

美国发布网联汽车进口及销售禁令拟议规则

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2024年9月23日，美国商务部工业与安全局（Bureau of Industry and Security, “BIS”）发布标题为《保护信息和通信技术与服务供应链：网联汽车》（Securing the Information and Communications Technology and Services Supply Chain: Connected Vehicles）的拟议规则通知（Notice of Proposed Rulemaking, “NPRM”）¹，并于9月26日公布NPRM文本及说明²。NPRM试图禁止向美国进口和在美国销售特定的与中国有关的车辆连接系统（Vehicle Connectivity System, “VCS”）硬件与包含VCS或自动驾驶软件的网联汽车整车，相较于2024年2月29日发布的规则制定预通知（Advance Notice of Proposed Rulemaking, “ANPRM”）拟设置的国家安全审查措施明显更为严格³。如果NPRM按现有内容生效，可能对中国网联汽车及相关上游产业带来严重不利影响。我们将在下文中对NPRM的主要内容加以解读。

一、立法背景

2019年，美国时任总统特朗普签署第13873号《保护信息和通信技术与服务供应链》（Securing the Information and Communications Technology and Services Supply Chain）行政令，试图减少由“外国对手（foreign adversary）”所拥有、控制、或受其管辖或指示的人士所设计、开发、制造或供应的信息和通信技术与服务（“ICTS”）带来的美国国家安全风险。2024年2月29日，美国白宫网站发布题为《拜登总统关于应对对美国汽车行业的国家安全风险的声明》，说明由于中国汽车可能会充斥美国市场，给美国国家安全带来风险，因而美国政府将“采取前所未有的行动”加以应对。同日，BIS发布ANPRM，拟制定新规对内嵌ICTS的网联汽车启动国家安全审查。本次发布的NPRM系BIS基于ANPRM所征集的近60份意见基础上更新的拟议规则。

二、交易禁令

根据NPRM，BIS拟针对三种类型交易（“被禁止的交易”）设置禁令，分别为：

¹ 见：<https://www.bis.gov/press-release/commerce-announces-proposed-rule-secure-connected-vehicle-supply-chains-foreign>。

² 见：<https://www.federalregister.gov/documents/2024/09/26/2024-21903/securing-the-information-and-communications-technology-and-services-supply-chain-connected-vehicles#>。

³ 见：<https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3457-2024-02-29-2024-fi-2024-04382-4251333-ppiv/file>；以及本所解读文章《汉坤·观点 | 网联汽车通信技术和服务企业在美面临合规新挑战》，载微信公众号“汉坤律师事务所”，2024年3月1日。

（一）禁止的 VCS 硬件交易（Prohibited VCS hardware transactions）⁴

- 禁止 VCS 硬件进口商在知情的情况下，进口由中国或俄罗斯拥有、控制、或受其管辖或指示的人士所设计、开发、制造或供应的 VCS 硬件⁵；
- 不会仅仅因为被雇佣、承包、或以其他类似方式参与 VCS 硬件的设计、开发、制造或供应的自然人的国籍，而认定 VCS 硬件由中国或俄罗斯拥有、控制、或受其管辖或指示的人士所设计、开发、制造或供应⁶。

（二）禁止的受限软件交易（Prohibited covered software transactions）⁷

- 禁止网联汽车制造商在知情的情况下，向美国进口包含由中国或俄罗斯拥有、控制、或受其管辖或指示的人士所设计、开发、制造或供应的受限软件的网联汽车整车⁸；
- 禁止网联汽车制造商在知情的情况下，在美国销售由中国或俄罗斯拥有、控制、或受其管辖或指示的人士所设计、开发、制造或供应的受限软件的网联汽车整车⁹；
- 不会仅仅因为被雇佣、承包、或以其他类似方式参与受限软件的设计、开发、制造或供应的自然人的国籍，而认定受限软件由中国或俄罗斯拥有、控制、或受其管辖或指示的人士所设计、开发、制造或供应¹⁰。

（三）相关禁止交易（Related prohibited transactions）¹¹

禁止中国或俄罗斯拥有、控制、或受其管辖或指示的网联汽车制造商在知情的情况下，在美国销售含有 VCS 硬件或受限软件的网联汽车整车¹²。

其中相关术语在 NPRM 中的定义如下：

⁴ Securing the Information and Communications Technology and Services Supply Chain: Connected Vehicles, 89 Fed. Reg. 79,117 (Sept. 26, 2024).

⁵ “VCS hardware importers are prohibited from knowingly importing VCS hardware that is designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of the PRC or Russia.” See *supra* note 4.

⁶ “In the context of this subpart, VCS hardware will not be considered to be designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of the PRC or Russia, solely based on the country of citizenship of natural persons who are employed, contracted, or otherwise similarly engaged to participate in the design, development, manufacture, or supply of the VCS hardware.” See *supra* note 4.

