

Commerce Department Adds 46 Huawei Affiliates to Entity List, Issues Updated Temporary General License

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International Trade Controls

On August 19, 2019, the Commerce Department's Bureau of Industry and Security ("BIS") issued a [Final Rule](#) adding 46 non-U.S. affiliates of Huawei Technologies Co., Ltd. ("Huawei") to the Entity List and extended, through November 18, 2019, a revised [Temporary General License](#) ("TGL") authorizing certain transactions with Huawei and listed Huawei entities. In addition, BIS published a [General Advisory Opinion](#) on its website providing guidance on prohibited activities in the standards setting context when a listed entity, such as Huawei or its listed affiliates, is involved.

These actions follow the initial designation of Huawei and 68 of its non-U.S. affiliates to the Entity List, as discussed in our May 17, 2019 [alert](#). The designation of Huawei and its non-U.S. affiliates means that exports, reexports, and transfers (in-country) to these entities of any item subject to the Export Administration Regulations ("EAR") requires prior BIS licensing, even for non-sensitive "EAR99" items (e.g., ordinary commercial items not otherwise subject to any heightened export control restrictions). EAR license exceptions cannot be used for exports, reexports, and transfers to these entities, and BIS has instituted and continues to maintain a policy of a presumption of denial for licenses to export, reexport, or transfer items to these entities.

As described further below, the updated TGL has been revised and clarified in important ways. In addition, the TGL now requires persons that rely on the TGL to obtain a more robust certification statement and related support documentation from the relevant Huawei entity prior to using the TGL. The updated TGL also removes an authorization relating to the engagement with Huawei and its listed affiliates necessary for the development of 5G standards by a duly recognized standards body. Concurrent with the removal of this authorization, BIS issued an advisory opinion on standards setting activities that makes clear that BIS prohibits the release of non-public technology or software to listed entities as part of the standards setting process.

Additional Huawei Designations

The Entity List, maintained as Supplement No. 4 to Part 744 of the EAR, identifies legal and natural persons believed to be involved, or to pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States.

In the final rule issued yesterday, BIS explained that it was designating to the Entity List an additional 46 Huawei entities that it views as posing a significant risk of acting on Huawei's behalf to engage in activities contrary to U.S. national security or foreign policy interests. Of the 46 Huawei entities, BIS added 27 as new, separate entries on the Entity List; the remaining 19 entities were added under the existing entry for Huawei. These affiliates newly added to the Entity List are located in the following 25 countries: Argentina, Australia, Bahrain, Belarus, Belgium, Brazil, China, Costa Rica, Cuba, Denmark, France, India, Indonesia, Italy, Kazakhstan, Mexico, New Zealand, Panama, Portugal, Romania, Russia, South Africa, Sweden, Thailand, and the United Kingdom.

The rule also moves three Huawei affiliates under the Huawei entry on the Entity List and modifies five existing entries for Huawei and its affiliates in China, Belgium, and Brazil.

As noted above, the Entity List designation mandates BIS licensing for all exports, reexports, and transfers (in-country) to the listed Huawei entities of any item subject to the EAR, and BIS has suspended license exceptions otherwise available under the EAR with respect to the Huawei entities. Further, BIS has maintained the previously stated license review policy of a presumption of denial for export license requests, even though the Administration suggested over the summer that it would entertain license applications for exports, reexports, and transfers that did not implicate U.S. national security concerns.

As discussed more fully in our May 17, 2019 alert, all commodities, software, and technology that are subject to U.S. export jurisdiction under the EAR—including common EAR99 items not identified on the EAR's Commerce Control List—require licensing prior to their supply to Huawei or any of the listed Huawei affiliates. Pursuant to Part 734 of the EAR, items “subject to the EAR” include all items located in or exported from the United States, and all items produced in the United States, wherever located. In addition, non-U.S.-made items that contain more than *de minimis* amounts of controlled U.S.-origin content also are subject to the EAR, as are the foreign direct products of sensitive U.S.-origin technology or software or that are the products of plants or major components of plants produced from sensitive U.S.-origin technology or software.

