May 28, 2020

Sent via email to: Richard.Ashooh@bis.doc.gov, Matthew.Borman@bis.doc.gov, and rpd2@bis.doc.gov

Mr. Rich Ashooh, Assistant Secretary of Commerce for Export Administration
Mr. Matthew Borman, Deputy Assistant Secretary
U.S. Department of Commerce
Bureau of Industry and Security
Room 3886C
1401 Constitution Ave., NW
Washington, DC 20230

RE: Request for Clarifications of Terms Used in the "Military End Use" and "Military End User" Final Rule, 85 Fed. Reg. 23459 (Apr 28, 2020).

Dear Mr. Ashooh and Mr. Borman:

The undersigned organizations represent a broad range of companies that employ millions of Americans and create tens of billions of dollars in exports. Our associations and our member companies recognize the national security challenges created by the three countries at issue and the concerns associated with the diversion of civilian items for military applications. We share the Administration's goal of controlling technology exports to military end users and military end uses, as these terms are normally understood, in these countries.

The Bureau of Industry and Security (BIS) has, however, defined these terms in its new rule with such breadth and ambiguity that they appear to extend beyond the intended goal and into commercial, mass market products and sales to end-users with indirect or limited connection to the military. This uncertainty threatens to create unmanageable compliance burdens for industry and upend tens of billions of dollars in commercial exports. U.S. exporters of commercial items cannot be reliable and predictable suppliers if export controls are not predictable and clear.

Furthermore, we are concerned that the compliance burden and regulatory uncertainty created by the new rules, as now written, will result in displacing U.S.-origin commercial items in favor of foreign-origin and widely available alternatives that may be shipped to China without such regulatory uncertainty. This will not advance our national security because it will harm U.S. industry without affecting the ability of Chinese companies to purchase and use the items at issue.

We, therefore, respectfully request the Department:

- Clarify and narrow the scope and meaning of the terms "military end use" and "military end user" used in the rule through guidance, an amendment to the EAR, or FAQ as proposed below:

- Remove from the rule's scope ECCNs for mass-market products with well-established

foreign availability such as 7A994 and 4A994, as well as "mass market" hardware and software described in ECCNs 5A992 and 5D992 given their widespread availability and limited military applicability;

- Delay the rule's effective date for 60 more days to enable our companies an opportunity to receive and understand U.S. government guidance to achieve our national security goals in an effective manner while at the same time providing for reasonable compliance with the rules.

The Final Rule warrants clarification in several respects. For example, one way of reading the second prong of "military end user" is that it only applies to non-governmental entities that have as their intended purpose supporting the incorporation of the items into military items, even if they also engage in some civil activities. Another way of reading the same words is that non-governmental commercial entities are deemed to be "military end users" if they even once intend to support an item that somehow supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, developing, or producing of a military item, directly or indirectly, in a completely unrelated part of the company involving items unrelated to the U.S.-origin item being exported. Given how sections 744.21(f) and (g) are structured, there are many different additional readings.

Many of our members will be engaging with BIS to raise questions and point out areas needing clarification, particularly those in the semiconductor, consumer electronics, consumer software, electronics manufacturing and civil aircraft industries. Clear, bright-line BIS guidance on how industry should read the terms together will make a dramatic difference in how effective the rule is and how significant its impact will be on commercial sales of billions of dollars' worth of U.S.-origin commercial items that are available outside the United States and sold without restrictions by foreign competitors. Such guidance will also be critical to addressing additional questions our members have.

The primary areas we seek clarification on are as follows:

1. <u>Presumption of Denial</u>

Does the stated presumption of denial policy mean what it has traditionally meant, which is that licenses are rarely, if ever, granted? Absent clear BIS guidance on the intended scope of the new rule, US companies will be reluctant to export even *civil items* that are intended for *civil end uses* without a BIS license due to uncertainty about whether BIS would nonetheless consider their commercial customers to be "military end user." Will BIS presumptively deny such applications? Or will it treat them, as a practical matter, on a more case-by-case basis and grant them when it is clear that the items being exported are exclusively for civil end uses? May exporters submit such applications before June 29, 2020 in order ensure continuity of business without such doubts? If so, will BIS grant or deny such pre-June 29, 2020 license applications by June 29, 2020, issue a temporary general license during the deliberation period, or will an exporter be obliged to terminate an outstanding order, license, or agreement to avoid a potential violation situation? Or is it BIS's position that if an exporter has confidence or certainty that a covered item is being exported exclusively for a civil end use, then no such applications are even

required because the policy concerns justifying the rule are not implicated?