⁷ See *supra* note 4.

⁸ “Connected vehicle manufacturers are prohibited from knowingly importing into the United States completed connected vehicles that incorporate covered software, designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of the PRC or Russia.” See *supra* note 4.

⁹ “Connected vehicle manufacturers are prohibited from knowingly selling in the United States completed connected vehicles that incorporate covered software, designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of the PRC or Russia.” See *supra* note 4.

¹⁰ “In the context of this subpart, covered software will not be considered to be designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of the PRC or Russia, solely based on the country of citizenship of natural persons who are employed, contracted, or otherwise similarly engaged to participate in the design, development, manufacture, or supply of the Covered Software.” See *supra* note 4.

¹¹ See *supra* note 4.

¹² “Connected vehicle manufacturers who are persons owned by, controlled by, or subject to the jurisdiction or direction of the PRC or Russia, are prohibited from knowingly selling in the United States completed connected vehicles that incorporate VCS hardware or covered software.” See *supra* note 4.

■ 网联汽车（Connected vehicle）（编者注：英文术语的大小写与 NPRM 原文一致）

由机械动力驱动或牵引，主要为在公共街道、公路和高速公路上使用而制造，集成了车载网络硬件和汽车软件系统，可通过专用短程通信、蜂窝电信连接、卫星通信或其他无线频谱连接与任何其他网络或设备进行通信的车辆；但不包括仅在铁路线上运行的车辆¹³。

BIS 在 NPRM 说明部分进一步解释，网联汽车的定义将涵盖乘用车、摩托车、巴士、小型和中型卡车、重型卡车、休闲车辆等，但不包括轨道有轮车辆（“rolling stock”）（编者注：引号为 NPRM 原文所加）和无人驾驶飞行器（unmanned aerial vehicles）；BIS 认为该定义可以涵盖未来新出现的车辆类型，并强调原则上所有在美国销售的新车均应该定义涵盖（除非个别情况）¹⁴。

■ 网联汽车整车（Completed connected vehicle）

无需进一步生产操作即可实现其预期功能的网联汽车。针对本定义而言，将“自动驾驶系统”集成到网联汽车中即构成网联汽车整车的生产操作¹⁵。

BIS 在 NPRM 说明部分进一步解释，即使由中国或俄罗斯拥有、控制、或受其管辖或指示的人士只负责自动驾驶系统的集成工作（而没有其余任何生产或组装行为），也将受到美国出口或在美国销售网联汽车整车的禁令管辖¹⁶。

■ 自动驾驶系统（Automated Driving System）

硬件与软件，无论是否局限于特定的操作设计域（operational design domain），其能够共同为网联汽车整车持续地执行完整动态驾驶任务¹⁷。

BIS 在 NPRM 说明部分进一步解释，该定义对应 SAE 国际标准 J3016 的 L3、L4 和 L5 级别自动驾驶¹⁸。

¹³ “*Connected vehicle* [sic] means vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, that integrates onboard networked hardware with automotive software systems to communicate via dedicated short-range communication, cellular telecommunications connectivity, satellite communication, or other wireless spectrum connectivity with any other network or device. Vehicles operated only on a rail line are not included in this definition.” See *supra* note 4, at 79,116.

¹⁴ “This definition captures the vehicles that would be subject to the rule (e.g., passenger vehicles, motorcycles, buses, small and medium trucks, class 8 commercial trucks, recreational vehicles) ...BIS further believes that the term...will capture future trends in vehicle development, particularly as software comes to play a larger role in vehicle operation...BIS declined to extend this definition to all ‘rolling stock’ or unmanned aerial vehicles...” See *supra* note 4, at 79,091.

¹⁵ “*Completed connected vehicle* [sic] means a connected vehicle that requires no further manufacturing operations to perform its intended function. For the purposes of this subpart, the integration of an Automated Driving System into a connected vehicle constitutes a manufacturing operation for a completed connected vehicle.” See *supra* note 4, at 79,116.

¹⁶ “BIS intends this caveat to clarify that a person owned by, controlled by, or subject to the jurisdiction or direction of the PRC or Russia, whose sole manufacturing or assembly operation is integrating ADS into an otherwise Completed Connected Vehicle [sic], would be subject to the prohibitions in the rule and would need to obtain a Specific Authorization [sic] before importing or Selling [sic] that completed connected vehicle [sic] in the United States.” See *supra* note 4, at 79,102.

¹⁷ “*Automated Driving System* [sic] means hardware and software that, collectively, are capable of performing the entire dynamic driving task for a completed connected vehicle on a sustained basis, regardless of whether it is limited to a specific operational design domain (ODD).” See *supra* note 4, at 79,116.

¹⁸ “...Specifically, this definition corresponds to automation levels 3, 4, and 5 as defined by SAE International standard J3016.” See *supra* note 4, at 79,102.