The rule's “savings clause” permits delivery to the newly listed Huawei affiliates of items subject to the EAR that are no longer eligible for export or reexport under a license exception or as “no license required” if such items were already en route aboard a carrier to a port of export or reexport as of the August 19, 2019 effective date of the new final rule, provided that such items are being shipped pursuant to actual orders by one of the newly listed Huawei affiliates. Notably, the new savings clause does not apply to the entities that were designated in the May 16, 2019, round of Huawei designations, including entities whose entries were modified by the August 19, 2019 rule.

Updated Temporary General License

In addition to designating additional Huawei entities to the Entity List, BIS issued a final rule yesterday—the day the TGL was due to expire—extending the validity of the TGL through November 18, 2019, clarifying the transactions authorized under the TGL, and modifying the certification statement requirements for reliance on the TGL. The TGL appears at Supplement No. 7 to Part 744 of the EAR.

Authorized Transactions

The final rule clarifies the authorizations of the TGL related to the continued operation of existing networks and equipment, provision of support to personal consumer electronic devices and Customer Premises Equipment (“CPE”), and cybersecurity research and vulnerability disclosures. Additionally, it removes the authorization for engagement as necessary for development of 5G standards by a duly recognized standards body.

The newly revised TGL contains several significant revisions and clarifications with respect to the first prong of the TGL, authorizing exports, reexports, and transfers to Huawei and its listed affiliates for the continued operation of existing networks and equipment, pursuant to legally binding contracts and agreements executed between Huawei or its listed affiliate and third parties on or before May 16, 2019:

- First, the revised authorization clarifies in the text of the authorization and two new notes that it applies only to transactions necessary to support and maintain an existing and currently “fully operational network” and equipment, now defined to refer to a third-party network providing services to a third party’s customers, where “third party” refers to a party that is not Huawei or its listed affiliates, nor the exporter, reexporter, or transferor, but rather an entity such as a telecommunications service provider;
- The TGL also adds several exclusions to clarify that “end-devices such as general-purpose computing devices ... would not be considered to be part of an existing and ‘fully operational network’” and thus could not be patched or supported under this authorization. Rather, the equipment must directly relate to the support and maintenance of a network. Relatedly, the exclusions state that this part of the TGL “does not authorize transfers of equipment for general business purposes or for activities that are not in direct support of an existing and ‘fully operational network’....” BIS gives as an example that the TGL would not authorize providing semiconductor production equipment to Huawei or its listed affiliates;
- In addition, this authorization in the TGL as it applied to software updates and patches (in the original TGL) now clarifies that it covers software for bug fixes, security vulnerability patches, and other changes to existing versions of the software, subject to the caveats above about the software changes being necessary to support and maintain existing and currently “fully operational networks” and equipment; and
- An addition to this part of the TGL specifies that transactions authorized “may not enhance the functional capacities of the original software or equipment.”

These changes are potentially significant clarifications to this part of the TGL, which previously was drafted in such a way as to raise questions about whether it authorized exports, reexports, and transfers of items subject to the EAR to Huawei and its listed affiliates to support their own existing equipment, not just related to third-party networks.

The revised and extended TGL also expands the second prong of the authorization—for exports, reexports, and transfers that support Huawei handsets—to more broadly authorize service and support for Huawei “personal consumer electronic devices” (including phones and personally-owned equipment such as tablets, smart watches, and mobile hotspots) and CPE (such as network switches and home networking adapters that enable consumers to access network communication services and distribute them within their home or small business). As with the first part of the TGL, such service and support may not enhance the functional

capacities of the equipment or software being supported. Further, the authorization is limited to service and support for models of Huawei personal consumer electronic devices and CPE that were available to the public on or before May 16, 2019.

The authorization to disclose to Huawei and its listed affiliates information regarding cybersecurity research and vulnerabilities remains. However, a new note adds clarity to the definition of a fully operational network, as described above.

Finally, as noted above, the revised TGL removes the authorization for engagement with Huawei and its listed affiliates as necessary for the development of 5G standards. BIS explained that it has determined that the existing provisions of the EAR exempting publicly available information “suffice for purposes of addressing the application of the Entity List-based license requirements to activities in connection with standards development bodies, including 5G standards bodies.” The concurrently issued general advisory opinion is discussed further below.

