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A One-Two Punch: The U.S. Government Hits China's Technology Sector

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In rapid succession, the Trump Administration took two actions targeting the Chinese technology sector. On May 15, President Trump issued an executive order declaring a national emergency based on a finding that “foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services.”¹ This step lays the groundwork for the United States to broadly prohibit transactions involving the procurement or use of telecommunications technology from any foreign company the United States designates to be a national security risk, a move largely seen as aimed at China. Officials from the U.S. Department of Commerce (“Commerce”) will craft rules for reviewing transactions that fall within the scope of the executive order over the next 150 days.

Immediately following the release of the Executive Order, the Commerce Secretary announced that the agency is adding Huawei Technologies Co. Ltd. and 68 non-U.S. affiliates to the Commerce Department “Entity List.”² This action will effectively prohibit the procurement by or the supply to Huawei of items consisting of or derived from U.S.-origin technology. Any person who seeks to export, reexport, or transfer any item subject to the U.S. Export Administration Regulations (“EAR”) to a company on the Entity List must first secure a license from Commerce; license exceptions are generally unavailable for such shipments.³ Moreover, applications for the required specific authorization are “usually subject to a policy of denial” according to Commerce guidance.⁴ Items that are subject to the EAR include those that are: (i) located in the United States; (ii) of U.S. origin; (iii) foreign-made items that incorporate U.S.-origin goods, software, or technology (often above a specified threshold); and (iv) certain other items that are “direct products” of U.S.-origin technology or software.

Companies added to the Entity List are designated as such via final rules promulgated in the Federal Register, and the complete list can be found in Supplement No. 4 to Part 744 of the EAR. Commerce intends to publish the final rule regarding Huawei on May 21 and has indicated that “[t]he listing will be effective when published.”⁵ A license will thereafter be required for the export, reexport, or transfer to the named Huawei entities of all items subject to the EAR with one exception: shipments that were en route on the date the rule is published may proceed to the destination, provided they were exported pursuant to a license exception or as no license required (“NRL”). The Federal Register notice also makes clear that all applications for a license will be subject to a “presumption of denial.” Importantly, because restrictions on the export, reexport, and retransfer to a person on the Entity List apply to the *item*, those restrictions will reach transactions and suppliers wherever originated or



located. Accordingly, even non-U.S. companies that seek to export, reexport, or transfer covered items to Huawei will be barred from doing so absent a license from Commerce.

In issuing the new executive order and placing Huawei on the Entity List, the U.S. Government is signaling an escalation of restrictions against the Chinese technology sector. Accordingly, companies would be well advised to carefully review the impact of these steps on any continued engagement with that sector.



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¹ Executive Order on Securing the Information and Communications Technology and Services Supply Chain (May 15, 2019), <https://www.whitehouse.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/>.

² Addition of Entities to the Entity List, U.S. Department of Commerce Bureau of Industry and Security (May 16, 2019), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-10616.pdf>; Press Release, Department of Commerce Announces the Addition of Huawei Technologies Co. Ltd. to the Entity List, U.S. Department of Commerce (May 15, 2019), <https://www.commerce.gov/news/press-releases/2019/05/department-commerce-announces-addition-huawei-technologies-co-ltd>.

³ 15 C.F.R. § 744.11(a).

⁴ *Lists of Parties of Concern*, U.S. Department of Commerce, <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern>.

⁵ See Press Release, U.S. Department of Commerce, *supra* note 2.

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