

Huawei and affiliates added to the Bureau of Industry and Security's Entity List effectively barring US exports to the company

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Executive summary

Effective 16 May 2019, the United States (US) Department of Commerce, Bureau of Industry and Security (BIS) issued a Final Rule announcing the addition of Huawei Technologies Co Ltd. (Huawei) and 68 of its non-US affiliates to the Entity List for activities contrary to the security interests of the US.¹ Export or re-export transactions subject to the jurisdiction of the US with Huawei and its affiliates will require export licenses from BIS that will be subject to a presumption of denial and the authorization of license exceptions is limited. Items that are already in-transit to Huawei as of 16 May are subject to a "Savings Clause" and will be permitted.

Detailed discussion

Background

The US Department of Justice charged Huawei, its Chief Financial Officer, Meng Wanzhou, and two affiliated companies, Huawei Device USA Inc. and Skycom Tech Co. Ltd., on 28 January 2019 with violating US sanctions against Iran, bank fraud and obstruction of justice. Ms. Meng was arrested in Vancouver, Canada and the US launched extradition proceedings, which remain ongoing.

Huawei, the world's largest supplier of telecom equipment, is headquartered in the People's Republic of China (PRC) and operates in 170 countries and employs 180,000 people worldwide. It has reportedly built at least 50 3G networks in 36 countries and has implemented 70% of Africa's 4G networks. Huawei and other Chinese tech companies are involved in everything from new undersea Internet cables and national data networks to selling millions of mobile phones on the African subcontinent. The Chinese companies are competing with other vendors for leadership in developing 5G cellular technology, with such technological advancements bringing an increase in speed and responsiveness of wireless networks and the capacity to handle more connected devices. The addition of Huawei and its affiliate companies to the Entity List could have wide-ranging impact because of the forthcoming ubiquity of interconnected devices and how such extensive devices and equipment transmit information and access the 5G networks.

Addition of Huawei to the Entity List

On 15 May 2019, US President Trump signed an Executive Order declaring a national emergency in response to threats by foreign adversaries creating and exploiting vulnerabilities in information and communication technology or services. The Order prohibits the acquisition, importation, transfer, installation, dealing in or use of any information and communications technology or service by any person where the transaction poses a risk to the national security or foreign policy of the United States. All US governmental agencies were directed to take all appropriate measures within their authority to carry out the provisions of the Order.²

Shortly thereafter, BIS added Huawei and 68 of its affiliates to the Entity List because the US Government found probable cause that Huawei acted "contrary to the national security and foreign policy interests of the United States." Specifically, the US District Court for the Eastern District of New York indicted Huawei on 13 counts of violating and conspiring to violate the *International Emergency Economic Powers Act* (IEEPA) for "knowingly and willfully causing the export, re-export, sale and supply, directly and indirectly, of goods, technology and services from the United States to Iran and the government of Iran without obtaining a license from [OFAC]."³ Huawei also allegedly obstructed the Office of Foreign Assets Control (OFAC)'s investigation through "deceitful and dishonest means."

As a consequence, BIS now requires US exporters and foreign re-exporters to apply for a license to export, re-export, or transfer (in country) any commodity, software or technology (collectively "items") subject to the EAR to Huawei and its affiliate entities. Items "Subject to the EAR" include all items in the United States, all US-origin items wherever located, and non-US items containing more than a de minimis level of US-controlled content.⁴

BIS imposed a "presumption of denial" on these licenses, which effectively means the license application will likely not be granted and Huawei will not be able to procure or obtain any items subject to the EAR.

What to expect next?

- ▶ The action against Huawei will have significant ripple effects, particularly for the US semiconductor industry for whom Huawei and China is a major market.⁵ The US Government took similar action against ZTE Corporation (ZTE) beginning in March 2017, including a seven year export ban implemented in April 2018 that was lifted in July following negotiations between the US and Chinese Governments.⁶ The US Government lifted the ban, in part, because of the detrimental effects to US suppliers of components to ZTE.
- ▶ The European Commission is currently considering banning the use of 5G equipment provided by companies from countries that are suspected of espionage. Similar to the Australian approach, such country-of-origin limitations would mean a de facto ban of Huawei equipment from the development of Europe's 5G networks.
- ▶ Japan has excluded Huawei from public procurement, and Australia and New Zealand have blocked Huawei from involvement in the rollout of their 5G network infrastructure.

Actions for businesses

Any company involved in US-China trade, or operating in industries with heightened risk (e.g. telecommunications, semiconductors, technology) is encouraged to identify the potential impact of the addition of Huawei (and related companies) to the Entity List and subsequently enhancing their export compliance programs to avoid potential violations. Immediate actions for such companies should include:

- ▶ Recognizing the broad and extraterritorial reach of the US export compliance regime as well as establishing or enhancing an export compliance program that properly monitors export control and sanctions compliance requirements.

- ▶ Understanding and determining the export licensing requirements for company products by determining whether products are subject to the EAR and by accurately identifying your products' export control classification number (ECCN).
- ▶ Considering whether a Temporary General License may be applied to transactions with Huawei and its affiliates, and if so, whether transactions are compliant with the relevant license conditions, certification requirements and recordkeeping requirements.⁷
 - Effective 20 May 2019 - 19 August 2019, companies may utilize a 90-day General License that temporarily authorizes the export, re-export or transfer (in-country) of items subject to the EAR if the transaction is specifically authorized in Supplement No. 7 to part 744 - Temporary General License. The types of transactions that may be covered by the Temporary General License include:
 - (a) continued operation of existing networks and equipment
 - (b) support to existing handsets
 - (c) cybersecurity research and vulnerability disclosure and
 - (d) engagement as necessary for development of 5G standards by a duly recognized standards body.
 - A certification statement is required to be made by the exporter, re-exporter, or transferor prior to making an export, re-export, or transfer (in-country) pursuant to this Temporary General License. In order to rely on the Temporary General License, the certification statement must specify how the export, re-export, or transfer (in-country) meets the scope of the Temporary General License. The certification statement must be kept for recordkeeping purposes by the exporter, re-exporter, or transferor.
- ▶ Implementing effective software to track transactions and to restrict doing businesses with prohibited parties (i.e. restricted party / blacklist screening).

Endnotes

1. See 84 FR 22961, 21 May 2019.
2. See Executive Order on Securing the Information and Communications Technology and Services Supply Chain <https://www.whitehouse.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/>.
3. 84 FR 22961, 21 May 2019.
4. See 15 §CFR 734.3.
5. <https://www.bloomberg.com/news/articles/2019-05-17/trump-s-twin-volleys-against-huawei-have-u-s-companies-reeling>.
6. <https://www.nytimes.com/2018/07/13/business/zte-ban-trump.html>.
7. 84 FR 23468, 22 May 2019.

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