

Before the  
**BUREAU OF INDUSTRY AND SECURITY**  
Washington, DC 20230

In the Matter of	)	
	)	
Release of “Technology” to Certain Entities on	)	Docket No. 200611-0158
The Entity List in the Context of Standards	)	RIN- 0694-AI06
Organizations	)	

**COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Telecommunications Industry Association (TIA) appreciates the opportunity to provide input regarding the Release of “Technology” to Certain Entities on the Entity List in the Context of Standards Organizations.<sup>1</sup> As both an advocacy organization for trusted manufacturers of ICT equipment and a standards-setting body, TIA represents more than four hundred U.S. and global manufacturers and vendors of information and communications technology (ICT) equipment and services. TIA member companies design, produce, and sell equipment and services in countries around the world, and each company has a vital stake in encouraging participation in international ICT standards development.

At a high-level, this interim final rule is a step forward with respect to the ability of U.S. companies to participate in global standards setting. This step forward, however, follows several previous steps backward as the Bureau of Industry and Security (BIS) inadvertently took actions that sidelined U.S. participation in global standards development and left American standards

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<sup>1</sup> Release of “Technology” to Certain Entities on the Entity List in the Context of Standards Organizations, 85 Fed. Reg. 36719 (June 18, 2020) (to be codified at 15 C.F.R. § 744), <https://www.federalregister.gov/documents/2020/06/18/2020-13093/release-of-technology-to-certain-entities-on-the-entity-list-in-the-context-of-standards>

development organizations scrambling to interpret how BIS guidance would impact their work. As a direct result of such previous BIS actions, U.S. companies have been forced to pare back engagement at international standards development organizations both in the context of formal proposals and information-sharing, and in the day-to-day, open communication that takes place on the margins of standards development meetings. The result has been a blow to U.S leadership in standards-setting, with some U.S. working group chairs in 5G-related standards development organizations ceasing participation for fear that they might inadvertently violate export controls laws. Uncertainty around U.S. law in this area has even contributed to the decision by some SDOs – such as the RISC-V Foundation – to relocate from the United States to overseas.

While TIA welcomes this new, interim final rule, more corrective action is needed. BIS has the opportunity to leap forward in a revised filing and support American industry by implementing the following recommendations:

1. TIA recommends that BIS acknowledges that standards development activities do not fall under the scope of the Export Administration Regulations (EAR).
2. Absent a determination that standards development is outside of the scope of the EAR, TIA recommends that the exclusion in this interim final rule be extended to all listed entities.
3. TIA recommends that BIS provides extensive opportunities for dialogue and comment prior to further rulemaking on any application of the EAR to standards development so that industry can help the Bureau achieve its goals without causing undue harm to U.S. technology leadership in the field of standards development.

In support of TIA's recommendations on this issue, we would like to share the following information based on TIA's experience as an SDO and on the priorities and experience of TIA member companies.

**I. INTERNATIONAL STANDARDS SUPPORT ICT EXPORTS, CONNECTIVITY, AND SECURITY GLOBALLY.**

International standards have long been the bedrock of the ICT sector because of the inherent need for interoperability in the context of global communications. While international standards are desirable in nearly all sectors, they are fundamental to ICT products because without them the basic function of the products is diminished. To date, the United States has been a global leader in ICT standards-setting and participation. This leadership has been instrumental in fostering a global technology environment and vibrant product marketplace that has greatly benefited U.S. companies and consumers.

International standards are created under frameworks that require transparent processes that promote the development of more secure technologies. The voluntary, consensus-driven process that drives standards development is a source of strength for U.S. ICT companies, as it allows for global industry to come together and set shared parameters for technology. These shared parameters lower barriers to trade around the world, allowing trusted manufacturers of ICT equipment to develop products that are interoperable and that can be manufactured and designed at scale. By using 3GPP's standards for 5G radio access equipment, for example, companies can sell roughly the same components and network gear to companies in the United States that they do in Europe, Africa, or Central Asia. This worldwide compatibility decreases prices; reduces environmental externalities by driving efficiency and interoperability; and allows companies to focus on quality, safety, and innovation.

