



Advancing a sustainable, just, and peaceful world

July 9, 2018

Mr. Steven Clagett
Office of Nonproliferation Controls and Treaty Compliance
Nuclear and Missile Technology Controls Division
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B, 14th Street and Pennsylvania Avenue NW
Washington, DC 20230

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

Dear Mr. Clagett,

We are writing to express our concerns about the U.S. Department of Commerce’s proposed rule, published in the Federal Register on May 24, 2018, to transfer certain firearms, guns, ammunition, and related parts from the U.S. Department of State’s U.S. Munitions List (USML) to the U.S. Department of Commerce’s Commerce Control List (CCL) under a new 500 series designation. While we were pleased to see that the proposed rule maintained some important controls connected with the USML for the firearms moving to the CCL, we believe the proposed rule will mean more U.S. firearms will be exported with less transparency, fewer oversight mechanisms, and a weaker ability for the U.S. government to prosecute violations.

First, the transfer of certain firearms, guns, and ammunition from USML to the CCL appears to be fundamentally inconsistent with the scope of statutory authority outlined in the Arms Export Control Act (AECA). For more than three decades, the U.S. government has designated many types of firearms and guns that are proposed to move to the CCL as “Significant Military Equipment” (SME) because of their “substantial military utility or capability.” According to the AECA, all defense articles designated as SME must be on the USML. While there may be more civilians using these types of weapons now than in the 1970s, most foreign militaries continue to use these types of firearms as standard issue and they continue to have substantial military utility. Moreover, the proposed rule’s assertion that the firearms moving over to the CCL, including “Combat Shotguns” and

.50 sniper rifles, has “for the most part,” “civil, recreational, law enforcement, or other non-military applications” and thus deserve limited controls is highly questionable.

Second, because the term “defense article” is linked to several statutes with national security import, the removal of firearms, guns, ammunition, and certain parts from the USML means there would be many rippling implications of the transfer of items from the USML to the CCL under the AECA and the Foreign Assistance Act (FAA). The AECA is a sophisticated statutory framework that enables the United States to more effectively monitor a large volume of arms exports. The proposed transfer impacts various statutes linked to the AECA more broadly and creates ambiguity with the ability of Congress to monitor U.S. assistance to foreign countries through various notification and reporting requirements found in the AECA and the FAA. The transfer of arms to the CCL would undermine that framework.

As outlined in more detail in the below analysis, the U.S. government or the U.S. policy community would lose many key oversight tools and abilities to help prevent irresponsible or illegal firearms trafficking around the world as a result of these proposed changes. In particular, the U.S. government or U.S. policy community (Congress and the public) would have a limited ability to do the following:

- Halt or modify risky proposed firearms sales valued at \$1 million or more to countries such as to Honduras, Turkey, or the Philippines;
- Curb risky exports of pistol grips and magazine clips valued at \$500 or less to over 100 countries, including Mexico and Guatemala;
- Review proposed training on how to aim and fire a gun and other types of foreign police training to countries such as Libya or China;
- Stop nonresident aliens leaving the United States via commercial airlines from taking firearms “accessories,” “attachments,” “components,” “parts,” and ammunition;
- Better understand U.S. firearms manufacturing and ownership to identify risks within the U.S. firearms industry; and,
- Investigate and prosecute companies for failing to properly provide political contributions and marketing fees aimed at curbing corruption.

Additionally, the AECA only permits the sales of defense articles and services for specific reasons, including primarily for legitimate defense purposes.¹ Section 3 of the AECA requires the State Department to notify Congress when there is credible information that such articles or services were misused.² However, there is not a similar requirement connected with the Export Administration Regulations (EAR). The AECA also requires the State Department to publicly report on all authorized and delivered arms exports annually, which has provided Congress and the public with an essential tool to identify potentially illegal trafficking patterns and sales that are inconsistent with U.S.

¹ 22 U.S.C. § 2754.

² 2753(c)(2), <https://www.law.cornell.edu/uscode/text/22/2753>; For more information, see https://www.americanbar.org/content/dam/aba/administrative/human_rights/ABACHRAssessmentofArmsSalestoSaudiArabia.authcheckdam.pdf

policy. However, the Commerce Department does not have this same requirement nor does it regularly provide the same level of transparency as the State Department.

