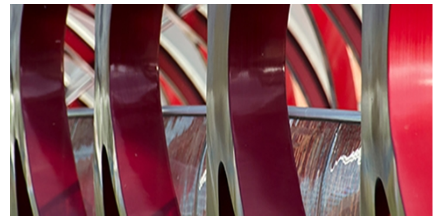
masuda funai



News & Types: Client Advisories

U.S. Technology Controls for 2020

1/15/2020

By: Asa W. Markel

Practices: Commercial, Competition & Trade

At the end of 2019, the U.S. Government enacted two additional restrictions on transactions involving foreign technology products, particularly those of Chinese origin or design.

First, the Federal Communications Commission (FCC) issued its determination that Huawei and ZTE equipment could no longer be purchased using the Universal Service Fund (USF), which exists to provide telecommunications access throughout the U.S. The November 22, 2019 FCC determination means that local networks and carriers in the U.S. who rely on the support of the USF will need to resort to other equipment suppliers. The larger importance of this determination is that it signals continuing hostility toward Huawei and ZTE by the U.S. Government. Starting from 2018, the U.S. Government itself has been barred from purchasing telecommunications equipment from either firm.

Second, the Department of Commerce (DOC) released its long-awaited draft regulations detailing its control over all transactions involving information and communications technology and services (ICTS) from suppliers connected or controlled by “foreign adversaries.” The November 27, 2019 draft regulations do not include a list of suppliers whose products will be banned. Rather, DOC reserves the right to review all ICTS transactions involving U.S. parties to determine if the transactions should be stopped or modified. The term “foreign adversary” is defined in fairly vague terms and will be left up largely to the discretion of the government. When President Trump ordered DOC to formulate these regulations, in May 2018, most commentators agreed that the restrictions would be used to curb use of Huawei products. However, DOC appears to have fashioned regulations that give it wide discretion over all telecommunications equipment and services transactions.

Going forward, companies will likely need to be concerned about transactions that involve sensitive or particularly high tech telecommunications projects that involve companies from countries like China that the U.S. Government continues to view as hostile. When the DOC regulations are put into their final form this year, they are still unlikely to name any specific countries or companies of concern. Moreover, it will not be a violation to have engaged in a transaction that DOC deems unacceptable – until after DOC actually issues a determination regarding the transaction. However, for most businesses, government interference halfway through a transaction is a serious enough risk to have a chilling effect for business with certain companies that have already been targeted by U.S. Government regulators.

The U.S. ban on transactions involving items on the Commerce Control List (of “dual-use” commercial items with possible military applications) with certain listed Huawei entities remains in effect. DOC has continued to renew its temporary general license (TGL), allowing U.S. entities to do business with the affected Huawei entities to the extent that such transactions only support or maintain existing systems. The purpose of the TGL is to provide a transition period for U.S. companies to shift their telecommunications systems to other suppliers. The TGL is currently set to expire after February 16, 2020. Otherwise, the White House and DOC have stated that they remain open to granting licenses for transactions with Huawei entities, as long as the technology involved does not pose a threat to U.S. national security. However, no government guidance has been given on what criteria would be used for granting such licenses. For the foreseeable future, businesses will have to remain vigilant regarding their telecommunications partners and suppliers.