The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; and STATE OF WISCONSIN,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as Secretary of State; DIRECTORATE OF DEFENSE TRADE CONTROLS; MIKE MILLER, in his official capacity as Acting Deputy Assistant Secretary of Defense Trade Controls; SARAH HEIDEMA, in her official capacity as Director of Policy, Office of Defense Trade Controls Policy; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, in his official capacity as Secretary of Commerce;

No. 2:20-cv-00111-RAJ

BRIEF OF *AMICUS CURIAE* BRADY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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BUREAU OF INDUSTRY AND SECURITY; CORDELL HULL, in his official capacity as Acting Undersecretary for Industry and Security; RICH ASHOOH, in his official capacity as Assistant Secretary of Commerce for Export Administration,

Defendants.

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CORPORATE DISCLOSURE STATEMENT

Brady is a § 501(c)(3) non-profit corporation. No publicly held corporation holds its stock.

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STATUTES:

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STATEMENT OF INTEREST

Brady is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Its membership includes individuals who are concerned with, and affected by, public health and safety issues stemming from gun violence. Brady has a substantial interest in ensuring that state and federal laws are not interpreted or applied in a way that would jeopardize the public's interest in protecting individuals, families, and communities from the effects of gun violence. Brady submitted comments on the rules that are at the center of this litigation. *See* Ex. 2 (Brady Comments on the Proposed Rules). Brady has also filed numerous briefs as *amicus curiae* in cases involving the constitutionality and interpretation of gun laws, including in *Washington v. U.S. Dep't of State*, 318 F. Supp. 3d 1247 (W.D. Wash. 2018), and *Defense Distributed v. U.S. Dep't of State*, 838 F.3d 451 (5th Cir. 2016). Brady submits this brief in support Plaintiffs' position that Defendants failed to provide adequate notice and opportunity to comment on the State and Commerce Departments Final Rules.

INTRODUCTION

The Administrative Procedure Act requires an agency to notify the public of—and provide the public with an opportunity to comment on—the agency's intention to change an existing regulation or to promulgate a new regulation. *See* 5 U.S.C. §§ 553(b), 553(c), 551(5). Adequate notice "is crucial to 'ensure that agency regulations are tested via exposure to diverse public comment," "to ensure fairness to affected parties," and "to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 95 (D.C. Cir. 2010) (citation omitted).

The Ninth Circuit has held that when a court considers whether an agency has satisfied the notice requirement of the APA, the "essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the draft [proposal]." *Nat. Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002). Thus, for example, where an agency "embrace[s] an entirely different standard" in the final rule than the standard that was proposed, the reviewing court should hold the agency's actions in promulgating the final rule unlawful

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because the agency has failed to afford interested parties the opportunity to comment on whether the change in the permit "conformed to the substantive requirements" of the law. *Id.* at 1189.

That is precisely what happened here. The State and Commerce Departments have promulgated rules that will de-regulate the technical information—that is, the computer files—necessary to manufacture 3D printed guns. The agencies rules will accomplish this change by transferring the responsibility to regulate technical information related to 3D printed guns from the State Department to the Commerce Department. Brady was able to glean that much from the notices of proposed rulemaking. But what Brady did not know—and could not have discovered by examining the proposed rules—was the agencies' intent to construct an entirely new standard to regulate the export of the technical information necessary to manufacture 3D printed guns: the new provision to be codified at 15 C.F.R. § 734.7(c).

In its notice of final rulemaking, the Commerce Department announced—for the first time—that it will retain jurisdiction over files "for the production of a firearm, or firearm frame or receiver" that are "made available by posting on the internet in electronic format" and are "ready for insertion" into a computer or other machine that "makes use" of the files "to produce the firearm frame or receiver or complete firearm." *Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List*, 85 Fed. Reg. 4136, 4172–73 (Jan. 23, 2020) (setting out the new Commerce rule to be codified at 15 C.F.R. § 734.7(c)). Neither the text nor the substance of that provision were in the notices of proposed rulemaking. The topic of that provision—the computer files necessary to manufacture 3D printed guns—does not appear in the notices of proposed rulemaking either. Yet, the Commerce's inclusion of this new provision in the final rule will work a substantial change in the regulatory regime that governs the online distribution of 3D printed guns.

In promulgating this new rule, the State and Commerce Departments denied Brady—and other interested members of the public—the opportunity to comment on the new provision. "A decision made without adequate notice and comment is arbitrary or an abuse of discretion" as a matter of law. *Nat. Res. Def. Council*, 279 F.3d at 1186 (citing 5 U.S.C. § 706(2)(A)).

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BACKGROUND

1. The statutory and regulatory path through which the State Department currently regulates the technical information necessary to manufacture 3D printed guns begins with the Arms Export Control Act. There, Congress authorized the President, "[i]n furtherance of world peace and the security and foreign policy of the United States," to "control the . . . export of defense articles and defense services." 22 U.S.C. § 2778(a)(1). The President has delegated that authority to the State Department. *See* Administration of Reformed Export Controls, Exec. Order No. 13,637, § 1(n), 3 C.F.R. 223–24 (2014). And, exercising that authority, the State Department has promulgated the International Traffic in Arms Regulations. *See* 22 C.F.R. §§ 120–130. Consistent with the Act, *see* 22 U.S.C. § 2778(a)(1), the State Department's regulations create a list—called the "United States Munitions List"—of materials that constitute "defense articles and defense services." *See* 22 C.F.R. §§ 120.2, 121. The State Department's regulations also provide that all firearms up to .50 caliber, and all "technical data" directly related to such firearms—that is, "[i]nformation . . . which is required for the . . . production . . . of defense articles," *id.*. § 120.10(a)(1)—are a part of the Munitions List. *See id.* § 121.1(I)(a). Persons who want to "export" items on the Munitions List—that is, "transfer[]" or "release[]" technical data to a foreign person, *id.* § 120.17(a)—must first obtain a license from the State Department. *See* 22 U.S.C. § 2778(b)(2), 22 C.F.R. § 123.1(a).

