

**Application of US Export Administration Regulations
to the Activities of the DVB Project**

Statement of Legal Director

Several members of the DVB Project have asked the Project Office to clarify the impact on DVB activities from the recent decision by the US government to name Huawei as an entity to which American technology – goods, technology and software, for example developed or produced in the United States – cannot be transferred except pursuant to a licence.

This Statement describes the position taken by the DVB Project Office on the question described below. It will be presented for discussion by the Steering Board at its meeting to be held on 2 July 2019. While this Statement describes the position of the DVB Project Office, individual DVB members should seek their own advice on the applicability of the US Export Administration Regulations to their own activities. For further information, please contact me at eltzroth@dvb.org.

As summary background, the United States has adopted rules, the Export Administration Regulations (EAR), preventing sale or transfer of American technology¹ to Entities that are listed in the EAR because they are found to be engaged in activities contrary to US national security or foreign policy interests. A company transferring such technology to a listed Entity is subject to sanctions. On 15 May 2019 the US Department of Commerce added Huawei Technologies Co., Ltd (Huawei) to the list of such Entities. Among Huawei's affiliates also explicitly named as Entities is HiSilicon Technologies Co., Ltd (HiSilicon),² a DVB member.

The question raised by DVB members is whether the activities within DVB, including the exchange among members of technological information that may include American technology, constitute impermissible activities under the EAR and subject the transferors of American technology to sanctions under the EAR.

In my view, the EAR provides a safe harbour for the activities of a standards development organisation, such as DVB. The EAR excludes from its definition of items subject to the EAR items that are “published”.³ The definition of “published” provides, in part,

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

¹ In this Statement, “American technology” means goods, software and technology, subject to the jurisdiction of the EAR. These are subject to the EAR if they are items developed/produced in the United States, foreign-developed/produced items that contain greater than 25 percent U.S. origin content, items physically present in or trans-shipped through the United States, items that are the “direct product” of US-origin items, and items developed based on US-origin plants or with US-origin technologies

² [84 Fed Reg 22961 \(21 May 2019\)](#).

³ [15 CFR s 734.3 \(b\)\(3\)\(i\)](#).

without restrictions upon its further dissemination such as through any of the following:

....

(3) Unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the interested public . . . ⁴

The exchange of information within a DVB subgroup fits within this safe harbour because the exchange, of documents, comments on documents or other communication of technical expertise, constitutes “unlimited distribution at a . . . meeting . . . generally accessible to the interested public”. The following characteristics of DVB are important: membership is broadly open to any company interested in DVB activities and the membership fee is not onerous to the “interested public”. Moreover any member can participate in any subgroup and has access to all the documents of that subgroup.⁵

For this reason, my conclusion is that the technological information exchanged within DVB does not constitute technology or software subject to the EAR.

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Legal Director DVB

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⁴ [15 CFR s 734.7 \(3\)](#).

⁵ The result could be different if DVB’s activities and its documents were subject to confidentiality. But DVB’s activities are not confidential. Annex A of DVB’s Rules and Procedures states, “Generally speaking there is no “confidentiality” rule within DVB.” There is a rule limiting distribution of input documents for meetings of the Steering Board, but very few are not Module documents that are otherwise available (and the remainder are not technical). DVB has had in the past “closed” subgroups (for example for the development of the Common Scrambling Algorithm), but none is active today.