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U.S. Increases Restrictions on Transactions with China

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The lockdown of several economies in order to slow the spread of COVID-19 has distracted many from recent changes in U.S. export control law affecting transactions with China. While the U.S. has waived import tariffs on certain medical supplies from China, U.S. import tariffs on many classes of Chinese goods remain in place. In addition, the Bureau of Industry and Security (“BIS”) of the U.S. Commerce Department has recently concluded that:

1. China is implementing “civil-military integration strategies to obscure” the civil or military identity of importers of foreign technology goods; and
2. It has evidence that restricted technology goods had been diverted to military uses in China and certain other countries.

As a consequence of these conclusions, the U.S. government is increasing export control restrictions, including:

1. Licenses will now be required for reexports of goods controlled by the U.S. Export Administration Regulations (“EAR”) from A:1 countries and Hong Kong to D:1 countries (including Russia, China and Venezuela). Previously, certain reexports did not require licenses if they fell under the APR (additional permissive reexports) exception to the licensing requirements. That exception will no longer apply. We further anticipate that all latitude given to Hong Kong authorities under U.S. export controls will be revoked as part of the U.S. government’s response to the new Hong Kong security law being imposed by the Mainland.
2. Licenses will now be required for exports to D:1 countries (again, including Russia, China and Venezuela) for items controlled for national security purposes. The previous license exception CIV (shipments to civil end users) will no longer apply.
3. From June 29, 2020, the list of items requiring export licenses has been increased when exporting to D:1 countries. Moreover, the definition of “military end users” and “military end uses” has been broadened to include non-military entities and actors used to assist in military or security activities. This new rule acknowledges that the governments of Russia, China and Venezuela have been using non-military entities to carry out defense, security and intelligence operations.

Separate from the export controls that affect Chinese purchasers generally, the U.S. currently has several restrictions applicable to sales to or purchases from Huawei and its subsidiary entities. This summer, BIS is making changes to the May 2019 order banning transactions with certain Huawei entities that involve restricted technology. First, BIS is extending the temporary general license (TGL) allowing the supply of equipment meant to support existing networks and systems, until August 13, 2020.

Second, BIS has concluded that Huawei has recently made significant use of overseas factories that utilize U.S. technology and equipment when acquiring semiconductors. In order to combat this trend, BIS has expanded the definition of “direct products,” which are items manufactured outside the U.S. but utilizing U.S. technology or U.S.-made manufacturing equipment. Now, certain products manufactured overseas and covered by categories 3, 4 and 5 of the Commerce Control List, will be considered “direct products” due to Huawei’s involvement in their design, development or production. The true scope of this new rule is not well understood. It is hoped that BIS will clarify the meaning of these new regulations in due course. However, what is clear is that overseas companies utilizing U.S. technology for certain kinds of circuitry and semiconductors may be violating U.S. export controls by involving Huawei entities in the design or development of derivative products. Ultimately, access to U.S. technology may be withheld from foreign companies who continue to do business with Huawei in spite of the increasingly expansive regulations.