



June 16, 2020

Mr. Rich Ashooh  
Assistant Secretary of Commerce for Export Administration  
U.S. Department of Commerce  
1401 Constitution Ave NW  
Washington, DC 20230  
Via email at [Richard.Ashooh@bis.doc.gov](mailto:Richard.Ashooh@bis.doc.gov)

Mr. Matthew Borman, Deputy Assistant Secretary  
Bureau of Industry and Security  
U.S. Department of Commerce  
1401 Constitution Ave NW  
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Via email at [Matthew.Borman@bis.doc.gov](mailto:Matthew.Borman@bis.doc.gov)

Re: RIN 0694-AH53-*Expansion of Export, Reexport, and Transfer(in-Country) Controls for Military End Use or Military End Users in the People's Republic of China, Russia, or Venezuela*

Dear Mr. Ashooh and Mr. Borman:

The Association of University Export Control Officers (AUECO) respectfully submits this letter in response to the final rule from the Department of Commerce's Bureau of Industry and Security, *Expansion of Export, Reexport, and Transfer(in-Country) Controls for Military End Use or Military End Users in the People's Republic of China, Russia, or Venezuela*, 85 FR 23459 (4/28/2020).

AUECO is an association of over 300 export control professionals with compliance responsibilities at over 180 institutions of higher education within the United States. AUECO is committed to monitoring changes in the administration of export control laws and regulations that may affect the unique nature of higher education and academia.

AUECO is submitting this letter to BIS to express concerns regarding the recently issued final rule, "Expansion of Export, Reexport, and Transfer (in-Country) Controls for Military End Use or Military End Users in the People's Republic of China, Russia, or Venezuela" (85 Fed. Reg. 23459). Specifically, AUECO is

concerned that the rule lacks sufficient clarity to allow U.S. universities to understand and apply the scope of the rule's restrictions and EEI filing requirements. Without additional guidance and clarification from BIS regarding the scope of "military end use," "military end user," and EEI filing exemptions, U.S. universities will have difficulty developing appropriate procedures to comply with the final rule. AUECO's concerns and requests for additional guidance are described in more detail below. In addition, AUECO requests that BIS delay the effective date of this rule by 60 days to allow BIS sufficient time to issue additional guidance to the public on this rule.

#### I. EXPANSION OF §744.21 LICENSE REQUIREMENTS FOR MILITARY END USES OR MILITARY END USERS

On April 28, 2020, the U.S. Commerce Department's Bureau of Industry and Security issued a final rule, effective June 29, 2020, that expands license requirements on exports, re-exports, and transfers of items intended for military end uses and military end users in China, Russia, or Venezuela. The rule broadens the scope of EAR §744.21 restrictions by expanding:

- The definition of "military end use" to include "...any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, "development," or "production," of military items described on the USML, or items classified under ECCNs ending in "A018" or under "600 series" ECCNs";
- The restrictions to military end users in China (§744.21(a)); and
- The scope of items subject to §744.21 license requirements by adding new ECCNs to Supplement 2 to Part 744, including many items controlled for Anti-Terrorism (AT) controls only.

The intent of these changes is to "support the national security and foreign policy objectives of the United States by broadening the United States government's visibility into and ability to deny or condition exports involving certain items of the CCL... that are destined to military end users or end uses in China, Russia or Venezuela." (85 Fed. Reg. 23459, 23460 (April 28, 2020)).

BIS's expansion of §744.21 raises significant compliance concerns for AUECO. We are writing this letter to highlight those concerns, which are described more fully below, and to request that BIS i.) issue additional clarification and public guidance prior to the rule's effective date so that U.S. universities better understand the scope of this rule and their compliance obligations under it, and ii.) delay the effective date of this rule by 60 days so U.S. universities have sufficient time to develop appropriate procedures to comply with the expanded license requirements in §744.21.

#### A. Lack of Clarity Regarding Scope of Military End Use and Military End User Definitions

The final rule's expansion of §744.21(a) restrictions to "military end users" in China poses significant compliance challenges to U.S. universities.

First, the final rule's definitions of "military end user" and "military end use" are so broad as to have potentially significant chilling effects on U.S. academic collaborations and projects with no military or defense applications. Section 744.21(g) defines "military end user" as "the national armed services (army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or reconnaissance organizations, *or any person or entity whose actions or functions are intended*

to support ‘military end uses’” (italics added). In turn, “military end use” is defined as “...any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, “development,” or “production,” of military items described on the USML, or items classified under ECCNs ending in “A018” or under “600 series” ECCNs.” (§744.21(f)). The terms “supports” and “contributes” are not defined. Without further guidance from BIS regarding which activities constitute “support” or contributions, U.S. universities may interpret the rule in ways that are inconsistent with the intentions of this final rule.

Second, the final rule lacks clarity with respect to the connection between the “military end use” of specific items listed in Supplement No. 2 to Part 744 and “any item that supports or contributes...” (italics added). Stated another way, the word “incorporation” is used in the sub-elements/definitions of “military end use” separated with semicolons in the new §744.21(f), while the last part of §744.21(f) simply begins with “any item” (italics added). One could interpret the new definition of “Military end use” in §744.21(f) as, “In this section, ‘military end use’ means: ...any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, ‘development,’ or ‘production,’ of military items described on the USML, or items classified under ECCNs ending in ‘A018’ or under ‘600 series’ ECCNs.” Without further clarification from BIS, the phrase “any item” in the new rule appears in conflict with the limited list of items identified in Supplement No. 2 to Part 744 that are subject to the “military end use” and “military end user” restrictions in §744.21(a).

