

Preliminary Analysis: Expected Proposed Changes to Firearm Export Controls September 3, 2017

The Trump Administration is expected to issue proposed regulations that would reduce or remove key U.S. export controls created to prevent the transfer of firearms and related ammunition to terrorists, criminal organizations, and corrupt and abusive foreign security forces. Deemed too risky by President Obama, the proposal would likely transfer responsibility for reviewing licenses to export assault-style rifles and pistols and armor-piercing sniper rifles from the State Department to the Commerce Department. The move purportedly aims to complete the Obama Administration's Export Control Reform Initiative (ECRI).

Exports of small arms are controlled because a significant amount of violence that occurs, including against U.S. military and law enforcement personnel, is inflicted by small arms. By one estimate, 1,000 people are killed every day around the world by terrorists, insurgents, and criminal gangs using such weapons.¹ Members from both parties of the House Subcommittee on Terrorism, Nonproliferation and Trade, in a June 8, 2017 hearing, expressed broad concerns regarding U.S.-origin arms being used by adversaries and criminal groups.

The proposal to transfer certain firearms from the State Department's U.S. Munitions List (USML) to the Commerce Department's Commerce Control List (CCL) has raised significant concerns, including among U.S. law enforcement agencies.² A recent report by the Institute for Science and International Security, found that "federal law enforcement agencies vehemently opposed the transfer of these items to the CCL due to fears that they would spread more rapidly or be re-transferred to unintended end users. Overall, they feared that the transfers would complicate national and international security objectives."

Given the inherently weaker controls at the Commerce Department, the Congress limited the executive branch's authority to transfer military equipment to the Commerce Department to only those articles that do not have "substantial military utility." As military-style assault rifles clearly have substantial military utility, transfer of these firearms to Commerce Department control is inconsistent with the statutory framework enacted by the Congress to regulate the export of arms. GAO should complete an assessment of the risks associated with the reform initiative to date before additional military equipment is moved to Commerce Department control.

Below, please find details on several critical controls that would likely be missing in a Trump Administration proposal to reduce regulations on certain firearms exports. These concerns must be addressed before any new transfer of firearms export controls is shifted to the Commerce Department.

¹ "UN Fails to Reach Agreement on Global Arms Treaty" Associated Press, July 27, 2012 (quoting British Deputy Prime Minister Nick Clegg).

² In May 2012, *The Wall Street Journal* reported on an internal memorandum from U.S. federal law enforcement and homeland security agencies sent to the Obama administration outlining concerns that the proposed reforms would have a negative impact on U.S. and international security and efforts to prevent domestic gun violence incidents and international firearms trafficking. "White House Efforts to Relax Gun Exports Face Resistance," *Wall Street Journal*, May 1, 2012. Law enforcement officials reiterated these concerns to authors of a review of the Export Control Reform Initiative, *U.S. Export Control Reform: Impacts and Implications for Controlling the Export of Proliferation-Sensitive Goods and Technologies*, Andrea Stricker and David Albright, Institute for Science and International Security (May 2017), p. 36.

1. Increased risk of diversion to unauthorized end users and conflict zones: For some firearms and parts controlled by the Commerce Department, the U.S. government would likely be unable to identify key risk factors that would help prevent the licit or illicit transfer of firearms to high risk individuals or groups. While the proposal may require an export license for all complete firearms that are moved to the CCL, companies could use [several](#) broad [license exemptions](#) to export firearms without U.S. government approval. This includes the [Strategic Trade Authorization](#) (STA) license exemption, which allows U.S. companies to export most arms on the CCL to 36 countries (mostly NATO, including Turkey). If firearms are eligible for the STA license exemption, the U.S. government would not have access to information to determine, for example, whether a U.S. company plans to use questionable individuals or routes in an arms deal or if a company plans to send firearms to abusive or corrupt foreign security units.

According to the Institute for Science and International Security report, U.S. officials believe that, “the STA created a loophole for exploitation by illicit procurement agents. They argued that such agents and entities could apply for the STA exception and use it to move large quantities of goods through repeated transfers until the activity was discovered by BIS or an enforcement agency.” The authors also reported that “current and former enforcement officials we spoke to were concerned that the STA mechanism would allow for large shipments of arms and ammunition to countries with poor export controls or end users that would exploit the exception in order to re-transfer the high value items. This increased flow of U.S. arms could lead to further destabilization in regions of war or conflict.”³ The report recommended against the transfer of small arms to Commerce Department control.

Outside of the STA, companies could use at least several other license exemptions or [No-License Required](#) (NLR) options on the CCL to export firearms or related parts and ammunition without U.S. government pre-approval that are not available on the USML. This includes a license exemption for some foreign governments and low-value items. Companies could also use a NLR option to export almost any firearm to Canada.