Changes to Certification Statement

Significantly, the revised TGL also substantially revises the certification requirement for reliance on the TGL. Under the revised TGL, the exporter, reexporter, or transferor must obtain a certification statement and any additional support documentation needed to substantiate the certification statement from the listed Huawei entity prior to exporting, reexporting, or transferring any item under the TGL.

The certification must specify how the export, reexport, or transfer satisfies the TGL and identify the paragraph in the TGL that authorizes the transactions. It also must list the name of and other information for the relevant Huawei entity; end-use(s) of the item(s); the applicable classification under the EAR of the items being exported, reexported, or transferred; and the quantity of items to be exported, reexported, or transferred. Additionally, where relevant under the TGL’s first prong, the supporting documentation must show that there was a legally binding contract between the Huawei entity and a “third party” on or before May 16, 2019. BIS also added a recordkeeping requirement to specify that both the Huawei entity and the exporter, reexporter, or transferor are responsible for retaining the certification and any supporting documentation.

Multiple exports, reexports, or transfers may be made under the same certification provided that the items and consignee/end user are the same, and provided that the exporter, reexporter, or transferor maintains a log that identifies each item and the quantity thereof for each transaction made against the certification statement.

General Advisory Opinion on Standards Setting Activities

Concurrently with the rule revising the TGL, BIS published on its website a general advisory opinion on prohibited activities in the standards setting context when a listed entity is involved. Specifically, BIS provided guidance that “a variety of activities in the standards setting or development context are prohibited” without authorization from BIS “if any of the listed Huawei entities (or another listed entity) is involved.”

BIS clarified that whether prior authorization is required will turn on whether the activity involves the disclosure of technology or software that is subject to the EAR and not exempt from EAR jurisdiction as technology or software that has been made available to the public without

restriction upon its further dissemination. Accordingly, to determine whether a license would be required to release technology or software at a standards development meeting or exchange where Huawei entities may be present, it is necessary to determine whether the information is subject to the EAR. EAR § 734.7(a) provides that unclassified technology is not subject to the EAR when it has been made available to the public through various means, including “unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the interested public.”

However, if the technology or software does not fall within one of the exempted categories, including that for open meetings, the BIS advisory opinion states that it would be prohibited to release the technology or software to Huawei or its listed affiliates through various means, even as part of standards setting activities, without a license.

In addition to this guidance, BIS addressed several questions in the rule publishing the revised TGL. First, it confirmed that the Entity List does not create a requirement for imports into the United States, including imports from Entity List entities. Second, it stated that the Entity List restrictions do not apply to the provision of services to entities on the Entity List, provided that such services do not involve the export, reexport, or transfer to Entity List entities of items subject to the EAR, such as commodities, software, and technology or services that are separately controlled under the EAR (e.g., as related to weapons proliferation pursuant to EAR § 744.6 or when provided with knowledge that a violation has occurred in relation to an item subject to the EAR under EAR § 736.2(b)(10)). Exports, reexports, and transfers of items subject to the EAR to entities on the Entity List, including those provided in the context of the provision of a service, would be prohibited unless licensed by BIS. BIS stated that it plans to release Frequently Asked Questions addressing additional questions regarding the TGL on its website soon.

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If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Trade Controls and Public Policy practices:

<u>Peter Flanagan</u>	+1 202 662 5163	<u>pflanagan@cov.com</u>
<u>Corinne Goldstein</u>	+1 202 662 5534	<u>cgoldstein@cov.com</u>
<u>Peter Lichtenbaum</u>	+1 202 662 5557	<u>plichtenbaum@cov.com</u>
<u>Kimberly Strosnider</u>	+1 202 662 5816	<u>kstrosnider@cov.com</u>
<u>David Addis</u>	+1 202 662 5182	<u>daddis@cov.com</u>
<u>Eric Carlson</u>	+86 21 6036 2503	<u>ecarlson@cov.com</u>
<u>Alan Larson</u>	+1 202 662 5756	<u>alarson@cov.com</u>
<u>Stephen Rademaker</u>	+1 202 662 5140	<u>srademaker@cov.com</u>
<u>Lisa Ann Johnson</u>	+1 202 662 5928	<u>liajohnson@cov.com</u>

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