Third, the U.S. government has stated that China’s government has adopted a “military-civil fusion” strategy.<sup>1</sup> BIS notes in the preamble a continued “lack of transparency regarding products and technologies intended for military use” in China (85 Fed. Reg. at 23460). Given this lack of transparency, it is challenging for U.S. universities to determine whether an entity in China qualifies as a “military end user”.<sup>2</sup> Without additional guidance from the Commerce Department as to what type of actions or functions support military end uses in the context of China’s civil-military integration, U.S. universities may inadvertently interpret the final rule in ways inconsistent with BIS’s intentions and that have unintended consequences. For example, U.S. universities may refuse to engage in collaborations that are of benefit to the United States, such as COVID-19 research, due to uncertainty as to what constitutes sufficient “Know Your Customer” due diligence under this rule in the context of civil-military integration.

## **B. Request for Additional Guidance from BIS**

AUECO requests that BIS provide additional public guidance and clarification on the following points:

- With respect to the definition of “military end use” in §744.21(f), what constitutes “support” or “contribution” to the operation, installation, maintenance, repair, overhaul, refurbishing, “production, or “development” of a military item?

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<sup>1</sup> U.S. Department of State, *Military-Civil Fusion and the People’s Republic of China*, May 28, 2020, available at <https://www.state.gov/wp-content/uploads/2020/05/What-is-MCF-One-Pager.pdf>.

<sup>2</sup> See Remarks by Dr. Christopher Ashley Ford, Assistant Secretary, Bureau of International Security and Nonproliferation, *Preventing U.S. Industry’s Exploitation by China’s “Military-Civil Fusion” Strategy*, April 2, 2020, available at <https://www.state.gov/preventing-us-industry-exploitation-by-chinas-military-civil-fusion-strategy>.

- What is the connection between the listed items identified in Supplement No. 2 to Part 744 and “any item” in the new “military end use” definition?
- With respect to the definition of “military end user” in §744.21(g), what criteria should U.S. universities use to determine whether the end user is a “person or entity whose actions or functions are intended to support ‘military end uses’”?
- What does “support” mean in this context?
  - If a Chinese university has dealings with the Chinese military, is the Chinese university a “military end user”? Even if such dealings are completely unrelated to the export at issue?
- The preamble to the final rule notes the expansion of “military end user” restrictions “will require increased due diligence with respect to the evaluation of end users in China, particularly in view of China’s widespread civil-military integration.” (85 Fed. Reg. at 23460). Are there “red flags” that U.S. universities should be aware of that indicate an entity’s possible involvement in activities that support “military end uses”? Alternatively, what must U.S. universities document to show that the intended end user in China is not a “military end user”?

## II. EXPANSION OF 758.1 EEI FILING REQUIREMENTS

### A. **Lack of Clarity Regarding EEI Filings**

We seek clarity on the discrepancy between 758.1(b)(10) and the preamble to the final rule regarding EEI filings for exports to China, Russia, and Venezuela, which states, “Certain exemptions from filing found in both the EAR and Foreign Trade Regulations (FTR) (see § 758.1(c) of the EAR), such as for personally-owned baggage, are retained in this rule.” The newly-added section 758.1(b)(10) states an EEI must be filed, “[f]or all exports of items on the Commerce Control List to the People’s Republic of China, Russia, or Venezuela, regardless of value, unless the export may be made under the exemption listed under paragraph (c)(4) of this section.”

Section 758.1(b)(10) allows for EEI filing exemptions for CCL-listed items shipped to China, Russia, and Venezuela using the GOV license exception (758.1(c)(4)). Additionally, the personally-owned baggage EEI filing exemption referenced in the preamble is listed under 758.1(c)(1). There is no mention in the preamble that this particular filing exemption would apply only to EAR99 items, yet 758.1(b)(10) states only exports of items on the CCL to China, Russia, or Venezuela described in 758.1(c)(4) are exempt from EEI filing. Since the preamble also states certain EEI filing exemptions provided for in the FTR are retained in this rule (and with no corresponding changes to the FTR) it is reasonable to conclude that the EEI filing exemptions listed under 758.1(c) would also remain valid for CCL-listed items destined to China, Russia, and Venezuela.

### B. **Request for Clarification Regarding EEI Filing Exemptions**

Please confirm our understanding that an item listed on the CCL – for example, a laptop classified under ECCN 5A992.c, hand-carried to China by a traveler as a ‘tool of the trade’ and meeting the criteria for FTR section 30.37(b) (as indicated in 758.1(c)(6)) and not shipped on a commercial invoice – would not require the filing of an EEI.

In summary, AUECO seeks clarification regarding the scope of “military end use,” “military end user,” and EEI filing exemptions in connection with the final rule (85 FR 23459 (4/28/2020)). In addition, AUECO requests that BIS delay the effective date of this rule by 60 days to allow BIS sufficient time to issue additional guidance to the public on this rule.

AUECO appreciated the opportunity to provide the Department of Commerce with the above comments on the Expansion of Controls for Military End Use rule and will be glad to provide further comments if it would be helpful.

Respectfully,

DocuSigned by:  
*Mary D Millsaps*  
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Mary Millsaps

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