

Implications of Proposed Changes to Firearms Export Regulations¹

The Administration has notified Congress of its intent to change firearms export regulations by reclassifying several kinds of firearms and ammunition – from their current designation as military weapons (defense articles) to commercial items. Semi-automatic and non-automatic firearms are the main items slated for change.² Included in this class of weapons are the high-powered assault rifles—including the semi-automatic AR-15—that have been used in several mass shootings in the US, as well as armor-piercing sniper rifles and sidearms used by the US military.³

The proposed regulatory change involves moving items from one list (the US Munitions List) to another (the Commerce Control List), but the two lists are subject to different statutory provisions and the implications are significant. Legislative action is needed to ensure that stringent rules remain in place to regulate the export of these lethal firearms and suspend further sales to individuals or governments who misuse US weapons or transfer them to criminal or terrorist organizations.

Why the proposed changes matter:

1. **Failure to appreciate the military significance of semi-automatic weapons**

At the heart of the proposed changes is a faulty proposition that semi-automatic weapons are fundamentally a commercial product. Semi-automatic rifles such as the AR-15 are currently classified within the US export regime as “assault rifles.” (The key difference between a fully automatic and a semi-automatic weapon is that for semi-automatic firearms, the trigger must be continuously activated to release bullets, whereas a fully automatic weapon only requires a single pull of the trigger to fire a continuous stream. In practical reality, there may be little difference between the two, inasmuch as a semi-automatic weapon can typically fire 45 rounds per minute and soldiers in combat often elect to use fully automatic weapons in a semi-automatic mode.) Category I on the US Munitions List (USML) is currently titled “Firearms, Close Assault Rifles and Combat Shotguns,” but if the proposed changes go forward, the sanitized title will become simply “Firearms and Related Articles.” Assault rifles as a category – on either list – will disappear, marking a significant change in the way we think about, and categorize, military-style weapons.

What Congress should do: Enact legislation such as H.R. 1134 or S. 459 to prevent the transfer of assault rifles and other semi-automatic weapons from the US Munitions List (USML) to the Commerce Control List (CCL).

2. **Certain Assault Rifles will no longer be subject to the human rights provisions of the Foreign Assistance Act**

Under the current system, Congress is notified when large sales of semi-automatic weapons are proposed for countries such as the Philippines, where government forces have used such weapons in extrajudicial killings or where there is a history of diversion from local security forces to cartels, such as Guatemala. After the proposed rule is adopted, there will be no legal barrier to transferring these weapons to countries with a consistent pattern of gross violations of human rights.⁴

¹ Prepared by Susan Waltz, Professor, Gerald R. Ford School of Public Policy, University of Michigan swaltz@umich.edu, February 2019. Thanks to Brittany Benowitz, Chief Counsel, American Bar Association for Human Rights, for reviewing a draft.

² Items scheduled to remain on the military control list include automatic firearms and firearms that use caseless ammunition, silencers, high-capacity magazines, belted ammunition, mortars, cannons, recoilless rifles, and grenade launchers. Flame throwers with a range exceeding 20 feet would also be explicitly controlled by the munitions list. In addition to semi-auto and non-auto firearms, grenades containing non-lethal or less lethal projectiles will be under CCL jurisdiction as 500-series items.

³ See “[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,” 2018, for a detailed list of firearms that would be released from USML controls.

⁴ For further details, see American Bar Association Center for Human Rights, [WHITE PAPER: Proposals to Relax Export Controls for Significant Military Equipment](#) January 14, 2013; Comments from the [Center for International Policy](#) Re: Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML), RIN 0694–AF47 (2018); and Comments by [Susan Waltz](#) on ITAR Amendment Categories I, II and III and EAR Amendment RIN 0694-AF47.

This is one of the provisions that derives from a statutory definition of terms such as *defense article*, *security assistance*, or *military equipment*. Where such terms are defined by statute, they are usually linked to the presence of an item on the USML. Congress recently expanded the definition of defense article to include “600-series” items previously moved to the CCL [22 USC 2304(d)(2)(C)], but no provision has been made regarding the items under consideration here, which are intended to be designated as “500-series” items. Moving an item off the USML now could still affect the scope of the various laws that refer to defense articles or security assistance.

Of greatest concern in this regard are the links to human rights conditionality on security assistance and provision of military equipment [22 USC 2304(d)(2)(C) and 10 USC 362]; vetting of foreign military units that receive training and equipment (22 USC 2378d); provisions for third-party transfer of grant-supplied defense articles (22 USC 2314); and various reports to Congress (22 USC 2776 and 22 USC 2415). If the changes go forward without adjustment, arms deals involving the sale or transfer of semi-automatic weapons would escape various statutory constraints.

What Congress should do:

- Continue to hold implementation of the new rule until the Government Accountability Office has completed its review of the current oversight regime and the Congress has had the opportunity to hold hearings.
- To ensure that **human rights protections** remain in place with regard to the potential sale or transfer of semi-automatic weapons, Congress should either enact legislation to ensure that weapons and ammunition currently listed in Categories I-III of the USML remain on the USML, or amend the definition of “security assistance” and “defense article” (22 USC 2304) to include weapons transferred to Commerce Department control (i.e. the “500 Series”).
- Further, to **prevent the diversion to unauthorized users or those engaged in atrocities**, Congress should ensure that such security assistance is subject to relevant oversight provisions, including Sections 2314 (diversion), 2378d (vetting) and 2776 (Congressional notification of proposed sales).
- To ensure that Congress continues to receive a **comprehensive annual report on US arms sales**, the Arms Export Control Act (22 USC 2778) should be amended to clarify that “defense articles” includes any 500-series items on the CCL.⁵