■ 网联汽车制造商（Connected vehicle manufacturer）

（1）在美国生产或组装网联汽车整车；和/或（2）进口网联汽车整车以供在美国销售的美国人士（U.S. person）¹⁹。

但是，需要特别注意，BIS 在 NPRM 说明部分的示例 16 中提及，“根据拟议规则的定义，一个美国人士进口一辆网联汽车整车，使其成为网联汽车制造商……”²⁰。首先，该示例中在美国主体进口“一辆”网联汽车整车的情况下就将其界定为“网联汽车制造商”；其次，该示例并未进一步分析前述拟议规则定义中的“以供在美国销售”目的。因此，按照示例 16 的口径，购买一辆网联汽车整车用于消费的美国个人也将可能构成网联汽车制造商，从而受到 NPRM 进口禁令的限制，这实质上扩大了禁令的适用范围。

■ 受限软件（Covered software）

由相应系统的主处理单元执行的基于软件的组件，其中存在外国利益（foreign interest），而相应系统是在车辆层面支持“车辆连接系统”或“自动驾驶系统”功能的组件²¹的一部分。

受限软件不包括固件（firmware），固件的特点是专门为硬件设备编程的软件，其主要目的是控制、配置硬件设备并与之通信。

受限软件也不包括可由任何人自由使用、修改和分发，且任何人都可以访问源代码并为软件的开发和改进做出贡献的开源软件（open-source software），除非该开源软件已为专有目的进行了修改且未进行再分发或共享²²。

BIS 在 NPRM 说明部分进一步解释，受限软件最小范围包括实时操作系统（real-time operating system）与通用目的操作系统（general-purpose operating systems）²³。

■ 外国利益（Foreign interest）

非美国人士（non-U.S. person）直接或间接拥有的任何性质的财产权益²⁴。

¹⁹ “*Connected vehicle manufacturer* [sic] means a U.S. person (1) [m]anufacturing or assembling completed connected vehicles in the United States; and/or (2) [i]mporting completed connected vehicles for sale in the United States.” See *supra* note 4, at 79,116.

²⁰ “A U.S. person imports a completed connected vehicle, making the U.S. person a connected vehicle manufacturer under the proposed rule’s definition.” See *supra* note 4, at 79,107.

²¹ “组件”是指在车辆层面具有特定功能的一个或一组组件。如果一个系统能实现某种功能，也可将其视为一个组件。（“a component or set of components with a specific function at the vehicle level. A system may also be considered an item if it implements a function.” See *supra* note 4, at 79,116.）。

²² “*Covered software* [sic] means the software-based components, in which there is a foreign interest, executed by the primary processing unit of the respective systems that are part of an item that supports the function of Vehicle Connectivity Systems or Automated Driving Systems at the vehicle level. Covered software does not include firmware, which is characterized as software specifically programmed for a hardware device with a primary purpose of controlling, configuring, and communicating with that hardware device. Covered software also does not include open-source software that can be freely used, modified, and distributed by anyone, with both access to the source code and the ability to contribute to the software’s development and improvement unless that open-source software has been modified for proprietary purposes and not redistributed or shared.” See *supra* note 4, at 79,116.

²³ “...At minimum, this definition of covered software would include operating system (RTOS), and general-purpose operating systems.” See *supra* note 4, at 79,102.

²⁴ “*Foreign interest* [sic], for the purpose of this subpart, means any interest in property of any nature whatsoever, whether direct or indirect, by a non-U.S. person.” See *supra* note 4, at 79,116.

BIS 在 NPRM 说明部分进一步解释，外国利益包括但不限于通过所有权、知识产权、合同（如维保等持续供应承诺、与使用知识产权有关的任何许可协议）、利润分享或费用安排以及任何其他可识别的利益²⁵。BIS 指出，自动驾驶系统和 VCS 软件通常被外国人士设计、开发或供应，而且这些人士通常在软件被整合进网联汽车后对软件仍保留法律上可识别的权益；例如，外国软件开发者可能会通过软件使用而获得收益，保留对软件的数据访问权限，或对软件有维护和升级的义务²⁶。

■ 进口（Import）

就任何物品而言，指该物品进入“美国关境（United States Customs Territory）”；但不包括将物品从美国境外运入外贸区（foreign-trade zone）以待在外贸区进一步组装或运往外国²⁷。

值得注意的是，NPRM 对进口的定义与美国其他进出口管制规则存在差异。通常而言，禁止向美国进口的商品亦不得进入美国外贸区²⁸。此外，根据美国《出口管制条例》（Export Control Regulations, “EAR”）的规定，在美国外贸区的物项亦视为位于美国的物项而受制于美国出口管制规则²⁹。

