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Nazak Nikakhtar  
Assistant Secretary for Industry and Analysis,  
performing the non-exclusive duties of the Under Secretary for Industry and Security  
U.S. Department of Commerce  
14th Street and Constitution Avenue, NW  
Washington, DC 20230

Dear Ms. Nikakhtar:

On behalf of the American National Standards Institute ("ANSI") and ANSI-appointed U.S. Technical Advisory Groups ("TAGs"), and after notification to the U.S. National Institute of Standards and Technology (NIST), I'm writing to set forth ANSI's view that continued engagement in open and unrestricted standards development activities is unaffected by the recent actions of the Bureau of Industry and Security (BIS) regarding Huawei Technologies Co. Ltd. This view is based on the Department of Commerce's Export Administration Regulations ("EAR") as well as guidance ANSI received directly from the Treasury Department's Office of Foreign Assets Control ("OFAC") in 2012 and again in 2015.

On May 16, 2019, in the interest of national security, BIS added Huawei Technologies Co. Ltd. and its sixty-eight non-U.S. affiliates ("Huawei") to the Department of Commerce ("DOC") "Entity List" which places restrictions on the export, re-export and transfer of items "subject to the EAR." On May 24, BIS then issued a 90-day temporary General License that, among other things, permits the continued sale of certain critical U.S. and foreign components and technology to Huawei and, in turn, allows Huawei to continue to support existing facilities of U.S. information and communications technology services. Relevant here, the General License also states that standards developers may continue to engage with Huawei "as necessary for the development of 5G standards as part of a duly recognized international standards body." That latter "exception" has raised questions whether the otherwise normal engagement in open and unrestricted standards activities with Huawei is still permitted. We believe it is.

### *ANSI and its International Standards Development Activities*

Open and unrestricted standards activities include, but are not limited to, collaboration in technical committees, subcommittees, and working groups, non-proprietary exchanges with national delegation experts and thousands of international standards participants that are intended to result in published standards beneficial to U.S. interests. Using the International

Organization for Standardization (“ISO”) as an example, information shared in the development of ISO standards in ISO committees at any stage is regarded as public and “open” as there are no restrictions on those participating to keep it confidential, and indeed, those participating are encouraged to seek broad input. During formal voting stages of ISO draft standards, the drafts are made widely and publicly available and ISO members are expected to make the drafts available to anyone in their own country for review and comment, in order to comply with World Trade Organization (“WTO”) Technical Barriers to Trade (“TBT”) Agreement requirements for a public review period for standards. These unclassified, non-proprietary standards are intended to be published and made available to the public without restrictions upon further dissemination.

The WTO’s TBT Agreement Committee Decision states that the global relevance of a standard is determined by how it was developed, not where. More specifically, the development of international standards must rely upon a number of principles, including openness, impartiality, consensus, transparency, and coherence, among others. In other words, the global relevance of a standard cannot and should not be measured by which organization developed it. The degree to which a standard is used in the global marketplace is the best measure of an international standard. In the U.S., we refer to this concept as the “multiple-path approach.” The WTO TBT Committee Decision is referenced both in U.S. government policy documents and in recent trade agreements negotiated by the U.S. with key trading partners.

#### *The EAR Does Not Limit Such Open Standard Development*

We understand that such open and unrestricted standards activities involving publicly-available information, as detailed below, do not require a general or specific license under the EAR because such activities, by definition, are not subject to EAR restrictions under 15 CFR 734.3(b). Items explicitly not subject to EAR include the following:

3) Prerecorded phonograph records reproducing in whole or in part, the content of printed books, pamphlets, and miscellaneous publications, including newspapers and periodicals; printed books, pamphlets, and miscellaneous publications including bound newspapers and periodicals; children's picture and painting books; newspaper and periodicals, unbound, excluding waste; music books; sheet music; calendars and calendar blocks, paper; maps, hydrographical charts, atlases, gazetteers, globe covers, and globes (terrestrial and celestial); exposed and developed microfilm reproducing, in whole or in part, the content of any of the above; exposed and developed motion picture film and soundtrack; and advertising printed matter exclusively related thereto.

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.