The volume of existing sales of mass market consumer goods into China and ambiguity regarding the definition of a military end user suggest BIS is likely to see a substantial increase in license applications and advisory opinions related to sales. To that end, will there be a process to ensure that the license review process and accompanying deliberations will be expeditious?

2. Due Diligence and Compliance Program Efforts

Given the Administration's descriptions of the three countries' civil-military fusion doctrines, has BIS essentially notified all exporters that there is a *per se* "red flag," as defined in the EAR's Know Your Customer Guidance, associated with their exports and reexports of items in Supplement No. 2 to the countries? If so, what does this mean with respect to required or warranted enhanced due diligence and compliance program efforts for such exporters or reexporters?

Given that many of the items added to Supplement No. 2 are high-volume commercial items – particularly including 5A992 and 5D992 "mass market" electronics and software – can you provide guidance on how to investigate such red flags? For example, how can a company that exports purely consumer, commercial items, including as software downloads, resolve whether, in light of the country's civil-military fusion doctrine, the customer intends to support a military item? Relatedly, how will BIS treat commercial items exported to a store, which are then purchased by a military end user? We realize the license requirement is a "knowledge"-based requirement, but Commerce can impute knowledge of its employees and others to the company. This, as a practical matter, warrants considerable due diligence and internal reviews to determine whether a company "knows" that a customer "intends to contribute or support" in unrelated areas, for example, the operation of a military item.

3. Scope of "Military End User" and "Military End Use"

What level or type of support, direct or indirect, can cause an otherwise commercial or academic entity using the items exported for civil applications to nonetheless be deemed to be a "military end user?" Is there a cutoff, whether it is share of sales, type of exported product, or any nother metric, that will be used in determining what is a military end user? It is likely the case that many companies in the three countries make and sell items to others that are then used for military applications. Such uses are several layers removed from the original export of the U.S.-origin items. For instance, should an academic institution ordering mass market consumer items for civil applications be a considered a military end user if a faculty member conducts research funded by a military grant? Is knowledge of such indirect applications enough to trigger the license requirement for all covered exports to the whole entity? Or is it BIS's position that, for the license obligation to exist, there must be more of a direct connection between the export and a military item or end use? We would submit that the entity ought to be primarily or predominately engaged in activities that constitute "military end uses" to be considered a "military end user."

4. Internally Consistent Definitions of "Military End Use" and "Military End User"

The EAR now has three different combinations of controls on "military end uses" and "military end users." They are in sections 744.9, 744.17, and 744.21. The definitions in each section are slightly different. For the sake of reducing regulatory burden by having common definitions for common terms, we ask that BIS align the definitions of "military end use" and "military end user," as applicable, across the three provisions.

Conclusion

Our members want to know what the rules are with certainty so that they know how to comply with them when they apply for transactions. This is important because BIS's clear, written answers will, as a practical matter, determine whether the new rule is something close to an embargo of Supplement No. 2 items to the three countries or a manageable increase in license and other due diligence efforts with respect to exports, reexports, and transfers that are clearly for military end users and end uses. The absence of responses from BIS will catalyze industry uncertainty, which neither furthers the policy objectives of section 744.21 or the Administration's general goal of eliminating unnecessary regulatory burdens. Also, given that the controls are unilateral, the uncertainty will be a boon for foreign competitors of U.S. companies. We, therefore, appreciate your prompt response to our request for clarification and answers to the questions so that guidance can be provided well in advance of the effective date of the rule.

Sincerely,

Aerospace Industries Association

Alliance for Automotive Innovation

BSA | The Software Alliance

Computing Technology Industry Association (CompTIA)

Consumer Technology Association

Here For America

IPC

Information Technology Industry Council (ITI)

Motor & Equipment Manufacturers Association

National Association of Manufacturers

National Foreign Trade Council

Pacific Northwest International Trade Association

Semiconductor Industry Association

SEMI

Software & Information Industry Association

Telecommunications Industry Association (TIA)

U.S. Chamber of Commerce

US-China Business Council

U.S.-Russia Business Council