

RECOMMENDED ACTION MEMO

Agency: Department of State, Department of Commerce
Topic: Transferring Oversight Authority Over Certain Firearm Exports
Date: November 2020

Recommendation: Restore oversight of firearm exports and imports to the Department of State by reversing Trump administration rules that transferred oversight of these weapons to the Department of Commerce.

I. Summary:

Description of recommended executive action

The federal government regulates the export and import of firearms according to the particular listing of that type of firearm. Most firearms and ammunition are typically listed on the US Munitions List (USML), a list of defense articles, services, and technologies with military applications overseen by the Department of State. Accordingly, export and import of items on the USML are subject to significant congressional oversight and stringent licensing requirements, and violations of USML regulations may result in significant civil and criminal penalties.¹

Firearms not on the USML are typically listed on the Commerce Control List (CCL). The export and import of these firearms are overseen by the Department of Commerce and are subject to less-stringent regulations and reporting requirements.

In early 2020, the Trump administration finalized two rules shifting most firearms, ammunition, and firearm component parts from the USML to the CCL. One rule, issued by the State Department, amended the USML to *remove* these weapons and ammunition from the list.² Another, issued by the Commerce Department, *added* these items to the CCL.³ Together, these companion rules decreased regulatory requirements and congressional oversight over the

¹ Martin Horan, "ITAR Requirements: The Consequences of Non-Compliance," *FTP Today*, May 29, 2019, <https://www.ftptoday.com/blog/itar-requirements-the-consequences-of-non-compliance>.

² U.S. State Department, "International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III," 85 Fed. Reg. 3,819 January 23, 2020, <https://www.federalregister.gov/documents/2020/01/23/2020-00574/international-traffic-in-arms-regulations-us-munitions-list-categories-i-ii-and-iii>.

³ The Industry and Security Bureau, "Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML)," 85 Fed. Reg. 4,136, January 23, 2020, <https://www.federalregister.gov/documents/2020/01/23/2020-00573/control-of-firearms-guns-ammunition-and-related-articles-the-president-determines-no-longer-warrant>.

export and import of dangerous and deadly weapons. The changes were supported by the National Rifle Association (NRA).⁴

To reverse the Trump administration's attempt to deregulate firearm exports and imports, the next administration should:

- (1) issue a Department of State rule to amend the USML to include the weapons and ammunition the Trump administration transferred off the list
- (2) issue a Department of Commerce companion rule to relinquish regulatory control of these items as they are transferred off the CCL and back to the USML

Overview of process and time to enactment

The Administrative Procedure Act (APA) requires that federal agencies issue rules through the notice-and-comment rulemaking (NCRM) process.⁵ For each of the two rules described above, the administration should issue a notice of proposed rulemaking (NPRM) through the Federal Register which should include a summary of the proposed changes and information about the need and authority for the changes. The NPRM should also set forth the time period—generally 30 to 60 days—for the public to submit comments about the proposed rule. The Trump administration allowed for 45 days of public comment for both the State Department⁶ and Commerce Department⁷ proposed rules they issued.

Once the comment period closes, the administration should respond to significant received comments (by either modifying the proposed rule or addressing substantive comments directly) and publish the final rule in the Federal Register. A rule generally goes into effect thirty days after it is published.⁸ In total, the multi-phase NCRM process generally extends for a year.

II. Current state

The export and import of firearms and ammunition is controlled by the federal government, depending on the particular listing of the type of firearm. Under the Arms Export Control Act

⁴ NRA ILA, "Docket No. DOS-2017-0046; RIN 1400-AEJO; International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III," Comment submitted to the Department of State, July 9, 2018, <https://beta.regulations.gov/document/DOS-2017-0046-2626>.

⁵ 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

⁶ U. S. State Department, "International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III," 83 FR 24198, May 24, 2018, <https://www.federalregister.gov/documents/2018/05/24/2018-10366/international-traffic-in-arms-regulations-us-munitions-list-categories-i-ii-and-iii>.

⁷ Industry and Security Bureau, "Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML)," 83 FR 24166, May 24, 2018, <https://www.federalregister.gov/documents/2018/05/24/2018-10367/control-of-firearms-guns-ammunition-and-related-articles-the-president-determines-no-longer-warrant>.

⁸ Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," January 7, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10003>.

(AECA), all “defense articles” controlled for export and import are listed on the USML, which is in the International Traffic in Arms Regulations (ITAR).⁹ The USML contains several categories of firearms and related defense articles, and is within the purview of the State Department, subject to various licensing requirements.