We are pleased to see that the proposed rule attempts to maintain effective oversight of arms brokers by ensuring that brokers must register and seek a license. These provisions are critical in helping mitigate illegal arms trafficking to major conflict zones and transnational criminal organizations. However, we are concerned that the basis for the State Department's rules is subject to legal challenge because it is not clear that the State Department has the statutory authority to maintain brokering controls if firearms are transferred from the USML. Similarly, we are concerned about the U.S. government's statutory basis to halt arms transfers based on human rights concerns. In 2014, Congress amended the FAA to prohibit the export of Series 600 items to countries "the governments of which engage in a consistent pattern of gross violations of internationally recognized human rights."³ If the proposed rule moved forward as is, the State Department would no longer have a statutory basis for vetoing a proposed sale on human rights grounds for firearms, guns, ammunition, and related parts that move to the CCL.

Given the potential loss of so many U.S. arms export controls and likely negative impact on curbing irresponsible and illegal arms transfers, we encourage you to wait until the Government Accountability Office finishes its analysis of the risks of moving firearms from the USML to the CCL until you move forward on this proposal. If you have decided you want to move forward with moving some firearms, guns, and related parts over to the CCL, we recommend making the below changes to the proposed rule:

- Recognize that semi-automatic firearms are still a weapon of choice for foreign militaries and of significant military value and place firearms under the 600 Series list on the CCL;
- Maintain the requirement to notify Congress and the public of any proposed firearms sales that reach \$1 million or more;
- Limit companies use of the Limited Value Shipments (LVS) license exception to \$100 or severally limit the types of parts and components that are available for the \$500 threshold value;
- Expand the definition of "technology" to capture defense-service type activities that would otherwise be left unregulated such as private security contractor training to foreign police with firearms. Similarly, 3D printing should be considered technology under the EAR;
- Remove or limit the registration fee for manufactures but keep the requirement for the registration;
- Add a mechanism to the CCL that would retain the reporting requirement on political contributions and marketing fees that were paid as part of arms sales.

³ 22 U.S.C. Sec. 2304. 22 USC 2304(a) establishes that no security assistance can go to a country with consistent pattern of gross human rights. 22 USC 2304(d)(2)(C)(ii) defines security assistance to include a license of 600-series items intended for armed forces, police, intelligence or other internal security forces.

For more details on some of these concerns, we are pleased to submit the below report, which provides more details on these main concerns and recommendations. We look forward to speaking with you or any of your colleagues about these important issues. Thank you for the opportunity to submit our comments and recommendations.

Sincerely,



Colby Goodman
Director
Security Assistance Monitor

Sincerely,



Christina Arabia
Program and Research Associate
Security Assistance Monitor



William D. Hartung
Director,
Arms and Security Project

Section-by-Section Key Concerns on Proposed Firearms Export Rule

Congressional Notification Requirement

Proposed Change

Under Section 36(c) of the AECA,⁴ if a sale of \$1 million worth of Category I firearms is authorized for export under the ITAR, the President must formally notify Congress 30 days prior to the approval of the ITAR export authorization. Both this formal notification process and the prior informal one provides Congress with the opportunity to review these proposed sales and ensure they are consistent with U.S. law, policy, and interests. Under the current system, if Congress does not agree with the executive branch decision to license the firearms export, it may block or modify the proposed sale. If Category I items are moved to EAR controls, they will not be subject to the AECA notification requirement.

Main Concerns

In the mid 1990s, Congress began requiring the administration to notify it of proposed firearms sales of \$1 million or more because of concerns about the role firearms have consistently played in inflicting serious harm on civilians in conflict and non-conflict zones. Since then, the requirement has allowed both Congress and the public to provide important oversight of U.S. firearms exports. Over the past ten years, Congress has also halted or modified several particularly problematic proposed firearms sales. Just last year, for instance, Congress blocked the sale of semi-automatic handguns and assault rifle sales to the Philippines and Turkey because of concerns that they would be used unlawfully against civilians.⁵ As these congressional notifications are often provided to the public, they have also given the U.S. foreign policy community an opportunity to provide insights on particular risky U.S. firearms sales.

