

ALERT

Commerce Department Removes Key Export Control Barriers for U.S. Industry Participants in Standards Activities

July 23, 2024

On July 18, 2024, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) published an interim final rule (IFR) amending the U.S. Export Administration Regulations (EAR) so that certain technology and software released for a "standards-related activity" will no longer be subject to the EAR. Comments on the IFR are due by **September 16, 2024**.

This rule builds on (and expands) BIS's previous standards-related authorizations based on private sector and interagency advice. Prior rules and authorizations include: a May 2019 Temporary General License authorizing certain activities with Huawei Technologies Company and its affiliates on BIS's Entity List in the context of 5G standards development, a June 2020 IFR authorizing the release of certain low-level technology and software to Huawei and its affiliates in the context of international standards development, and a September 2022 IFR authorizing release of certain technology and software to *all* companies on the Entity List in the context of standards setting and development in standards organizations.

As additional context for the rule, BIS acknowledges that any impediment to U.S. private sector participation in standards development threatens U.S. national and economic security because it limits U.S. leadership in standards development and could lead to a global standards environment that is adverse to U.S. interests. In addition, BIS highlights that the U.S. government is especially focused on standards development related to critical and emerging technologies, and notes that, by removing barriers to private sector participation in standards development, this rule promotes the

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Practice Areas

Export Controls and Economic Sanctions
International Trade
National Security
Strategic Competition & Supply Chain

objectives of the Biden Administration's 2023 United States Government National Standards Strategy for Critical and Emerging Technology.

Under this IFR, when otherwise EAR-controlled technology or software is released for a "standards-related activity," the particular technology or software is not subject to the EAR (*i.e.*, outside the jurisdiction of the EAR's controls and licensing requirements) if:

1. The item is designated as EAR99 (the lowest level of U.S. control), controlled on the EAR's Commerce Control List for anti-terrorism (AT) reasons only (*e.g.*, low-level controls just above EAR99), or the release involves certain specified software and technology for the development, production, and use of cryptographic functionality; **and**
2. The technology or software is released for a published standard (*e.g.*, conformance testing) or occurs with the intent that the resulting standard will be published.

Note that a "standards-related activity" will be defined in this context as including "the development, adoption, or application of a standard (*i.e.*, any document or other writing that provides, for common and repeated use, rules, guidelines, technical or other characteristics for products or related processes and production methods), including but not limited to conformity assessment procedures. A 'standards-related activity' includes an action taken for the purpose of developing, promulgating, revising, amending, issuing or reissuing, interpreting, implementing or otherwise maintaining or applying such a standard." This new regulatory carve-out will be added at 15 C.F.R. § 734.10(b).

BIS's new rule streamlines and clarifies controls over disclosures of technology and software in the context of standards-related activities and eliminates certain limitations of existing standards-related authorizations, providing additional flexibility to U.S. companies and organizations and allowing them to participate more fully in critical global collaboration. Notably, the IFR expands the existing authorization of release of certain technology and software to parties on the Entity List by removing releases of such technology and software entirely from the EAR's purview. As such, the IFR eliminates the need for BIS authorization for exchanges of such technology and software with all foreign participants in standards organizations that would have formerly triggered other BIS licensing requirements, such as the other end use/end user restrictions in Part 744 of the EAR. Given the significant expansion of the EAR's end use and end user prohibitions over the past several years – including with respect to military, semiconductor manufacturing, and advanced computing end uses/users in certain countries – BIS's bright-line exception for standards-related activities offers U.S. industry participants a measure of certainty moving forward.

Nevertheless, keep in mind that the IFR is limited in some important ways. For example, this rule does not apply to more tightly controlled, sensitive technology and software subject to the EAR, the release still must be related to a standards-related activity for the carve-out to apply, and the rule does not impact technical data or software controlled by the International Traffic in Arms Regulations (ITAR).

Wiley has unparalleled experience and expertise representing a broad range of U.S. and multinational clients in export control matters, including exchanges in the context of standards setting activities. Should you have any questions, please do not hesitate to contact one of the attorneys listed on this alert.