



Comments from the American National Standards Institute on Bureau of Industry and Security Interim Final Rule

Docket Number 200611-0158

The American National Standards Institute¹ (ANSI) welcomes the opportunity to provide its input to the Bureau of Industry and Security (BIS) Request for Comments on the Interim Final Rule – Release of “Technology” to Certain Entities on the Entity List in the Context of Standards Organizations.

Continued limitations on the ability of U.S. companies to engage in standardization venues where entities included on the Entity List also participate creates a very real risk of fragmentation in international standardization, increased compliance costs for industry, and reduced credibility of U.S.-based SDOs as open global standards organizations. The issue addressed by the Entity List is a serious one—technology transfers to entities involved in activities that may be contrary to U.S. national security interests. However, by their very nature, open global standards organizations are engaged in activities that enable U.S. economic growth and do not involve technology transfers contrary to U.S. national security interests. The U.S. government should ensure that U.S. companies are able to engage fully with the SDOs where industry leaders define the next wave of standardized technology.

As the coordinator of the U.S. private sector-led standardization system and the U.S. member of two major international standards setting bodies – the International Organization for Standardization (ISO) and, via our U.S. National Committee (USNC), the International Electrotechnical Commission (IEC) - ANSI is an advocate for broad engagement in standards activities that support U.S. competitiveness and enable innovation. A significant portion of America’s economic growth comes from industries and manufacturing processes that barely existed twenty years ago. As industries and manufacturing processes continue to evolve, they offer substantial promise for job creation and market expansion that can support our next generation. But their success depends upon continued innovation. Standardization provides a solid foundation of knowledge and understanding that allows creative technological innovation to grow and enables an ecosystem for providing competitive solutions to global markets.

Therefore, ANSI strongly recommends that BIS consider the following clarifications and expansions to the interim final rule to address the continued requirements that hinder U.S. companies’ engagement in standardization:

1. expand the scope of the Entity List authorization to all entries on the List;

¹ www.ansi.org

2. include software and technology subject to the EAR that is designated as EAR99, controlled on the Commerce Control List for anti-terrorism reasons only, or designated as 5D002 or 5E002; and
3. recognize that standards development activities include any action taken by a standards development organization for the purpose of developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard conformity assessment activities.

Continued U.S. Access to Global Standards Forums is Critical to Competitiveness

U.S. industry is increasingly global and invests in relevant international standards forums to develop standards. The United States has long been a leader in the international standards arena and key contributor to international solutions. The ability to participate fully in these open forums is critical to U.S. competitiveness. Others are clamoring for leadership roles that U.S. representatives currently occupy. Abandoning these roles to our foreign competitors would be devastating to U.S. industry and to the U.S. government's interests for U.S. leadership in emerging technologies.

Standards development organizations (SDOs) are integral to the process of commercializing and deploying cutting-edge technologies, such as 5G cellular communications, Artificial Intelligence (AI), Internet of Things (IoT) and many more.

These organizations are composed of representatives of companies and other relevant stakeholders that work together, share information, and create technical specifications to guide technology development and help ensure that hardware and software created by different companies interoperate seamlessly.

Traditionally, this system has benefited U.S. companies, which are often the first to develop an open marketplace for a particular technology and can thus utilize standard-setting bodies to further the application and reach of that technology. Active participation in global standards forums also directly aligns with the stated policy objectives of the U.S. government, including: the President's *Executive Order on Maintaining American Leadership in AI*, the *National Strategy for Secure 5G*, and the *Secure 5G & Beyond Act*. The goals of these policies cannot be achieved if U.S. companies are limited and constrained in their ability to participate in and lead standards development activities.

The scale of the challenge is important to keep in mind, as there are hundreds of standards organizations representing tens of thousands of participating individuals and firms, and technical projects that affect every facet of industry. This very broad-based participation precludes any one company from dominating the process and unduly influencing the resulting standards. Establishing a permanent and broadly applicable exemption based on the new Huawei exemption language that BIS has proposed is necessary to address this challenge at scale.

The comments below are informed by input from ANSI members and focus on aspects of the interim final rule (IFR) – listed above - that would benefit from expansion or clarification. ANSI also offers comments for BIS consideration regarding implementation of the IFR.

Compliance with the EAR

The BIS interim final rule (IFR) states “the assessment of whether “technology” is subject to the EAR is the same regardless of whether a person on the Entity List is a member of, or participates in, the standards setting or development group or body”. It would be helpful for the IFR to acknowledge in addition that the interpretation that the burden of compliance with the EAR lies solely on the entity sharing technical information rather than on the convening organization providing the forum for technical discussions aimed at development or updating of a voluntary consensus standard.