As U.S. companies continue to propose firearms sales to risky countries, it is critical for Congress to maintain its oversight on major sales. From January to December of 2017, the Trump Administration requested Congress to approve at least \$662 million in Category I firearms and ammunition exports to over 15 countries through the congressional notification process.⁶ Of these, potential firearms sales to El Salvador, Honduras, Indonesia, Mexico, Thailand, Turkey, and the United Arab Emirates raised concerns amongst the human rights community and required necessary scrutiny by Congress. In the case of Honduras, Congress had raised several questions to help ensure

⁴ 22 U.S.C. § 2776(c)

⁵ <http://www.middleeasteye.net/news/us-halts-arms-sales-erdogan-bodyguards-1467964562>;
<https://www.reuters.com/article/us-philippines-usa-rifles-idUSKBN12V2AM>

⁶ For more details see Security Assistance Monitor's factsheet, "Congressional Notifications for Proposed U.S. Commercial Firearms Exports in 2017," available at http://securityassistance.org/fact_sheet/congressional-notifications-proposed-us-commercial-firearms-exports-2017

that U.S. weapons would not be used to fire on civilian protestors. These notifications also helped U.S. civil society identify important trends in U.S. firearms sales such as in licensed production.

Recommendation

For these reasons, it is critical that the new rule continue to require the U.S. administration to notify Congress of any proposed firearms sales that reach \$1 million or more.

License Exception LVS (§ 740.3) / License Exception BAG (§ 740.14)

Proposed Changes

Under the proposed rule, U.S. companies are given new opportunities to export certain firearms parts and components without U.S. government prior approval if the net value of the shipment is at or below \$500, which is higher than the \$100 threshold under ITAR. In particular, U.S. companies can use the Commerce Department's License Exception Shipments of Limited Value (LVS) to avoid the license requirement for exports of certain firearms "parts," "components," "accessories," and "attachments", including pistol grips and detachable magazines, to over 100 countries in Country Group B.⁷ Guns and armament and related items controlled under ECCN 0A602 are also eligible for LVS with a limit of \$500 net value per shipment. Further, the rule adds a license exception under LVS for ammunition parts and components with a limit of \$100 per shipment.

The proposed rule would also revise License Exception BAG to allow U.S. citizens and permanent resident aliens temporarily leaving the United States to take up to three non-automatic *and* semi-automatic firearms under 0A501 and up to 1,000 rounds of ammunition for such firearms controlled under 0A505.a for personal use while abroad. Currently, BAG is authorized only for non-automatic firearms. The proposed rule carves out a new exception for semi-automatic firearms and revises the current framework to allow nonresident aliens leaving the U.S. to take firearms "accessories," "attachments," "components," "parts," and ammunition controlled by 0A501 or 0A505, provided that these were lawfully brought into the United States.

Main Concerns

Over the past decade, U.S. criminal prosecutions and research studies have shown how the smuggling of small numbers of firearms on a regular basis can have a large impact on gun violence in Mexico and Central America.⁸ Indeed, trafficking experts have long

⁷ See <https://www.bis.doc.gov/index.php/documents/regulation-docs/452-supplement-no-1-to-part-740-country-groups/file>.

⁸ Small Arms Survey, "Drips and Drabs: The Mechanics of Small Arms Trafficking from the United States," Issue Brief, March 2016, online at <https://www.files.ethz.ch/isn/196408/SAS-IB17-Mechanics-of-trafficking.pdf>.

argued that “small arms and spare parts are the lifeblood of the gray market.”⁹ Instead of trying to improve U.S. efforts to stop this smuggling, the proposed rule seems more aimed at limiting or complicating U.S. government efforts to stop the smuggling of U.S. firearms and relate parts. The new \$500 net value per shipment value under LVS could significantly expand the number of shipments of firearms components such as pistol grips and magazine clips that the U.S. government will not have a chance to review. Similarly, the expansion of the license exception BAG will likely make it harder for the U.S. government to stop the export of potentially problematic exports of semi-automatic firearms at the U.S. border to many countries around the world, including Mexico and in Central America.

