

**RECOMMENDED ACTION MEMO**

**Agency:** Department of State  
**Topic:** Reversing the Rescission of the 2002 Policy on Silencer Exports  
**Date:** November 2020

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**Recommendation: Reinstate the 2002 State Department firearms silencer policy prohibiting the export of silencers for commercial sales.**

**I. Summary:**

Firearm silencers are inherently dangerous devices that shooters can use to suppress the sound of gunfire and mask muzzle flash. These deadly accessories, which put law enforcement and the public at grave risk by making it more difficult to identify nearby gunshots and locate an active shooter, have been regulated effectively in the United States since the 1930s and are thus rarely used in crime. Still, the gun lobby has made concerted efforts to make it easier to buy and sell silencers. After a failed attempt at domestic deregulation in 2017, the gun lobby succeeded in making silencers easier to export abroad in 2020, when the Department of State rescinded an 18-year-old guidance document governing how silencers could be exported. As a result, silencers are now legally allowed to be sold commercially to foreign companies, putting lives overseas at risk.

**Overview of process and time to enactment**

The State Department should renew its guidance document regarding silencer exports. It can do this by issuing a memo to enact this recommendation immediately without the need for a formal rulemaking process, so long as it explains the reason for the change and acknowledges reliance interests. Because this recommendation reinstates a previous guidance document, this could be done at the very beginning of the administration.

**II. Current state****The dangers of silencers**

Federal law defines “firearm silencer” as “any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for the use in assembling or fabricating a firearm silencer or firearm muffler, any part intended only for use in such assembly or fabrication.”<sup>1</sup> Domestically, silencers are regulated under the National Firearms Act, which requires silencers to be registered with ATF.<sup>2</sup> This law, on the books since 1934, has made it more difficult to obtain silencers than consumer firearms.

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<sup>1</sup> 18 U.S.C., § 921(a)(24).

<sup>2</sup> 26 U.S.C. § 5841 et seq.

However, when criminals have gained access to silencers, they have been used in targeted, assassination-style murders.

In 2013, Christopher Dorner, a Los Angeles Police Department officer who had been let go from his job, was able to target law enforcement officers in what the Police Foundation described as a bizarre act of vengeance—a “gang-style hit” on innocent people sitting in a car.<sup>3</sup> He murdered four people and wounded several others. Police were initially puzzled as to why no neighbors heard the 14 shots, but it was later discovered that Dorner used a silencer.

Firearm silencers have also long been used to gain a strategic advantage over military enemies in times of war, including when SEAL Team Six killed Osama Bin Laden.<sup>4</sup> While silencers do not completely quiet the sound of gunfire, they do alter the sound of gunfire and hide muzzle flash, making it difficult to recognize. In the case of SEAL Team Six, highly trained soldiers used silencers to successfully ambush guards successfully and apprehend the world’s most wanted terrorist.

### **Silencer export regulation in the Bush administration**

The Arms Export Control Act (AECA) authorizes the president to control the export and import of defense articles.<sup>5</sup> This authority is administered through the United States Munitions List (USML). As described further below, the president exercises significant discretion in the use of this authority, which applies to exports of items on the USML, regardless of whether the intended end user is a foreign government or a private member of the public. Regulation of items on the USML entail a registration requirement, a congressional notification of pending transfers, end-use checks on foreign recipients, special requirements for transfers of registered exporters to foreign ownership, and other requirements.<sup>6</sup>

In 2002, the State Department moved to create additional regulations on the export of silencers. Describing them as having a “one-dimensional, clandestine” purpose, the department moved to allow the export of silencers only to government entities, police, and military forces—not private or commercial recipients—in countries friendly to the United States.<sup>7</sup> Under this guidance, the Department of Defense (DOD) would review all applications for export licenses and determine how many silencers each applicant could export. An application would require a specific purchase order from the foreign government to whom the silencer would be sold, as well as a letter outlining the specific intended use of the silencer by that government or official entity, and

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<sup>3</sup> Police Foundation, “Police under Attack: Southern California Law Enforcement Response to the Attacks by Christopher Dorner,” accessed October 22, 2020, <https://www.policefoundation.org/wp-content/uploads/2015/07/Police-Under-Attack.pdf>

<sup>4</sup> Mark Mazzetti et al., “SEAL Team 6: A Secret History of Quiet Killings and Blurred Lines,” *N.Y. Times*, June 6, 2015, [https://www.nytimes.com/2015/06/07/world/asia/the-secret-history-of-seal-team-6.html?\\_r=1](https://www.nytimes.com/2015/06/07/world/asia/the-secret-history-of-seal-team-6.html?_r=1)

<sup>5</sup> 22 U.S.C. § 2778(a)(1). See also Exec. Order No. 13,637, 78 Fed. Reg. 49 (March 13, 2013).

<sup>6</sup> See 22 U.S.C. § 2778 et seq.

<sup>7</sup> “Action Memo from Lincoln P. Bloomfield, Assistant Secretary for Political-Military Affairs, to William J. Lowell, Director Defense Trade Controls,” April 18, 2002.

a signed non-transfer and end-use agreement. Export licenses would be valid for only one year, and DOD would conduct post-shipment checks on each approved license to ensure compliance with these requirements.<sup>8</sup>

### **Deregulation attempts in the Trump administration**

The Trump administration has gone to great lengths to widen the gun industry's market to sell their products both domestically and abroad. With regards to exports, the administration has taken three significant actions. First, it settled a lawsuit by agreeing to allow the posting of gun blueprints online for anyone to download and use for the 3-D printing of firearms. The online distribution of these blueprints had previously been considered an export of technical data regarding defense articles subject to the AECA.<sup>9</sup> Second, the administration utilized the federal rulemaking process to loosen restrictions on the export of most firearms (not including silencers), ammunition, and this 3-D code. Proposed in 2018 and finalized in March 2020, a new rule moved oversight of firearms exports from the State Department's USML to the Department of Commerce's Commerce Control List (CCL).<sup>10</sup>

This memo focuses on the third action the administration has taken to boost the gun industry's ability to sell its products abroad: the rescission of the State Department's 2002 policy regarding silencer exports. As described below, the next administration should renew that policy.

