

President Trump Authorizes Blocking Information and Communications Technology Transactions as Huawei is Sanctioned

by Lawrence Ward, Dave Townsend, and T. Augustine Lo

In an Executive Order (EO) issued on Wednesday, President Trump gave exceedingly broad authority to the U.S. Department of Commerce to block transactions of information and communications products and services if the transaction is perceived as potentially undermining U.S. national security. The U.S. Department of Commerce's Bureau of Industry and Security (BIS) also publicly announced on Wednesday that U.S. companies will no longer be able to provide goods from the United States to Huawei Technologies Co. Ltd (Huawei) and its subsidiaries unless licensed by the U.S. Government because they will be added to the BIS Entity List. These combined actions represent an increasingly aggressive posture towards China by the Trump Administration, although the EO on its face applies more broadly to all sources deemed to be a threat by the U.S. Government.

The EO combined with the Entity List status of Huawei and its affiliates will have great consequence for the U.S. and global telecommunications supply chain. Huawei is the world's largest telecommunications equipment provider, and sources large amounts of electronic components from the United States and sells telecommunications equipment to U.S. companies. The combined actions will impact both U.S. companies that intend to export parts and components to Huawei, as well as U.S. companies that rely on foreign-made telecommunications equipment. The effect may be felt most acutely in rural and less populated parts of the United States where Huawei's lower cost telecommunications equipment has been particularly attractive to smaller local operators that have far lower revenues due to the demographics of their service areas. Having purchased Huawei equipment in the past, those operators may face service and warranty issues because of these new prohibitions.

Under the terms of the BIS action adding Huawei and 70 of its global subsidiaries and affiliates to the BIS Entity List, which will go into effect upon publication in the *Federal Register*, U.S. firms cannot send anything from the United States to Huawei or any of its 70 global subsidiaries and affiliates without a BIS export license. Additionally, foreign companies could not send any U.S.-origin parts and components to any of those entities

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- Lawrence Ward
- Dave Townsend
- T. Augustine Lo

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unless approved by BIS. The action may reach significant non-U.S. transactions because Huawei produces goods in non-U.S. locations that could remain subject to the Export Administration Regulations (EAR). Any such required BIS licenses could be difficult (or potentially impossible) and time-consuming to obtain.

Huawei responded to the action by stating that the United States will lag behind in development of fifth generation (5G) wireless internet infrastructure by shutting Huawei out of the U.S. market. The stock market also did not react well to the Huawei sanctions as tech stocks slid in reaction to this latest move in the U.S.-China trade war. Today, China threatened retaliatory sanctions but no details were given. However, given the larger context of the troubled trade talks between China and the United States and the tariffs and counter-tariffs, the Chinese response will undoubtedly be felt most acutely by U.S. companies operating in China.

Under the EO, titled *Securing the Information and Communications Technology and Services Supply Chain*, the Trump Administration provided the Commerce Department with authority to block or require mitigating measures related to certain transactions involving information and communications technology. The Commerce Department is to consult widely with other federal agencies, including the Departments of Justice, the Treasury, State, Defense, and Homeland Security, the Federal Communications Commission, and others to determine when a transaction presents a potential threat. In addition, reports will be issued by the Director of National Intelligence and the Secretary of Homeland Security to identify risks to the security of U.S. information and communications technology, and the extent to which potentially compromised hardware, software, or services are relied upon by service providers.

The EO is not expressly directed at China but would allow blocking of transactions with a “foreign adversary,” (defined as any foreign government or 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 safety of U.S. persons). The EO allows the U.S. Government to block, or to require mitigating measures related to, any transaction that poses a risk of: (1) sabotage or subversion of information and communications technology in the United States; (2) catastrophic effects to the security or resiliency of U.S. critical infrastructure or the digital economy of the United States; or (3) national security harm. The scope of items and services covered by the EO broadly includes any hardware, software, or other product or service primarily intended to fulfill or enable the function of information or data processing, storage, retrieval, or communication by electronic means, including transmission, storage, and display.

Although the EO is neutral as to the source of threats to the United States, given the simultaneous announcement of sanctions placed on Huawei by the Commerce Department, the action certainly appears to cover China. For years, U.S. policy makers have raised concerns that Huawei’s integration into U.S. communications infrastructure could undermine U.S. national security. In announcing the EO, the Trump Administration identified its goal of ensuring that U.S. “data and infrastructure are secure.”

The impact of the EO on U.S. businesses is still uncertain since there is no historical

precedent for such a sweeping order and since it is unclear how frequently and aggressively the Commerce Department intends to block covered transactions. However, at the least, the new White House action creates uncertainty for U.S. companies that source electronic items from non-U.S. sources or that support and develop the information and communications infrastructure in the United States. The action could signal the beginning of a purge of certain non-U.S. suppliers of information technology infrastructure. For example, the U.S. Government has imposed various sanctions on ZTE Corporation, another Chinese multinational telecommunications equipment and systems manufacturer in recent years. The EO may serve as a new basis to shut ZTE out of the infrastructure portion of the U.S. marketplace. On the other hand, the authority could be narrowly applied to block or alter only a limited number of transactions.

The Trump Administration has aggressively pushed for other national governments to discontinue and forbid use of Huawei electronics equipment, citing potential national security concerns. These concerns are also shared by the U.S. Congress where many members have called for more aggressive action with respect to China. For now, U.S. allies have remained relatively silent as to these new sanctions and the U.S. Government's urging that they also shut-off Huawei. For example, Germany has indicated that it will require companies participating in its 5G auction to meet strict standards outlined by the German Government in March.

Dorsey & Whitney attorneys can assist companies in assessing the potential impact of these actions on their business, including review of options for mitigating the effects of these actions.