Parts and Components Under LVS: Under the proposed changes to LVS, U.S. companies could export the following types of firearms parts and components without a U.S. license to over 100 countries, including Guatemala, El Salvador, Mexico, Somalia, South Sudan, Yemen, and the Philippines if the net value per shipment was \$500 or less:

- 1) “barrels, cylinders, barrel extensions, mounting blocks (trunnions), bolts, bolt carriers, operating rods, gas pistons, trigger housings, triggers, hammers, sears, disconnectors, pistol grips that contain fire control “parts” or “components” (e.g., triggers, hammers, sears, disconnectors) and buttstocks that contain fire control “parts” or “components;” and,
- 2) “detachable magazines with a capacity of greater than 16 rounds “specially designed” for a commodity controlled by paragraph .a or .b of this entry. “

The rule also allows companies to use the LVS for guns and armament related items under ECCN 0A602 in addition to ammunition parts, which can easily be used to make one’s own ammunition.¹⁰ As many of these parts are relatively inexpensive, especially if used, it’s possible for companies or individuals to export many items in one shipment without a U.S. license. Following common practice, firearms traffickers may also increase their number of shipments of firearms components that significantly increase lethality such as pistol grips and magazine clips to questionable clients. Taken together, the U.S. government will lose the ability to stop many types of sales to problematic destinations and end-users.

Semi-Automatic Firearms Under BAG: Over the past five years, U.S. researchers have highlighted how individuals have successfully trafficked U.S. firearms to Mexico and Central America and beyond via commercial airlines using temporary export licenses similar to the BAG license exception.¹¹ While anyone traveling on a plane needs to

⁹ Willian J. Lowell, Comments on Public Notice 7256 Amendment to the International Traffic in Arms Regulations: Revisions of U.S. Munitions List Category VII; and Public Notice 7257 Revisions to the USML (Feb. 7, 2011)

¹⁰ https://www.armscontrol.org/system/files/Lowell_Comments_ExportReform_Feb7_2011.pdf
<https://taskandpurpose.com/ammo-expensive-heres-make/>; <https://www.skilledsurvival.com/how-to-make-your-own-ammo/>; <https://www.offthegridnews.com/self-defense/guns-ammo/what-will-i-need-to-make-my-own-ammo/>

¹¹ Small Arms Survey, “Dribs and Drabs,” March 2016. Colby Goodman, “U.S. Firearms Trafficking to Guatemala and Mexico,” Working Paper, Woodrow Wilson Center, April 2013, online at

declare their firearm(s) to a U.S. CBP officer at the port of departure, CBP officers do not conduct a risk assessment similar to what the State or Commerce Department would do to help prevent U.S. firearms from being misused or diverted at the destination point. In addition, if a U.S. person overseas is robbed of or loses a semi-automatic firearm, there is little recourse from the United States. Nefarious actors who are cognizant of this exception could more easily facilitate semi-automatic firearm transfers abroad acting in concert with a U.S. citizen or permanent resident alien.

Not dissimilar from the points mentioned in the section on LVS, it is also troublesome that the BAG exception allows for nonresident aliens leaving the United States to take firearms “accessories,” “attachments,” “components,” “parts,” and ammunition controlled by 0A501 or 0A505. The U.S. government lacks jurisdiction over nonresident aliens while abroad. This exception will increase the number of firearms parts and ammunition that are currently allowed to be transported overseas, many of which are already contributing to epidemic levels of violence in Latin America.¹² In fact, as many as a quarter to half of all guns seized by police in Honduras, Guatemala, and El Salvador and submitted for tracing by the Bureau of Alcohol, Tobacco, Firearms and Explosives have been sourced to the United States.¹³

Recommendation

For these reasons, we believe the proposed BAG provision authorizing license-free exports of semi-automatic rifles by citizens and legal permanent residents be revised to allow the U.S. government to have more oversight before such a license exception is used. In order to allow the U.S. government to review many risky license requests of firearms components around the world, we also encourage you to limit companies use of LVS to \$100 or severally limit the types of parts and components that are available for the \$500 threshold value.

Controls on the Export of Services and 3D Printing

Proposed Change

Under the ITAR, companies must apply for a license with the State Department to export “defense services” to foreign entities. Defense services include items such as providing assistance or training to foreign persons in the design, development, manufacture, production, repair, maintenance, and operation of weapons on the USML. Companies must also request a license if they seek to provide military training to foreign units and forces. However, the Commerce Department’s CCL does not have a similar defense services rule for items moving from the USML to the CCL. Instead, EAR controls are

https://www.wilsoncenter.org/sites/default/files/US%20Firearms%20to%20Guatemala%20and%20Mexico_0.pdf

¹² New Data Reinforces Link Between Guns, Violence in Latin America, available at

<https://www.insightcrime.org/news/brief/new-data-reinforces-link-guns-violence-latin-america/>.

