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Cross-Border Compliance UPDATE

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Alert for Information and Communications Technology and Services Industries: Proposed New Rule Implements Unprecedented Regime to Review and Restrict Transactions

The Department of Commerce (DOC) is accepting comments from now through December 27, 2019 on a proposed rule (the "Rule") that would restrict certain foreign-involved transactions, including investment and services contracts, in the information and communications technology and services (ICTS) industries. The Rule as proposed has a very broad scope, and would impact telecommunications service providers, internet and digital service providers, and vendors and manufacturers of ICTS.

The long-anticipated Rule would implement the May 15, 2019 Executive Order 13873, "Securing the Information and Communications Technology and Services Supply Chain." This EO, while it does not name any particular entities or countries, is widely regarded as targeting China, and particularly Chinese companies such as Huawei, for the risks their presence in the global ICTS supply chain may pose to U.S. national security.

The Rule would give jurisdiction to DOC to evaluate transactions:

(1) conducted by any person subject to the jurisdiction of the United States or involves property subject to the jurisdiction of the United States;

(2) involving any property in which any foreign country or a national thereof has an interest; and

(3) which are initiated, pending, or completed after May 15, 2019.

Any transaction that meets the above criteria may be subject to unwinding or imposition of mitigation measures if the transaction involves ICTS designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a "foreign adversary"; and

(1) the transaction poses an undue risk of sabotage to or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of information and communications technology or services in the United States; or

(2) the transaction poses an undue risk of catastrophic effects on the security or resiliency of U.S. critical infrastructure or the digital economy; or

(3) the transaction otherwise poses an unacceptable risk to the national security of the United States or the security.

While the Rule is short on details as to what constitutes an undue or unacceptable risk, reviews would be conducted on a case-by-case, fact-specific basis in consultation with other agencies. "Foreign adversary" is also not defined, and the proposed rule states that it is "a matter of executive branch discretion." In the final determination, DOC would deem the transaction prohibited, permitted, or permitted only with the adoption of mitigating measures.

Temporary License Extension for Huawei; DOC Grants First Huawei Export Licenses

On November 18, 2019, the Bureau of Industry and Security (BIS) of the U.S. Department of Commerce (DOC) announced that it will extend the Temporary General License (TGL) authorizing specific transactions involving the export, reexport, and transfer of items to Huawei and its non-U.S. affiliates for an additional 90 days. The TGL will now expire on February 16, 2020. Huawei and affiliates were added to the Entity List after the DOC concluded that Huawei engaged in activities contrary to U.S. national security interests, such as alleged violations of the International Emergency Economic Powers Act (IEEPA), providing prohibited financial services to Iran, and obstruction of justice in connection with the investigation of activities in violation of U.S. sanctions. Secretary of Commerce Wilbur Ross stated that the motives for the extension were to "allow carriers to continue to service customers in some of the most remote areas of the United States who would otherwise be left in the dark." For more information, see the DOC press release here.

On November 20th, Microsoft reported that the DOC granted their request for a license to export certain software to Huawei. The Microsoft license was among the one-quarter of the nearly 300 licenses granted in the same timeline, according to an anonymous official who spoke to the Washington Post. Another one-quarter of the license applications were denied, and no action has been taken yet on the remainder. In an emailed statement to the Post, DOC said that the approvals are for "limited and specific activities which do not pose a significant risk to the national security or foreign policy interests of the United States." The Semiconductor Industry Association disclosed that semiconductor companies which manufacture silicon chips have been granted licenses, but declined to name specific recipients.

Foreign Executive Found Guilty of FCPA Violations Based on Evidence That He Acted as Agent of U.S. Subsidiary in Carrying Out Bribery Scheme

In November, a jury sitting in the U.S. District Court for the District for Connecticut convicted Lawrence Hoskins, a former senior executive with the French power and transportation company Alstom S.A. ("Alstom"), on a number of Foreign Corrupt Practices Act charges. The charges were brought against Hoskins in connection with his involvement in a scheme to bribe Indonesian government officials to secure a $118 million contract for Alstom's U.S. subsidiary at the time, Alstom Power, Inc. ("Alstom-US").