■ 知情（Knowingly）

对某一情况有所了解（可能的术语包括“知道”、“应当知道”或“应当确信”），不仅包括对该情况存在或实质上肯定会发生的积极了解，还包括对其存在或未来发生的高度可能性的认识。这种意识可以从一个人有意识地无视已知事实的证据中推断出来，也可以从一个人故意回避事实的行为中推断出来³⁰。

■ 车型年（Model year）

用于指定独立车型的年份，与实际生产车辆的日历年无关，但生产期不得超过 24 个月³¹。

²⁵ “Under this definition, a foreign interest can include, but is not limited to, an interest through ownership, intellectual property, contract — e.g., ongoing supply commitments such as maintenance, any license agreement related to the use of intellectual property — profit-sharing or fee arrangement, as well as any other cognizable interest.” See *supra* note 4, at 79,103.

²⁶ “ADS and VCS software is frequently designed, developed, or supplied by foreign persons, and those persons frequently retain a legally cognizable interest in the underlying software, even after it has been integrated into the connected vehicle. For example, foreign software developers may earn profits from use of their software; retain data access and sharing rights to the software; or have obligations to maintain and update the software.” See *supra* note 4, at 79,103.

²⁷ “Import [sic] means, in the context of this subpart, with respect to any article, the entry of such article into the United States Customs Territory. It does not include admission of an article from outside the United States into a foreign-trade zone for storage pending further assembly in the foreign-trade zone or shipment to a foreign country.” See *supra* note 4, at 79,116.

²⁸ “Any merchandise that is not prohibited from entry into the territory of the U.S. may be admitted to a zone.” See <https://www.trade.gov/about-ftzs?anchor=content-node-t14-field-lp-region-1-11>. “Any foreign or domestic merchandise not prohibited by law or other exception listed below, whether dutiable or not, may be taken into a foreign-trade zone. Merchandise, which lawfully cannot be imported into the United States, is prohibited without exception. Furthermore, placing merchandise subject to a quota into a zone cannot circumvent quota on the imported merchandise.” See <https://www.cbp.gov/border-security/ports-entry/cargo-security/cargo-control/foreign-trade-zones/about>.

²⁹ See 15 C.F.R. § 734.3.

³⁰ “Knowingly [sic] means having knowledge of a circumstance (the term may be a variant, such as ‘know’, ‘reason to know,’ or ‘reason to believe’), to include not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person’s willful avoidance of facts.” See *supra* note 4, at 79,116.

³¹ “Model year [sic] means the year used to designate a discrete vehicle model, irrespective of the calendar year in which the vehicle was actually produced, provided that the production period does not exceed 24 months.” See *supra* note 4, at 79,116.

■ 销售 (Sale)

为购买、租赁或其他商业运营目的有偿分销新的网联汽车整车，包括将网联汽车整车从网联汽车制造商转让给经销商或分销商，如《美国法典》第 49 编第 30102 条所定义³²。

BIS 在 NPRM 说明部分进一步解释，该定义涵盖了网联汽车制造商直接销售给最终用户的销售模式³³。

■ 车辆连接系统【Vehicle Connectivity System (VCS)】(编者注：英语缩写为 NPRM 原文所加)

用于网联汽车的硬件或软件，其功能是以 450 兆赫以上的频率传输、接收、转换或处理射频通信³⁴。

BIS 在 NPRM 说明部分进一步解释，该定义将排除大多数遥控无钥匙进入设备 (remote keyless entry fobs)、胎压监测设备、防盗器以及某些内部无线传感器和继电器，而 VCS 软件属于受限软件定义的范围³⁵。BIS 明确以低于 450 兆赫的频率传输、接收、转换或处理射频通信的 ICTS 不属于 NPRM 规制的范围³⁶。

此外，BIS 也排除了在 ANPRM 中曾纳入规制的其他系统，包括操作系统 (OS)、高级驾驶辅助系统 (Advanced Driver-Assistance System, ADAS) 以及电池管理系统 (battery management systems, BMS)，除非这些系统符合 NPRM 中关于 VCS 硬件的定义³⁷。激光雷达 (LiDAR) 也不受 NPRM 禁令限制³⁸。

■ VCS 硬件 (VCS hardware)

VCS 硬件是指支持“车辆连接系统”功能、或作为支持“车辆连接系统”功能的部件一部分的下列软件支持的或可编程的部件和子部件：微控制器、微型计算机或模块、片上系统 (system on a chip)、网络或远程信息处理装置 (networking or telematics unit)、蜂窝调制解调器/模块、Wi-Fi 微控制器或模块、蓝牙微控制器或模块、卫星导航系统、卫星通信系统、其他无线通信微控制器或模块以及外部天线。

VCS 硬件不包括对 VCS 硬件的通信功能无贡献的部件 (如支架、紧固件、塑料组件和无源电子元件)

³² “Sale [sic] means, in the context of this subpart, distributing for purchase, lease, or other commercial operations a new completed connected vehicle for a price, to include the transfer of completed connected vehicles from a connected vehicle manufacturer to a dealer or distributor, as those terms are defined in 49 U.S.C. 30102. This definition also applies to the related terms such as *Sell* or *Selling* [sic].” See *supra* note 4, at 79,117.

