

U.S. and Foreign Business Affected by Addition of Huawei to the BIS Entity List

May 23, 2019

The Bureau of Industry and Security (**BIS**) of the U.S. Department of Commerce (**Commerce**) has added Huawei Technologies Co. Ltd. and 68 of its Chinese and global non-US affiliates (the **Huawei Group**) to the BIS Entity List.[i]

Additions to the BIS Entity List are decided by a multiagency End-User Review Committee (**ERC**), which is comprised of officials from the Departments of Commerce, Defense, State and Energy. The decision on May 21, 2019, to add the Huawei Group affiliates to the BIS Entity List stems from information made available by Commerce to the ERC that provides it with a reasonable basis to conclude that the Huawei Group is engaging in activities contrary to U.S. national security or foreign policy interests.[ii] This information includes activities set forth in the 13-point indictment filed in January 2019 by the U.S. Justice Department against Huawei Technologies Co. Ltd., its affiliates, and Skycom, alleging they intentionally violated the U.S. Iranian Sanctions Program administered by the U.S. Office of Foreign Assets Control (**OFAC**).

Export License Requirement Imposed. Effective May 16, 2019, the BIS imposes an export license requirement for all "U.S. Items" exported, re-exported from a third-country, or transferred within the same country to a Huawei Group company (**Huawei Group Transactions**). "U.S. Items" means: (a) any physical commodities, software, or technology in the U.S. or of U.S. origin, (b) such items moving in-transit through the U.S. from one foreign country to another, (c) foreign items incorporating or bundled with U.S. Items,[iii] and (d) certain foreign-made items that are direct products of U.S. origin technology or software.[iv] The BIS presumption is that such export license applications for Huawei Group Transactions will be denied. Excluded from such export license requirements are U.S. Items en route aboard a carrier to a port of export or re-export by May 16, 2019 under actual orders.[v]

Temporary General License Issued. While the original BIS rule states that there are no exceptions to this export license requirement for Huawei Group Transactions, to facilitate U.S. and foreign businesses in making a transition, the BIS issued a temporary general license (**Temporary General License**), [vi] effective from May 20, 2019 through August 19, 2019, that authorizes:

1. *Continued Operation of Existing Networks and Equipment:* Authorized are Huawei Group Transactions necessary to maintain and support existing and currently fully operational networks and equipment (including software updates and patches) under binding contracts with a Huawei Group company that were in place on or before May 16, 2019.
2. *Support to Existing Handsets:* Authorized are Huawei Group Transactions necessary to provide service and support (including software updates or patches) to existing Huawei handsets available to the public on or before May 16, 2019.
3. *Cybersecurity Research and Vulnerability Disclosure:* Authorized are Huawei Group Transactions comprised of disclosures made to Huawei Group companies of specific information on security vulnerabilities in items owned, possessed or controlled by Huawei Group companies as part of ongoing security research critical to maintaining the integrity and reliability of existing and currently fully operational networks and equipment, as well as handsets.

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4. *Engagement as Necessary for Development of 5G Standards by a Duly Recognized Standards Body*: Authorized are Huawei Group Transactions constituting engagement with the Huawei Group personnel on 5G Network standards development as part of a recognized international standards setting body.[vii]

Proper use of the Temporary General License authorizes a company to engage in those Huawei Group Transactions listed above without submitting a specific export license application to the BIS.[viii] All Huawei Group Transactions outside of those listed above remain subject to the export license requirement.

Certification Statement Required. Each exporter, re-exporter or in-country transferor must prepare and retain a certification statement prior to engaging in a Huawei Group Transaction in reliance upon the Temporary General License (**Certification Statement**). In order to rely upon the Temporary General License, the Certification Statement must specify how the proposed Huawei Group Transaction meets the scope of the Temporary General License.

The addition of the Huawei Group to the BIS Entity List will have a significant and comprehensive impact on U.S. and foreign companies providing U.S. Items to the Huawei Group. Affected U.S. and foreign companies must immediately cease providing U.S. Items as part of Huawei Group Transactions, assess whether reliance upon the Temporary General License is warranted, and implement proactive procedures to ensure compliance with this Commerce action.

Should you have questions about the potential impact of the addition of the Huawei Group to the BIS Entity List, including: (a) those Huawei affiliates included in the Huawei Group, (b) particular transactions considered Huawei Group Transactions, (c) qualifying for and using the Temporary General License, (d) drafting and executing the Certification Statement, or (e) implementing other trade compliance measures that are immediately required, please contact the Miller Canfield Export Control Practice Group.

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[i] On May 15, 2019, President Donald J. Trump also issued an Executive Order, declaring a national emergency with respect to threats against U.S. information and communications technology or services and delegating authority to Commerce to prohibit import transactions posing an unacceptable risk to such technologies located in the U.S. This is seen as a concerted action between the President and Commerce to address the perceived threat against the U.S. posed by the Huawei Group. For more information on this Presidential action, see <https://www.millercanfield.com/resources-Executive-Order-May-2019.html>.

[ii] The Commerce Secretary, Wilbur Ross, stated: "This action by the Commerce and the BIS, with the support of the U.S. President, places Huawei, a Chinese-owned company that is the largest telecommunications equipment producer in the world, on the BIS Entity List. This will prevent U.S. technology from being used by foreign-owned entities in ways that potentially undermine U.S. national security or foreign policy interests."

[iii] Subject to the De Minimis Rule described in § 734.4(c) or § 734.4(d) of the Export Administration Regulations (**EAR**).

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[iv] See § 736.2(b)(3) of the EAR.

[v] Notwithstanding the exclusion from this specific licensing requirement, U.S. Items en route by May 16, 2019 remain otherwise subject to the EAR and other U.S. export controls and sanctions with the available license exceptions or No License Required (**NLR**) designation, if applicable.

[vi] See <https://federalregister.gov/d/2019-10829>.

[vii] Standards setting bodies recognized by the BIS include: IEEE – Institute of Electrical and Electronics Engineers; IETF – Internet Engineering Task Force; ISO – International Organization for Standards; ITU – International Telecommunications Union; ETSI- European Telecommunications Standards Institute; 3GPP - 3rd Generation Partnership Project; TIA- Telecommunications Industry Association; and GSMA, a.k.a., GSM Association, Global System for Mobile Communications.

[viii] Despite proper use of the Temporary General License, these transactions remain otherwise subject to the EAR and other U.S. export controls and sanctions with the available license exceptions or NLR designation, if applicable.