Hoskins' case raised important questions regarding the jurisdictional reach of the FCPA over individuals who are not U.S. persons, such as foreign executives of multinational companies residing abroad. Hoskins, a UK national, did not travel to the U.S. while the bribery scheme was ongoing, did not personally engage in any criminal conduct on U.S. soil, and only communicated with US-based conspirators by phone and email from France. The Department of Justice had initially brought charges against Hoskins based on three independent theories of liability: (1) Hoskins allegedly acted as an "agent" of Alstom-US in violating the FCPA; (2) Hoskins, independently of his agency relationship, allegedly conspired with Alstom-US, its employees and foreign consultants, to violate the FCPA; and (3) Hoskins, independently of his agency relationship, allegedly aided and abetted the FCPA violations committed by Alstom-US, its employees and foreign consultants.

In a much-awaited decision issued last year, the Second Circuit rejected the DOJ's second and third theories of liability, holding that Hoskins could not be charged with conspiring to violate the FCPA, or aiding and abetting violations of it. The Second Circuit rejected those theories because they reached individuals beyond the three specific categories of persons over whom the FCPA expressly claims jurisdiction: (1) U.S. and foreign issuers of securities listed on U.S. stock exchanges, or their officers, directors, employees, or agents; (2) American companies and U.S. persons ("domestic concerns"); and (3) foreign persons or businesses acting in the U.S. in furtherance of a bribery scheme.

However, the Second Circuit allowed the DOJ to still prosecute Hoskins based on its first theory of liability, i.e.

by showing that Hoskins acted as an "agent" of a domestic concern (here, Alstom-US), in carrying out the bribery scheme.

Because the FCPA does not define the term "agent," the DOJ and Hoskins vigorously disputed how the trial court should instruct the jury regarding the definition of that term. In the end, the trial court decided that for FCPA purposes an agency relationship requires simply: (1) "a manifestation by the principal that the agent will act for it," (2) "acceptance by the agent of the undertaking," and, (3) "an understanding between the agent and the principal that the principal will be in control of the undertaking." Defining the agency relationship in this way puts the focus on the control that the principal (here, Alstom-U.S.) had over the undertaking (i.e., the bribery scheme) rather than its control over the agent (Hoskins).

Following a two-week trial, the jury found Hoskins guilty after just one day of deliberations. Sentencing has been set for January 31, 2020. Hoskins moved for a judgment of acquittal on all counts, which means the case may continue for Hoskins. In the meantime, the Hoskins verdict shows that the threat of prosecution for FCPA violations on agency grounds remains real in the Second Circuit even for those foreign executives that may not otherwise fall within the categories of persons over whom the FCPA prescribes liability.

CFIUS Annual Report to Congress Released

On November 20, 2019, the Department of Treasury released the public version of the Committee on Foreign Investment in the United States (CFIUS) Annual Report to Congress, which covers calendar years 2016 to 2017. This report does not cover the period of implementation of the Pilot Program (31 CFR 801) and demonstrates that even before the passing of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), the level of CFIUS activity and scrutiny was already increasing. Some highlights from the report include:

- In 2016, CFIUS reviewed 172 notices of covered transactions. In 2017, this number increased to 237. 27 notices were withdrawn in 2016, compared to 74 in 2017.
- In 2016, CFIUS investigated 79 notices, compared to 172 in 2017—the same number of total notices that were submitted the previous year.
- CFIUS referred one transaction to the President in each of 2016 and 2017.
    - In 2016, the President issued an order prohibiting the acquisition of the U.S. businesses of Aixtron SE by Grand Chip Investment Gmbh, a privately held German company whose ultimate parent is a privately held Chinese company.
    - In 2017, the President issued an order prohibiting the acquisition of Lattice Semiconductor Corporation by Canyon Bridge Merger Sub, Inc., a U.S. company ultimately owned and controlled by a Chinese corporation owned by various state-owned entities.
- From 2009 to 2017, Finance and Information Services has been the fastest-growing segment of covered transactions, increasing from 34 percent of all transactions to 46 percent. During that same time period, transactions in the Mining, Utilities, and Construction segment diminished from 29 percent to 12 percent.
- Chinese investment remains the largest source of notices of covered transactions. From 2015 to 2017, acquisitions by investors from China accounted for 25.9 percent (143) of all notices received by CFIUS.
- In 2016 and 2017, CFIUS identified 178 transactions involving acquisitions of U.S. critical technology companies, with acquirers from 36 countries and territories. The largest amount of M&A activity with foreign acquisitions involved targets in the Professional Services and Computers and Electronics sectors.