³³ “This would include direct-to-consumer sales of completed connected vehicles from the connected vehicles manufacturer to the ultimate purchaser.” See *supra* note 4, at 79,104.

³⁴ “*Vehicle Connectivity System (VCS)* [sic] means a hardware or software item for a completed connected vehicle that has the function of enabling the transmission, receipt, conversion, or processing of radio frequency communications at a frequency over 450 megahertz.” See *supra* note 4, at 79,117.

³⁵ “This definition would exempt most remote keyless entry fobs and immobilizers and certain internal wireless sensors and relays. VCS software is included in the definition of Covered Software [sic].” See *supra* note 4, at 79,104; “...[L]owering compliance burden by excluding from regulation those ICTS with functions that pose a lower risk and offer high utility to consumers (e.g., tire pressure monitoring systems, electronic key fobs).” See *supra* note 4, at 79,092.

³⁶ “[T]he proposed rule does not cover ICTS with the function of enabling the transmission, receipt, conversion, or processing of radio frequency communications at a frequency below 450 megahertz.” See *supra* note 4, at 79,092.

³⁷ “BIS ultimately chose to exclude other systems highlighted in the ANPRM — such as OS, ADAS, or BMS — from this proposed rule unless they have VCS components and fall within the proposed rule’s definition of VCS hardware.” See *supra* note 4, at 79,092.

³⁸ “BIS’s further technical analysis found that LiDAR generally lacks the ability to transmit from the vehicle and does not, as a standalone system, control the vehicle. Importantly, BIS notes that in many cases, ADS exerts control over both LiDAR and the vehicle and thus presents a higher risk.” See *supra* note 4, at 79,092.

BIS 在 NPRM 说明部分进一步解释，VCS 硬件包括售后设备，这些设备在销售时并不包含在网联汽车整车中，但可在日后集成到车辆中或连接到车辆上，以执行 VCS 功能⁴⁰。例如，包括车队跟踪设备和系统在内的售后远程信息处理设备，只要功能符合 VCS 硬件的定义，即属于拟议规则规制的 VCS 硬件⁴¹。

■ VCS 硬件进口商（VCS hardware importer）

为进一步制造、集成、转售或分销而进口 VCS 硬件的美国人士。如果网联车辆制造商进口网联汽车时 VCS 硬件已经被安装在该网联汽车中，则该网联汽车制造商可能也属于 VCS 硬件进口商⁴²。

BIS 在 NPRM 说明部分进一步解释，这一定义将包括 OEM 制造商，以及向美国进口 VCS 硬件的一级（tier 1）和二级（tier 2）供应商⁴³。

三、由外国对手拥有、控制、或受其管辖或指示的人士

NPRM 中最核心的定义是“由外国对手拥有、控制、或受其管辖或指示的人士（Person owned by, controlled by, or subject to the jurisdiction of a foreign adversary）”，即：

1. 作为外国对手 — 或其全部或大部分活动由外国对手直接或间接指示、指挥、控制、资助或补贴的人士 — 的代理人、代表、雇员、或根据外国对手或前述人士命令、要求、指挥、控制行事的人士，无论其位于何处；
2. 外国对手或其控制的国家的公民或居民，且不是美国公民或永久居民，无论其位于何处；
3. 在外国对手或其控制的国家的国家注册或依据其法律组织成立，或主营业地或总部在外国对手或其控制的国家的公司、合伙企业、协会或其他组织；
4. 可以（而无论该等权力是否实际行使）直接或间接地被（1）至（3）项下人士通过持有多数或显著少数（dominant minority）控制权、董事会席位、代理投票权、特别股、合同安排、正式或非正式的协同行动安排、或其他方式，决定、指示或确定（determine, direct, or decide）重要事项的任何实体⁴⁴。

³⁹ “VCS hardware [sic] means the following software-enabled or programmable components and subcomponents that support the function of Vehicle Connectivity Systems or are part of an item that supports the function of Vehicle Connectivity Systems: microcontroller, microcomputers or modules, systems on a chip, networking or telematics units, cellular modem/ modules, Wi-Fi microcontrollers or modules, Bluetooth microcontrollers or modules, satellite navigation systems, satellite communication systems, other wireless communication microcontrollers or modules, and external antennas. VCS hardware does not include component parts that do not contribute to the communication function of VCS hardware (e.g., brackets, fasteners, plastics, and passive electronics).” See *supra* note 4, at 79,117.

