

BUSINESS UPDATE • JULY 8, 2019

# Huawei: Post-G20 Rundown of Legal Issues in Context

After talks with China's president at the G20 summit in Japan, President Trump announced on June 29 that "[he would allow](#)" U.S. companies to continue to sell "product" to Huawei. The statement, construed by some as a "concession" or "reversal" of U.S. policy toward Huawei, has generated confusion and disagreement from China "hawks" in Congress and elsewhere. This rundown of Huawei legal and policy issues discusses the presidential statement, its lack of legal effect to date, its context, and why technology industry stakeholders need to understand the complete U.S.-China technology picture to navigate developments and mitigate risk. Familiarity with recent Huawei developments is assumed.

## The President's June 29 Announcement on Huawei Has No Legal Effect, Presently

- The President's June 29 announcement has no operative legal effect at the present time. Administrative action, such as the issuance of a rule or other action by one or more agencies with authority, namely the Department of Commerce, is necessary to give concrete meaning to and implement the President's June 29 statement.

## The President's G20 Statement in the Context of Huawei's Entity List Status and Temporary General License

- Insofar as the President's position is that U.S. companies may continue to export controlled items to Huawei, the position, which is vague, may be entirely consistent with the 90-day Temporary General License (TGL) issued by the Commerce Department and effective as of May 20, 2019. The TGL partially lifts the export restrictions put in place on May 16, 2019, the date on which Huawei and 68 of its non-U.S. affiliates were added to the Entity List.
- The TGL permits, among other transactions, exports of U.S. controlled items necessary to support and maintain networks and equipment that existed and were fully operational as of May 16, 2019, as well as Huawei handsets that were available to the public on or before May 16, 2019. The President's June 29 statement could be construed as an endorsement of the current TGL, or as support for its extension beyond 90 days and/or its expansion to additional permissible transactions. (Note: the meaning of some of the TGL's language is not clear—for example, interpretations of when a handset was "available to the public" can vary).
- Statements made by administration officials made after the President's G20 comments suggest that the Trump Administration might adopt, in the near-term, an export controls policy more narrowly tailored to stated U.S. national security concerns of priority. If so, such a policy might curtail exports related to the further development of Huawei's capabilities as to strategically significant emerging technologies, such as 5G (although Huawei is a global leader in 5G).
- Export controls might also be tailored to counter alleged "espionage" or surreptitious surveillance by Huawei through "back doors" that some have claimed are embedded in its equipment, although these concerns would more logically be addressed through restrictions on inbound restrictions (rather than

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export controls), such as to prohibit the integration of Huawei equipment and services in U.S. telecommunications infrastructure. Executive Order 13873 provides the legal authority to restrict inbound transactions, as discussed below.

### Executive Order 13873

- On May 15, one day before the Commerce Department added Huawei and 68 of its non-U.S. affiliates to the Entity List, the President issued Executive Order 13873, entitled “Securing the Information and Communications Technology and Services Supply Chain.” The Order—which targets both inbound and outbound transactions—lays legal groundwork to block the integration into U.S. telecommunications infrastructure equipment and services produced, designed by, supplied by, or involving a “foreign adversary.” A “foreign adversary” could be a foreign nation, a specific foreign governmental body, a private entity, or a party subject to the jurisdiction or acting at the direction or under the control of a “foreign adversary.”
- The Order also establishes a legal foundation for broader future prohibitions on U.S. companies doing business with parties deemed “foreign adversaries.”
- EO 13873, which had been expected for some time, is widely thought to have been developed with Huawei in mind. Importantly, the Order is not yet operative as to any foreign nations or entities. The Commerce Department is expected to issue implementing regulations by October 12, 2019. U.S. officials (unnamed) have suggested to various news outlets that implementing regulations will be focused, initially at least, on back-end telecommunications infrastructure.
- While the President’s sentiment—essentially that U.S. companies should be able to “sell product” to Huawei—may seem contradictory to the Order, particularly given the time proximity of the Order and G20 comments, it is not necessarily so. First, the Order’s targeting of inbound transactions—*e.g.*, those facilitating or resulting in the integration of Huawei equipment or services into U.S. telecommunications infrastructure—is separable from controls on exports of U.S.-controlled technology to Huawei. Second, the Order’s language is broad, and thus could be implemented widely or narrowly over time.

