

Executive Order Restricts Access to US Telecom Markets for Equipment, Services That Impose Security Risks

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On May 15, President Donald Trump signed an executive order starting the process for banning the importation, sale and use of equipment and technology in the US as a response to potential security risks. Although this order appears to be directed at Chinese telecom firms Huawei and ZTE, it potentially could apply to any communications technology, including chips, manufactured in another country.

Under the order, the secretary of the US Department of Commerce, after consulting with other agencies including the Federal Communications Commission, will determine whether equipment from foreign countries poses a security risk to the integrity of the US communications network, national security, critical infrastructure or the digital economy. The secretary can ban any transactions – broadly defined to include essentially any activities related to foreign equipment or technology, including use of the technology – or require specific measures to mitigate any risks that are identified. The order applies to transactions that occur after the date of the order, but the secretary can prohibit the import or use of equipment or technology even if a contract for the equipment or technology was signed before May 15.

The secretary is granted broad powers to adopt any necessary rules to implement the order and may apply prohibitions to individual transactions, classes of transactions, specific companies or potentially all companies making communications equipment in countries deemed to pose a security risk. The secretary also may grant individual waivers or establish processes to review proposed transactions that otherwise would be prohibited. The initial rules to implement the order must be published by mid-October, but the order does not require the rules to be adopted before the secretary acts.

Although the order could apply to technology and equipment imported from any country, there is little doubt that it is aimed at Chinese firms, particularly Huawei. The US government has long believed that use of Huawei equipment in telecommunications networks makes those networks vulnerable to surveillance. In addition, earlier this year Huawei and its chief financial officer were indicted on charges of theft of trade secrets, wire fraud and obstruction of justice. As a result, it is likely that the Secretary of Commerce will soon ban new imports of Huawei equipment. The order also likely will affect ZTE, which has been subject to similar claims. Both firms have denied the claims.

In addition to the impact on Chinese telecommunications equipment manufacturers, the order could have significant implications for US telecommunications providers – notably, rural wireless providers – that use telecommunications equipment made in China, as well as non-US telecommunications manufacturers that market their devices and equipment in the US, including those that make components used in communications equipment or provide communications functions in electronic devices. The Commerce Department has significant flexibility in crafting how the order will be implemented. For instance, the rules could create specific requirements for equipment being imported into the US; cover handsets and other user devices, rather than just affecting network equipment; include specific exemptions or a process for seeking exemptions; or implement a regime that imposes additional market entry requirements on all companies from a particular country or with particular levels of ownership from specified companies.

This order also should be viewed in the broader context of the administration's efforts to discourage use of Huawei equipment worldwide. Any decision to prohibit imports of Huawei equipment almost certainly will be used as evidence that other countries should take similar steps. Similarly, the concurrent Commerce Department decision to add Huawei to its Entity List, which prevents US companies from exporting or transferring commodities, software or technology to any designated entity absent a waiver, could seriously undermine Huawei's ability to manufacture its products.

Although the Commerce Department has not announced a comment period, it is likely that there will be an

opportunity to respond to proposed rules or comment more broadly on how the order should be implemented. Any comment period will be announced in the Federal Register.

Cooley lawyers can assist in evaluating the impact of the order on telecommunications providers and manufacturers, in preparing comments to the Commerce Department and in compliance with the requirements ultimately adopted to implement the order.

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