Uncertainty regarding how the EAR impact standards setting is causing U.S companies to harbor reservations about participating fully in the standards development process, threatening to undermine U.S. technological leadership in multiple sectors. This uncertainty could also increase the prospect of U.S. or other companies electing to invest in proprietary technology rather than putting investment in standardized technologies at risk. U.S. industry needs clarity and predictability from BIS so that companies developing standards in emerging technologies do not hold back while participating.

ANSI encourages BIS to take additional actions to resolve ambiguity and provide clarity and consistency to U.S. companies and U.S.-domiciled SDOs with regard to participation in standards development activities involving listed companies beyond Huawei.

For example, even if the BIS license requirement does not apply, items subject to the EAR are still subject to recordkeeping or other applicable EAR requirements. It is not known what new administrative and regulatory requirements will apply to those participating in standards development activities covered by the IFR. Clarification on this issue is important, as any violations of the EAR may result in criminal and administrative penalties.

We further urge BIS to interpret the OMB Circular A-119 definition of a voluntary consensus standards body in a goal-focused, flexible manner. SDOs active in emerging technology areas comprise a range of management and operational structures. As appropriate, BIS should treat participation in any organization whose processes are consistent with the principles outlined in the World Trade Organization Technical Barriers to Trade (TBT) Agreement and the TBT Committee decision on international standards favorably. This flexibility would best meet the rule’s underlying objective of permitting participation in the development of widely accepted, market-driven and innovative standards and would be consistent with how OMB Circular A-119 has been applied in practice.

Expand BIS Huawei-specific Exemption

The Federal Register Notice states that “BIS is amending the Export Administration Regulations (EAR) to authorize the release of certain technology to Huawei and its affiliates on the Entity List without a license if such release is made for the purpose of contributing to the revision or development of a “standard” in a “standards organization”.”

We appreciate that the interim final rule is intended to address the confusion created by the 5G “exception” contained in the May 22, 2019 Temporary General License, as extended and amended, and commend BIS for taking this step. However, limiting the interim final rule to establishing a Huawei-specific exemption from certain EAR provisions implies that other Entity Listed firms are not exempt. Yet the same logic applied to Huawei has equal merit when applied to any other company on the entity list. Limitations on other listed entities and the prospect of future additions to the Entity List will continue to create confusion for U.S. companies participating in global standards organizations and activities.

Importantly, it may be difficult for U.S. participants to know the company affiliation of all participants in international standards organizations where participation is via national body (e.g. ISO, IEC, and International Telecommunication Union). In national body-based organizations, individuals are required to declare the country with which they are affiliated but are not required to disclose which organization employs them. In practice, some disclose their employer and some do not. Further, the disclosures are often not available to participants at the start of the meeting. This uncertainty could stifle U.S. participation in these standards organizations absent an expansion of the interim final rule.

BIS should expand the scope of the standards authorization to include all entries on the Entity List. Multiple entities participate in standards organizations, and such a revision will allow U.S. companies to participate in critical standards development activities without the need to revisit export compliance issues on a per-entity basis, ensuring uninterrupted U.S. participation and leadership in standards organizations.

Clarify/Broaden Authorization Scope

The Federal Register notice states, “...this rule revises the Entity List to authorize certain releases of technology without a license. 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.”

We urge BIS to clarify the scope of the exemption to include both EAR99 and AT-controlled software in the scope of the authorization. Some standards bodies exchange source and executable software code in the course of their work. Given that BIS is already comfortable with the transfer of EAR99 and AT-controlled “technology” in the context of identified standards activities, expanding the authorization to include software should not harm U.S. national security.

Since some standards development activities will relate to encryption, we also recommend that BIS add the following commercial encryption items - software (5D002) and technology for the development, production and use of equipment or software (5E002) - to the scope of the authorization. This will facilitate U.S. participants’ participation in relevant discussions in standards organizations.

The inclusion of “software” as well as “technology” in the scope of authorization is important. In the 5G space, the U.S. is pursuing the development and adoption of standards to establish an open internet architecture and the virtualization of network components into software-based operations in order to reduce reliance on any single equipment provider. Software is equally important in the AI space, to include AI intelligence platforms, chatbots, deep learning and machine learning software.

Finally, we note that many standards are insufficiently detailed to allow vendors to create reliably interoperable products. This “last mile” of interoperation is frequently bridged by standards organizations convening “plug-fests,” at which vendors can work out the final wrinkles necessary to allow end-users to enjoy the benefits of seamless interoperation and avoidance of vendor lock-in. Other common, collaborative, standards-related activities include compliance testing and reference implementation development. In order to allow the full commercial benefit of standards development to be achieved, the transfer of standards-related technology and software for these activities should be permitted without risk as well. We encourage BIS to make it clear that activities related to certification or conformance testing, when performed by a standards organization or in support of a standards activity, are covered. This would help ensure that U.S. contributions can be made to all standards development activities and continued normal operations of standards bodies based in the United States.