¹³ American Guns Drive the Migrant Crisis That Trump Wants to Fix With a Wall, available at

<https://www.thetrace.org/2017/05/gun-trafficking-central-america-immigrant-crisis-trump-wall/>.

focused more on technology transfers. Additionally, the new rule would likely mean that the U.S. companies would no longer be prohibited from publishing 3D gun plans on the Internet.

Main Concerns

As the current rule is written, the U.S. government will likely lose oversight on many types of defense services that could pose real risks to U.S. national security interests. Today, U.S. defense companies regularly receive U.S. approval to provide over \$40 billion in defense services a year to over 100 countries.¹⁴ Under the proposed rule, however, U.S. companies may be able provide a wide range of training activities, design and development assistance, testing, and production assistance on firearms and ammunition to foreign persons without sufficient U.S. oversight. In particular, a U.S. company would likely no longer be required to obtain U.S. government approval before they provided training to foreign security forces around the world on how to aim and fire certain guns. Further, when anyone that has access to 3D printing machines is able to obtain plans on how to build a gun, this circumvents U.S. laws that seek to prevent known criminals from obtaining U.S. firearms.

Narrow Definition of Technology: As the proposed rule identifies “the EAR does not include a concept of ‘defense services’ and the ‘technology’ related controls are more narrowly focused and apply in limited contexts as compared to the ITAR.” The technology “required” for the development, production, or operation of semi-automatic firearms would be controlled. But the definition of “required” as applied to “technology” relates only to that portion of “technology” which is “peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions.” Therefore, training a foreign person in the United States or abroad would only require a license if the assistance involved the release of controlled technology. That means companies may be able to provide a wide range of training activities, design and development assistance, testing, and production assistance on firearms and ammunition to foreign persons without sufficient scrutiny and oversight.

Private Security Contractors: As U.S. private security contractors continue to pursue training opportunities with foreign security forces in countries such as Libya and China, it remains critical that the U.S. government maintain oversight of U.S. private security contractor activities.¹⁵ At the moment, a U.S. private security contractor seeking to sell training to foreign police units on how to aim and fire semi-automatic weapon must

¹⁴ Security Assistance Monitor, Arms Sales Database, Direct Commercial Sales Services, accessed on July 6, 2018, online at <http://securityassistance.org/data/country/arms/Direct%20Commercial%20Sales%20Services/2012/2017//Global//all>.

¹⁵ Matthew Cole and Jeremy Scahill, “Eric Prince in the Hot Seat,” The Intercept, March 24, 2016, online at <https://theintercept.com/2016/03/24/blackwater-founder-erik-prince-under-federal-investigation/>. Marc Fisher, Ian Shapira, and Emily Rauhala, “Beyond Eric Princes China Venture,” The Washington Post, May 4, 2018, online at https://www.washingtonpost.com/news/world/wp/2018/05/04/feature/a-warrior-goes-to-china-did-erik-prince-cross-a-line/?noredirect=on&utm_term=.15fb0693b992

obtain a license. But, the new rule would likely allow a U.S. company to avoid this license requirement if the company did not also export firearms as part of the training. It also means that some past enforcement actions, such as the deferred prosecution agreement with the private security company formerly known as Blackwater, which included violations related to the export of small arms, ammunition, and training of foreign security forces in Sudan, Iraq, and Afghanistan, could be compromised.¹⁶ The new rule could also create an unfortunate scenario where U.S. private security contractors are able to provide services to foreign security units or militias that are otherwise prohibited from receiving training through U.S. foreign security aid.

3D Printing: In *Defense Distributed v. United States Department of State*, 838 F.3d 451 (5th Cir. 2016), the Fifth Circuit determined that posting 3D gun instructions, which constituted an export of controlled technical data under the ITAR, was not an infringement on the First Amendment. But the proposed BIS rules suggest that information posted on the internet would not be subject to EAR controls. The rules state that *“the EAR includes criteria in part 734 that would exclude certain information and software from control. 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 restrictions on further dissemination (i.e., unlimited distribution), the operation and maintenance information included in that published operation and maintenance manual would no longer be “subject to the EAR.” (See §§ 734.3(b) and 734.7(a).)”* If information published online would not be subject to the EAR, then 3D plans for guns published online would be outside the scope of export controls under the proposed rules. We are greatly concerned about the loss of controls on 3D gun-printing plans, which has increasingly assisted bad actors in enhancing their capabilities to inflict atrocities around the world.