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##### Tech Wars: Restrictions on Foreign Access to U.S. Technology, October 2018

*“The technology industry is now at the center of legal and policy measures designed to protect U.S. technology from foreign access and influence. Measures to curb foreign access to U.S. technology have taken and will likely take various forms that will cut across industries and legal disciplines. Among them are restrictions on foreign access to and influence on U.S. technology through (1) foreign investment, (2) supply chain exclusions, (3) limits on participation in academic and other research, (4) legal or political curbs on U.S. technology access or transfers through third countries, and (5) countermeasures against foreign control of raw materials essential to technological manufacturing and innovation.”*

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## Huawei is ZTE 2.0, on Steroids

- Huawei's U.S. legal drama has much in common with the ZTE saga. However, Huawei's U.S. legal entanglements are more numerous and complex. And, because Huawei is vastly larger and more global than ZTE, the potential implications of Huawei's U.S. legal troubles are more far-reaching.
- ZTE was investigated for violating U.S. sanctions on Iran and other nations, including sanctions-based prohibitions on exports of U.S.-controlled items. Huawei has been under investigation for sanctions violations for years. Three Huawei entities and the company's CFO have been indicted for sanctions and related offenses, and additional or separate sanctions actions may be in process or initiated.
- For its sanctions and export controls violations, ZTE was added to the Denied Persons List and subjected to additional monetary and other penalties (the company was subsequently removed from the Denied Persons List at the President's instruction). As discussed below, Huawei could also be added to the Denied Persons List if and when its sanctions case reaches a verdict and/or administrative enforcement phase, and the company is vulnerable to additional legal penalties that could limit or prohibit U.S. persons from exporting to or doing other business with Huawei.

### RELATED MASSPOINT INSIGHT

#### U.S. Law as Trade War Weapon, May 2018

*"The details of the ZTE case merit study. But the case has broader legal and policy meaning as it puts into focus the Trump Administration's apparent strategy to use U.S. sanctions, along with anti-corruption and anti-money laundering laws, as trade war weapons against economic rivals like China."*

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## U.S. Law as Trade War Weapon, Additional ZTE and Huawei Parallels

- The content and timing of statements made by the President and other administration officials over the course of trade talks, as well as actions taken by the administration, suggest that U.S. laws—e.g., sanctions, export controls, and national security and national emergency authorities embedded in trade laws—have been used or are perceived by some as trade war weapons or bargaining chips.
- For example, ZTE was added to the Denied Persons List on April 15, 2018, shortly after the U.S. President declared that trade wars are "easy to win" and imposed metals tariffs, in response to which China retaliated on April 1, 2018. Later in April 2018, ongoing U.S.-China trade talks fell flat. By tweet on May 13, 2018, the President instructed the Commerce Department to remove the company from the Denied Persons List, and ZTE was removed from the list pursuant to a revised settlement agreement. The sequence of ZTE events, in the context of the push and pull of ongoing trade talks, suggested that the ZTE case may have been viewed by some officials at various times as a weapon or a bargaining chip to advance a wider trade agenda. (*This is not to suggest that the ZTE case lacked merit. ZTE admitted to the offenses for which it was penalized. Nevertheless, the timing of the Denied Persons List addition and the company's subsequent removal from the List raise questions. Moreover, a monetary penalty was an available alternative to ZTE's Denied Persons List addition and was favored by career professionals, as discussed in this [MassPoint Note](#)*).
- The President has stated several times that Huawei's U.S. legal issues are on the table in trade talks with China, including the United States' pending request that Canada extradite Huawei's CFO. His comments

about Huawei at the G20 reinforce his previously expressed views on the role of legal enforcement matters in trade negotiations.

#### RELATED MASSPOINT INSIGHT

ZTE: Was the Export Ban the Right Penalty? May 2018

*"In a May 24 interview with CNBC, Secretary Ross elaborated on the process leading to Commerce's decision to activate the ZTE export ban. Secretary Ross' description of the process leading to the export ban and the mess that has followed it give more reason to ask whether, in the first place, the export ban was the right (or best) remedy under applicable laws and the objectives served by them."*

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### What Might Congress Do in Response to the President's G20 Statement on Huawei? ZTE Redux.

- In response to the President's G20 statements about Huawei, some Congress members have pushed back with words. Senator Rubio of Florida, for example, "[vowed to pass legislation](#) to put Huawei back on the entity list if President Trump decides to remove it, tweeting that the bill 'will pass with a large veto proof majority.'"
- The timing of the President's Huawei statement and Congress members' responses is noteworthy, and again harkens back to the ZTE case. Last year, after the Commerce Department removed ZTE from the Denied Persons List at the President's instruction, Congress members sought to re-impose the ZTE export ban by legislation. Amendments to that effect were included in last year's National Defense Authorization Act (NDAA) for fiscal year 2019. The amendments were [ultimately dropped](#) after Congressional Republicans acceded to the President's position.
- The NDAA for fiscal year 2020 is working its way through Congress now, and its passage deadline is quickly nearing. Any legislative efforts to block the Trump Administration from ameliorating export restrictions on Huawei might appear in the NDAA for 2020, or in other legislation. The fate of any such measures may depend on the availability of a veto-proof supermajority.