Two New Laws Impose Sanctions on China: "The Hong Kong Human Rights and Democracy Act of 2019" and "An Act to Prohibit the Commercial Export of Covered Munitions Items to The Hong Kong Police Force"

On November 27, 2019, President Trump signed the Hong Kong Human Rights and Democracy Act of 2019, which, among other measures, is intended to encourage democracy, and grants the President the power to impose sanctions on non-U.S. persons determined to be responsible for "undermining fundamental freedoms and autonomy in Hong Kong." This would include individuals who perpetuate the extrajudicial rendition, arbitrary detention, torture, or other gross violations of internationally recognized human rights in Hong Kong. The Act states that "the United States condemns the deliberate targeting and harassment of democracy activists, diplomatic personnel of the United States and other nations, and their families by media organizations controlled by the Government of the People's Republic of China."

Sanctions that may be imposed include designation on the Specially Designated Nationals and Blocked Persons List (SDN List), asset blocking, and U.S. visa restrictions or revocation. The Act also requires that the Secretary of Commerce (in consultation with the Secretary of the Treasury and the Secretary of State) submit an annual report to Congress which assesses violations of U.S. export controls and sanctions occurring in Hong Kong, whether the Chinese Government is importing items into China from Hong Kong in violation of U.S. export control laws, and whether the Government of Hong Kong is adequately enforcing United Nations sanctions.

While not currently heightening surveillance technology-specific export controls, the Act concludes by stating that "[i]t is [the] sense of Congress that the Department of Commerce . . . should consider appropriate adjustments to the current United States export controls with respect to Hong Kong to prevent the supply of crowd control and surveillance equipment that could be used inappropriately in Hong Kong."

On the same day, the President signed a related bill, titled An Act to Prohibit the Commercial Export of Covered Munitions Items to The Hong Kong Police Force. This Act also serves to support the democracy movement in Hong Kong by prohibiting the issuance of export licenses for exports to the Hong Kong police force of "covered munitions items," defined as tear gas, pepper spray, rubber bullets, foam rounds, bean bag rounds, pepper balls, water cannons, handcuffs, shackles, stun guns, and Tasers.

Enhanced Due Diligence for Humanitarian Trade with Iran

On October 25, 2019, the Departments of the Treasury and State announced a new mechanism to ensure that funds intended to support the Iranian people are not diverted by the Government of Iran. Foreign governments and foreign financial institutions through participating in the mechanism will be able to receive written confirmation from the Treasury that their proposed transactions will not be subject to U.S. sanctions. U.S. entities can also participate in the mechanism, although they must still comply with all existing sanction requirements. This applies only to the commercial export of agricultural commodities, food, medicine, and medical devices to Iran. Under the new mechanism, foreign governments and financial institutions would conduct "enhanced due diligence" and provide monthly reports to the Treasury with detailed information regarding the transaction and the beneficiaries. The mechanism includes safeguards intended to prevent transactions with persons on the Specially Designated Nationals and Blocked Persons List (SDN List). If any suspicious information is uncovered during the course of the due diligence, the collecting entity must immediately suspend the transaction and report all relevant information to the Treasury. Guidelines on the type of information that should be collected and reported is available here.