Under the current regulatory regime, the State Department has the power to prevent a person from uploading the technical information necessary to manufacture 3D printed guns to the Internet because federal law requires a person to obtain a license from the State Department before exporting items on the United States Munitions List. *See Defense Distributed*, 838 F.3d at 456; *Washington*, 318 F. Supp. at 1262 (citing 22 C.F.R. §§ 120.10, 120.11). That is, as noted above, persons who want to export items on the United States Munitions List must first obtain a license from the State Department to do so. *See* 22 U.S.C. § 2778(b)(2), 22 C.F.R. § 123.1(a). The computer files that are needed to produce a 3D printed gun are "technical data" directly related to firearms, 22 C.F.R. § 120.10(a)(1), and as a result, are included in the United States Munitions List. *See id.* § 121.1(I)(a). And posting computer files that are needed to produce a

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3D printed gun on the Internet, where that information can be accessed by foreign nationals, is an "export" of that information. *See id.* § 120.17.

2. In 2018, the State Department and the Commerce Department each published a notice of proposed rulemaking announcing the federal government's intent to make substantial changes to the regulatory regime that governs the export of firearms. *See Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List*, 83 Fed. Reg. 24,166 (May 24, 2018) (Commerce Proposed Rule); *International Traffic In Arms Regulations: U.S. Munitions List Categories I, II, and III*, 83 Fed. Reg. 24,198 (May 24, 2018) (State Proposed Rule).

The proposed rules silently announced the government's intent to divest itself of the power to prevent the widespread dissemination of the technical information necessary to manufacture 3D printed guns. In particular, State proposed removing all non-automatic firearms up to .50 caliber and related technical information—including the computer files needed to manufacture a 3D printed gun—from the United States Munitions List. *See* State Proposed Rule, 83 Fed. Reg. 24,198. In making that change, State disclaims its authority to regulate the export of such computer files. And if State no longer has that authority, then the agency will no longer be able to stop a person from uploading the computer files necessary to manufacture 3-D printed guns a person to the Internet.

Commerce's proposed rule purported to solve that problem by providing that items removed from the Munitions List would instead be regulated by Commerce under the Export Control Reform Act and Commerce's Export Administration Regulations. *See* Commerce Proposed Rule, 83 Fed. Reg. 24,166. The Export Control Reform Act authorizes Commerce to regulate the export of certain controlled commodities, software, and technology. *See* 50 U.S.C. §§ 4801(7), 4812. But Commerce's proposed rule cannot not fill the regulatory void created by State's proposed rule because the Commerce's authority under the Export Control Reform Act is limited in a way that the State's authority under the Arms Export Control Act is not.

Under the Export Control Reform Act, Commerce lacks jurisdiction to regulate the export of "published" technology or software. *See* 15 C.F.R. §§ 734.3(b)(3), 734.7(a). And

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Commerce's regulations define "published" technology or software as technology or software that "has been made available to the public without restrictions upon its further dissemination." *Id.* § 734.7(a). So where the Arms Export Control Act and State's regulations empower the State Department to prevent a person from posting computer files that are needed to produce a 3D printed gun on the Internet, the Export Control Reform Act and Export Administration Regulations would render the Commerce Department powerless to prevent a person from sharing computer files that are needed to produce a 3D printed gun.

3. Brady spotted this "significant loophole." Ex. 2 at 8. In Brady's comments on the proposed rules, Brady noted that "if jurisdiction over technical data related to the design, production or use of semi-automatic or military-style firearms transfers to [Commerce], there would no longer be any controls on companies or individuals releasing such sensitive information into the public domain." *Id.* As Brady explained, "[i]t has been [State's] long standing practice to require prior authorization for any public release of . . . controlled technical data, source code or software (e.g., posting controlled technical data on a public website)," but Commerce "takes a less stringent approach to publicly available information, removing . . . controls once the items are made public (or intended to be made public) without requiring prior authorization." *Id*. Thus, Brady warned that "if a gun manufacturer posts a firearm's operation and maintenance manual on the Internet" then the "information included in that published manual would no longer be . . . subject to export controls." *Id.*

Brady also warned that the loophole would result in the proliferation of 3-D printed guns. As Brady pointed out, "the Fifth Circuit ordered manufacturer Defense Distributed to remove 3-D printing instructions from the Internet after the State Department charged the company with violating the [State Department Regulations]." *Id*. (citing *Defense Distributed*, 838 F.3d at 451–76). "In contrast, under the proposed rules, such manufacturers would be able to freely release 3-D printing instructions and code into the public domain (and thereby enable the private production of firearms overseas and in the United States), as the [Commerce Regulations] permit publication of source code and technology (except encryption source code and technology) without authorization from [the Commerce Department]." *Id*.

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4. Last month, the State and Commerce Departments promulgated their Final Rules without closing this loophole. *See Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List,* 85 Fed. Reg. 4136 (Jan. 23, 2020) (Commerce Final Rule); *International Traffic In Arms Regulations: U.S. Munitions List Categories I, II, and III*, 85 Fed. Reg. 3819 (Jan. 23, 2020) (State Final Rule).

Instead, the agencies created an entirely different kind of loophole. State's final rule confirmed its decision to remove non-automatic firearms and related technical information—including the computer files need to manufacture a 3D printed gun—from the Munitions List. *See* State Final Rule, 85 Fed. Reg. 3819, 3823. But Commerce's final rule included a new provision that did not appear in the Proposed Rules. *See* Commerce Final Rule, 85 Fed. Reg. at 4162. Under that new provision, which will be codified at 15 C.F.R. § 734.7(c), notwithstanding the ordinary exception from jurisdiction for "published" items, Commerce explained that it will retain jurisdiction over files "for the production of a firearm, or firearm frame or receiver" that are "made available by posting on the internet in electronic format" and are "ready for insertion" into a computer or other machine that "makes use" of the files "to produce the firearm frame or receiver or complete firearm." *See* Commerce Final Rule, 85 Fed. Reg. at 4172–73 (setting out the new rule to be codified at 15 C.F.R. § 734.7(c)).

Section 734.7(c) creates a regulatory regime that differs substantially from the one currently in effect. First, the new regulations differ from the existing regulations because the Final Rules authorize—where current regulations would prohibit—the distribution of the technical information necessary for manufacturing 3D printed guns by any means other than "posting on the internet." So under the Final Rules, a person could transfer the technical information necessary to manufacture 3-D printed guns to a foreign national through an email, an AirDrop, or a USB drive. Second, the new regulations also differ from the existing regulations because the Final Rules authorize—where existing regulations would prohibit—the distribution of the technical information necessary for manufacturing 3D printed guns in any format that is not readable by a 3D printer. So under the Final Rules, a person could distribute the technical

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information necessary for manufacturing 3D printed guns in any computer language that is not readable by a 3D printer, but could easily become so. And third, the new regulations differ from the existing regulations because the Final Rules authorize—where existing regulations would prohibit—the distribution of the technical information necessary for manufacturing components of a 3D printed gun other than the firearm frame or receiver. So under the Final Rules, a person could distribute the technical information necessary for manufacturing the barrel of or magazine for a 3D printed gun.

