

General Advisory Opinion Concerning Prohibited Activities in the Standards Setting or Development Context When a Listed Entity Is Involved

The Bureau of Industry and Security (BIS) is providing this guidance in response to questions that BIS has received regarding the disclosure of technology or software subject to the Export Administration Regulations (EAR) between and among members of standards setting or development groups or bodies. The questions relate to the addition on May 16, 2019, of Huawei Technologies Co., Ltd. (Huawei) and sixty-eight of its non-U.S. affiliates to BIS's Entity List, found in Supplement No. 4 to Part 744 of the EAR, and BIS's issuance on May 20, 2019, of a Temporary General License (TGL) relating to these 69 listed Huawei entities.¹ The TGL did not amend the Entity List, but modified the Entity List-based licensing requirements for these 69 entities, including authorizing "subject to other provisions of the EAR, engagement with Huawei and/or the sixty-eight non-U.S. affiliates as necessary for the development of 5G standards by a duly recognized international standards body." BIS has received a number of questions requesting further clarification concerning the TGL and/or engagement with the 69 listed Huawei entities in connection with other standards setting or development activities, including questions relating to the application of Section 734.7 of the EAR, pursuant to which certain publicly available information, including certain publicly available technology, may not be subject to the EAR. These questions tend to have similar themes or overlap with each other at least in part; rather than respond to them individually, BIS has determined that it is more efficient and more informative for the public to issue this general advisory opinion.

Guidance

There are different types of standards bodies and their practices and procedures can vary. Some standards organizations may operate under procedures where aspects of the standards discussion and development process may be widely and freely available to the public, some may only authorize public availability of a final written work product after a standard has been adopted by the organization, others may not authorize public availability at all, and still others may engage in some mix or combination of the foregoing. All of them are likely to exchange information and technology through a variety of means, both formally and informally, in meetings and technical discussions, through the draft and review of position papers, creation and review of presentations, and examination of datasets and other materials. Regardless of whether such exchanges occur within a standards body designated or characterized as an organization that develops international standards, a consortium, or some other designation, a variety of activities in the standards setting or development context are prohibited absent a license or other authorization from BIS if any of the listed Huawei entities (or another listed entity) is involved.

The Entity List-based licensing requirement will turn on whether the activity involves the exchange, transfer, or other disclosure of technology or software that is of U.S.-origin or is otherwise subject to the EAR (see Section 734.3 of the EAR), and does not involve technology

¹ *Additions to the Entity List*, 84 Fed. Reg. 22961 (May 21, 2019); *Temporary General License*, 84 Fed. Reg. 23468 (May 22, 2019) (effective May 20, 2019 through August 19, 2019).

or software made available to the public without restrictions upon its further dissemination (as set forth in Section 734.7). Examples of such prohibited activities include, but are not limited to, the following:

- Participating in a non-public working or study group involving the exchange, discussion, or other disclosure or release of such technology or software.
- Participating in a non-public standards or technical committee or subcommittee meeting, session, or other technical discussion, whether in person or via teleconference or videoconference, involving the exchange, discussion, or other disclosure or release of such technology or software.
- Participating in electronic exchanges within a standards body, by email or other means, that contain or attach such technology or software, including, for example, by providing access to documents or materials uploaded to or otherwise shared on a non-public or closed document repository or website.
- Releasing or otherwise providing access to blueprints, flowcharts, schematics, prototypes, or similar materials that contain such technology or software.
- Giving presentations or demonstrations in non-public settings, whether orally or via written or recorded materials, that contain disclosures of such technology or software.
- Exchanging or otherwise providing access to position papers, or drafts or edits of such materials, that disclose such technology or software without the intent of it being made publicly available in, for example, a final standards report or a manual, journal, or catalog.

These examples are illustrative; it is not feasible for BIS to specifically identify and list each type of exchange or communication of technical information that contains technology or software subject to the EAR. Other exchanges or disclosures of such information not made available to the public without restrictions upon its further dissemination (i.e., non-public exchanges or disclosures) would not fall within Section 734.7 of the EAR, as discussed above.² For additional guidance on specific scenarios not captured in the examples above, exporters may request an advisory opinion under the procedures described in Part 748 of the EAR. As indicated in the rule that added the 69 Huawei entities to the Entity List and in the TGL, the Entity List-based licensing requirements are in addition to any other licensing requirements that may apply.

² Section 734.7 of the EAR provides guidance as to interpreting the concept of open participation in standards setting bodies as it relates to the “publicly available” concept of the EAR.