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What Huawei Hath Wrought: Department of Commerce Proposes Sweeping New Regulations

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Comments due on or before December 27, 2019

On May 15, 2019, President Trump issued a new Executive Order widely reported as being targeted against Huawei to keep it from doing business in the United States. But as we reported at the time, the Executive Order was much broader and could affect companies having no dealings with Huawei or with China. Furthermore, we cautioned, the scope and impact of the Executive Order could not be determined until the Department of Commerce issued implementing regulations.

On November 27, 2019, the Department of Commerce finally proposed those regulations, and they are even more sweeping than we anticipated. The proposed regulations give the Department of Commerce authority to investigate *any* “information and communications technology or services” transaction involving one or more foreign governments, individuals, or entities. The proposed regulations cover transactions *initiated, pending, or completed* after May 15, 2019. The regulations cover any transactions anywhere in the world, not just in the United States, so long as the transactions involve someone, or some property, subject to U.S. jurisdiction. The proposed regulations encompass transactions with *any* foreign company or individual, not just Huawei or other Chinese companies; implicate *any* foreign country, not just China; and encompass all information technology services or transactions, not just specified categories of transactions. Although the proposed regulations imply that the Department will typically notify the parties to the transaction, those regulations give the Department authorization to investigate and issue preliminary findings without the parties to the transaction even knowing that an investigation has begun. And the proposed regulations give the Department of Commerce plenary authority to order companies to unwind or modify those transactions, even if the

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companies have already begun to implement them.

These regulations are modeled more closely on the Committee on Foreign Investment in the United States (“CFIUS”) process than on more widely-used licensing processes, such as the processes for licensing military goods or dual use items for export to foreign countries. The Department is charged under these regulations with ordering private parties to modify or unwind a transaction that poses an undue or unacceptable risk (a) of sabotage to or subversion of communications infrastructure; (b) of catastrophic effects on the security or resilience of United States critical infrastructure or the United States digital economy; or (c) to the national security or public security or safety of United States persons.

As with CFIUS, the investigation process proposed by the Department of Commerce is informal, without any clear standards for how it will be conducted once it is initiated. The proposed regulations state only that the Department of Commerce may begin an investigation of a transaction on its own initiative, at the request of a government body or agency, or based on information submitted to the Department by private parties. This last provision is not limited just to parties to the transaction, so it is entirely possible that competitors or advocacy organizations could use these regulations to request government investigations of transactions that do not involve them.

The proposed regulations prohibit the Department from issuing advisory opinions or declaratory rulings, so it appears that parties cannot have their transactions blessed by the Department in advance. The proposed regulations give the parties to the transactions the opportunity to respond to the Department’s preliminary written determination within 30 days, but only in response to the preliminary determination. The regulations do not give the parties a right to participate in the Department’s initial evaluation of the transaction. Instead, the regulations give the *Department* the right to rely on information it receives from the parties, but do not specify how the Department can gather that information or give the parties any particular procedural rights. Parties, for instance, are not given the right to present evidence beyond what the Department seeks or to explain or argue in favor of the propriety of the transaction until after the Department makes its preliminary determination.

As of now, these are only proposed regulations and are not yet final. The Department has requested written comments from the public, which are due no later than December 27, 2019.

We will keep you abreast of developments in this matter and inform you when there are additional developments to report. We are prepared to assist you if you have any further questions or would like more information about how to comment or prepare for the impact of these proposed regulations on you or your company.

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