Recommendations

We recommend that the final rule expand the definition of “technology” to capture defense-service type activities that would otherwise be left unregulated. More specifically, it will be critical to ensure that a final rule requires U.S. companies to request a license to furnish training on the use of firearms to foreign security forces, support for design and development assistance, testing, and production assistance on firearms and ammunition. To ensure that criminal organizations do not have the capability to easily build firearms, it will be critical that design and development information related to semi-automatic firearms, including 3D printing plans for guns, be considered controlled “technology” under the EAR.

Registration Requirement for Manufacturers

Proposed Change

¹⁶ <https://archives.fbi.gov/archives/charlotte/press-releases/2012/academi-blackwater-charged-and-enters-deferred-prosecution-agreement>

The transfer of certain Category I-III items from the USML to the CCL means that manufacturers and exporters, as well as providers of defense services, of those items will no longer be required to register with the State Department's Directorate of Defense Trade Controls (DDTC) or with any U.S. government entity before engaging in manufacturing or exporting certain firearms, ammunition, and related parts and components. In other words, exporters and manufactures will no longer be subject to the U.S. government requirement under 22 C.F.R. 122.1, which states that "*any person who engages in the United States in the business of manufacturing or exporting or temporarily importing defense articles, or furnishing defense services, is required to register with the DDTC. A manufacturer who does not engage in exporting must nevertheless register.*"

Main Concerns

The State Department requirement for companies and individuals to register before they engage in the manufacturing or exporting is an important tool for the U.S. government to better understand the nature of the firearms industry, including who owns and controls key items and technology of significant military value. It provides the U.S. government with valuable data on manufacturers, government contractors, and importers. While some data on exporters will still be available through Commerce Department required export licenses, not all U.S. manufacturers regularly export or are required to submit a license for export. This loss of documented evidence on firearms manufacturing could severely hamper U.S. law enforcement investigations and the prosecution of arms dealers or others found in violation of AECA.

New Types of Manufacturing: In 2016, U.S. registration for firearms manufacturing activities was deemed so important that DDTC issued specific guidance providing that the below broad range of activities constitute "manufacturing" and thus require registration. The below activities were likely added because of concerns about illicit firearms trafficking and an inability to identify some new or uncommon types of manufacturing. However, this new guidance will not apply to Category I-III items moving to the CCL.

- a) Use of any special tooling or equipment upgrading in order to improve the capability of assembled or repaired firearms;
- b) Modifications to a firearm that change round capacity;
- c) The production of firearm parts (including, but not limited to, barrels, stocks, cylinders, breech mechanisms, triggers, silencers, or suppressors);
- d) The systemized production of ammunition, including the automated loading or reloading of ammunition;
- e) The machining or cutting of firearms, e.g., threading of muzzles or muzzle brake installation requiring machining, that results in an enhanced capability;
- f) Rechambering firearms through machining, cutting, or drilling;
- g) Chambering, cutting, or threading barrel blanks; and
- h) Blueprinting firearms by machining the barrel.

Company Acquisition Data: DDTC registrants are required to notify the State Department within five days of the effectuation of a transaction if the registrant is either a target or a buyer in an acquisition. If a foreign buyer is acquiring a DDTC registrant, a notification must be provided to DDTC 60 days prior to the transaction's effectuation. One of the reasons these notifications are critical is to understand who owns and controls manufacturers of items and technology that could be used to harm U.S. foreign policy interests and, in the case of foreign buyers, pre-notification allows the government to take action and ask questions if there are concerns with a non-U.S. company owning a manufacturer or exporter of controlled items.

Recommendation

While some U.S. companies may make the argument that the registration fee (\$2,250 a year for most exporters) is an economic burden, establishing a threshold for annual revenues could easily solve this issue. If a company does not meet this threshold, their registration fee may be waived. If the proposed rules go into effect, we recommend that the U.S. government establish a registration requirement for manufacturers of the items that are transferring from the USML to the CCL, including the 2016 DDTC guidance, in order to provide for the transparency and accountability needed to identify risk and support U.S. law enforcement investigations.

Reporting Requirements on Political Contributions and Fees

Proposed Change

Finally, the transfer of certain Category I, II, and III items from ITAR to EAR control will mean the loss of the reporting requirements outlined in 22 C.F.R. §130. ITAR's Section 130 requires exporters to report payment of certain political contributions, fees, and commissions related to the sale of defense articles and services to the armed forces of a foreign country or international organization to the DDTC. These reporting requirements were implemented to address concerns about the growing use of agents, advisers, and consultants to obtain business in international defense trade.