DOJ Issues Clarifications to FCPA Corporate Enforcement Policy

On November 20, 2019, the DOJ issued several revisions to its FCPA Corporate Enforcement Policy. The policy was first released in 2017 and provides that when a company has (1) voluntarily self-disclosed misconduct, (2) fully cooperated in the government's ensuing investigation, and (3) appropriately remediated the situation and made restitution or otherwise disgorged all illicit profits, there is an express presumption – absent certain identified aggravating factors – that the DOJ will affirmatively decline to prosecute the company.

The DOJ made two revisions to the definition of "voluntary self-disclosure" under the policy. First, the DOJ revised the requirement that a company "disclose all facts known to it" by adding the phrase "at the time of disclosure" at the end of the sentence to clarify that the DOJ "recognizes that a company may not be in a position to know all relevant facts at the time of a voluntary self-disclosure, especially where only preliminary investigative efforts have been possible." The DOJ noted that "[i]n such circumstances, a company should make clear that it is making its disclosure based upon a preliminary investigation or assessment of information, but it should nonetheless provide a fulsome disclosure of the relevant facts known to it at that time." Second, the DOJ also revised the language requiring disclosure of "relevant facts about all individuals substantially involved in or responsible for the violation of law," by replacing "violation of law," with "misconduct at issue," thus clarifying that the company need not have concluded that the misconduct constituted a "violation of law" before being expected to disclose.

In addition, the DOJ also revised the requirement for a company to identify opportunities for the DOJ "to obtain relevant evidence not in the company's possession and not otherwise known to the [DOJ]" only when it "is aware of" such evidence to receive full cooperation credit. Previously, the policy required that a company identify those opportunities even when the company "should be aware of" them, so this revision removes one area of possible dispute with the government when negotiating over cooperation credit.

New Amendments to Venezuela Sanctions Regulations

On November 22, 2019, the Department of the Treasury's Office of Foreign Assets Control (OFAC) amended the Venezuela Sanctions Regulations (31 CFR Part 591) to incorporate additional Executive Orders, add a general license authorizing U.S. Government activities, and add an interpretive provision. Since OFAC issued the initial Regulations in 2015, implementing Executive Order 13692 of March 8, 2015 ("Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela"), there have been six additional Executive Orders related to sanctions on Venezuela:

a. Executive Order 13808 of August 24, 2017 ("Imposing Additional Sanctions With Respect to the Situation in Venezuela");
b. Executive Order 13827 of March 19, 2018 ("Taking Additional Steps to Address the Situation in Venezuela");
c. Executive Order 13835 of May 21, 2018 ("Prohibiting Certain Additional Transactions With Respect to Venezuela");
d. Executive Order 13850 of November 1, 2018 ("Blocking Property of Additional Persons Contributing to the Situation in Venezuela");
e. Executive Order 13857 of January 25, 2019 ("Taking Additional Steps To Address the National Emergency With Respect to Venezuela"); and
f. Executive Order 13884 of August 5, 2019 ("Blocking Property of the Government of Venezuela").

The above Executive Orders are now incorporated into the Regulations. OFAC also incorporated the existing General License E into the Regulations (§591.509), which authorizes the U.S. Government to engage in certain activities related to Venezuela, and a new interpretive provision at §591.407 on settlement agreements and the enforcement of liens, judgments, arbitral awards, decrees, or other orders. The final rule is available at this link. More information on Venezuela-related sanctions is available here.

Restrictions on U.S. Air Service to Cuban Airports

On October 25, 2019, the Department of Transportation suspended all air service between U.S. and Cuban airports, with the exception of flights to José Martí International Airport. This action was taken at the request of the Secretary of State and will remain in effect until further notice. U.S. air carriers have 45 days to discontinue their services to the nine restricted airports. The Department of State described that this action is intended to prevent "revenue from reaching the Cuban regime that has been used to finance its ongoing repression of the Cuban people and its support for Nicolas Maduro in Venezuela." More information is available here. This further builds on earlier rules promulgated by BIS and OFAC in June 2019 (84 FR 25986 and 84 FR 25992, respectively), which implement restrictions on non-family travel to Cuba (referred to by the White House as "veiled tourism").

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