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Trump's Comments Highlight Confusion Over Huawei Ban

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The United States currently has three bans in place concerning (or potentially concerning) Huawei products:

- Congress' ban on the purchase of Huawei telecommunications equipment by U.S. government agencies, passed in August 2018 ("Government Procurement Ban");
- The President's May 15, 2019 executive order banning the acquisition, sale, importation, or installation of communications technology or services if the technology or services are associated with a "foreign adversary" ("Foreign Adversary Ban"); and
- The Commerce Department's May 16, 2019 order bans exports or in-country transfers to Huawei and sixty-eight of its affiliates with respect to any dual-use goods or technology, unless the Commerce Department grants a license for such transaction ("Export Ban").

The U.S. Government has not promulgated the regulations necessary to clarify the effect of the Foreign Adversary Ban, which does not specifically name Huawei. However, commentators generally expect Huawei to be an entity subject to the Foreign Adversary Ban. The "dual-use" goods under the Export Ban are items with a generally commercial purpose, which also have a national security or military application and are therefore regulated under the Commerce Department's Commerce Control List. Although, the List also includes non-military items that the U.S. Government may wish to protect for other reasons. Technically, under the Export Ban, Huawei and its sixty-eight affiliates are on the Entity List, a list of persons and businesses the Commerce Department is suspicious of, and for which a U.S. exporter or any other person dealing in goods subject to U.S. export controls, will need to obtain a specific license to transfer dual-use goods or technology.

President Trump's August 9, 2019 announcement that the U.S. Government would be doing no business with Huawei made headlines this past week. However, the U.S. Government already is not legally able to purchase from Huawei (or ZTE) anyway, under the Government Procurement Ban. Confusingly, President Trump also indicated that perhaps a trade deal with China could change this legal restriction. However, this is doubtful. First, the Government Procurement Ban is a law, passed by Congress, so it will be difficult for the President to override this ban. Second, the issues that allow the U.S. Government to single out Huawei and its products are quite different from the issues that have allowed the U.S. Government to wage its "trade war" with China. Basically, U.S. Government actions against Huawei are based upon the assessment of U.S. and Allied intelligence agencies that the proliferation of Huawei products constitutes a risk of increased Chinese espionage and acts of cyber warfare. The "trade war," being a series of import tariffs levied on Chinese origin

goods, is ostensibly justified because of Chinese trade practices that the U.S. Government has determined are unfair to U.S. companies. Since the bans on Huawei and its products are not based, legally or philosophically, on the same kinds of harms the “trade war” is designed to combat, it is difficult to see how any trade deal will resolve all (or any) of the Huawei bans.

President Trump’s June 29, 2019 comments about loosening the Export Ban against Huawei do not appear to change the impact of that restriction very much. First, Huawei and sixty- eight of its affiliates are still on the Entity List, and a license is still required to transfer restricted goods and technology to them. Second, as part of Congress’ 2018 legislation banning government purchases from Huawei and ZTE, and overhauling U.S. export controls, Congress specifically disapproved of the removal of export controls that were initiated because of national security concerns, simply because the White House wishes to conclude a trade agreement. This second factor may be part of the reason that there has been no formal change of policy on Huawei. Instead, the White House and Commerce Department have said that they will consider granting licenses for transfers to Huawei for “general merchandise” that is globally available and does not impact any national security concerns. However, for all other proposed transfers to Huawei, the U.S. Government retains its policy of denial for license applications.

Ultimately, in spite of almost weekly comments from the Administration regarding what may be possible in a U.S./China trade deal, both the Government Procurement Ban on Huawei products being bought by the U.S. Government and the Export Ban on sales to Huawei continue in effect. The Foreign Adversary Ban is still expected to include a ban on all Huawei products in the U.S. market, although its implementing regulations are still being finalized. Additionally, for those businesses that have existing relationships with Huawei, the Temporary General License for transactions with Huawei designed to maintain existing systems will expire on August 19, 2019. After that time, few if any transfers of high tech goods or know-how will be permitted to Huawei from any U.S. exporter, or from any business anywhere trading in goods or technology controlled by the U.S. Department of Commerce.

The last point highlights the fact that the Export Ban continues to potentially affect non-U.S. businesses as well as U.S. businesses. Under U.S. export control law, even non-U.S. persons and businesses can be subject to U.S. export controls where they deal in U.S. origin goods, or goods that incorporate U.S. components or technology that are restricted under U.S. law. This all means that even businesses located outside the U.S. will need to continue to monitor the status of the U.S. Government’s Huawei bans and make certain to comply with any requirements that may affect them.