risk to US information and communications technology or services, EO 13873 could prohibit Huawei and other Chinese competitors from providing any information and communications technology or service to persons within US jurisdiction.

BIS has issued a 90-day general license that temporarily authorizes certain transactions with Huawei Companies, extending the date of imposing the new measures on pre-existing transactions to August 19. However, the general license is only a temporary measure. Thus, companies should consider making alternative arrangements going forward in view of the risk that the license will not be renewed.

In short, as explained below, these new rules, taken together, will likely force telecommunication and software services companies around the world to choose between sourcing technology and software in their products from US suppliers or transacting with Huawei Companies and potentially other Chinese companies. Huawei says that the ban will affect more than 1,200 US suppliers, including suppliers to the company’s cyber security systems.

Background

The US Government and US technology companies have raised a range of related concerns over Huawei for years, extending across several US administrations. Cisco Systems (Cisco) has long alleged that Huawei engaged in intellectual property theft, and in 2003, sued Huawei for IP infringement. Huawei ultimately admitted copying code from Cisco, and the parties settled out of court. In August 2018, a Texas jury found Huawei guilty of infringing on a Texas-based company’s LTE patents. In 2012, the House Intelligence Committee found that Huawei and ZTE pose a national security risk to the US. The US also had been investigating Huawei’s potential Iran sanctions violations since 2016, and in December 2018, Huawei’s CFO was arrested as part of a US anti-money laundering (AML) and economic sanctions investigation. Finally, in January
2019, Huawei’s CFO was indicted, together with Huawei and its US affiliate, based on allegations of conspiracy, bank fraud, wire fraud, sanctions violations, money laundering and obstruction of justice.

EO 13873

Pursuant to EO 13873, effective May 15, 2019, any person who is subject to US jurisdiction is prohibited from engaging in transactions that involve any property in which any non-US country or person has any interest if the US Government has determined that: (1) 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”2; and (2) the transaction poses (A) an undue risk to the US information and communications technology or services; (B) an undue risk of catastrophic effects on the US critical infrastructure or digital economy; or otherwise (C) poses a national security or safety risk.

EO 13873 does not specifically mention Huawei or China. Rather, it creates the authority for the US Government to develop regulations that address the above-mentioned threats within 150 days of its issuance. However, the impression is that the Executive Order was crafted with the perspective of potentially applying it to Huawei in order to limit its role in the emerging 5G telecommunications infrastructure.

Huawei’s Designation on the Entity List

Parties on the Entity List have been identified by the US Government as being involved, or as posing a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the US. When BIS adds a person to its Entity List, that person is effectively prohibited from receiving any EAR-controlled items, software, or technology, and there is a presumption of denial for any license application. EAR controls commercial and dual-use (commercial and military use) commodities (including materials, equipment, and components), technology, software, and services.

On May 15, 2019, BIS announced that it would add Huawei and its non-US affiliates to the Entity List. BIS’s designation of Huawei Companies on the Entity List was published in the Federal Register on May 21, 2019, with an effective date of May 16, 2019. The Entity List designation effectively prohibits the sale, export, or transfer of US-origin products or technology to Huawei Companies. It states that: (1) Huawei has “been involved in activities contrary to the national security or foreign policy interests of the United States”; and (2) Huawei’s non-US affiliates “pose a significant risk of involvement in activities contrary to the national security or foreign policy interests of the United States.” The designated non-US Huawei affiliates are not located only in China—many are located in Europe, North America, South America, the Middle East, and Asia.3

The Entity List designation also posed challenges for numerous US companies
that are suppliers to Huawei or that afford it access to their technology platforms, such as Google’s Android operating system. Following the BIS designation, some of these US technology companies—including Google, Intel, Qualcomm, and Broadcom—announced they would cease doing business with Huawei, effective immediately.

Temporary General License

On May 22, 2019, BIS issued a temporary general license that “grandfathers” certain pre-existing transactions with Huawei Companies for a period of 90 days, from May 20, 2019, through August 19, 2019, which will ease the application of the designation for US firms with pre-existing arrangements with Huawei and allow them time to plan for an appropriate transition (with the possibility that this temporary license may be extended again).

