

Commerce Permits Sharing of Controlled Technology with Huawei to Support Development of Industry Standards

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The Department of Commerce's Bureau of Industry and Security (BIS) has released [an interim final rule](#) which allows U.S. companies to provide Huawei with certain technology subject to the U.S. Export Administration Regulations (EAR) for the development of technological standards (e.g., standards for 5G wireless telecommunication). The Federal Register notice containing this interim final rule is expected to be published on June 18, 2020, and the rule will take effect upon publication.

Last year, BIS added Huawei and a number of its affiliates to its [Entity List](#). As a result, companies and individuals were prohibited from exporting, re-exporting, or transferring any goods, software, or technology subject to the EAR to Huawei without a license. Additional information about the Entity List and the implications of Huawei's listing can be found in [our prior briefing](#) on the subject. Given Huawei's participation in many organizations which set international product standards, Huawei's listing has made it difficult for U.S. companies to contribute to important standards-developing activities.

In order to address this issue, the interim final rule modifies the EAR to authorize certain releases of technology without a license to Huawei and its affiliates. Specifically, technology subject to the EAR that is designated as EAR99 or controlled on the Commerce Control List only for anti-terrorism (AT) reasons may be released to members of a standards organization without a license, including Huawei, if released for the purpose of contributing to the revision or development of a standard.

As used in the interim final rule, a "standards organization" is equivalent to a "voluntary consensus standards body" as defined in the [Office of Management and Budget Circular A-119 \(Rev. 2016\) \(the 2016 OMB Circular\)](#), meaning a type of association, organization, or technical society that plans, develops, establishes, or coordinates voluntary consensus standards using a voluntary consensus standards development process that includes the following attributes or elements:

- Openness: The procedures or processes used are open to interested parties. Such parties are provided meaningful opportunities to participate in standards development on a non-discriminatory basis. The procedures or processes for participating in standards development and for developing the standard are transparent.
- Balance of interest: The standards development process should be balanced. Specifically, there should be meaningful involvement from a broad range of parties, with no single interest dominating the decision-making.

- Due process: Due process shall include documented and publically available policies and procedures, adequate notice of meetings and standards development, sufficient time to review drafts and prepare views and objections, access to views and objections of other participants, and a fair and impartial process for resolving conflicting views.
- An appeals process: An appeals process shall be available for the impartial handling of procedural appeals.
- Consensus: Consensus is defined as general agreement, but not necessarily unanimity. During the development of consensus, comments and objections are considered using fair, impartial, open, and transparent processes.

As used in the interim final rule, the term “standard” is equivalent to the term “technical standard” as defined in the 2016 OMB Circular, which includes all of the following:

- Common and repeated use of rules, conditions, guidelines or characteristics for products or related processes and production methods, and related management systems practices;
- The definition of terms; classification of components; delineation of procedures; specification of dimensions, materials, performance, designs, or operations; measurement of quality and quantity in describing materials, processes, products, systems, services, or practices; test methods and sampling procedures; formats for information and communication exchange; or descriptions of fit and measurements of size or strength; and
- Terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process, or production method.

If you have any questions about this action, please contact your Winston & Strawn relationship attorney or one of the Winston contacts listed below.

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