

# Memorandum

## Huawei Targeted by the Trump Administration: U.S. Export Ban Imposed on Technology Giant

May 22, 2019

### Introduction

On May 15, 2019, the Trump administration added Chinese telecommunications firm Huawei Technologies Co. Ltd. and sixty eight affiliated entities located in twenty six countries (collectively, “Huawei”) to the Entity List administered by the Bureau of Industry and Security of the U.S. Department of Commerce (“BIS”), barring Huawei from acquiring items “subject to” the Export Administration Regulations (“EAR”).<sup>1</sup> Subsequently, on May 20, 2019, the BIS announced the issuance of a temporary General License, valid for ninety days through August 19, 2019, that authorizes engaging in transactions involving the export, reexport, and transfer (in-country) of items subject to the EAR to Huawei, subject to certain conditions. Notwithstanding the limited reprieve set forth in the General License, U.S. and non-U.S. companies alike should take steps to review any ongoing business dealings involving Huawei to ensure that they do not run afoul of these new prohibitions.

Items that are “subject to the EAR” include: (1) all U.S.-origin items (including U.S.-origin components, technology, and software) wherever located in the world; (2) any item exported from the U.S. (including items of foreign origin); (3) any foreign-made item containing more than a *de minimis* amount<sup>2</sup> of U.S.-origin content; and (4) any foreign-made item that is the “direct product”<sup>3</sup> of certain controlled U.S.-origin software or technology. The EAR prohibits the export, reexport, or transfer (in-country) of items subject to

<sup>1</sup> Huawei’s designation was effective as of May 16, 2019, when BIS displayed the Federal Register Notice implementing the Entity List designation.

<sup>2</sup> The *de minimis* calculation involves a comparison of the value of the U.S.-origin content to the value of the foreign-made product into which it is integrated.

<sup>3</sup> “The term ‘direct product’ means the immediate product (including processes and services) produced directly by the use of technology or software; and certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S.-origin technology or software.” Items Subject to the EAR, 15 C.F.R. § 734.3 (2018).

the EAR to any person or entity designated on the Entity List, without a license to do so.<sup>4</sup> Consequently, a license from the BIS is now required for all exports, re-exports, and transfers of commodities, software and technology subject to the EAR to Huawei. It is possible that the designation of Huawei on the Entity List may be temporary, pending the resolution of on-going trade negotiations with China.

The decision to designate Huawei was not without fallout in the United States and around the world. Several U.S. chipmakers announced their intention to halt sales to Huawei as required by the ban. In response, the Department of Commerce issued a new General License, effective May 20, 2019, that grants Huawei a temporary reprieve from certain aspects of the designation until August 19, 2019. In particular, it permits otherwise-prohibited transactions that are necessary to maintain and support existing and operational networks and equipment; transactions necessary to provide service and support, including software updates and patches, to existing Huawei handsets; disclosure of information regarding security vulnerabilities in items owned, possessed, or controlled by Huawei; and as necessary for the development of 5G standards as part of a duly recognized international standards body. “5G” refers to fifth generation cellular network technologies.

Huawei has been at the forefront of President Trump’s ongoing trade dispute with Beijing, and has been publicly accused of conspiring with the Chinese government to incorporate technologies into its 5G networking equipment that could be used to spy on the U.S. and other countries and private companies. Concerns have also been expressed about possible vulnerabilities in Huawei-manufactured smartphones. Furthermore, despite the fact that Huawei remains a private company, a widely-held belief by U.S. government officials is that the Chinese security apparatus frequently coopts the cooperation of its citizens and companies to further its national security interests.<sup>5</sup> The fact that Huawei’s founder is a former officer of the People’s Liberation Army only exacerbates these worries, and there have been numerous calls in the United States and Europe to preclude Huawei components from 5G networks entirely.<sup>6</sup> There are also concerns amongst China commentators that Huawei’s communications technologies will outpace and outperform its Western counterparts over the next few years, and will dominate supply chain networks as

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<sup>4</sup> Note that designation on the Entity List does not block all dealings with the designated entity and, as such, the designation is more targeted in scope than designation on the Specially Designated Nationals and Blocked Persons (“SDN”) List administered by the Office of Foreign Assets Control of the U.S. Department of the Treasury (“OFAC”).

<sup>5</sup> Australia recently banned Huawei from participating in the country’s 5G network based on similar national security concerns.

<sup>6</sup> In fact, on the same day as Huawei’s designation, President Trump separately issued an Executive Order with respect to “Securing the Information and Communications Technology and Services Supply Chain.” The Order calls upon the Secretary of Commerce to implement regulations prohibiting U.S. companies and those subject to U.S. jurisdiction from sourcing foreign telecommunications equipment deemed to pose certain risks to national security. The Order does not name Huawei or China, specifically, but is seen as another step by the Administration to limit Huawei’s ability to access the country’s telecommunications industry. Pursuant to the Executive Order, the Secretary of the Department of Commerce must issue implementing regulations by October 14, 2019.

the world rolls out 5G technologies. Huawei's designation on the Entity List is seen as an attempt by Washington to isolate Huawei from vital components and impede its ability to become the dominant player in the global telecommunications industry. Further designations of Chinese entities in the telecom space may be forthcoming, and there have also been reports of potential designations in related sectors of the Chinese economy.

We see the foregoing as the latest chapter in the turbulent trade negotiations between the United States and China, and another example of the unpredictable issues that can arise under the Administration. In our view, it is equally possible that: (1) the temporary General License will expire in August without further action from the President, or (2) the designation will be modified or lifted prior to the expiration of the General License as part of a broader trade deal between the two countries. Regardless, both U.S. and non-U.S. persons engaged in dealings with Huawei should be sure to review the extent to which these activities may be prohibited or otherwise affected by these recently-enacted prohibitions.

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