## **II. TIA'S ROLE IN DEVELOPING ICT STANDARDS DEMONSTRATES THE VALUE OF GLOBAL PARTICIPATION.**

As a leading U.S.-based telecommunications standards development organization, TIA's engagement with global telecommunications companies has yielded concrete benefits for U.S. industry. As an organizational founder of 3GPP2, TIA helped develop CDMA in coordination with companies from China, Korea, Japan, and from around the world. This included Huawei through their participation in the activities of the China Communications Standards Association (CCSA). CDMA was pivotal in the expansion of 3G services which galvanized the digital revolution through the early 2000s period. This standard became a regional and worldwide success in part because of the international support it received during its development. By 2011, roughly 300 service providers utilized this standard and boasted over 623.3 million mobile subscribers.<sup>2</sup>

TIA's role as a founding partner of the oneM2M – a global organization developing interoperable Machine-to-Machine Communications for Internet of Things (IoT) applications – is another demonstration of how Chinese participation is valuable to U.S. industry in the context of international standards development. Founded in 2012, this global partnership fosters interoperability of IoT technologies based on the contributions of its members and the results of various working groups within the body. Leading global ICT standards development organizations contribute to oneM2M's work including ARIB (Japan), ATIS (US), CCSA (China), ETSI (Europe), TIA (USA), TSDSI (India), TTA (Korea), and TTC (Japan). Specific initiatives include projects on API specification, IoT configuration, and Machine-to-Machine solutions. The OneM2M Partnership now boasts over 200 participating partners with some of the

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<sup>2</sup> *CDMA History*, CDMA DEVELOPMENT GROUP (CDG) (updated 2020), [http://www.cdg.org/resources/cdma\\_history.asp](http://www.cdg.org/resources/cdma_history.asp)

largest telecommunications firms in the world including Huawei and other Chinese entities. Without participation and buy-in from these global players, U.S. firms will likely find additional obstacles in terms of their abilities to access foreign markets as individual countries pivot from engaging globally with international standards to instead relying on opaque, domestically generated, and potentially inferior standards that serve as a barrier to trade.

It is important to note that both within the context of TIA's own standards development across various technical committees and its participation in larger international standards-setting, TIA operates by processes that are fair, open, and inclusive. Per the TIA Procedures for American National Standards (PANS), TIA promotes fair and equitable participation without dominance by a single interest, timely and adequate notice of any action taken by a formulating group, balance in resolving different interests, and good faith coordination and harmonization of potential conflicts.<sup>3</sup> The process includes the following steps:

1. Standards development begins with notification to all directly and materially affected persons of a formulating group's decision to approve a new standards project.
2. TIA then submits a form to the American National Standards Institute (ANSI) notifying the organization of the project. During the development process if there is a change in the stakeholders involved, the formulating group notifies the TIA Standards Department which then notifies ANSI.
3. The project then receives public review and comments from both ANSI and outside interested parties. The formulating group will address the comments, give prompt

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<sup>3</sup> TELECOMM. INDUSTRY ASS'N, TIA PROCEDURES FOR AMERICAN NATIONAL STANDARDS (PANS) (2018), [http://standards.tiaonline.org/sites/default/files/pages/TIA\\_PANS\\_2018\\_03\\_23.pdf](http://standards.tiaonline.org/sites/default/files/pages/TIA_PANS_2018_03_23.pdf)

consideration to concerns, and attempt to resolve all expressed objections including any assertions of conflict or duplication.

4. The proposed standard then goes up for vote with procedures in place to ensure consensus. If there are substantive changes to any proposed rule after public review, the proposed rule will be resubmitted for a public comment period.
5. Parties may submit objections to the vote and if any of these objections remain, they are notified of an appeals process to resolve any outstanding issues.

This rigorous, public, and procedure-driven process is typical of American standards development and demonstrates how concerns about deemed exports of sensitive technical information do not apply in the context of standards development activities.

While TIA specifically was given an exemption in the first temporary general license issued in May of 2019<sup>4</sup> and Huawei is neither a member of TIA nor does it directly participate in any of TIA's various standards activities, TIA has nonetheless been impacted by the decision to apply the EAR to standards development activities. TIA standards staff report a broad chilling effect on standards cooperation and note that it is increasingly difficult for Chinese nationals to secure visas to travel to the United States in order to participate in standards development activities. As a result – and in concert with the addition of a growing number of Chinese technology companies to the entity list – opportunities for cooperation on standards have faced growing challenges.