Section 734.7(c) also represents a substantial departure from the State and Commerce Department's proposed rules. First, neither the substance nor the text of Section 734.7(c) appears in State and Commerce's notices of proposed rulemaking. And second, neither State's nor the Commerce's notice of proposed rulemaking mention 3D printed guns at all. Thus, although the Final Rules are similar to the Proposed Rules in that they create a new regulatory regime under which the federal government will lack the power to prevent the widespread dissemination of the technical information necessary to manufacture 3D printed guns, the new provision in the Commerce Final Rule still differs substantially from what the State and Commerce Departments proposed.

5. If Brady had been given the opportunity to comment on the new Section 734.7(c), it would have done so. *See generally* Ex. 1 (Decl. of Kelly Sampson). As noted above, Brady commented on the proposed rules' applicability to 3D printed guns. Brady was attentive to and interested in this issue. And if the State and Commerce Departments had given Brady the opportunity to comment on Section 734.7(c), Brady would have opined on whether the regulation of 3D printed guns through an exception to the Commerce Department's existing regulations would conform to the substantive requirements of the law.

ARGUMENT

The State Department and the Commerce Department violated the APA in promulgating the Final Rules at issue here. The APA requires administrative agencies like the State and Commerce Departments to provide an opportunity for notice and comment for its proposed regulations and rules. *See* 5 U.S.C. § 553(b)-(c). Although a final rule need not be the same as a

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proposed rule, it must be a logical outgrowth of the proposed rule *See Nat. Res. Def. Council*, 279 F.3d at 1186, or a second round of comment is required, *see Am. Water Works Assoc. v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994). Section 734.7(c) is not a logical outgrowth of the proposed rules. Brady did not have an adequate opportunity to comment on this provision. And the State and Commerce Department's failure to comply with the APA's notice requirements was not harmless. Accordingly, the State and Commerce Department's promulgation of that provision violates the APA, and the Court should vacate the final rules.

I. The Commerce Department Rule to be Codified at 15 C.F.R. § 734.7(c) Is Not a Logical Outgrowth of State and Commerce's Proposed Rules.

1. The APA requires agencies to provide notice of the "terms or substance" of proposed regulations and to provide an opportunity for the public to comment on its proposals. 5 U.S.C. § 553(b), (c). While a final rule need not be "identical" to the proposed rule, "a final rule which departs from the proposed rule must be a logical outgrowth of the proposed rule." *Nat. Res. Def. Council*, 279 F.3d at 1186 (citation omitted). Thus, where an agency "embrace[s] an entirely different standard" in the final rule than the one that was proposed, the reviewing court should hold the agency's actions in promulgating the final rule unlawful. *Id.* at 1189.

Here, the State and Commerce Department's notices of proposed rulemaking tacitly indicated that the federal government would divest itself of the power to prevent the widespread dissemination of the technical information necessary to manufacture 3D printed guns. In particular, State proposed removing certain non-automatic firearms and related technical information—including the computer files needed to manufacture a 3D printed gun—from the United States Munitions List. *See* State Proposed Rule, 83 Fed. Reg. 24,198. Commerce's proposed rule purported to solve the problem created by State's proposal to deregulate this group of firearms by regulating the items removed from the Munitions List. *See* Commerce Proposed Rule, 83 Fed. Reg. 24,166. But because the Commerce lacks jurisdiction to regulate the export of "published" technology or software, *see* 15 C.F.R. §§ 734.3(b)(3), 734.7(a), the agencies essentially announced that the federal government would be powerless to prevent the dissemination of the technical information necessary to produce a 3D printed gun.

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By contrast, the State and Commerce Department's notices of final rulemaking indicated that the federal government would regulate the dissemination of the technical information necessary to manufacture 3D printed guns, albeit ineffectually. In particular, Commerce's final rule contained a provision that appears to have been specifically drafted to address the dissemination of technical information related to 3D printed guns. Under that new provision, which will be codified at 15 C.F.R. § 734.7(c), notwithstanding the ordinary exception from jurisdiction for "published" technology or software, Commerce explained that it will retain jurisdiction over files "for the production of a firearm, or firearm frame or receiver" that are "made available by posting on the internet in electronic format" and are "ready for insertion" into a computer or other machine that "makes use" of the files "to produce the firearm frame or receiver or complete firearm." Commerce Final Rule, 85 Fed. Reg. 4136,4172–73.

Thus, prior to the publication of the final rules, the agencies gave no indication that they would develop a specific regulation to address the threat posed by the online dissemination of technical information related to 3D printed guns. Indeed, prior to the publication of the final rules, the agencies had tacitly conveyed that they did not intend to regulate technical information related to 3D printed guns at all. Commerce all but acknowledged the fact that it was flipping the regulatory switch from "off" to "on" when it said in the notice of final rulemaking that "[a]t the time of the proposed rule, [Commerce] believed that its existing framework struck the appropriate approach in providing for national security and foreign policy control of firearms" that would transfer from the Munitions List, but "[s]ince that time, [Commerce] has had considerable time to review the comments related to 3D printing of firearms," and concluded that "the framework of [Commerce] regulations as described in the proposed rule did not adequately address" the issue of "regulating the unlimited access to certain files for the 3D printing of firearms." Commerce Final Rule, 85 Fed. Reg. 4136, 4141–42.

The addition of an entirely new provision is not the sort of deviation from the proposed rule that is allowed under the APA as a logical outgrowth of the proposals on which the public had the opportunity to comment. "Something is not a logical outgrowth of nothing." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) (citation omitted); *see also, e.g.*,

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Alameda Health Sys. v. Ctrs. for Medicare & Medicaid Servs., 287 F. Supp. 3d 896, 918 (N.D. Cal. 2017) (final rule was not a logical outgrowth where challenged provision was "not mentioned at all" in the proposed rule).

2. The conclusion that the Section 734.7(c) is not a logical outgrowth of the State and Commerce Department's proposed rules is underscored by the record that was before the agency. As the Ninth Circuit has explained, "in determining the adequacy of [an agency's] notice and comment procedure," the "salient question" is "whether interested parties reasonably could have anticipated the final rulemaking from the draft." *Nat. Res. Def. Council*, 279 F.3d at 1187 (internal quotation marks and citation omitted). Put another way, where the final rule's substance is "'not foreshadowed in proposals and comments advanced during the rulemaking,' it will not be considered a 'logical outgrowth' because it may catch interested parties by surprise." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059, 1073 (N.D. Cal. 2007) (quoting *Nat. Res. Def. Council*, 279 F.3d at 1188).