Certain other types of firearms that are not on the USML are listed on the CCL, which is within the Export Administration Regulations (EAR). The Export Control Reform Act (ECRA) is the permanent statutory authority of the EAR.¹⁰ The CCL is subject to the Commerce Department’s jurisdiction, and is overseen by the Bureau of Industry and Security (BIS), a division of the Commerce Department.

Earlier this year, both the State Department and Commerce Department published final rules that drastically changed the implementation of this regulatory framework. The State Department published rules that amended Categories I, II, and III of the USML by removing many types of firearms from these categories.¹¹ Simultaneously, the Commerce Department published a companion rule that transferred oversight over certain firearms and related items to the CCL.¹² The concurrent rules were finalized and enacted with few changes between the proposed and final versions.¹³

In particular, the rules asserted that firearms “which have an inherently military function” will remain under the State Department’s purview, while other firearms, such as those widely available in retail markets, will be part of the CCL and thereby subject to the Commerce Department’s control. Given that many firearms that serve “an inherently military function” are also widely available for sale in the US, these changes effectively limited oversight over many dangerous weapons and ammunition, including the following.

- Four sniper rifles designed for long-distance strategic military targets, including the following.
 - The L115A3 sniper rifle, used by the UK Armed Forces. In 2009, a British Army Corporal in Afghanistan used this sniper rifle to shoot and kill two Taliban fighters

⁹ 22 U.S.C. § 2778.

¹⁰ Akin Gump Strauss Hauer & Feld LLP, “The Export Control Reform Act and Possible New Controls on Emerging and Foundational Technologies,” September 12, 2018, <https://www.akingump.com/en/news-insights/the-export-control-reform-act-of-2018-and-possible-new-controls.html>.

¹¹ State 2020 Rule *supra* note 2.

¹² Commerce 2020 Rule *supra* note 3.

¹³ Initially, the Trump administration’s proposed rules would have also transferred technical data for 3D-printed guns from its listing on the USML to the CCL. In response to this specific provision, 22 states and the District of Columbia filed suit. A U.S. District Court in Washington enjoined the regulation “insofar as it alters the status quo restrictions on technical data and software directly related to the production of firearms or firearm parts using a 3D-printer or similar equipment.” *Washington v. U.S. Dep’t of State*, No. 2:20-CV-00111-RAJ, 2020 WL 1083720 (W.D. Wash. Mar. 6, 2020).

and destroy their machine gun from a distance of 2,700 yards. At the time, this shot was the world record for the longest kill shot ever recorded.¹⁴

- The Barrett M82, a 50-caliber anti-armor sniper rifle used by armies all over the world, including the US and Ukraine. The M82 can “penetrate light armor, down helicopters, destroy commercial aircraft, and blast through rail cars and bulk storage tanks filled with explosive or toxic chemicals” from distances of 1,000 to 2,000 yards.¹⁵
- The M40A5 sniper rifle, used by the US Marine Corps, which is a “highly modified” version of a Remington 700 hunting rifle and is capable of hitting targets with a high-level of accuracy from a distance of 1,000 yards.¹⁶
- Four sidearms used by US armed forces, including the SIG Sauer Mk 25, which is advertised by its manufacturer as “designed for the U.S. military, carried by elite forces, and proven to be the premier combat pistol.”¹⁷
- A number of semi-automatic assault pistols that “combine the firepower of a rifle, [and ability] to accept high-capacity ammunition magazines designed for assault rifles with the increased concealability of a handgun.”¹⁸ These weapons pose a special threat to law enforcement as they are capable of penetrating defensive body armor.

The Trump administration framed these changes as part of the USML review process that began in 2011 under the Obama administration to streamline the USML and ensure State Department oversight concentrated on military-style articles.¹⁹ The Obama administration’s

¹⁴ Nikola Budanovic, “The Sniper Who Killed a Taliban Machine Gunner from 8,120 Feet away,” *War History Online*, June 1, 2017, <https://www.warhistoryonline.com/articles/what-sniper-who-killed-a-taliban-machine-gunner-from-8120-feet-away-xc.html>.

¹⁵ Tom Diaz, “Clear and Present Danger: National Security Experts Warn About the Danger of Unrestricted Sales of 50 Caliber Anti-Armor Sniper Rifles to Civilians,” Violence Policy Center, July 2005, <https://vpc.org/studies/50danger.pdf>.