### **III. STANDARDS DEVELOPMENT SHOULD NOT BE UNDERSTOOD TO FALL UNDER THE SCOPE OF EXPORT ADMINISTRATION REGULATIONS.**

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<sup>4</sup> Temporal General License, 84 Fed. Reg. 23468 (May 20, 2019) (codified at 15 C.F.R. § 744), <https://www.federalregister.gov/documents/2019/05/22/2019-10829/temporary-general-license>

The assertion by BIS, in filings pursuant to the addition of Huawei to the entity list, that standards development activities broadly fall under the scope of the EAR is a novel interpretation and application of the statute that damages U.S. participation in global standards development. From a legal perspective, clarifying that the EAR does not apply to standards development is consistent with the plain meaning of the statute. 15 C.F.R. § 734.3(b) states that the following are explicitly not subject to the EAR:

4) Information and “software” that:

- (i) Are published, as described in § 734.7;
- (ii) Arise during, or result from, fundamental research, as described in § 734.8;
- (iii) Are released by instruction in a catalog course or associated teaching laboratory of an academic institution;
- (iv) Appear in patents or open (published) patent applications available from or at any patent office, unless covered by an invention secrecy order, or are otherwise patent information as described in § 734.10;
- (v) Are non-proprietary system descriptions; or (vi) Are telemetry data as defined in Note 2 to Category 9, Product Group E.<sup>5</sup>

§ 734.7 of the EAR clarifies that unclassified “technology” or “software” is “published,” and is thus not subject to the EAR when it has been made available to the public.<sup>6</sup> TIA reads this statutory language to mean that discussions with representatives of listed entities in the context

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<sup>5</sup> Export Administration Regulations 15 C.F.R. § 734.7 (2020), <https://www.bis.doc.gov/index.php/documents/regulations-docs/2382-part-734-scope-of-the-export-administration-regulations-1/file>

<sup>6</sup> Id. at 734.7

of legitimate standards-setting activities are not be subject to the EAR as they are made in the context of an open and transparent process with the intent to publish a standard.

This interpretation is in line with the plain meaning of the statute and determinations made by other executive agencies. ANSI has noted that other economic sanctions such as the Treasury Department's Office of Foreign Assets Control (OFAC) application of sanctions pursuant to the Specially Designated Nationals and Blocked Persons List (SDN List) specifically did not apply restrictions to participation in standards development activities because such interactions were public and intended to result in published standards.<sup>7</sup>

#### **IV. MAINTAINING RESTRICTIONS ON LISTED ENTITIES OTHER THAN HUAWEI PERPETUATES UNCERTAINTY.**

While Huawei is certainly the largest company on the entity list involved in standards development activities, it is not the only one. By lifting license requirements for Huawei but neglecting to address restrictions on other entities, BIS perpetuates uncertainty regarding the ability of U.S. firms to fully participate in international standards development. As an example, Fiberhome Technologies Group was added to the entity list on June 5, 2020. The company participates in a number of standards forum and consortia including several working groups under 3GPP,<sup>8</sup> ITU-T,<sup>9</sup> and the Wifi Alliance.<sup>10</sup> Since Fiberhome is not covered by this IFR, barriers still remain to U.S. participation and engagement in any standards development organization where Fiberhome participates. The same is true for standards development

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<sup>7</sup>Letter from Jeanette A. Miller, Licensing Division Chief OFAC, King & Spalding LLP, Case No. SU-2015-323915-1 (Mar. 23, 2016), <https://share.ansi.org/Shared%20Documents/Standards%20Activities/Critical%20Issues/OFAC/OFAC-Sudan-2016.pdf>

<sup>8</sup>*Specifications Groups*, 3GPP (2020), <https://www.3gpp.org/specifications-groups>

<sup>9</sup>Int'l Telecomm. Union [ITU], Future Networks Including Cloud Computing, Mobile and Next-Generation Networks for ITU-T, SG 13 (June 13, 2016) <https://www.itu.int/md/meetingdoc.asp?lang=en&parent=T13-SG13-C&source=FiberHome%20Technologies%20Group>

<sup>10</sup>*Member Companies*, WiFi ALLIANCE (2020), <https://www.wi-fi.org/membership/member-companies>



organizations where Hikvision, the Harbin Institute of Technology (HIT), and other entities engaged in standards development engage with global partners.