But Commerce does not cite any comments that foreshadowed the agency's adoption of the specific requirements set out in Section 734.7(c). That is, Commerce does not cite any comments showing that the public supported Commerce's decision to "tailor[]" the new Section 734.7(c) so that "only technology or software for the complete firearm, its frame, or its receiver are subject to [Commerce] licensing requirements" 85 Fed. Reg. 4136, 4142. Commerce does not cite any comments to show that the public approved of Commerce's decision to "craft[] its rule to regulate dissemination" in the "electronic format that the internet provides." *Id.* And Commerce does not cite any comments to show how the public was involved in helping the agency "reach[] the conclusion" that "technology and software ready for insertion into an automated manufacturing tool" should be the focus of the rule. *Id.*

The agencies' inability to cite comments regarding the new Section 734.7(c) underscores the fact that the State and Commerce Departments "clearly caught [public commenters] by surprise." *Nat. Res. Def. Council*, 279 F.3d at 1188 (citation omitted). By contrast, cases finding that an agency rule was a logical outgrowth of the rulemaking identify clear connections between the proposed rule and the issues extensively discussed in public comments. *See, e.g.*, *Envtl. Def.*

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Center, Inc. v. U.S. EPA, 344 F.3d 832, 852 (9th Cir. 2003) (final rule was a "logical outgrowth" where it "contain[ed] no elements that were not part of the original rule"); *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 591 (9th Cir. 1998) (agency's adoption of application deadline was valid where public comment was "extensive" and included "specific references" to the deadline issue); *Rybachek v. U.S. EPA*, 904 F.2d 1276, 1288 (9th Cir. 1990) (EPA's adoption of provisions "strongly recommended" by public commenters was "very much in character with the original proposal and a logical outgrowth of the notice and comments"). There is no such connection between the proposed and final rules is here.

II. Brady Did Not Have Adequate An Adequate Opportunity to Comment on the Commerce Department Rule to be Codified at 15 C.F.R. § 734.7(c).

Brady did not have an adequate opportunity to comment on the final rules. To be sure, Brady submitted comments regarding how the proposed rules would affect the regulation of technical information related to 3D printed guns. *See* Ex. 2. In particular, Brady commented on a loophole in the State and Commerce Department's proposed rules that would have deregulated the dissemination of technical information related to 3D printed guns. But Brady did not comment on Section 734.7(c). Brady was not able to develop or express its views regarding whether Commerce should promulgate a regulation to specifically address the dissemination of the technical information necessary to manufacture a 3D printed gun. Brady was not able to express its views about Commerce's decision to regulate some, but not all components of a 3D printed gun. Brady was not able to express its views about Commerce's decision to regulate some, but not other electronic formats for the technical information necessary to manufacture a 3D printed gun. And Brady was not able to express its views about Commerce's decision to regulate technical information that is "ready for insertion" into a 3D printer, but leave unregulated technical information that can easily be made ready for insertion. Put another way, Brady's comments on the proposed rules' implications for 3D printed guns cannot reasonably be viewed as comments on the final rules' Section 734.7(c). That provision is entirely new. As would be Brady's comments on that provision.

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III. The State and Commerce Departments' Failure to Comply with the APA's Requirements Was Not Harmless.

Nothing about the circumstances of this case indicates that the State and Commerce Departments should be excused from complying with the APA's requirements. See *California v. Azar*, 911 F.3d 558, 580 (9th Cir. 2018) ("The failure to provide notice and comment is harmless only where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.'") (citation omitted). The agencies did not, for example, simultaneously called for the public's views on the issue pursuant to a different statute. *Cf. Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 763–64 (9th Cir. 1986). Nor did the agencies merely make a technical violation, such as publishing the final rule earlier than described in the governing statute. *Cf. Cty. of Del Norte v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984).

To the contrary, the agency error at issue here implicates the most fundamental of APA's rulemaking requirements: the requirement that agencies "shall" publish a "notice of proposed rulemaking … in the Federal Register," and the requirement that agencies "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" for the agency's consideration. 5 U.S.C. § 553(b), (c). The word "shall" indicates a "command that admits of no discretion" on the agency's part. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661–62 (2007). Consequently, "[a] decision made without adequate notice and comment is arbitrary or an abuse of discretion" as a matter of law. *Nat. Res. Def. Council*, 279 F.3d at 1186 (citing 5 U.S.C. § 706(2)(A)). *See, e.g., Paulsen v. Daniels*, 413 F.3d 999, 1006 (9th Cir. 2005) (rejecting a harmless error claim where an agency failed to comply with notice-and-comment requirements); *Empire Health Found. for Valley Hosp. Med. Ctr. v. Price*, 334 F. Supp. 3d 1134, 1163 (E.D. Wash. 2018) (same). Therefore, this Court should not excuse the State and Commerce Department's failure to comply with the requirements of the Administrative Procedure Act here.

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CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for a preliminary injunction.

DATED: February 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED February 20, 2020.

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Attorneys for *Amicus Curiae*

Exhibit 1

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON; STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; COMMONWEALTH OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; and STATE OF WISCONSIN,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as Secretary of State; DIRECTORATE OF DEFENSE TRADE CONTROLS; MIKE MILLER, in his official capacity as Acting Deputy Assistant Secretary of Defense Trade Controls; SARAH HEIDEMA, in her official capacity as Director of Policy, Office of Defense Trade Controls Policy; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR L. ROSS, in his official capacity as Secretary of Commerce;

No. 2:20-cv-00111-RAJ

DECLARATION OF KELLY SAMPSON IN SUPPORT OF MOTION OF BRADY FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS

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BUREAU OF INDUSTRY AND SECURITY; CORDELL HULL, in his official capacity as Acting Undersecretary for Industry and Security; RICH ASHOOH, in his official capacity as Assistant Secretary of Commerce for Export Administration,

Defendants.

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I, Kelly Sampson, declare as follows:

1. I am over the age of 18 and have personal knowledge of all the facts stated herein.

2. I am the Counsel on Constitutional Litigation at Brady.

3. Brady filed comments on the Department of State's Proposed Rule to Amend the International Traffic in Arms Regulations; U.S. Munitions List Categories I, II, and III, and the Department of Commerce's Proposed Rule Regarding Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List. *See* Exhibit 2.

