



September 25, 2024

Via regulations.gov

Hillary Hess
Director, Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce

*Re: Comments on End-Use and End-User Based Export Controls, Including U.S. Persons Activities Controls: Military and Intelligence End Use and End Users, 89 Fed. Reg. 60,985 (July 29, 2024)
RIN 0694-AJ43, BIS-2024-0029*

Dear Ms. Hess:

The Association of University Export Control Officers (AUECO) respectfully submits this letter in response to *End-Use and End-User Based Export Controls, Including U.S. Persons Activities Controls: Military and Intelligence End Use and End Users, 89 Fed. Reg. 60,985 (July 29, 2024)* (the “Proposed Rulemaking”). We are grateful for the opportunity to provide feedback on important regulatory amendments likely to have wide-ranging consequences for international educational exchanges, research collaborations, and expert consulting arrangements. Please note that we are also submitting a comment letter on the companion rulemaking, *Comments on Export Administration Regulations: Crime Controls and Expansion/Update of U.S. Persons Controls, 89 Fed. Reg. 60,998 (July 29, 2024)*, RIN 0694-AI35, BIS-2023-0006.

Several of the proposed changes to the Export Administration Regulations (“EAR”) provide welcome clarity, and do not subject low-risk activities and items to unnecessary controls. However, due to the potentially broad scope and application of other aspects of the Proposed Rulemaking, AUECO encourages BIS to clarify certain concepts in the final amendments to minimize the potential unnecessary impact they may have on critical global research collaborations and commonly associated activities. The open and collaborative nature of the U.S. academic research and development (“R&D”) enterprise underpins America’s science and technology leadership, economic competitiveness, and national security. Certain elements of the Proposed Rulemaking may put the success and efficacy of this model in jeopardy by overly restricting—or unnecessarily discouraging—controlled activities that often run parallel to the conduct of fundamental research at universities in the United States and abroad (*e.g.*, shipments of specimens and samples, the carriage of consumer electronics in connection with student or faculty travel, and faculty consulting arrangements).

AUECO is an association of over 500 export control professionals with compliance responsibilities at over 200 institutions of higher education and related organizations 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, including international academic and research collaborations.

Exclusions for Routine Academic Activities from “Support” in Proposed Section 744.6 Should be Retained in the Final Rulemaking.

AUECO applauds the explicit exclusion of “[a]ctivities related to items [not subject to the EAR] described in section 734.3(b)” in the definition of “support” at proposed section 744.6(a)(1)(ii)(A). The definition in existing section 744.6(b)(6) lacks a provision of this sort, leading to some uncertainty as to whether certain activities in which researchers commonly engage in might somehow cause a university to inadvertently provide “support” in violation of section 744.6(b). (Examples of such activities include merely presenting a previously published journal article during an online seminar or making open-source software resulting from fundamental research available for public download.) We respectfully urge BIS to retain this proposed language itemizing activities that are not “support” for purposes of this control. Opting not to do so could fuel confusion or uncertainty about conduct frequently associated with otherwise unrestricted fundamental research and educational activities.

Request for Clarity on the Definition of Military-Support End User (“MSEU”).

The definition of MSEU at proposed section 744.22(f) is ambiguous in key respects. It states, in pertinent part, that an MSEU is “any person or entity whose actions or functions *support*” (emphasis added) the “development” or “production” of military systems or technologies, among other things. The difficulties with this definition are twofold.

- *The concept of “support” is ambiguous and requires clarification or replacement.*

First, the Proposed Rulemaking does not define “support” for purposes of the MEU definition in new section 744.22(f). Given the centrality of this word in deciding whether a person or organization is an MSEU, we recommend that BIS furnish a definition here. In the alternative, and to minimize the potential for confusion, with section 744.6 “support,” the Bureau could provide a different term or phrase (and corresponding definition), such as “contribute to” or “advance,” in place of the proposed section 744.22(f) “support.”

- *It is unclear what quantity of support makes an organization an MSEU.*

Second, it is not clear how much military-related activity would render an organization an MSEU. The proposed definitions at sections 744.22(f) (in conjunction with 744.21(f)), would appear to mean that an entity with just a single project or contract for the “development” or “production” of military items is an MSEU. This would seem to be the case even when the vast majority of its business is purely civilian, and even when a given export has nothing to do with the recipient’s comparatively incidental military-related activities.