⁴⁰ “VCS hardware would include aftermarket devices not contained in a completed connected vehicle at sale but that could be later integrated into or attached to the vehicle to perform VCS functions.” See *supra* note 4, at 79,105.

⁴¹ “[A]ftermarket telematics devices, including fleet tracking devices and systems, that fulfill functions consistent with the definition of VCS hardware are covered by this proposed rule.” See *supra* note 4, at 79,092.

⁴² “VCS hardware importer [sic] means a U.S. person importing VCS hardware for further manufacturing, integration, resale, or distribution. A connected vehicle manufacturer may be a VCS hardware importer if VCS hardware has already been installed in a connected vehicle when imported by the connected vehicle manufacturer.” See *supra* note 4, at 79,117.

⁴³ “This definition would capture OEMs, and tier 1 and tier 2 suppliers importing VCS hardware into the United States.” See *supra* note 4, at 79,104.

⁴⁴ “Person owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary [sic] means:

其中，“外国对手”一般是指中国、古巴、伊朗、朝鲜、俄罗斯和委内瑞拉，但 NPRM 中目前仅限于中国和俄罗斯。BIS 在 NPRM 说明中另明确中国包括香港特别行政区，但未提及澳门特别行政区。

NPRM 就“由外国对手拥有、控制、或受其管辖或指示的人士”的认定提供了十三个参考示例。示例一至十二涵盖了国企海外全资或控股子公司、中国公司的海外子公司、中国公司持有多数表决权或特殊否决权的海外子公司、中国公司或公民合计持有多数或显著少数表决权的海外子公司、中国公民可因董事会席位而获得否决权的海外公司等情形。其中，示例十三尤为值得关注：A 公司是一家在美国设立的私人公司。A 公司的一位董事 X 是某中国大型企业的前任董事长，并且和中国政府具有已知的联系。X 拥有 A 公司的少数股权，但比例较高，并且此前在 A 公司 CEO 设立的其他公司中进行了显著投资。X 还促成了其此前任职的中国大型企业对 A 公司进行了大额少数股权投资。并且，X 的职业背景表明其直接或间接地受到中国政府的指示、指挥、控制、资助或补贴。因此，综合考虑 X 与 A 公司 CEO 的紧密关系，X 的所有权益以及引导受高度监管的大型中国公司投资的能力，以及 X 与中国政府的紧密关系，A 公司应被视为受中国指挥⁴⁵。

（编者注：即，A 公司构成上述定义第（1）项中“根据全部或大部分活动由外国对手直接或间接指示、指挥、控制、资助或补贴的人士的指挥行事的人士”）。

NPRM 同样就认定 VCS 硬件或受限软件由中国或俄罗斯拥有、控制、或受其管辖或指示的人士所设计、开发、制造或供应提供了八个参考示例。其中，示例十四至十七分别涉及：

- 进口在中国制造但从第三国进口的 VCS 硬件；
- 进口在第三国组装但包含中国制造微控制器的远程信息处理单元；
- 进口包含远程信息处理单元的整车，而该远程信息处理单元运行由位于中国的实体部分或全部设计、开发或供应的软件；
- 在美国销售含有中国设计、开发或供应的自动驾驶系统软件的网联汽车整车。

示例十八中，美国网联汽车制造商通过子公司、合营企业或合同安排，使用外国 VCS 和自动驾驶系统软件开发团队，而该等团队可能对软件保留了服务义务、合同或许可权力或其他权益（编者注：即 NPRM 所定义的“外国利益”）；其中一个软件开发团队位于中国。因此，BIS 认为该软件开发团队“受中国管辖”，

(1) Any person, wherever located, who acts as an agent, representative, or employee, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign adversary or of a person whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in majority part by a foreign adversary;

(2) Any person, wherever located, who is a citizen or resident of a foreign adversary or a country controlled by a foreign adversary, and is not a United States citizen or permanent resident of the United States;

(3) Any corporation, partnership, association, or other organization with a principal place of business in, headquartered in, incorporated in, or otherwise organized under the laws of a foreign adversary or a country controlled by a foreign adversary; or

(4) Any corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by a foreign adversary, to include circumstances in which any person identified in paragraphs (a) through (c) possesses the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity.” See *supra* note 4, at 79,116 – 79,117.

⁴⁵ “*Example 13*: Company A is privately held and incorporated in the United States. One member of Company A’s board of directors, Person X, a former chairman of the board of a large PRC corporation, has known ties to the government of the PRC, owns a large minority share of Company A, and has previously made significant investments in other companies founded by Company A’s chief executive officer. Person X also facilitated a large minority investment in Company A by the large PRC corporation where they were previously chairman of the board. Person X’s professional background indicates that they are directly or indirectly supervised, directed, controlled, financed, or subsidized by the PRC government. The combination of Person X’s close ties to Company A’s CEO, Person’s X’s ownership interest and ability to direct investment from large, highly regulated PRC corporate entities, and Person X’s close ties to the PRC government indicate that Company A would be “subject to the direction” of the PRC.” See *supra* note 4, at 79,106.