¹⁶ Kyle Mizokami, “5 Sniper Rifles That Can Turn Any Solider [sic] into the Ultimate Weapon,” *The National Interest*, March 11, 2018, <https://nationalinterest.org/blog/the-buzz/5-sniper-rifles-can-turn-any-solider-the-ultimate-weapon-24851>.

¹⁷ Sig Sauer, “P226,” accessed October 16, 2020, <https://www.sigsauer.com/products/firearms/pistols/p226/>.

¹⁸ Violence Policy Center, “AR-15 and AK-47 Assault Pistols: Rifle Power in a Handgun,” accessed October 16, 2020, <https://www.vpc.org/studies/armor.pdf>.

¹⁹ State 2020 Rule *supra* note 2. (“The Department [of State] underscores that this rule constitutes an important part of a nine-year program of revisions that has streamlined the USML...the Department [of State] has repeatedly stated its goals for that program...First, that it is seeking to better focus its resources on protecting those articles and technologies that provide the United States with a critical military or intelligence advantage. As applied to this rule, for example, firearms and firearms technology that are otherwise readily available do not provide such an advantage...Second, to resolve jurisdictional confusion between the ITAR and EAR among the regulated community through revision to “bright line” positive lists. Third, to provide clarity to the regulated community thereby making it easier for exporters to comply with the regulations and enable them to compete more successfully in the global marketplace.”).

revisions, however, focused on aircraft technology, gas turbine engines, and component parts—not firearms.²⁰

In terms of oversight and regulatory control, there are several significant differences between the USML and the CCL.

- Articles on the USML require notification to Congress before export, but articles on the CCL do not. This means a significant number of weapons exports are no longer subject to any level of oversight or scrutiny from lawmakers.²¹ In June 2020, the Center for International Policy highlighted the impact of this change by providing data about USML Category I-III notifications lawmakers received in 2019 that would likely have gone unseen by Congress under the current guidelines.²² Examples include a \$2.4 million sale of semi-automatic rifles to security forces of the Philippines government, which US lawmakers blocked due to ongoing police-led violence against Filipino citizens.²³
- The USML requires exporters and importers of listed items to register with the State Department, while the CCL does not require registration. To engage in the export or import of items on the CCL, companies and individuals are required to apply for a license, but are not required to register with the Commerce Department. To engage in the export or import of items on the USML, companies and individuals must *both* apply for a license and register with the State Department. The registration requirement is far more involved, and provides regulators with important sources of information regarding firearms exports and imports.
- Because some US manufacturers may no longer have to register with the State Department, they are not required to provide advance notification of intended sales or transfers to foreign persons of ownership or control of the registrant. Without the advance notification requirement, foreign entities could potentially influence the sales and marketing activities of US manufacturers in a manner that would be detrimental to US national security.
- The Department of Commerce, unlike the Department of State, does not charge registration or licensing fees. As such, the transfer to the CCL could constitute an unnecessary burden on taxpayers.
- Providing “services” related to items listed on the USML triggers licensing requirements, while the CCL does not. Under the ITAR, companies must apply for a license with the

²⁰ Congressional Research Service, “The U.S. Export Control System and the Export Control Reform Initiative,” updated January 28, 2020, <https://fas.org/sgp/crs/natsec/R41916.pdf>.

²¹ Center for International Policy, “The Firearm Sales Lawmakers Would Have Missed in 2019,” Security Assistance Monitor, June 4, 2020, http://securityassistance.org/fact_sheet/firearm-sales-lawmakers-would-have-missed-2019.

²² *Id.*

²³ *Id.*

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 or manufacture, produce, repair, maintain, or operate weapons on the USML. 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 focused more on technology transfers. As a result, under the proposed rule, US 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 US oversight. For example, a US company would likely no longer be required to obtain US government approval before it provided training to foreign security forces around the world on how to aim and fire certain guns.

- State conducts more thorough end-use monitoring regarding USML items than Commerce for items on the CCL. Through the Department of State’s Blue Lantern program, US embassy officials in the country receiving the export are required to conduct pre-license checks and post-shipment verifications of items.

III. Proposed action

To protect global and national security, the next administration should issue new regulations to restore oversight of firearm exports and imports to the Department of State by reversing Trump administration rules that transferred oversight of such weapons to the Department of Commerce.

A. Substance of the new rules

State Department USML rule

The Department of State should promulgate a new rule that reverses the Trump administration’s deregulation of firearms. The rule should include, at the very least, the complete list of firearms, ammunitions, and component parts that were transferred to the CCL by the Trump administration, and propose the amendment of USML Categories I-III to include those articles again.

