

Trump Administration Further Extends Huawei Temporary General License

November 18, 2019

The U.S. Commerce Department's Bureau of Industry and Security (BIS) announced today that it will extend the Temporary General License (TGL) authorizing specific, limited engagements with Huawei and 114 of its designated affiliates for an additional 90 days. The TGL, which was set to expire today, will be effective through February 16, 2020. The extension does not make any changes to the scope of authorized activities under the TGL, which remains limited to transactions necessary to maintain existing networks and equipment; service and support existing personal consumer electronic devices and customer premises equipment; and ensure the integrity of existing networks and equipment via cybersecurity vulnerability disclosures.

***Note: This is an update to an alert that was originally published on August 19, 2019, which appears below.**

Trump Administration Extends Huawei Temporary General License and Adds New Huawei Affiliates to the Entity List

August 19, 2019

On August 19, 2019, the U.S. Commerce Department's Bureau of Industry and Security (BIS) took significant actions related to Huawei Technologies Co., Ltd. First, it announced a 90-day extension of the Temporary General License (TGL) that authorizes specific, limited engagements with Huawei and its designated affiliates. Second, it is imposing comprehensive export restrictions on 46 additional Huawei entities.

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In May, BIS added Huawei and a number of its non-U.S. affiliates to its Entity List, banning exports, reexports, and transfers of U.S. hardware, software, and technology (including common, off-the-shelf electronic components and commercial software) to such entities without authorization from BIS. Shortly thereafter, BIS issued a limited TGL authorizing certain transactions with Huawei—namely, transactions necessary to (1) maintain existing networks/equipment, (2) service and support existing handsets, (3) ensure the integrity of existing networks/equipment via security vulnerability disclosures, and (4) develop 5G standards as part of a duly recognized standards body. The TGL was set to expire today but has been extended through November 18. According to BIS, the 90-day extension is “intended to afford consumers across America the necessary time to transition away from Huawei equipment, given the persistent national security and foreign policy threat.”

BIS also is publishing a number of changes and clarifications to the scope of authorized activities under the TGL going forward. Brief explanations of the key changes and clarifications are provided below:

(1) Continued operation of existing networks and equipment (i.e., transactions necessary to maintain and support existing and currently fully operational networks and equipment)

- BIS has clarified that this part of the TGL extends **ONLY** to activities such as patching networks and network infrastructure equipment. Authorized activities include provision of software bug fixes, security vulnerability patches, and other updates to existing versions of the software necessary to maintain and support existing and currently fully operational networks and equipment, as long as the software does not enhance the functional capacities of the original software or equipment.
- This authorization **CANNOT** be used for the following types of items:

(1) end-devices, such as general purpose computing devices, that would not be considered to be part of an existing and fully operational network;

(2) equipment not directly related to support and maintenance of the network; or

(3) equipment for general business purposes or activities not in direct support of an existing and fully operational network (*g.*, semiconductor production equipment).

- Additionally, BIS has explicitly indicated that covered items **CANNOT** be used for internal Huawei networks. Instead, they must be used to support a pre-existing contract between Huawei and a non-Huawei entity, such as a telecommunication service provider. BIS also has defined a “fully operational network” to mean a third party (non-Huawei) network that is providing services to that third party’s customers.

(2) Support to existing personal consumer electronic devices and Customer Premises Equipment (CPE)

- BIS expanded the current authorization permitting transactions necessary to provide service and support to existing Huawei handsets so that it now covers “personal consumer electronic devices,” including phones, tablets, smart watches, mobile hotspots, and similar personally-owned equipment. Similar to the network authorization above, BIS has indicated that companies are allowed to engage in

transactions necessary to provide service and support to these items, including software for bug fixes, security vulnerability patches, and other changes to existing versions of the software; however, the software cannot enhance the functional capacities of the original software or equipment.