It is also important to note that in some settings, determining whether someone represents a listed entity is not always straightforward. In organizations where participation or their votes are based on country affiliation, the corporate entity a participant is affiliated with may not be immediately clear. Some of the most prominent standards setting organizations in the world use this model, including the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC) and the International Telecommunications Union (ITU). As a result, a haze of uncertainty descends over interactions in these forums, as fears about possibly violating the EAR prevent robust participation.

This uncertainty is further compounded by the possibility that future additions to the entity list could suddenly alter the ability of U.S. companies to engage with other participants. As an example, U.S. entities might be perceived by global partners as less desirable candidates for leadership positions within standards development organizations and working groups if their ability to fully participate and coordinate between members is contingent on BIS not taking action against other participants. The negative effects of this uncertainty make it all the more urgent that BIS take broader action by affirming that the EAR does not apply to standards development, or if this is not possible in the context of this rulemaking, instead providing a license exemption to all listed entities for the purpose of standards development.

Finally, holding other listed entities to a stricter standard than Huawei sends a mixed message to America's partners and allies about the U.S. government's determination that Huawei

is a security threat.<sup>11</sup> For example, by applying the EAR more stringently to the Harbin Institute of Technology than to Huawei, the U.S. government implies that HIT is more of a security concern than Huawei. By creating a general exemption for standards development, BIS eliminates differentiation between listed entities and makes the U.S. government's message with respect to the company clearer to both domestic and international stakeholders.

## **V. CONSULTATION WITH INDUSTRY AND WITH NIST IS VITAL TO EFFECTIVE POLICYMAKING IN THIS AREA GOING FORWARD.**

While TIA believes that the EAR's statutory language does not apply to standards development, to the extent that BIS does engage with this area going forward TIA strongly recommends extensive engagement with the private sector and with the National Institute of Standards and Technology (NIST), which has statutory responsibilities for coordinating federal government standards engagement and also federal engagement with the private sector. There are numerous ways to coordinate with possibly affected parties going forward including:

1. *Consultation with BIS Technical Advisory Committees (TACs)*: TACs provide an easy way for BIS to consult with trusted industry stakeholders on the impact of additions to the entity list.
2. *Ad hoc consultations with industry*: TIA and the Information Technology Industry Council (ITI) both have standards-focused policy committees with industry stakeholders ready and able to provide input on emerging policies. Additionally,

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<sup>11</sup> TIA concurred with the FCC's determination that suppliers of specific concern should be ineligible for USF funding. See generally Comments of the Telecommunications Industry Association, *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89 (filed June 1, 2018), available at <https://mk0tiamultisitee8xgk.kinstacdn.com/wp-content/uploads/2018/06/TIA-Comments-to-FCC-on-USF-Security-6-1-18.pdf>

ANSI works closely with U.S. government stakeholders and has the ability to leverage connections across a range of industries.

3. *Interagency consultation with NIST:* BIS has, for good reason, had limited exposure to the range of stakeholders engaged with standards development. For NIST though, coordinating U.S. government action on standards is their primary mission, and their deeper collaboration with the private sector on this topic will yield to better, more targeted policies.

With regard to future rulemaking on this topic, TIA recommends an “all-of-the-above” approach in order to develop smarter and more targeted policies *vis-à-vis* standards.

## **VI. CONCLUSION**

As the leading American association for trusted manufacturers of telecommunications equipment and as an ANSI-accredited standards development organization that engages with global partners, TIA has a strong interest in ensuring the conditions for maximum U.S. participation in standards development. We believe that adopting TIA’s recommendations will support continued U.S. technological leadership and ensure that markets around the world remain open to American products and services. TIA staff and members of TIA’s Standards and IPR Policy Committee (SIPC) welcome the opportunity to engage with BIS in the course of further work on this Interim Final Rule and appreciate the hard work of the Bureau’s staff.

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