This list should be accompanied by a clear and comprehensive explanation of how this reversal in policy supports the goals of both the agency and the AECA, which include the “furtherance of world peace and the security and foreign policy of the United States,”²⁴ explained in greater detail below.

Commerce Department CCL rule

²⁴ 22 U.S.C. § 2778 (a)(1).

The Department of Commerce should issue a new rule that reverses the Trump administration's rule. The rule should identify a clear and complete list of military-style weapons, ammunition, and component parts currently subject to its oversight through their inclusion on the CCL, and stipulate that these articles will no longer be included on the CCL and are being transferred to the USML via the Department of State's proposed rule. The Department of Commerce should support the Department of State's rule by also providing an explanation of how increased regulation of these articles, through their inclusion on the USML, is in accordance with the goals of the Department of Commerce and the ECRA.

B. Process

The Supreme Court has held that agencies seeking to "amend or repeal a rule" must "use the same procedures...as they used to issue the rule in the first instance."²⁵ Therefore, the Department of State and the Department of Commerce must both go through the NCRM process under the APA.²⁶ First, each agency must provide notice that it intends to promulgate a rule by publishing an NPRM in the Federal Register. The notice must provide the time, place, and nature of the rulemaking; the legal authority under which the rule is proposed; and either the terms or subject of the proposed rule.²⁷

The public then has an opportunity to comment on the proposed rules. The agencies set the time period for public comments, typically at least 30 days.²⁸ The agencies must then review the comments and respond to "significant" comments.²⁹ The agencies may then make changes to the proposed rule based on those comments.³⁰

Once the revision process concludes, the agencies publish the finalized rule in the Federal Register, accompanied by a "concise general statement" of the rule's "basis and purpose."³¹ Generally, the rules may not go into effect less than 30 days after the publication of the finalized versions.³²

C. Legal justification

State Department USML rule

²⁵ *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015).

²⁶ 5 U.S.C. § 553; 16 U.S.C. § 460d; 33 U.S.C. 1, 28 Stat. 362.

²⁷ Congressional Research Service, "An Overview of Federal Regulations and the Rulemaking Process," updated January 7, 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10003>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

The AECA authorizes the president to control the export and import of defense articles.³³ This authority includes creating and updating the USML, which lists items, technologies, and services that are properly classified as defense articles.³⁴ The AECA also requires the president to regulate the export and import of articles on the USML.³⁵ The president has delegated this authority to the secretary of State, who administers the ITAR through the Directorate of Defense Trade Controls (DDTC).³⁶ Thus, the AECA authorizes the Department of State to promulgate rules that alter or amend Categories I-III of the USML in accordance with federal agency rulemaking provisions.³⁷

Commerce Department CCL rule

Items not subject to ITAR or any other set of licensing regulations are subject to regulation under ECRA.³⁸ The Department of Commerce performs its duties under the ECRA by updating the CCL as a list of items to be regulated under the EAR.³⁹ Thus, the Department of Commerce maintains the authority to promulgate rules related to the maintenance of the CCL, including transferring items off the CCL.

IV. Risk analysis

Agency rulemaking is generally subject to two types of challenges: procedural challenges and substantive challenges. Procedural challenges center on whether the agency promulgated the final rule in accordance with the requirements outlined by § 553 of the APA.⁴⁰ The procedural requirements of the APA are discussed in Section III of this memorandum. So long as the Department of Commerce and the Department of State are careful to observe these requirements, the new rule is likely to withstand procedural challenges.

On substantive legal grounds, the Department of State and Department of Commerce rules proposed here also have minimal legal vulnerability. As both agencies have issued regulations amending the content of both the USML and CCL in the past, doing so again is clearly within the scope of their authority. The main legal question will be whether the rulemaking record supports the agencies' change in position in reverting back to the pre-Trump administration status quo, such that the new rules are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁴¹

³³ 22 U.S.C. § 2778(a)(1). See also Exec. Order No. 13,637, 78 Fed. Reg. 49 (Mar. 13, 2013).

³⁴ 22 U.S.C. § 2778(a)(1).

³⁵ *Id.*

³⁶ 22 C.F.R. § 120.1(a).

³⁷ 5 U.S.C. § 553.

³⁸ 50 U.S.C. §§ 4801-51.

³⁹ 15 C.F.R. §§ 730-44 (2012); 50 U.S.C. §§ 4801-51 (2018).

⁴⁰ 5 U.S.C. § 553.

⁴¹ 5 U.S.C. § 706(2)(A).