- The authorization also has been expanded to cover support for personal use of telecommunications hardware known as CPE, such as network switches, residential Internet gateways, set-top boxes, home networking adapters, and other personally-owned equipment that enable consumers to access network communications services and to distribute them within their residence or small business.
- The current limits on use of this authorization for models of Huawei hardware available to the public on or before May 16, 2019 is still in effect.

(3) Cybersecurity research and vulnerability disclosure

- This authorization continues to allow companies to disclose to the listed Huawei entities information regarding security vulnerabilities in items owned, possessed, or controlled by a listed entity as part of an effort to provide ongoing security research that is critical to maintain the integrity and reliability of existing and currently fully operational networks and equipment.
- As noted above, BIS has clarified that “fully operational network” means a third party (non-Huawei) network that is providing services to that third party’s customers.

(4) Engagement necessary for development of 5G standards by a duly recognized standards body

- BIS eliminated this authorization entirely, preventing the disclosure of any proprietary U.S. technology or software to a listed Huawei entity as part of the standards development process.
- The Entity List restrictions would not necessarily apply if any technology/software provided is or will be published. Nonetheless, the removal of this part of the TGL could well have a chilling effect on standards development activities that involve U.S. companies/persons.
- BIS has issued an advisory opinion on standards development, outlining certain prohibited activities and pointing industry to BIS’s definition of the term “published,” which delineates technology and software that are not subject to U.S. export controls or the Huawei export restrictions. Nonetheless, questions and ambiguities remain, as standards setting varies by organization and can involve situations where it may not be entirely clear if certain interactions meet the exclusion for published information or otherwise are not controlled, or, instead, are subject to the export ban.

In addition to these clarifications and changes, BIS is altering the existing certification requirement for use of the TGL. Formerly, to use the TGL, companies were required to make a certification statement prior to any export, reexport, or transfer specifying how the transaction met the scope of the TGL and to maintain that certification in the company’s records. This certification now must come directly from Huawei and must include a detailed list of information, including contact information for the Huawei entity involved, names/quantities/export classifications of tangible items involved, and identification of the specific paragraph of the TGL authorizing the transaction. Additionally, BIS is requiring that Huawei affirmatively state in the certification that it will comply with BIS’s recordkeeping requirements and that the individual signing the certification has

sufficient authority to legally bind Huawei. Notably, to use the network and equipment authorization described above, companies also are required to obtain documentation from Huawei showing that there is a legally binding contract/ agreement executed between Huawei and a third party on or before May 16, 2019. Both Huawei and the company involved must maintain copies of certifications/supporting documentation, and, if one certification covers multiple transactions, the company must maintain a log linking the certification with each transaction.

If the TGL does not apply, companies can apply for a license from BIS to engage in covered transactions with Huawei. At least right now, however, obtaining a license from BIS to engage in transactions with Huawei will be challenging, as the agency's official licensing review policy is a presumption of denial. Although President Trump indicated that licenses would be considered expeditiously on a case-by-case basis, in the last two weeks, the U.S. government suspended consideration of specific licenses, and today, Commerce Secretary Ross reiterated that "there were no 'specific licenses being granted for anything.'" Whether specific licenses will be reviewed and approved going forward may well depend, at least in part, on the outcome of U.S.-China trade negotiations.

In parallel with the TGL extension/clarification, BIS is adding 46 non-U.S. affiliates of Huawei to the Entity List because they "pose a significant risk of involvement in activities contrary to the national security or foreign policy interests of the United States." Nineteen of these affiliates are being added under the existing Entity List entry for Huawei, while the other 27 entities are being added under separate entries. The newly-designated affiliates are from 25 different countries: Argentina, Australia, Bahrain, Belarus, Belgium, Brazil, People's Republic of China (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. Exporters are encouraged to carefully screen and review any open or pending business with Huawei that was not captured by the previous designations to determine whether such dealings are now covered by the U.S. export ban.

Wiley Rein continues to closely monitor Huawei-related developments and the impacts and unintended consequences of the U.S. government's crackdown on Chinese telecom companies. Should you have any questions, please do not hesitate to contact one of the attorneys listed on this alert.