因此在美国销售含有该团队开发的受限软件的汽车受到 NPRM 的拟议禁令管辖⁴⁶。

而在示例十九中，美国网联汽车制造商通过子公司、合营企业或合同安排，使用全球各地的 VCS 和自动驾驶系统软件开发团队。其中一个软件开发团队中存在中国公民，但该中国公民系为一个在中国和俄罗斯之外的司法辖区、且不由中国或俄罗斯拥有、控制、或受其管辖或指示的公司工作。这种情况下，该软件开发团队雇佣中国公民本身不会单独导致含有该软件开发团队的软件的网联汽车整车受 NPRM 的拟议禁令管辖⁴⁷。

在示例二十中，A 公司是一家外国公司的全资子公司，而该外国公司由一家中国或俄罗斯实体拥有控制性权益。A 公司进口含有受限软件和 VCS 硬件的网联汽车整车，但是受限软件和 VCS 硬件均不是由中国或俄罗斯拥有、控制、或受其管辖或指示的人士最初设计、开发、制造或供应的。BIS 认为，在这种罕见的情况下，鉴于 A 公司并未参与受限软件和 VCS 硬件的设计或开发，因此 A 公司仅需根据 NPRM 规则，针对进口网联汽车整车每车型年提交一次合规声明（Declaration of Conformity）。但是，A 公司在美国后续销售这些网联汽车整车的行为被禁止（例如将车辆销售给一家美国的经销商）。因为 A 公司属于被中国或俄罗斯控制的人士，并在销售前对 VCS 硬件和受限软件有直接的访问权限，因此，其在知情情况下销售含有属于受限软件和 VCS 硬件网联汽车整车的行为属于 NPRM 下一项禁止交易⁴⁸。

在示例二十一中，A 公司系一家中国或俄罗斯公司的全资子公司，在美国制造网联汽车整车。A 公司制造的网联汽车整车含有 B 公司提供的受限软件和 VCS 硬件，而 B 公司不由中国或俄罗斯拥有、控制、或受其管辖或指示。此种情况下，A 公司仍被禁止在美国销售网联汽车整车，因为 A 公司由中国或俄罗斯拥有、控制、或受其管辖或指示，其参与了受限软件和 VCS 硬件的设计和开发，并且对车辆有直接访问权限⁴⁹。

⁴⁶ “Example 18: A U.S. person who is a connected vehicle manufacturer utilizes foreign VCS and ADS software development teams through various subsidiaries, joint ventures, and contract arrangements, some of which retain servicing obligations, contractual and licensing rights, and other interests in the software they have developed. One of those software development teams is located in the PRC or Russia, and as such, that software team is subject to the jurisdiction of the PRC or Russia. Given the role of PRC or Russian developers in the creation of the VCS or ADS software (covered software), the sale of a completed connected vehicle within the United States that integrates this proprietary covered software, would be a prohibited transaction under the proposed rule, unless it qualifies for a general authorization or specific authorization granted by BIS.” See *supra* note 4, at 79,107.

⁴⁷ “Example 19: A U.S. person who is a connected vehicle manufacturer utilizes VCS and ADS software development teams around the world through various subsidiaries, joint ventures, and contract arrangements. One of those software development teams is comprised of individuals who are PRC or Russian citizens working in a foreign jurisdiction other than the PRC or Russia for a company that is not owned by, controlled by, or subject to the jurisdiction or direction of the PRC or Russia. Although the individuals technically meet the definition of “person owned by, controlled by, or subject to the direction of a foreign adversary,” the sole fact that PRC or Russian citizens work on the connected vehicle manufacturer’s software development would not make the Sale of a completed connected vehicle within the United States that integrates this VCS or ADS software a Prohibited Transaction under the proposed rule.” See *supra* note 4, at 79,107.

⁴⁸ “Example 20: Company A, which is a wholly owned subsidiary of a foreign corporation in which a PRC or Russian entity owns a controlling interest, imports completed connected vehicles that incorporate covered software and VCS hardware, none of which was originally designed, developed, manufactured, or supplied by an entity owned by, controlled by, or subject to the jurisdiction or direction of the PRC or Russia. In such rare circumstance where Company A did not participate in the design or development of the covered software or VCS hardware, Company A would submit (once per Model Year) a Declaration of Conformity for the import of the completed connected vehicles containing covered software and VCS hardware. However, any subsequent sale by Company A of such completed connected vehicle in the United States would be prohibited. For example, Company A subsequently Sells such completed connected vehicles to a dealer in the United States. Because Company A is a person controlled by the PRC or Russia and has direct privileged access to the VCS Hardware and covered software prior to the sale, the knowing sale by Company A of the completed connected vehicle with VCS hardware and covered software would be a prohibited transaction under the proposed rule, and a specific authorization from BIS would be required before engaging in such a transaction.” See *supra* note 4, at 79,107.