#### RELATED MASSPOINT INSIGHT

House Bill "Blocks Bailout" of ZTE After Export Ban, May 2018

*"On May 17, 2018, the House Appropriations Committee unanimously approved a measure to block the Commerce Department from using appropriated funds to alter the export ban (i.e., the "denial order") that the agency activated against ZTE on April 15, 2018."*

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### Huawei's Entity List Status is But One of Several U.S. Legal Entanglements That Threaten its Export Privileges and Business with U.S. Companies

- Huawei and its 68 non-U.S. affiliates were added to the Entity List on unspecified national security grounds, pursuant to the Export Administration Regulations (EAR). But Huawei is susceptible to additional or renewed export controls or other measures on separate legal grounds.

- Huawei is vulnerable to adverse legal measures that could stem, for example, from the indictment of three Huawei entities and the company's CFO for sanctions violations and related offenses. Other Huawei entities have been indicted for trade secret theft. Either or both of these pending matters could result in, among other penalties, the addition of one or more Huawei entities to the Entity List (e.g., such as expanding the existing Huawei designations or re-imposing them if lifted earlier). Or, Huawei, like ZTE before it, could be added to the Denied Persons List.

## What Might Happen Next? Trump Administration “Hawks” and “Doves” and the Whole-of-Government Strategy to Counter China on Technology

- The President of the United States speaks frequently, and his platform renders his words most resonant. But on the issue of Huawei and the U.S.-China tech war more broadly, the President is not the only influential actor.
- The United States has adopted a whole of government strategy to counter China on technology, particularly emerging technologies like Artificial Intelligence and 5G. U.S. law is central to the whole of government strategy, and has been deployed to limit Chinese access to and participation in U.S.-controlled technology. In addition, the United States has, with varying degrees of success, leveraged its diplomatic resources to exclude Huawei from 5G and other telecommunications infrastructure globally.
- It is doubtful that the whole of government strategy will be abandoned or significantly altered in the medium- or long-term as a result of one or more presidential tweets or press conferences. Even if export restrictions on Huawei are lessened in the near- to medium-term, U.S. law and policy will very likely continue to be applied to counter China on technologies deemed to have national security significance by virtue of their nature or application, or both.
- There is a split in the Trump Administration between so-called “hawks” and “doves” on China and trade (“transactionalists” should be added as a third viewpoint category). The divergence of views within the administration appears to have led to inconsistent and self-contradictory statements and actions with respect to Huawei, other Chinese firms, and technology and trade more generally.
- The President's statement on Huawei at the G20 and subsequent moves within the administration to actualize the statement are the most recent examples. A recent Financial Times report article captures the dynamic well, [reporting that](#), with respect to Huawei: “it is likely to take some time for the administration to figure out how exactly it is going to keep everyone on board here — from Beijing, to US industry, to the China hawks in his own party.” (The same hawks vs. doves dynamic appeared to be at work in the ZTE case.)

### RELATED MASSPOINT INSIGHT

Tech War: U.S. Whole-of-Government Approach to China is a Force Multiplier, May 2019

*“Across the executive branch and in Congress, U.S. officials have taken issue with the manner in which China is advancing its technological development objectives, which China has outlined, most notably, in the Made in China 2025 plan. The U.S. government has adopted and is implementing a “whole-of-government” strategy to counter China. The whole-of-government approach entails a range of legal and policy measures to curb China's access to U.S. technology, by lawful and unlawful means.”*

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## Technology Companies and Other Stakeholders Must Grasp the Full Picture to Effectively Navigate a Rapidly Changing Legal Landscape

- To effectively navigate legal and policy developments involving Huawei (and Chinese and foreign firms more generally), it is necessary to understand context. U.S. and foreign companies, industry groups, governments, and others with a stake in the technology sector should adopt comprehensive law and issues monitoring strategies that facilitate the understanding of legal and policy developments in context and the ability to anticipate, segment, and manage direct and indirect risk.
- In developing comprehensive approaches, technology industry stakeholders should understand that the U.S. strategy to counter China on technology does not start or end with export controls, curbs on Chinese investment in U.S. technology, or other legal and policy measures most commonly covered by in-house or external legal and policy advisors. Rather, the U.S. strategy targets the entire technology pipeline. For example, R&D and research collaborations are, among other areas, susceptible to restrictive legal measures. Stakeholders should, as appropriate for them, identify how their current and planned activities and relationships are or may become subject to legal and policy measures applicable across the technology pipeline, from lab to market.

### RELATED MASSPOINT INSIGHT

Protect Our Universities Act Restricts Foreign Student Participation in “Sensitive” Academic Research, March 2019

*“The Protect Our Universities Act is instructive insofar as it reflects and builds on concerns about threats posed by foreign nations and associated individuals and entities, viewed as adversaries of the United States, particularly in the area of technological innovation and related “economic” and “academic” espionage and influence. Accordingly, academic institutions and parties in the federally funded research pipeline—including technology and other companies—should take note of the POUA as it reflects sentiments that have and likely will continue to permeate the political and policy climate.”*

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