

New Executive Order Will Impact Ability of U.S. Companies to Use Certain Technologies Deemed a Security Risk

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President Donald J. Trump signed and issued an Executive Order (**EO**) on May 15, 2019, declaring a national emergency with respect to threats against U.S. information and communications technology or services (**I&C Technologies**) and delegating authority to the U.S. Commerce Department (**Commerce**) to prohibit transactions posing an unacceptable threat to I&C Technologies located in the U.S. and U.S. national security. U.S. companies need to pay close attention as to how the EO can affect their business.

Prohibited Transactions. The EO prohibits U.S. persons and companies from engaging in transactions constituting the acquisition, importation, installation, dealing in, or use of inbound I&C Technologies (**Prohibited Transactions**) from any company "controlled"[i] by a "foreign adversary" where the transactions are likely to create an "undue risk of sabotage to" or "a catastrophic effect on" I&C Technologies located in the U.S. or otherwise pose a U.S. national security risk. The precise scope of Prohibited Transactions will ultimately be determined by Commerce.

Commerce Ruling. Commerce has 150 days from the EO date (i.e., October 12, 2019) to issue rules and regulations (i.e., a **Ruling**): (a) identifying specific countries "as foreign adversaries" and specific companies as "controlled" by foreign adversaries and (b) specifying, in particular, which I&C Technologies and actions would comprise elements to Prohibited Transactions.

Multiagency Consultation. Commerce will make its ruling in consultation with the U.S. departments of Treasury, State, Defense, Homeland Security, the U.S. Trade Representative, the U.S. Director of National Intelligence, and other specified government agencies and officials.[ii]

Licensing. The EO directs Commerce to establish procedures to license U.S. persons and companies under qualifying circumstances to engage in transactions that would otherwise constitute Prohibited Transactions.

Huawei, a likely target. The Chinese company, Huawei Technologies Co. Ltd. (**Huawei**), is currently the world's largest telecommunications equipment maker and is poised to become the world's largest supplier of 5G network infrastructure equipment, which is the next generation of wireless network technology.

In January 2019, the U.S. Justice Department filed 13 charges against Huawei and its affiliates Huawei USA and Skycom, alleging they intentionally violated the U.S. Iranian Sanctions Program administered by the U.S. Office of Foreign Assets Control (**OFAC**).

More recently, U.S. government officials have been vocal in claiming that Huawei poses a threat to I&C Technologies located in the U.S.

On Wednesday, May 15, 2019, Commerce in a parallel manner also announced that Huawei will be added to the BIS Entity List, precluding U.S. persons and companies from selling or transferring U.S. technology to Huawei.

As such, many speculate that the forthcoming Commerce Ruling is almost certain to: (a) identify the People's Republic of China as a "foreign adversary" and Huawei and select affiliates as companies "controlled" by a foreign adversary and (b) then specify particular Prohibited Transactions between U.S. persons and companies and Huawei. The expected

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Commerce Ruling would prohibit the importation of any I&C Technologies from Huawei covered by the Prohibited Transactions.

It is important to note that other countries may be designated as "foreign adversaries" and other companies may be designated as "controlled" by foreign adversaries in the Commerce Ruling.

This will have a significant and comprehensive impact on U.S. persons and companies (and their affiliates abroad) doing business with Huawei, as well as with other companies potentially designated under the Ruling as "controlled" by foreign adversaries. Affected U.S. companies (and their foreign affiliates) will have to cease engaging in certain transactions and implement procedures to ensure compliance with the Commerce Ruling.

Should you have questions about the potential impact of the forthcoming Commerce Ruling, the Prohibited Transactions or corresponding trade compliance measures, please contact the Miller Canfield Export Control Practice Group.

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[i] More specifically, Section 1(a)(i) of the EO covers persons (i.e., companies) "owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary."

[ii] Upon release of the Ruling, the EO directs (a) the U.S. Director of National Intelligence continually assess and report to the President ongoing threats to I&C Technologies located in the U.S. and (b) Commerce to issue periodic reports to the U.S. Congress and President, updating the U.S. Congress and President on whether the Ruling and other Commerce actions taken pursuant to the EO continue to be necessary to mitigate threats to I&C Technologies located in the U.S.