Under Section 734.7 of the EAR, unclassified “technology” or “software” is “published,” and is thus not “technology” or “software” “subject to the EAR,” when it has been made available to the public without restrictions upon its further dissemination, such as through any of the following:

(1) Subscriptions available without restriction to any individual who desires to obtain or purchase the published information;

(2) Libraries or other public collections that are open and available to the public, and from which the public can obtain tangible or intangible documents;

(3) Unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the interested public;

(4) Public dissemination (i.e., unlimited distribution) in any form (e.g., not necessarily in published form), including posting on the Internet on sites available to the public; or

(5) Submission of a written composition, manuscript, presentation, computer-readable dataset, formula, imagery, algorithms, or some other representation of knowledge with the intention that such information will be made publicly available if accepted for publication or presentation:

(i) To domestic or foreign co-authors, editors, or reviewers of journals, magazines, newspapers or trade publications;

(ii) To researchers conducting fundamental research; or

(iii) To organizers of open conferences or other open gatherings.

In light of these EAR provisions, ANSI does not believe that discussions with Huawei representatives participating in open and unrestricted standards activities are “subject to the EAR” in the first place and therefore, the recent Temporary General License does not place any additional burdens on standards development in such activities that include Huawei.

### *Recent OFAC Guidance Expressly Permits Standards Activities*

Guidance provided in response to inquiries ANSI made to OFAC in 2012 and 2015 is informative. We were specifically advised by OFAC that: "all U.S. persons engaged in ANSI's standard-setting activities, as described in the letter, appears to involve either (1) exempt exportation of informational material described in section 560.210 (c) of the ITR or (2) licensed collaboration on the creation and enhancement of written publications." (2012) OFAC further clarified that "Applicants may engage in transactions related to licensing of written materials and publications to the ISO...and further transmitted through the ISO review process' technical committees, subcommittees, and working groups, in the interest of deriving new international standards." (2015) Critical to the OFAC analyses was the fact that ANSI national and international standards development activities were intended to result in published standards and did not permit the sharing of confidential or proprietary information. The OFAC guidance ANSI received further suggests that a similar EAR regime would not require a special or general license for discussions with Huawei representatives participating in open and unrestricted standards activities that involve publicly-available information.

### *Impact on US Competition if a Different Interpretation Were to be Accepted*

A contrary interpretation of the EAR or the prior OFAC guidance would have a devastating effect on international standards development and severely impede U.S. industry's abilities to compete abroad. As the coordinator of the private sector-led standardization system in the U.S., 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 these sectors continue to develop, 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 for creative technological innovation to grow.

Standardization, or the process of implementing and developing technical standards based on the consensus of a broad range of stakeholders, helps to build focus, cohesion and critical mass in the emerging stages of technologies and markets. Standards for measurements and tests help innovative companies to demonstrate to the customer that their innovative products possess the features they claim to have, but also meet acceptable levels of risks for health, safety and the environment. Finally, standards codify and diffuse state of the art in science and technology and best practice, and speed the commercialization of new technologies.

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. Continued access to these forums, while respecting national security constraints, is critical to U.S. competitiveness. Others are clamoring for leadership roles that U.S. representatives currently occupy in organizations such as ISO/IEC JTC 1 – information technology – and others. Abandoning these roles to

our competitors would be devastating to U.S. industry and to U.S. government's interests in emerging technologies.

In sum, ANSI does not believe that discussions with Huawei representatives participating in open and unrestricted standards activities involving publicly-available information, like international standards committees or U.S. Technical Advisory Groups (TAGs) to ISO or IEC, are "subject to the EAR." We do not think that BIS intended that the 5G "exception" contained in the recent Temporary General License is intended to swallow the general rule that publicly-available information disclosed in open and unrestricted standards activities is not subject to the EAR.

ANSI respectfully requests that the Department of Commerce, through BIS, issue clarifying guidance that affirms our interpretation as stated above. We would appreciate an opportunity to discuss this further with BIS should the Bureau have any questions or concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read "S. Bhatia". The signature is fluid and cursive, with a large initial "S" and a stylized "Bhatia".

S. Joe Bhatia

Cc: Walter G. Copan, Undersecretary for Standards and Technology