4. Brady's comments on the Department of State's and the Department of Commerce's Proposed Rules discussed the risk that the Proposed Rules would deregulate the technical information needed to manufacture 3D printed guns. *See id*. at 8.

5. If the Department of State and the Department of Commerce's Proposed Rules had included the Department of Commerce Rule to be codified at 15 C.F.R. § 734.7(c), Brady's comments on the Proposed Rules would have discussed that proposed regulation.

I declare under penalty of perjury under the laws of the State of Washington and the United States of America that the foregoing is true and correct.

DATED this 13th day of February, 2020, in Washington, District of Columbia.

/s/ Kelly Sampson

Kelly Sampson

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Exhibit 2

Brady Campaign
To Prevent Gun Violence

Comments of the Brady Center and Brady Campaign to Prevent Gun Violence
On the
Department of State Proposed Rule to Amend the International Traffic in Arms Regulations:
U.S. Munitions List Categories I, II, and III
And the
Department of Commerce Proposed Rule Regarding Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List

Filed via email to DDTCPublicComments@state.gov; electronically via http://www.regulations.gov

Together the Brady Center and the Brady Campaign to Prevent Gun Violence ("Brady") are national leaders in strengthening, supporting and expanding gun laws, policies, and practices in the United States. Our complimentary missions are to significantly decrease the number of gun deaths and injuries in America. We achieve this by amplifying the voice of the American public; changing social norms through public health and safety programs; and holding the gun industry accountable for dangerous and irresponsible practices and products.[1] These comments are submitted in furtherance of those shared goals. Brady specifically seeks to ensure the safe use and transfer of legal firearms within and outside of the United States by advocating for appropriate regulations that reflect the sensitive nature of the firearms industry.

Brady hereby comments on the proposed rules published by the Department of State's Directorate of Defense Trade Controls ("DDTC") and the Department of Commerce's Bureau of Industry and Security ("BIS") on May 24, 2018 (83 Fed. Reg. 24198; 83 Fed. Reg. 24166) ("Proposed Rules"), which seek comments on the transfer of certain firearms and related items from the International Traffic in Arms Regulations' ("ITAR") U.S. Munitions List ("USML") to the Export Administration Regulations' ("EAR") Commerce Control List ("CCL"). In particular, the Proposed Rules would transfer a broad range of semi-automatic and non-automatic firearms, including those used by the military, (along with their components and ammunition) from USML Categories I, II, and III, where they are classified as significant military equipment, to the CCL, where they will be categorized as "600 Series" items

We respectfully submit that the proposed transfer of semi-automatic and firearms used by the military (and related items) from the stringent control of the USML to the more permissive regime administered by the Commerce Department would be contrary to Congressional intent and would undermine U.S national security interests, international stability and the protection of human rights. We respectfully request that the State and Commerce Departments withdraw their current

[1] For more about Brady's mission and work, see www.bradycampaign.org.

proposed rules, and keep these dangerous weapons (and related items) subject to State Department jurisdiction on USML, consistent with well-settled and established practice.

Both the Proposed Rules indicate that the firearms at issue, which include armor-piercing sniper rifles used by the military, side arms used by the military, and semi-automatic rifles such as AR-15 and other military-style weapons, no longer warrant control under the ITAR because they are not "inherently military" or are widely available for commercial sale. The transfer of these items to Commerce Department jurisdiction is framed by DDTC and BIS as merely technical measures to reduce procedural burdens and compliance associated with exports of firearms. The reality, however, is that these rule changes would significantly weaken existing controls on the exports of military-style weapons, and would thereby increase the supply of such weapons to dangerous repressive regimes, rebel movements, criminals, and gun and drug traffickers. Many state and non-state groups in importing countries use semi-automatic weapons and sniper rifles in armed conflicts, drug trafficking and crime, and would be eager beneficiaries of the proposed rule changes. Further, if U.S. troops are called upon to intervene in certain conflicts, they may be exposed to significant danger from enemy combatants using military sniper rifles and semi-automatic weapons exported from the United States because of the weaker standards set forth in this rule change. Since Congress first imposed these regulations many years ago, the world has not suddenly become more safe, nor our military less at risk.

In granting statutory authority to regulate arms exports to the State Department in the Arms Export Control Act ("AECA"), Congress emphasized the importance of promoting regional stability and preventing armed conflict. In contrast, the delegation of export control authority to the Commerce Department in the Export Administration Act ("EAA") provides that the promotion of trade and other commercial interests are significant factors in agency decisions. Congress purposefully delegated the authority for licensing arms exports to the State Department, recognizing that the two agencies have very different mandates. In the State Department licensing process, international security and human rights are given more weight, while in the Commerce Department licensing process, commercial interests are given more weight. To transfer jurisdiction over these firearms, which have substantial military utility, from the State to the Commerce Department means that U.S. international security and human rights interests will not have the appropriate weight required before determining whether exports of firearms should be undertaken.

We also note that many of the firearms that are subject to the proposed rules are not widely available for commercial sale. As set forth in more detail below, a number of countries prohibit the commercial sale and civilian possession of semi-automatic weapons and military-style firearms, and therefore these weapons cannot be considered to be widely commercially available. Transferring semi-automatic firearms to the more permissive Commerce Department regime would result in less control over these items and a greater likelihood that they will end up in the hands of repressive regimes, terrorist organizations, criminal gangs, gun traffickers and other dangerous actors. Less stringent state gun laws in the United States already fuel a gun pipeline across the border into Mexico and other Central and Latin American countries, causing an increase in violent crime in those countries and subsequently higher numbers of displaced citizens of those countries fleeing across the border into the United States. The proposed transfer of the firearms in question to the less stringent regulation of items on the CCL would further exacerbate these existing problematic firearm and migration flow issues.

We discuss below the various ways the current controls on exports of semi-automatic and military-style firearms would be weakened by the transfer of such items to the jurisdiction of the Commerce Department.