One of the most precedential and often-cited cases that discusses the arbitrary-and-capricious standard in the context of an agency's change in position is *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Company*.⁴² There, the Supreme Court considered the National Highway Traffic Safety Administration's (NHTSA) repeal of a requirement that motor vehicles have automatic seatbelts or airbags. The NHTSA stated that it could no longer support the finding that automatic restraints would provide significant safety benefits to consumers, thereby reversing its own finding from several years prior.

The Supreme Court explained that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."⁴³ Courts cannot substitute their own judgment for the agency's, but the agency "must examine the relevant data and articulate a satisfactory explanation for its action."⁴⁴ In this case, the Supreme Court found that NHTSA's explanation was insufficient to allow the Court to "conclude that the rescission was the product of reasoned decision making."⁴⁵ NHTSA relied on substantial uncertainty to justify its actions, but this is not enough: the "agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'"⁴⁶

So long as they provide such a reasoned explanation, agencies are afforded latitude even when they depart from a prior position by altering or repealing rules.⁴⁷ In 2009, the Supreme Court established the principles governing this type of agency change.⁴⁸ Specifically, while an agency must "display awareness that it is changing position...it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change adequately indicates."⁴⁹ As stated by the Supreme Court in *Chevron*, initial administrative decisions are not "carved in stone;" rather, the agency "must consider varying interpretations and the wisdom of its policy on a continuing basis."⁵⁰

There are two scenarios that may require a "more detailed justification" on the part of an agency: (1) if the prior policy "engendered serious reliance issues," or (2) if a new policy relies on fact finding that contradicts its prior policy.⁵¹

⁴² *State Farm*, 463 U.S. 29 (1983).

⁴³ *Id.* at 30.

⁴⁴ *Id.*

⁴⁵ *Id.* at 52.

⁴⁶ *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

⁴⁷ See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2217, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

⁴⁸ *F.C.C. v. Fox Television Stations, Inc.*, 566 U.S. 502, 513 (2009).

⁴⁹ *Id.*

⁵⁰ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 863 (1984).

⁵¹ *Id.* In particular, when there has been "decades" of reliance on a prior policy, the agency must present a more reasoned explanation for overruling its prior position. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-27 (2016).

Reliance interests

As to reliance interests, the Trump administration's rules represented a significant shift away from the status quo regulation of firearms. Presidents have traditionally exercised their authority to control the export of "defense articles," including most firearms and ammunition, through the State Department. Past administrations have done so by including all handguns, rifles and short-barreled shotguns, and certain kinds of ammunition on the USML. A change back to the long-term status quo will thus not significantly impact reliance interests.

Fact finding

As to fact finding that contradicts prior policy, there are ample ways in which both agencies can provide a "more detailed justification" for why good reasons exist for a reversal and that the agencies believe the change in policy to be better.⁵² These reasons include the following.

- **The agencies' prior reasoning regarding weapons that have "an inherently military function" was unsound.**

The rule issued by the Trump administration State Department claimed the purpose of their effort to "revise the USML" was to "limit its scope to those items that provide the United States with a critical military or intelligence advantage *or, in the case of weapons, perform an inherently military function.*"⁵³ (Emphasis added). This standard is not required by statute, but is a creation of the executive branch. The State Department then went on to reason that:

"[G]iven that the majority of the items referenced in these comments that will transfer to the CCL through this rule are widely available in retail outlets in the United States and abroad, and widely utilized by the general public in the United States, it is reasonable for the Department to determine that they do not serve an inherently military function."⁵⁴

This reasoning is not sound. Just because military-style weapons are "widely utilized by the general public in the United States" does not mean they "do not serve an inherently military function." In fact, as noted above, many of the weapons removed from the USML were designed, marketed, and continued to be deployed for military use.

The fact that some gun enthusiasts "enjoy" shooting these weapons and have labeled this activity "modern sport shooting" or "tactical shooting" does not change the design or purpose of these firearms or the danger they pose in civilian hands. Military-style semiautomatic firearms were used to perpetrate the tragedies that occurred in an elementary school in Newtown, Connecticut, at a music festival in Las Vegas, Nevada, at a workplace in San Bernardino,

⁵² *F.C.C. v. Fox Television Stations, Inc.*, 566 U.S. at 515.

⁵³ State 2020 Rule *supra* note 2.

⁵⁴ *Id.*

California, in a movie theatre in Aurora, Colorado, and at a high school in Parkland, Florida, among others. Because of the dangerous nature of these weapons, DC and seven states ban them. Because of the military nature and serious lethality of these weapons, they belong on the USML.