Of course there will be clear cases. For example, prominent defense contractors, such as Russia’s State Corporation for the Promotion of the Development, Manufacture, and Export of High Tech Products (“Rostec”) or the China Aerospace Science and Industry Corporation (“CASIC”), are unquestionably MSEUs. But other cases will be less straightforward. How should exporters classify a Chinese or Russian university

that employs several thousand researchers and support personnel, but only a relative handful of whom are involved in military-related aerospace R&D work? Under the proposed definition, that university would seem to be an “entity whose actions or functions support” the “development” of defense items and consequently an MSEU, even though those actions or functions make up a small fraction of its total research and the proposed export may be completely unrelated to the military-related R&D activities.

A specific example might illustrate the impact. Let’s suppose a U.S. university wanted to export a new 1C991.a vaccine to a research group working on a global pandemic response in the medical school of a Chinese university funded predominantly by the National Natural Sciences Foundation of China. If just a small number of personnel in another department of that Chinese university are conducting unrelated military-funded R&D work on integrated circuits, then prudence would compel the U.S. university to consider the entire Chinese university an MSEU in light of the proposed definition in 744.22(f). The U.S. university would thus need to delay the planned shipment for weeks (or possibly months) while pursuing an export license for a 1C991.a vaccine that is otherwise controlled only for Anti-Terrorism reasons, and that has nothing whatsoever to do with the military-funded work on integrated circuits.

Accordingly, AUECO respectfully requests that BIS consider ways to narrow and clarify the MSEU definition or otherwise assist exporters in determining whether an organization is subject to proposed section 744.22. Possibilities include:

- The scope of “any person or entity whose actions or functions support” could be adjusted to something like “any person or entity whose predominant actions or functions materially and directly” support or contribute to military end uses. While there might still be some uncertainty in cases on the margins, a formulation of this sort would cover high-risk defense-focused organizations while excluding entities whose activities are principally civilian.
- BIS could offer an expedited service, analogous to the Advisory Opinion or Commodity Classification processes, to advise exporters whether a given organization is an MSEU.
- An FAQ document could provide welcome guidance, especially if it were to apply the final language to realistic, close-call hypotheticals in detail. (An example of a similar document is the September 1, 2016, FAQs published in connection with *Revisions to Definitions in the Export Administration Regulations*, 81 *Fed. Reg.* 35,586 (June 3, 2016), which AUECO members frequently consult).
- If it is the position of BIS that one or two defense contracts or projects should render an entire organization an MSEU regardless of its predominant commercial or civilian activities, a clarifying statement to that effect in section 744.22(f) would be warranted. We note, however, that the practical implications of such a position would greatly complicate business and academic relationships with organizations in China and other covered countries. U.S. exporters would most likely have to operate on the default presumption that all but the smallest universities, manufacturers, and technology companies in covered countries (at least China and Russia) are MSEUs. The undue chilling effect on commercial and academic exchanges of a low-risk, routine nature could be substantial.

Request for Clarity on Definition of Intelligence End User (“IEU”).

The definition of IEU at proposed section 744.24(f) would also benefit from clarification. The text includes certain government organizations as well as “other entities performing functions on behalf of such organizations.” The phrase “performing functions on behalf of” is unqualified, and thus potentially overbroad. For example, might the definition of IEU cover a foreign university offering language training or political science classes in which covered government intelligence personnel enroll if the tuition is paid by their employing agency? AUECO respectfully suggests that this phrase be narrowed to specific “functions” of concern: “performing intelligence, surveillance, or reconnaissance functions on behalf of” such government organizations, for example. Another possibility would be “performing the functions of such government organizations, such as clandestine intelligence gathering, surveillance, or reconnaissance.”

Conclusion

AUECO recognizes that developing the Proposed Rulemaking cannot have been a trivial undertaking and applauds BIS for the work it has done in further tailoring controls to promote U.S. national security and foreign policy interests while being mindful to consider the potential consequences for impacted stakeholders. Although the final version of the changes will no doubt add complexity to Part 744, we believe the existing and suggested efforts at clarification described above will result in a more manageable set of controls that will allow regulators and the regulated community to focus on the exports of greatest genuine concern.

Thank you for this opportunity to comment on the above-referenced rulemaking.



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Chair

Association of University Export Control Officers (AUECO)



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COGR endorses this AUECO comment letter:



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