2. Compromised ability to investigate and prosecute arms smugglers: In the mid-1990s, Congress amended the Arms Export Control Act to improve the [U.S. government’s efforts](#) to investigate and prosecute arms brokers or intermediaries such as Viktor Bout who were orchestrating large shipments of firearms to conflict zones around the world. A key aspect of this amendment is a [requirement](#) that any individual that wants to engage in a deal for firearms and other significant military equipment for risky destinations must first receive U.S. approval. In the case of [Taipan Enterprises, Ltd.](#), the United States likely sought to prevent an irresponsible arms deal to Libya and Yemen when it charged the owner of the company for failing to register and obtain a U.S. brokering license. This case would not have been possible if the arms were on the CCL. However, the Trump Administration proposal would likely eliminate the current requirement that individuals must first receive approval before attempting to broker a deal to non-NATO countries for firearms on the CCL. The proposal may also remove the requirement that companies must first register with the U.S. government before engaging in arms exports, which U.S. law enforcement have used to build investigations against illegal arms traffickers.

3. Greater difficulty in investigating and prosecuting illegal firearms exports: The Export Control Reform Initiative has created legal ambiguity about which items are controlled and thereby increased the risk that that companies with ill-intent could use it to avoid prosecution. If the U.S. government discovers an illegal export, it would need to show that the exporter voluntarily and knowingly violated

³ Stricker and Albright.

U.S. laws and regulations to pursue a prosecution. However, if the exporter can show that a reasonable person would be confused by the regulation, the illegal exporter could escape justice. Confusion over the new definition of “specially designed” has replaced an objective test of what is controlled with a subjective test based on a confusing set of criteria. This may have [already led](#) U.S. law enforcement officials to charge individuals involved in the illegal shipment of military aircraft technology to Iran under a statute intended for different purposes that carry lesser penalties than the Arms Export Control Act. In addition, if foreign countries decide to treat firearms on the CCL as non-military or dual-use items, it could impede U.S. law enforcement’s efforts to investigate illegal arms trafficking cases.

4. Loss of key legal restrictions on arms transfers: Unlike the Commerce’s Departments control list, the State Department’s entire control list, the USML, is tied to federal laws that regulate the provision of security assistance, including the commercial export of defense articles, to foreign governments. The Foreign Assistance Act and the Arms Export Control Act contain specific [restrictions](#) on the export of USML articles and services to governments that support terrorism, violate internationally recognized human rights norms, or interfere with humanitarian operations as well as country specific controls imposed on countries of concern, such as China. While Commerce Department regulations attempt to make up for some of these deficiencies, such regulatory action is susceptible to legal challenges due to the absence of a clear statutory framework. When Congress calls for restrictions on arms sales to specific countries, they often do not include arms sales on the CCL.

The transfer may also exclude human rights violations data from consideration of export license applications. Currently, the State Department relies on its Bureau of Human Rights, Democracy and Labor (DRL) for reviews of potential human rights implications of arms transfers. DRL maintains a vast database of alleged human rights violations in order to implement the Leahy Law for foreign military and police assistance. Transferring reviews to Commerce would complicate if not stop use of the most relevant knowledge base of human rights violators. Commerce has the ultimate say on whether items it controls are authorized for export, thereby diluting the State Department’s ability to prevent high-risk transfers.

5. Erosion of global norms on firearms exports. The United States has long been a leader on firearms export control regulations and laws. Over the past two decades, it has successfully encouraged governments around the world to adopt better laws and policies to stop irresponsible and illegal arms transfers through bilateral and multilateral engagement, especially related to the export of small arms and light weapons. Many of these bilateral and multilateral efforts have noted the need to review export licenses on a case-by-case basis, the importance of brokering registration and licensing, and other key controls. If the United States decides to reduce or remove some of these controls, however, many other countries may choose to reduce their controls to a similar level or to an even lower level to better to compete with the United States.

6. Decreased transparency in arms sales: Over the past three decades, the publication of summary data on U.S. arms sales has greatly helped the U.S. policy community identify potential problems with U.S. arms export policy and illicit arms deals. In 2004, for example, researchers from Amnesty International USA were able to help identify how U.S.-made tear gas canisters were trafficked to Zimbabwe and used against innocent civilians by reviewing the countries that received U.S. tear gas in public reports of State Department authorized exports. Congress and civil society have also used these reports to raise questions about arms transfers that may have been inconsistent with U.S. arms export control law and policies. The Trump Administration proposal to move some firearms exports to the Commerce Department could eliminate Congress’ and the public’s view of the total amount (dollar value and items)

of firearms sales authorizations and deliveries around the world, since the Commerce Department annual reports currently only cover about 20 countries. Furthermore, there are no public end-use reports on arms exports through the CCL as currently exist for the arms on the USML. These reports are useful for identifying key illegal arms trafficking patterns that can help policy makers understand these complex challenges.

For more information, contact:

Colby Goodman, colby@ciponline.org

Brittany Benowitz, (202) 662-1743

Rachel Stohl, rstohl@stimson.org

John Lindsay-Poland, JLindsay-Poland@afsc.org

Kristen Rand, krand@vpc.org

Jeff Abramson, jeff@armscontrol.org