- **The agencies' prior reasoning regarding the retail availability of firearms was contradictory to fact.**

The State Department's final rule stated items to be removed from the USML "are widely available in retail outlets in the United States and abroad, and widely utilized by the general public in the United States."⁵⁵ The addition of "abroad" was added in response to comments submitted during the proposed rule's comment period, which criticized the proposed rule for focusing exclusively on the United States gun market, despite the fact that the domestic gun market is not the market to which exports treated by the rules would be directed.

While the final rule added the word "abroad," it provided no facts to justify the assertion that the firearms removed from the USML are actually "widely available in retail outlets...abroad." In fact, the final rule seemed to conclude that the availability of weapons in retail outlets abroad was irrelevant to its reasoning:

The Department recognizes that there are variations in commercial availability of firearms not only between nations, but also within the domestic market itself; however, this variation in availability does not overcome the Department's assessment that the subject firearms do not provide a critical military or intelligence advantage such that they warrant control under the ITAR.⁵⁶

The State Department's factual assertion that the firearms removed from the USML are "widely available in retail outlets...abroad" is wrong, as is its reasoning that the availability of firearms abroad doesn't matter.

As to the factual inaccuracies, the US retail firearms market is qualitatively and quantitatively different from nearly every market in the world.⁵⁷ For example, the US, with 4.4% of the world's population, comprises more than 45% of the world's firearms in civilian possession.⁵⁸ Belize, Colombia, Israel, Japan, Kenya, Turkey, and the United Kingdom do not permit any civilian use of some or all types of semi-automatic firearms removed from the USML, and so cannot be said to have any retail availability of these prohibited firearms.⁵⁹ Other nations, including Australia, Canada, Croatia, India, Lithuania, New Zealand, South Africa, and Switzerland apply special restrictions to civilian possession of semi-automatic firearms, such as proof that they are

⁵⁵ State 2020 Rule *supra* note 2.

⁵⁶ *Id.*

⁵⁷ John Lindsay-Poland, "Comment on Proposed Rules on Categories i-ii-iii by Depts. of State and Commerce," July 9, 2018, <https://beta.regulations.gov/document/DOS-2017-0046-3038>.

⁵⁸ *Id.*

⁵⁹ *Id.*

needed for self-defense, so it cannot be said that these firearms are “widely available in retail outlets” there.⁶⁰

The State Department’s reasoning is also flawed. The State Department claims the limited availability of firearms at retail outlets abroad “does not overcome the Department’s assessment that the subject firearms do not provide a critical military or intelligence advantage.” Yet, the State Department’s entire rationale that such firearms “do not provide a critical military or intelligence advantage” is that they are widely available at retail outlets. Either the State Department believes domestic gun markets are solely relevant to the analysis (which as detailed above, is factually inaccurate), or the State Department’s logic collapses on itself.

- **The agencies’ prior reasoning undermines Congress’ intent in passing the AECA.**

When Congress passed the AECA, they gave the president authority to designate items for additional controls in order to further world peace, national security, foreign policy, reducing international terrorism, and preventing the proliferation of armed conflict.⁶¹ In removing military-style firearms from the USML, the Trump administration undermined each of these purposes.

For example, the Trump administration rules increase the likelihood of small-arms trafficking. Over the past decade, US 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.⁶² Indeed, trafficking experts have long argued that “small arms and spare parts are the lifeblood of the gray market.”⁶³ Small arms are often the weapons of choice for terrorists, human rights abusers, and other bad actors. By moving certain military-style firearms off the USML, gun exporters are now subject to less oversight, increasing the risk of guns falling into the wrong hands.⁶⁴

⁶⁰ *Id.*

⁶¹ 22 U.S.C. § 2778(a)(1).

⁶² Matt Schroeder, “Drips and Drabs: The Mechanics of Small Arms Trafficking from the United States,” Small Arms Survey no. 17, March 2016, <https://www.files.ethz.ch/isn/196408/SAS-IB17-Mechanics-of-trafficking.pdf>.

⁶³ William J. Lowell, “Re: ‘Category VII Revision’ and ‘USML—Positive List.’,” Comments on Public Notice 7256 and Public Notice 7257, February 7, 2011, https://www.armscontrol.org/system/files/Lowell_Comments_ExportReform_Feb7_2011.pdf

⁶⁴ Giffords, “Giffords Condemns Trump Administration Proposal to Deregulate the Oversight of Firearm Exports,” November 13, 2019, <https://giffords.org/press-release/2019/11/trump-firearms-exports-2/>.