Specifically, the temporary general license authorizes transactions: (1) "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 Companies and third parties; (2) “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.” It also authorizes the disclosure of information to Huawei Companies regarding security vulnerabilities related to providing “ongoing security research critical to maintaining the integrity and reliability of existing and currently fully operational networks and equipment, as well as handsets” in items owned, possessed, or controlled by Huawei Companies. Finally, it authorizes engagement with Huawei Companies for the development of 5G standards. The licensing and other policies of the EAR regarding exports, re-exports, and transfers (in-country) to Huawei and 68 of its non-US affiliates that were in effect before their addition to the Entity List on May 16, 2019, are available for exports, re-exports, and transfers (in-country) for transactions eligible for the temporary general license established by this final rule.

What Does the Designation Mean?

Generally, the sale, export, re-export, or transfer of EAR-controlled items, software or technology to persons on the Entity List requires a license. Therefore, as a practical matter, going forward (and subject to the terms of the temporary license noted above), US persons are now precluded from providing to the Huawei Companies, and they are prohibited from receiving, any US-origin products, software, or technology subject to the EAR without a license.

While companies may apply for a license to continue these transactions with Huawei Companies, there is a presumption of denial and BIS will most likely not grant them, unless the Savings Clause applies. The Savings Clause is a provision of the final rule adding Huawei to the Entity List. It authorizes shipments to be completed that were en route on May 16, 2019. For the Savings
Clause to apply, a shipment must relate to an existing order placed before BIS issued the Final Rule and the goods must have previously been eligible for export under a license exception or without a license.

It is important to note that the EAR-controlled items, software, or technology subject to the rule do not need to be physically located in the US as long as they are of US-origin or contain above the *de minimis* level of US-origin content.4

Effectively, as noted at the outset, this action forces telecommunication and software services companies around the world to choose between sourcing technology and software in their products from US suppliers or transacting with Huawei Companies.

**What Does the Temporary General License Mean?**

The temporary general license allows companies to continue doing business involving Huawei Companies that had been authorized before May 16, 2019. Companies essentially have 90 days to wind down their business with Huawei and may not enter into any new transactions during this transition period. However, individuals or companies may not provide Huawei any new US-sourced or US-content software, equipment, technology, information, or services that had not already been in place before May 16, 2019.

It is important to note that the temporary general license provides relief only for the: (1) continued operation of existing networks and equipment; (2) support of existing handsets; (3) cybersecurity research and vulnerability disclosure; and (4) necessary engagement for the development of 5G standards. It does not provide relief for any other obligations under the EAR, such as licensing requirements to China, or any import restrictions that may result from EO 13873.

**How Is EO 13873 Relevant?**

Even though EO 13873 does not specifically name Huawei, it is highly likely that BIS will identify transactions with Huawei as: (1) involving "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 (2) posing “an undue risk” to the US information and communications technology or services.

**Conclusion**

In sum, pursuant to EO 13873, BIS undoubtedly will at some point soon adopt new regulations that limit trade in information and communications technology and services, which will inevitably target more Chinese companies. Further, whether the designation of Huawei Companies is, like the sanctions designation and later de-listing of ZTE Corporation, simply a negotiation tactic used by the Trump Administration that will be reviewed once concessions are achieved,
remains to be seen.

Consequently, while the General License provides temporary relief to US companies that provide Huawei Companies with products or services subject to US jurisdiction, in order to ensure compliance with the ban, US companies are advised to identify and distinguish between existing, pending, and future transactions; consider steps to wind down pending or future transactions; and remain mindful of the risk of future designations of Chinese information services technology and services companies.

1 15 C.F.R. § 730, et seq.

2 The term “foreign adversary” means any foreign government or foreign non-government person engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons. The term “United States person” means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States. EO 13873.

3 The designated Huawei affiliates are located in 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.


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