1. Types of Firearms that Would be Released from State Department Control

The Proposed Rules would transfer a broad range of semi-automatic and non-automatic firearms, including firearms typically used by the military and military-style firearms, to Commerce Department jurisdiction. For example, below is a non-exhaustive list of the types of weapons that would be transferred:

Sniper Rifles Used by Armed Forces		
• M40A5 (used by US Marines) • M24 (used by US Army)	• L115A3 (used by UK Armed Forces) • Barrett M82 (used by multiple armies including US)	• Knight's Armament M110 (used by US Army)
Sidearms Used by Armed Forces		
• Sig Sauer XM17 and XM 18 pistols (used by US Army) • Glock M007 (Glock 19M) pistol (used by US Marines)	• Heckler & Koch Mk 23 pistol (used by US Special Forces)	• SIG Sauer Mk 25 (used by Navy Seals)
Semi-automatic Assault Rifles		
• Bushmaster XM15 (AR-type rifle) • Daniel Defense M4A1 rifles (AR-type rifle) • IWI TAVOR • Kalashnikov KR-9 (AK-type rifle)	• Kel-Tec Sub-2000 • Mossberg MMR Tactical rifles (AR-type rifle) • POF USA P415 (AR-type rifle)	• SIG Sauer MCX rifles • SKS assault rifle (predecessor to the AK-47) • Sturm, Ruger & Co. AR-556 rifles (AR-type rifle)
Semiautomatic Assault Pistols		
• Bushmaster SquareDrop pistol • CZ Scorpion pistol	• CORE Rifle Systems Core 14 Roscoe pistol • Daniel Defense MH18 pistol	• PAP M92 pistol

The sniper rifles set forth above are some of the deadliest and most lethal firearms used on the battlefield when used by trained snipers. They can be used to target battlefield commanders, radio or heavy weapon operators, and other equipment, inflicting considerable damage to troop morale.[2]

A number of the semi-automatic rifles set forth above, including the Bushmaster XM15 and the Mossberg MMR Tactical Rifle, are AR-15 style rifles that were originally based on the M16 automatic rifle used by the U.S. military. Certain semi-automatic rifles, including the Kalashnikov KR-9 above, are based on the original design of the AK-47 automatic rifle used by many militaries and terrorist groups around the world.

2. The Firearms at Issue Would be Subject to a Less Stringent Licensing Policy and Review Process under the EAR

The transfer of the firearms at issue, including those set forth above, to BIS jurisdiction would likely result in more permissive licensing of these firearms for export. Congress enacted the AECA, which provides the statutory authority for the ITAR, in order to "bring about arrangements for reducing the international trade in implements of war and to lessen the danger of outbreak of regional conflict and the burdens of armaments." AECA § 1. In contrast, the Export Administration Act ("EAA"), which provided the original statutory authority for the EAR, emphasizes in addition to national security concerns that "[i]t is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations, except those countries with which such trade has been determined by the President to be against the national interest." EAA § 3.

The purposeful delegation of authority by Congress in the AECA to regulate arms to the State Department, rather than the Commerce Department, reflects the reality that these two agencies have very different mandates governing their priorities and decision-making. The State Department's mission is to promote international security and human rights, while the Commerce Department is tasked with promoting and regulating trade and the interests of U.S. industry in addition to protecting national security. Specifically, in the DDTC review process for firearms, U.S. national security, U.S. foreign policy, and human rights considerations are important elements of the review. Under the BIS licensing process, commercial considerations would have a heighted significance, which would result in less stringent licensing decisions. The risk associated with transferring semi-automatic and military-style firearms from the State Department to the Commerce Department is that the latter will elevate commercial interests associated with increasing beneficial trade and assisting U.S. companies, while deemphasizing international security and human rights concerns.

[2] Kyle Mizokami, "5 Sniper Rifles That Can Turn Any Solider into the Ultimate Weapon," National Interest (March 11, 2018), located at <http://nationalinterest.org/blog/the-buzz/5-sniper-rifles-can-turn-any-solider-the-ultimate-weapon-24851>.

In addition, the State Department, unlike the Commerce Department, keeps a database of human rights violators that it uses to conduct Leahy Law vetting of military and police assistance overseas, and many recipients of exported firearms are military and police actors. Under the ITAR, a license application involving firearms is reviewed against this database to prevent their use in human rights abuses. It is not clear that this practice would continue once the licensing jurisdiction moves to the Commerce Department.

3. The Firearms at Issue are not Widely Available for Commercial Sale

The Commerce Department's proposed rule provides that the scope of the items that are to be moved from the USML to the CCL "is essentially commercial items widely available in retail outlets and less sensitive military items."[3] The rule adds that: "There is a significant worldwide market for firearms in connection with civil and recreational activities such as hunting, marksmanship, competitive shooting, and other non-military activities."[4]

The proposed rule, however, cites to examples of firearms sales in the United States rather than providing examples of countries that import firearms from the United States:

> "Because of the popularity of shooting sports in the United States, for example, many large chain retailers carry a wide inventory of the firearms described in the new ECCNs for sale to the general public. Firearms available through U.S. retail outlets include rim fire rifles, pistols, modern sporting rifles, shotguns, and large caliber bolt action rifles, as well as their 'parts,' 'components,' 'accessories' and 'attachments.'"[5]

The U.S. market should not be the basis for assessing the commercial availability of firearms, as this is not the market to which the proposed rule would be directed. Moreover, the U.S. retail firearms market is unique and cannot be used as a proxy for other markets, given that the United States, with less than 4.5% of the world's population, comprises more than 45% of the world's firearms in civilian possession.[6]

Furthermore, a number of importing countries outside the United States ban or otherwise substantially restrict the sale and transfer of firearms that are subject to the Proposed Rules, including semi-automatic and military-style weapons. By way of example, in Mexico, there is only one retail outlet in the entire country for the legal purchase of any kind of firearm;[7] China bans firearm purchases for most people, and private gun ownership is almost unheard of;[8] Germany bans semi-automatic weapons not intended for hunting or marksmanship, as well as

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[3] Department of Commerce, Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 83 Fed. Reg. 24,166 (proposed May 24, 2018).

[4] *Id.*

[5] *Id.*

[6] Aaron Karp, Estimating Global Civilian-Held Firearms Numbers, Small Arms Survey (June 2018), located at <http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf>.

[7] Kate Linthicum, "There is only one gun store in all of Mexico. So why is gun violence soaring?" The Los Angeles Times (May 24, 2018), located at <https://www.latimes.com/world/la-fg-mexico-guns-20180524-story.html>.