This is consistent with OMB Circular A-119, which recognizes that standards organizations need to be involved in many types of activities necessary to *promulgate* a standard so that it is effective – and that the Executive Branch should adopt policies to facilitate such activities. The Circular refers to the definition of such “standards-related activity” in the Trade Agreements Act of 1979,^[1] which is “the development, adoption, or application of any standard, technical regulation, or conformity assessment procedure.” Similarly, the SDO Advancement Act of 2004 defines “standards development activity” as “any action taken by a standards development organization for the purpose of developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard conformity assessment activities...”^[2]

About ANSI

ANSI is a federation whose members are government agencies, trade associations, standards developing organizations, professional societies, companies, academic and international bodies, and consumer organizations looking to harness the power of standards to position themselves for long-term success. ANSI represents the interests of more than 270,000 companies and 30 million professionals worldwide. As the voice of the U.S. standards and conformity assessment system, ANSI empowers its members and constituents to strengthen the U.S. marketplace position in the global economy while helping to assure the safety and health of consumers and the protection of the environment.

^[2] 15 U.S.C. § 4301(a) (7).

Voluntary consensus standards for products, processes, and services are at the foundation of the U.S. economy and society. The United States has a proud tradition of developing and using voluntary standards to support the needs of our citizens and the competitiveness of U.S. industry in world markets.

ANSI oversees the creation, promulgation, and use of thousands of norms and guidelines that directly impact businesses in nearly every sector: from acoustical devices to construction equipment, from dairy and livestock production to energy distribution, and many more. Across the broad range of topic areas where ANSI oversees work, information and communications technology standards are both a horizontal and vertical focus area.

ANSI's wholly owned subsidiary, the ANSI National Accreditation Board (ANAB), is actively engaged in the accreditation of conformity assessment bodies – assessing the competence of organizations determining conformance to standards.

And via the ANSI affiliate Workcred, the Institute supports efforts to strengthen workforce quality by improving the credentialing system, ensuring its ongoing relevance, and preparing employers, workers, educators, and governments to use it effectively.

International Standardization

ANSI promotes the use of U.S. standards internationally, advocates U.S. policy and technical positions in international and regional standards organizations, and encourages the adoption of international standards as national standards where they meet the needs of the user community.

The Institute is the sole U.S. representative and dues-paying member of the two major non-treaty international standards organizations, ISO and IEC. As a founding member of ISO, ANSI plays a strong leadership role in its governing bodies while U.S. participation, via the USNC, is equally strong in the IEC.

To formulate and advance consensus U.S. positions with respect to ISO and IEC work, ANSI accredits U.S. Technical Advisory Groups (TAGs) to ISO and approves USNC TAGs to IEC. The primary purpose of these TAGs is to develop and transmit, via ANSI, U.S. positions on activities and ballots of ISO and/or IEC Technical Committees (and, as appropriate, subcommittees and policy committees). ANSI's *International Procedures* provide the due process-based framework within which U.S. TAGs develop and coordinate U.S. positions.

ANSI is a permanent member of both the ISO Council and Technical Management Board. ANSI and its members participate in more than 78% of ISO and JTC1 Technical Committees (TCs) and Subcommittees (SCs) and administer 14% of TC and SC Secretariats. ANSI's USNC is a permanent member of the IEC Council Board, Standardization Management Board, and Conformity Assessment Board. The USNC participates in over 95% of IEC TCs and SCs, and administers 14% of TC and SC Secretariats.

American National Standards

Domestically, ANSI accredits standards developing organizations (SDOs) and approves standards from these organizations as American National Standards (ANS). More than 240 organizations are currently accredited. To achieve the ANSI-Accredited Standards Developer (ASD) designation – the first step for developing ANS – SDOs must comply with ANSI’s [Essential Requirements](#) and demonstrate commitment to a set of principles that includes openness, balance, due process, and consensus. The principles contained in the *Essential Requirements* are consistent with the *United States Standards Strategy* (USSS) and World Trade Organization (WTO) TBT Agreement principles for the development of international standards. Conformance to these principles means that the U.S. can set an example globally for what open and trusted standardization looks like. ASDs meet the definition in OMB Circular A-119, *Federal Participation in the Development and use of Voluntary Consensus Standards and in Conformity Assessment Activities*, of “voluntary consensus standards body.”

Conclusion

ANSI thanks BIS for this opportunity to provide comments. We support Commerce’s efforts to protect national and economic security, and welcome the opportunity to work with BIS in the future so that we can continue to ensure U.S. leadership and participation in standards activities and maintain the viability of U.S.-based standards organizations.

Comments submitted by:

Mary Saunders

Vice President for Government Relations and Public Policy

ANSI

msaunders@ansi.org