

U.S. Commerce Department Clarifies Rules for Dealing with Huawei in Standards Setting

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On June 18, 2020, the Department of Commerce's Bureau of Industry and Security (BIS) published an interim final rule, sought by tech and telecom companies, that clarifies the rules of the road for global standards work in light of export restrictions on certain Chinese companies. This new rule amends the Export Administration Regulations (EAR) to authorize certain releases of technology without a license to Huawei Technologies Co., Ltd. and its affiliates in the context of international standards development. The rule became effective upon publication, and comments are due by August 17, 2020.

The rule responds to requests from across the private sector to ensure that the private sector can fully participate in critical global collaborations, a priority of the Administration and Congress. The rule authorizes the release of technology subject to the EAR that is designated as EAR99 or controlled on the Commerce Control List only for anti-terrorism (AT) reasons to Huawei and its affiliates on BIS's Entity List, in their capacities as members of a standards organization, without a license if the release is made for the purpose of contributing to the revision or development of a "standard" in a "standards organization." The rule adds definitions of "standard" and "standards organization" to the EAR. BIS adopted those definitions from the Office of Management and Budget's OMB Circular A-119: "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities."

Shifting Huawei-Related Export Restrictions Created Uncertainty

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In May 2019, BIS added Huawei and many of its affiliates to the Entity List. By placing Huawei on the Entity List, BIS prohibited exports, reexports, and transfers of U.S. goods, software, and technology, including common, off-the-shelf electronic components and commercial software as well as basic, low-level EAR99 technology, to Huawei.

Following its addition of Huawei to the Entity List, BIS also issued a Temporary General License (TGL) authorizing limited transactions with Huawei, including transactions necessary to develop 5G standards as part of a duly recognized standards body. However, in August 2019, BIS eliminated the standards-related authorization from the TGL, and, in conjunction with the rescission, issued a general advisory opinion to provide guidance on engagement with the listed Huawei entities in connection with standards setting or development activities. The opinion offered guidance on how industry should analyze such activities to determine whether an activity involves publicly available technology that is not subject to the EAR, meets an EAR exception, or, instead, is subject to the export ban. In addition, the advisory opinion provided examples of standards development activities prohibited by the export ban.

Nonetheless, given the broad array of activities and disclosures that take place in standards work, the advisory opinion did not eliminate all ambiguities or answer all industry questions. For example, certain preparatory/input activities and technical exchanges that routinely occur in standards setting but are not intended to be published may fall within the U.S. export ban on Huawei, which led to considerable uncertainty and, in some cases, chilled U.S. participation in standards development activities involving Huawei.

BIS Rules Impact U.S. Industry and Competitiveness

BIS's new rule permitting the disclosure of technology to Huawei in activities of standards organizations aims to fix this ambiguity. It also realigns export controls with the U.S. government's promotion of robust U.S. public and private sector engagement and leadership in international standards development activities.

The March 2020 Cyberspace Solarium Commission Report, for example, called for more active and effective U.S. government involvement in forums setting international information and communications technology (ICT) standards to strengthen and promote U.S. values, interests, and security. Indeed, BIS acknowledged the importance of U.S. industry participation in international standards organizations in its summary of the new rule: "As international standards serve as the building blocks for product development and help ensure functionality, interoperability, and safety of the products, it is important to U.S. technological leadership that U.S. companies be able to work in these bodies in order to ensure that U.S. standards proposals are fully considered."

This new rule removes significant industry uncertainty surrounding participation in standards development and enables greater U.S. participation in developing international ICT standards, which is critical to U.S. competitiveness and access to global markets. Notably, the scope of this authorization, unlike the prior authorization for standards setting that was revoked in August of last year, is not limited to 5G technology and instead broadly covers all standards-related activities.

Although the new rule permits releases of certain technology to Huawei, it falls within the context of a series of Trump Administration measures restricting transactions with China and Chinese tech and telecom companies, including another recent interim final rule that expanded export controls on certain foreign-manufactured products produced from U.S. technology or software when such items are destined to Huawei or its affiliates. Wiley continues to closely monitor Huawei-related developments as well as other U.S. restrictions on China. Should you have any questions, please do not hesitate to contact one of the attorneys listed on this alert.

Paul Coyle, a Law Clerk in Wiley's International Trade Practice, contributed to this alert.