[8] Ben Blanchard, "Difficult to buy a gun in China, but not explosives," Reuters (October 2, 2015), located at <https://www.reuters.com/article/uk-china-security-idUSKCN0RV5QV20151002>.

some multiple-shot semi-automatic firearms; Norway bans certain semi-automatic weapons; Great Britain bans military-style weapons; Spain bans firearms "designed for war use"; and many other countries ban "military style" and other high capacity weapons.[9] In the vast majority of countries, according to one of the few studies of firearms regulations, "there is a presumption against civilians owning firearms unless certain conditions and requirements are met."[10]

Given the significant differences in the regulation of semi-automatic and non-automatic firearms outside the United States, it appears that firearms that are covered by this rule change as "widely commercially available" are, in fact, not only not widely commercially available in many countries, but outright banned in other major developed countries. Therefore, at a minimum, BIS and DDTC should withdraw the proposed rules and further study the retail or commercial availability worldwide of the firearms at issue prior to taking any regulatory action.

4. Under the EAR, Firearms Manufacturers Would no Longer be Subject to Registration Requirements

Under the ITAR, persons who engage in the business of manufacturing, exporting, or temporarily importing defense articles in the United States must register with the DDTC. *See* ITAR Part 122. In order to register, manufacturers are required to submit a Statement of Registration and undergo a background check, and then must re-register and pay a registration fee annually. In contrast, the EAR contain no such registration requirement, so firearms manufacturers will be able to engage in exports, re-exports, and other activities subject to the EAR, or seek an export license, without being subject to the additional controls of registering with the U.S. Government, being subject to a background check and paying an annual registration fee. In addition, the U.S. Government would lose a valuable source of information about manufacturers of firearms in the United States, such as the registrant's name, address, organization stricture, directors and officers, foreign ownership, and whether directors or officers of the company have been charged, indicted or convicted of a U.S. or foreign crime. This information is used by the U.S. Government to monitor gun manufacturers and exporters, and losing this source of information would increase the likelihood of dangerous firearms being manufactured and transferred in significant quantities without effective oversight.

5. The Proposed Rules Would Permit Foreign Companies to Assume Control of U.S. Firearms Manufacturers with Minimal Oversight

The ITAR require registrants to notify DDTC at least 60 days in advance of any intended sale or transfer to a foreign person of ownership or control of the registrant or any entity owned by the registrant. *See* ITAR § 122.4(b). This 60-day notification from the registrant must include detailed information about the foreign buyer, the target, and the nature of the transaction, including any post-closing rights the foreign buyer will have with regard to ITAR-controlled

[9] *See* Firearms-Control Legislation and Policy, Law Library of the Library of Congress, February 2013, located at <http://www.loc.gov/law/help/firearms-control/firearms-control.pdf>.

[10] Sarah Parker, "Balancing Act: Regulation of Civilian Firearm Possession," States of Security: Small Arms Survey 2011 6, located at <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2011/en/Small-Arms-Survey-2011-Chapter-09-EN.pdf>.

items and any related steps that will be taken to confirm compliance with the ITAR. The 60-day rule ensures that DDTC is aware of acquisitions that pose potential threats to U.S. national security or foreign access to controlled commodities and technical data, and can coordinate review by the Committee on Foreign Investment in the United States ("CFIUS") as necessary. In contrast, the EAR impose no such 60-day advance notification requirement for acquisitions of U.S. companies with sensitive items or technology by foreign entities. Therefore, to the extent a U.S. manufacturer of semi-automatic or non-automatic firearms (and related items) is acquired by a foreign company, there would no longer be an advance notification required to the U.S. Government. As such, the U.S. Government would be unaware of a potential acquisition of a U.S. firearms manufacturer by a foreign entity that could influence the sales and marketing activities of the manufacturer in a manner that undermines U.S. national security, international security, and human rights.

6. Under the EAR, the Firearms at Issue Would no Longer be Subject to Congressional Reporting Requirements

Once semi-automatic and military-style firearms are transferred to the CCL, there would no longer be any requirements for reporting significant sales of this significant military equipment to Congress. This would result in less transparency and would weaken Congress's ability to monitor exports of dangerous firearms to other countries.

Under the ITAR, Congress must be provided with a certification prior to the granting of "[a] license for export of a firearm controlled under Category I of the [USML] in an amount of $1,000,000 or more." *See* ITAR § 123.15(a)(3). The EAR does not impose similar reporting requirements on firearms controlled as 600 Series items.[11] Therefore, Congress would not be give advance notification of Commerce Department licensing of sizeable exports of firearms, undermining its oversight role with regard to these significant military equipment, which potentially could be diverted to repressive regimes, criminal enterprises, rebel factions, or terrorist organizations.

Congress has in the past played a vital role in halting arm sales that were inconsistent with U.S. interests. For example, Congress halted the $1.2 million sale of 1,600 semi-automatic pistols to the security force of Turkish President Recep Tayyip Erdoğan in 2017 after reports of public beatings of protestors. Furthermore, Senator Ben Cardin opposed the sale of 26,000 assault weapons to the Philippines police in 2016, citing grave human rights concerns. In sum, the State Department's regulatory framework ensures that both Congress and the public are kept aware of arms sales that raise human rights and other concerns. This critical oversight function, which stop transfers against U.S. national interests, would be lost if regulatory oversight of the firearms at issue were transferred to the Commerce Department.

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[11] Under the EAR, items that are "600 Series Major Defense Equipment" are subject to Congressional notification requirements where such items are exported (a) in an amount exceeding $14,000,000 to a country outside the countries listed in Country Group A:5, or (b) in an amount exceeding $25,000,000, to a country listed in Country Group A:5. "600 Series Major Defense Equipment" is defined as "[a]ny item listed in ECCN 9A610.a, 9A619.a, 9A619.b or 9A619.c, having a nonrecurring research and development cost of more than $50,000,000 or a total production cost of more than $200,000,000," which would not include the firearms affected by the Proposed Rules. *See* EAR §§ 743.5.; 772.1.

7. The Firearms at Issue Would no Longer be Subject to the ITAR's Controls on Public Release of Controlled Technology

It has been DDTC's long standing practice to require prior authorization for any public release of ITAR-controlled technical data, source code or software (e.g., posting controlled technical data on a public website). BIS, however, takes a less stringent approach to publicly available information, removing technology, software, and source code from EAR controls once the items are made public (or intended to be made public) without requiring prior authorization BIS. *See* EAR § 734.3(b)(3). Therefore, if jurisdiction over technical data related to the design, production or use of semi-automatic or military-style firearms transfers to BIS, there would no longer be any controls on companies or individuals releasing such sensitive information into the public domain.