⁴⁹ “Example 21: Company A, a wholly owned subsidiary of a PRC or Russia corporation manufactures completed connected vehicles in the United States. The completed connected vehicles that Company A manufactures incorporate covered software and VCS hardware provided by Company B, a company that is not owned by, controlled by, or subject to the jurisdiction or direction of the PRC or Russia. Because Company A is owned by, controlled by, or subject to the jurisdiction or direction of the PRC or Russia, participated in the design and development of the covered software or VCS hardware, and in any event, has direct and privileged access to its completed connected vehicles — including the incorporated covered software and VCS hardware — Company A’s sale of the completed connected vehicles is a prohibited transaction under the proposed rule, and a specific authorization from BIS would

四、许可与豁免

针对拟议禁令，NPRM 中设置了许可（分为通用许可与特别许可）以及豁免。

（一）通用许可（General authorizations）

在符合下列条件一项或多项条件时，VCS 硬件进口商和网联汽车制造商可以通过自行认证的方式获得通用许可，从而进行被禁止的交易⁵⁰：

- VCS 硬件进口商或网联汽车制造商以及与其受共同控制的实体 — 包括母公司 — 所提供（produce）的 VCS 硬件或网联汽车整车的车型年产量总计少于 1,000 件；
- 包含受限软件或 VCS 硬件的网联汽车整车在任何日历年内在公共道路上使用的天数少于 30 个日历日；
- 包含受限软件或 VCS 硬件的网联汽车整车仅用于展示、测试或研究目的，而不会用于公共道路；
- 包含受限软件或 VCS 硬件的网联汽车整车进口仅用于维修、改造或在公共道路外竞赛（competition off public roads），且自进口之日起一年内重新出口。

但是，如果存在下列情形之一的，则不得适用通用许可：

- VCS 硬件进口商或网联汽车制造商已经接到 BIS 通知，其没有适用通用许可的资格；或
- VCS 硬件进口商或网联汽车制造商由中国或俄罗斯拥有、控制、或受其管辖或指示。

（二）特别许可（Specific authorizations）

VCS 硬件进口商以及网联汽车制造商还可以向 BIS 申请特别许可。特别许可将在个案审查的基础上予以颁发。根据 NPRM，BIS 在审查特别许可时会考虑申请人对特定交易识别的风险以及提出的潜在缓解措施，包括但不限于⁵¹：

- 网联汽车的数据泄露和远程操纵风险；
- 外国对手参与设计、开发、制造或供应 VCS 硬件或受限软件的程度和性质；
- 申请方限制中国或俄罗斯政府接触或影响设计、开发、制造或供应 VCS 硬件或受限软件的能力；
- 申请方使用的安全标准，以及此类标准是否可由 BIS 或第三方验证；
- 申请方为降低不当或不可接受的风险而打算采取的其他行动和建议。

（三）豁免（Exemptions）

为了保证美国网联汽车制造商和 VCS 硬件进口商能够重新部署供应链，NPRM 对拟议禁令设置了过渡期，在过渡期内可以进行被禁止的交易⁵²：

be required before engaging in such a transaction.” See *supra* note 4, at 79,107.

⁵⁰ See *supra* note 4, at 79,119.

⁵¹ *Id.*

⁵² See *supra* note 4, at 79,120.

针对 VCS 硬件进口商：

- 在 2029 年 1 月 1 日之前，仍可进口不符合 NPRM 的、不针对特定车型年的 VCS 硬件；
- 仍可进口针对 2030 车型年之前车型、或作为 2030 车型年之前的网联汽车的部件的 VCS 硬件，即便该等 VCS 硬件不符合 NPRM 规定；

针对网联汽车制造商：

- 仍可继续进口或在美国销售 2027 车型年之前制造的包含受限软件的网联汽车整车；
- 受中国或俄罗斯拥有、控制、受其管辖或听从其指示的网联汽车制造商仍可继续在美国销售 2027 车型年之前制造的包含 VCS 硬件或受限软件的网联汽车整车。

五、结语

近年来，随着中国智能网联汽车相关产业的不断发展，美国对中国相关产业的限制不断加强，从趋势上来看包括行政问询、调查、关税增加、国家安全审查及本次 NPRM 所规定的交易禁令等多种行政手段对中国智能网联汽车及其上游产业对美国的销售进行限制，该等限制也必将影响中国智能网联汽车及上游产业经营者与其他国家合作伙伴的合作。中国智能网联汽车及上游产业经营者应当关注相关法规和行政令的立法动态，积极采取应对措施，降低对业务的不利影响。

特别声明

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