Section 130.9 mandates that license applicants disclose to the DDTC political contributions in an aggregate of \$5,000 or more and fees or commissions in an aggregate of \$100,000 or more that the applicant or its vendors have paid or agreed to pay related to the sale for which the license is requested. The same disclosure requirements are imposed upon suppliers, which the regulation defines as "any person who enters into a contract with the Department of Defense" for the sale of defense articles or defense services valued in an amount of \$500,000 or more.¹⁷ Section 130.10 requires that applicants and suppliers furnish detailed information related to the sale (such as the total contract price and the name and nationality of each foreign purchaser) and its related political contributions, fees, or commission to the DDTC. Section 130.12 requires vendors to disclose to the applicant or supplier any political contributions, fees, and commissions paid in relation to the sale. Finally, section 130.14 imposes strict recordkeeping

¹⁷ See 22 C.F.R. §130.7.

requirements on each applicant, supplier, and vendor, requiring each to maintain records of any information it furnished or obtained in compliance with Section 130 for at least five years following the date of the report submitted to the DDTC. As the proposed rule will move certain Category I, II, and III items from ITAR control, Section 130 disclosures will no longer be required when obtaining licenses to export those items.

Main Concerns

In many countries around the world, corruption is rampant within their arms procurement systems, as foreign officials seek to steal funds from their national budgets for their personal gain. In Nigeria, this type of corruption helped hollow out the military and made it more difficult for them to effectively combat Boko Haram.¹⁸ In response to similar types of concerns, the U.S. Congress adopted the above reporting requirements to help the U.S. government stop bribery and other fraudulent schemes within the international arms trade. However, this is still a challenging task. According to an earlier Commerce Department report, the United States became aware of "significant allegations of bribery by foreign firms in 294 international contract competitions valued at \$145 billion."¹⁹ Under the proposed rule, the Commerce Department would limit its ability to obtain useful information on U.S. defense companies and prosecute bribery.

Transparency: Section 130 reporting requirements encourage transparency within international defense trade and provide U.S. law enforcement with a useful tool to stop corrupt arms deals. At the moment, Section 130 disclosures are an important information-gathering tool through which the government gains access to useful data about arms trade transactions. Information such as the identities and countries of foreign purchasers and the recipients of donations to foreign governments and campaigns have political and diplomatic uses that extend beyond the arms industry. The loss of required Section 130 disclosures when obtaining licenses to export USML Category I, II, and III items means that the pool of useful data the government can access will become smaller. Just as the access to this data has benefits beyond the arms industry, the decrease in accessible data will have negative repercussions beyond the arms industry.

Prosecutions and Compliance Systems: The requirement that U.S. companies disclose payments made to solicit, promote, or secure the sale of defense articles or services to the armed forces of a foreign country or international organization is an effective anti-bribery and anti-corruption mechanism. The same can be said for the reporting requirements imposed upon suppliers. While U.S. companies may expectedly choose to avoid notifying the U.S. government of fees and contributions that could be considered bribery, U.S. law enforcement have used the provisions to pursue U.S. prosecutions against major defense companies. In 2010, for example, BAE Systems pleaded guilty and paid a \$400 million fine to the United States after being caught in a scandal to cover up, among other items,

¹⁸ Transparency International, "Weaponizing Transparency: Defense Procurement Reform as a Counterterrorism Strategy," May 2017, online at http://ti-defence.org/wp-content/uploads/2017/05/Weaponising_Transparency_Web.pdf.

¹⁹ Paul Holden, "Indefensible: Seven Myths that Sustain the Global Arms Trade," online at <https://projectindefensible.org/>.

payments made to “marketing agents” to help it secure arms contracts with Saudi Arabia. The company failed to disclose any fees paid to the agents.²⁰ The requirement is also a useful tool to encourage U.S. companies to have stronger compliance systems to identify and stop corruption.

Recommendation

In order to maintain important transparency and anti-corruption mechanisms on U.S. firearms sales, the U.S. government would benefit by adding a mechanism to the CCL that would retain the reporting requirement of Part 130.

²⁰ U.S. Department of Justice, “BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine,” March 1, 2010, online at <https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine>.