This significant risk is not hypothetical. In *Defense Distributed v. U.S. Department of State*, the Fifth Circuit ordered manufacturer Defense Distributed to remove 3-D printing instructions from the Internet after the State Department charged the company with violating the ITAR. In contrast, under the proposed rules, such manufacturers would be able to freely release 3-D printing instructions and code into the public domain (and thereby enable the private production of firearms overseas and in the United States), as the EAR permit publication of source code and technology (except encryption source code and technology) without authorization from BIS. If this were the case, the public would have significantly higher access to the knowledge needed to manufacture guns, which could result in huge increases in the private manufacture and transfer of firearms with little to no oversight by governments.

In general, items that would move to the CCL would be subject to existing EAR controls on technology, software, and source code. However, while the EAR control certain technology, software, and source code set forth in the CCL, Section 734.3 excludes certain published information and software from control under the EAR. For example, if a gun manufacturer posts a firearm's operation and maintenance manual on the Internet, making it publicly available to anyone interested in accessing it and without restriction on further dissemination (i.e., unlimited distribution), the operation and maintenance information included in that published manual would no longer be "subject to the EAR," and therefore no longer subject to export controls. *See* EAR §§ 734.3(b) and 734.7(a). Non-proprietary system descriptions, including for firearms and related items, are another example of information that are not subject to the EAR. *See* EAR § 734.3(b)(3)(v).

This lack of control on public release of technology, software and source code related to semi-automatic and non-automatic firearms appears to be a significant loophole that could be exploited to release sensitive design, production and use technology regarding highly dangerous weapons.

8. The Proposed Rules Would Remove Licensing Requirements for Temporary Imports, Creating Another Channel for Criminals to Obtain Dangerous Weapons in the United States

Temporary imports (import into the United States of defense articles, technical data, and defense services on the USML and their subsequent export) are regulated by the ITAR (*see* ITAR Part

123), while permanent imports of items on the U.S. Munitions Import List ("USMIL") are regulated by the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). The EAR imposes no import licensing requirements, so if semi-automatic or military-style firearms are transferred from the USML to the CCL, temporary imports of such items will not be regulated by any agency. Therefore, semi-automatic and military-style firearms could be freely imported into the United States without any authorization if the importer intends to subsequently export the items (the subsequent export of the item would require an export license from BIS). This includes temporary imports into the United States of semi-automatic and military-style firearms for gun shows, trade shows, or for repair or refurbishment. While the subsequent export of these firearms would require an export license from BIS, a key control that requires U.S. Government authorization *before* the import of the controlled firearms into the United States would be removed.

This approach would not only cause confusion and make compliance more difficult, but could result in more firearms flooding the U.S. market without any meaningful regulation. The United States already has a significant crime gun problem; while every firearm is manufactured as a legal consumer product, the opportunities for diversion to the criminal market are numerous. Guns are trafficked across jurisdictional lines, from states with weak laws to those cities and states where there are more gun regulations. This practice continues to fuel violence in cities like Chicago and Baltimore, which both have strong gun laws in place but border areas where it is easy to purchase multiple guns in one transaction with little or no regulation. Additionally, the large private sale loophole continues to put guns in the hands of dangerous criminals, who can exploit a system that only requires licensed gun dealers to conduct background checks on firearms sales. It is through this method that approximately at least one in five guns are sold in the United States today without a background check. Continually flooding the market with a supply of cheap handguns and assault rifles by permitting the legal "temporary import" of firearms that may never be re-exported will only exacerbate these problems.

Furthermore, the ATF does not have the capacity or resources to pursue the illegal distribution of firearms that were originally intended to be temporary imports, but are subsequently sold in the United States (thus making them permanent imports). While the ATF is tasked with regulating permanent imports of items on the USMIL, it is subject to severe resource constraints in exercising its jurisdiction, including finding and sanctioning individuals trying to distribute temporarily imported firearms in the United States. Therefore, the BIS export licensing process and the reality of the ATF's capacity together mean that illegal gun sales and transfers within the United States may skyrocket if the Proposed Rules go into effect.

9. The Proposed Rules Would Make it Easier For Foreign Gun Manufacturers to Sell and Distribute Firearms Based on U.S. Origin Components and Technology

Under the ITAR, defense articles, such as firearms and their components and ammunition, require export licensing regardless of their destination, unless a narrow exemption applies. The ITAR "See-Through Rule" provides that foreign manufactured items are subject to the ITAR, including licensing requirements, if they contain any amount of U.S.-origin content subject to the ITAR, no matter how trivial. As such, foreign manufacturers must seek authorization from DDTC prior to exporting foreign items that incorporate ITAR-controlled components or technology in their foreign made item.

BIS, however, has a less strict approach to incorporation of U.S.-origin content than DDTC. Unlike the ITAR, the EAR apply the "De Minimis Rule" to foreign items that are manufactured using U.S.-origin content. *See* EAR § 734.4. Under the De Minimis Rule, foreign items that have less than 25% U.S.-origin controlled content (by value) are not subject to the controls of the EAR. Therefore, foreign manufacturers could use U.S.-origin components or technology to produce products that are not subject to U.S. export control laws if the value of the U.S.-origin controlled content is under 25% of the value of the final product. With regard to components of semi-automatic and non-automatic firearms transferred to the CCL, such items would remain subject to the ITAR's See-Through Rule when incorporated into a foreign firearm and exported to certain countries subject to U.S. unilateral or United Nations arms embargoes. *See* ITAR § 126.1. However, exports of such firearms with U.S. content outside of these arms embargoed countries would be subject to the more permissive De Minimis Rule under the EAR. As such, foreign manufacturers would be able to export semi-automatic and military-style firearms made using less than 25% U.S.-origin controlled content without any U.S. Government scrutiny to most countries around the world (except for those subject to U.S. or United Nations arms embargoes).

For example, under the current State Department rules, if a foreign gun manufacturer in Germany sourced its barrels from a U.S. company and the barrels made up 20% of the value of the foreign manufactured gun, that gun would be subject to ITAR licensing and congressional reporting requirements if the German manufacturer wanted to export such guns to the Philippines. Under the Commerce Department rules, such sales would not be subject to U.S. export control requirements.

Based on the foregoing, we urge DDTC and BIS to withdraw the proposed rule and keep semi-automatic and military-style guns (along with their components and ammunition) on the USML under DDTC jurisdiction. This approach would best support the safe use and export of firearms outside the United States.

Brady is available to comment further on this proposed rule change and any other agency initiatives impacting the domestic or global firearms policy. Please contact us by reaching out to Sean Kirkendall, Policy Director, Brady Campaign to Prevent Gun Violence, at skirkendall@bradymail.org or (202) 370-8145.