International Trade Alert

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Commerce Adds Huawei, Its Non-US Affiliates Worldwide and Others to the Entity List

May 17, 2019

Key Points

- On May 16, 2019, the U.S. Department of Commerce published a final rule adding Huawei and 68 other companies, mostly its non-U.S. affiliates worldwide, to the Entity List. The rule, with the list of entities, is here. The rule will be officially published in the *Federal Register* on May 21, 2019.
- The rule states that, effective May 16, 2019 at 4:15 pm Eastern Time, all commodities, software, and technology "subject to the Export Administration Regulations" require a license to be exported, reexported, or transferred (in-country) to a listed entity.
- Applications for licenses involving listed entities will be presumptively denied. Whether Commerce issues a Temporary General License to authorize some types of exports, as was the case when ZTE was added to the Entity List in 2016, is unknown.

Background

On May 16, 2019, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) published a rule adding Huawei Technologies, Co. Ltd. (Huawei) to the Entity List (Supplement No. 4 to Part 744 of the Export Administration Regulations (EAR)). The stated basis for the listing was that Huawei has been involved in activities contrary to the national security or foreign policy interests of the United States, specifically the Iran sanctions violations alleged in the recent indictment of Huawei in U.S. District Court for the Eastern District of New York.

BIS also added 68 other companies, which are mostly non-U.S. affiliates of Huawei, located in the following 26 countries: 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. BIS noted that Huawei's affiliates present a significant risk of acting on Huawei's behalf to engage in activities contrary to the national security or foreign policy interests of the United States. Absent the imposition of specific license requirements on these entities, BIS determined there was

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reasonable cause to believe that Huawei would seek to use these entities to evade the restrictions imposed by its addition to the Entity List.

The Entity List designation of Huawei follows the May 15, 2019 issuance of an Executive Order permitting the U.S. Department of Commerce (in coordination with other U.S. government agencies) to block any transaction involving information and communications technology or services provided by a "foreign adversary" that, among other considerations, poses an "unacceptable" risk to the national security of the United States or the security and safety of United States persons. As further discussed in our earlier alert here, this Executive Order does not identify any countries or companies by name, but is believed to be focused on China and Huawei in particular.

Prohibitions

The Entity List designation prohibits the export, reexport, or transfer of "items subject to the EAR" to Huawei and the listed entities without a license. In essence, "items subject to the EAR" are all commodities, software, and technology, regardless of their sensitivity or other export controls, that are:

i. in the United States

ii. U.S.-origin, wherever located

iii. foreign origin and incorporating more than de minimis amount of "controlled" U.S.-origin content or

iv. the foreign direct product of U.S.-origin technology controlled for national security reasons.

License applications involving parties listed on the Entity List are subject to a presumption of denial. The only exception, pursuant to a Savings Clause in the final rule, applies to items that were previously eligible for shipment to Huawei or its affiliates under a license exception or without a license (i.e., NLR) and which were *en route* aboard a carrier to a port of export or reexport as of May 16, 2019, pursuant to an existing order. The only way to know with certainty whether a particular license will, in fact, be denied is to apply for it. The policy issues involving this listing are likely going to evolve considering its significance. For example, BIS has not announced any plans to issue a Temporary General License, as it did when ZTE was added to the Entity List in 2016, authorizing some types of exports to a listed entity, but it may.

Knowing the Facts and Definitions is Critical

Given the magnitude of Huawei's global operations and supply chain, the listings will have worldwide implications for companies in a variety of industries, particularly the semiconductor, microelectronics, and telecommunications sectors. To ensure compliance with the new requirements, U.S. and non-U.S. companies must identify pending or expected exports, reexports, or transfers involving, directly or indirectly, Huawei, its affiliates, or other listed entities that would involve items subject to the EAR. Thereafter, companies must immediately block such exports, reexports, or transfers absent an applicable license from BIS.

Given that the regulatory definition of "subject to the EAR" is complex, identifying these items can be difficult. It requires an understanding of the EAR's structure and

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meaning of terms nested within it. Thus, to know whether any particular export from the United States or reexport or transfer outside the United States to a listed entity of any U.S. or foreign-origin commodity, software, or technology of any sort is affected by the rule requires a careful analysis of the definitions relevant to the facts at issue. Given the sometimes counter-intuitive nature of the regulatory definitions, common sense conclusions about what is and is not subject to the new controls can result in inadvertent over- and under-controls. For example, not all foreign-origin items containing some U.S.-origin content are subject to the EAR and many basic commercial items that do not normally require a license could be. Small changes in facts can result in big changes in legal conclusions.

The application of these definitions to foreign-made items is particularly difficult. To fully understand their application (and the extraterritorial application of the EAR generally), companies outside the U.S. generally should conduct an analysis of their commodities, software, and technologies to be reexported or transferred to determine whether they contain more than a *de minimis* amount of U.S.-origin controlled content or are the controlled direct product of U.S.-origin technology controlled for national security reasons.

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