3. Retaining authority to monitor end use and block further sales if equipment is misused

What’s in an asterisk? Some of the items included on the US Munitions List are marked with an asterisk (*) to signify that they are considered significant military equipment (SME), defense articles “for which special export controls are warranted because of the capacity of such articles for substantial military utility or capability.”⁶ Semi-automatic firearms are currently classified as SME, but that would change if the current proposals go forward. All of the provisions covering defense articles (discussed above) apply to SME. In addition, there are a few statutory provisions that apply specifically to SME. The most relevant of these applies to end use controls, which could be significantly weakened by the proposed changes. As provided by 22 USC 2753, re-transfers of SME require explicit authorization. A special form for end-use control (DSP-83) is currently required for SME weapons transfers (22 CFR 123.10), and suppliers must provide precise information about the transferred equipment along with a certification by the foreign government at destination that the equipment will not be re-transferred without prior written approval of the US government. Under current law, if significant military equipment is re-transferred without permission or used against anything other than a legitimate military target, the President must notify the Congress and suspend further transfers. The proposed rule would eliminate these oversight provisions.

⁵ The BIS regulatory proposal includes several changes to Export Administration Regulations (EAR) that affect record keeping on firearms transactions (namely EAR parts 743, 748, 758, and 762). If the proposed regulations go forward, AECA reporting provisions (22 USC 2776) should be amended to ensure that statistical information about firearms transactions collected for other purposes, including compliance with multilateral agreements, should also be supplied directly to Congress.

⁶ 22 USC 2794(9).

What Congress should do if the proposal moves forward: Amend the Arms Export Control Act (notably 22 USC 2753) to ensure that all items currently designated as significant military equipment remain subject to end use monitoring and retain the prohibition on further sales or deliveries in the event of a violation of an end use agreement.

4. **Risk of Diversion via unscrupulous brokering.**

In 2010, 24-year old Efraim Diveroli was arrested for efforts to arrange munitions shipments to Afghanistan without proper authorization.⁷ Because the middle men who arrange arms deals are a significant source of diversion of weapons to criminal and terrorist organizations, Congress has imposed strict requirements for registration and licensing of brokers who supply defense articles (22 USC 2778). The State Department has asserted that it will continue to claim jurisdiction over such activities but if the proposed changes are enacted it would no longer have a statutory basis for doing so and therefore may face significant legal challenges to the assertion of this authority. Further, one provision of the changes proposed in May 2018 anticipates a regulatory modification [specifically, 129.2(b)(2)(vii)], which by narrowing the interpretation of “brokering activities” would open the door to lawful transactions that bypass scrutiny of the middlemen who ship, finance, or possibly transship semi-automatic rifles.⁸

In addition to these concerns about the increased risk of diversion, the capacity for monitoring sale and delivery of firearms may be jeopardized by the proposed changes. End use monitoring of such weapons is currently overseen by the State Department’s Blue Lantern program, which reports annually to Congress. Although the Commerce Department checks on export compliance through its Sentinel Program, relatively little is known about the operations or effectiveness of this program. It is unclear what resources the Commerce Department would be able to devote to monitoring transfers of 500-series weapons listed on the CCL.

What Congress should do if the proposed regulations are put in place: Adopt legislation making clear that the current statutory definition of brokering activity will remain applicable for middle men involved in the transfer of items formerly controlled by the State Department, and ensure that all brokers of such items are required to register and secure licenses pursuant to Section 2778.

5. **Criminal Prosecution.**

The Department of Justice’s January 2018 summary of major US export enforcement cases includes recent smuggling of semi-automatic assault rifles (and other firearms) to Dominican Republic, the Gambia, Russia via Latvia, Thailand and other destinations. In addition, the report documents the case of two men in Georgia attempting to export firearms to a range of international buyers on the dark net, and another similar case from Kansas.⁹ If semi-automatic weapons and other non-automatic firearms are removed from the US Munitions List, where they are now considered defense articles and significant military equipment, it will impact the ability of law enforcement to charge weapons traffickers with the serious offense of violating the Arms Export Control Act.

What Congress should do: Keep all weapons with substantial military utility – including semi-automatic weapons – on the US Munitions List where they are subject to provisions of the AECA.

⁷ See “Supplier Under Scrutiny on Arms for Afghans,” New York Times, March 27, 2008, and “Arms Dealer Faces New Charges,” New York Times, August 23, 2010. The arms brokering adventures of Diveroli and his partner David Packouz are the story behind the 2016 film *War Dogs*.

⁸ As of February 2019 it is not clear whether those changes are being advanced, because they are not referenced in available documents.

⁹ Department of Justice, “[Summary of Major U.S. Export Enforcement, Economic Espionage, And Sanctions-Related Criminal Cases](#),” January 2018.

6. 3-D Printed Weapons.

By moving non-automatic and semi-automatic weapons oversight to the Commerce Department, individuals will no longer need prior approval before publishing or posting designs to produce plastic and untraceable guns using 3D-printing technology or CNC milling.

What Congress should do: Enact legislation, such as S. 459, which would extend restrictions on the publication of plans for printing untraceable 3-D printed weapons.

7. Weakening Control Procedures (Registration and Licensing).

Procedures to authorize the export of weapons on the USML are overseen by the Department of State and involve two steps: registration and licensing. This system was put in place by Congress several decades ago to ensure adequate oversight of weapons transfers. The two-step procedure allows background scrutiny and close review of transactions before they are made – to ensure that unscrupulous deals do not go forward. While the Commerce Department will require licensing on items transferred, it does not have any way to track manufacturers of these weapons, removing an important opportunity to ensure that those required to obtain licenses are in fact doing so.

What Congress should do if the proposed regulatory changes are implemented: Require the concurrence of the Secretary of State for exports of articles and services that were previously controlled by the State Department.