### **Silencers**

Domestically, the popularity of silencers among gun enthusiasts has skyrocketed in recent years. Leading up to the 2016 election, President Trump's son appeared in SilencerCo videos and spoke in support of the use of silencers, calling a silencer "a great instrument," and claiming "there's nothing bad about it at all."<sup>11</sup> The administration's support of the silencer industry continued as it entered the White House, leading to huge increases in silencers registered with

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<sup>8</sup> *Id.*

<sup>9</sup> See *Washington v. United States Dep't of State*, 443 F. Supp. 3d 1245 (W.D. Wash 2020) (describing the litigation).

<sup>10</sup> Bureau of Industry and Security, Department of Commerce, "Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML)," 85 Fed. Reg. 4136, 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>

<sup>11</sup> Michael S. Rosenwald, "Gun silencers are hard to buy. Donald Trump Jr. and silencer makers want to change that.", *Wash. Post.*, Jan. 9, 2017, [https://www.washingtonpost.com/local/gun-silencers-are-hard-to-buy-donald-trump-jr-and-silencer-makers-want-to-change-that/2017/01/07/0764ab4c-d2d2-11e6-9cb0-54ab630851e8\\_story.html](https://www.washingtonpost.com/local/gun-silencers-are-hard-to-buy-donald-trump-jr-and-silencer-makers-want-to-change-that/2017/01/07/0764ab4c-d2d2-11e6-9cb0-54ab630851e8_story.html)

ATF. Nine hundred thousand silencers were registered before the Trump administration took over in 2016;<sup>12</sup> as of May 2019, that number stood at more than 1.75 million.<sup>13</sup>

In 2017, claiming the auidial dangers of gunshot noise, congressional Republicans worked to advance H.R. 367, the Hearing Protection Act, which would remove silencers from the National Firearms Act and allow them to be transferred like other firearms, subject to the same loopholes in federal law.<sup>14</sup> These provisions were also included in H.R. 3668, the Sportsmen’s Heritage and Recreational Enhancement (SHARE) Act, which was marked up in the House Committee on Natural Resources.<sup>15</sup> The bill’s proponents argued that not only would the widespread use of silencers improve public health, their deregulation was necessary due to long wait times that had arisen from the high volumes of silencer orders in recent years, following the White House’s advocacy. Following opposition from law enforcement leaders,<sup>16</sup> the bill stalled.

Thus, the administration turned to the international silencer market. In July 2020, the State Department repealed its 2002 silencer export policy that placed additional regulations to control the end users of American silencers better. As a result, silencers are now regulated like other USML items, and can be sold to foreign private companies. The change could mean a reported additional \$250 million in profits for American silencer companies<sup>17</sup> and increased the likelihood that silencers will fall into the hands of those wishing to use them against American troops.

### **III. Proposed action**

#### **A. Substance**

The next administration should issue a letter or memorandum from the State Department’s Director of Defense Trade Controls within the Department of State to the Assistant Secretary for Political/Military Affairs reinstating the 2002 regulations regarding the export of firearm silencers. Just as the Department had the authority to issue this guidance document in 2002, the Department has the authority to re-issue a similar document today. The letter or memorandum should outline the previous requirements and limitations governing the export of silencers that will take effect, and the oversight around the end-use of these silencers by allied foreign governments, militaries, or police departments.

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<sup>12</sup> Bureau of Alcohol, Tobacco, Firearms & Explosives, Firearms Commerce in the United States, “Annual Statistical Update 2016,” accessed October 22, 2020, <https://www.atf.gov/resource-center/docs/2016-firearms-commerce-united-states/download>.

<sup>13</sup> Bureau of Alcohol, Tobacco, Firearms & Explosives, Firearms Commerce in the United States, “Annual Statistical Update 2019,” accessed October 22, 2020, <https://www.atf.gov/firearms/docs/report/2019-firearms-commerce-report/download>.

<sup>14</sup> H.R. 367 (115th Cong.) <https://www.congress.gov/bill/115th-congress/house-bill/367/text>.

<sup>15</sup> H.R. 3668 (115th Cong.) <https://www.congress.gov/bill/115th-congress/house-bill/3668>.

<sup>16</sup> Law Enforcement Coalition for Common Sense, “Letter to Congressional Leaders,” September 11, 2017, [https://giffords.org/wp-content/uploads/2017/09/Final-LE-letter\\_Silencers\\_SHARE-9.17-1.pdf](https://giffords.org/wp-content/uploads/2017/09/Final-LE-letter_Silencers_SHARE-9.17-1.pdf).

<sup>17</sup> Michael LaForgia and Kenneth P. Vogel, “Inside the White House, a Gun Industry Lobbyist Delivers for His Former Patrons,” *N.Y. Times*, July 13, 2020, <https://www.nytimes.com/2020/07/13/us/trump-gun-silencer-exports.html>.

## B. Process

The State Department's letter may be viewed as a formal guidance document. Publication of formal guidance documents is a common practice of federal agencies which seek to clarify or interpret the laws to which they are subject. This process normally involves the internal development of the guidance's substance in accordance with the Department's written procedures.

This type of guidance may appropriately be considered an interpretive rule because it is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."<sup>18</sup> The Administrative Procedure Act's (APA's) NCRM requirement "does not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice," unless another statute provides otherwise.<sup>19</sup> As the Supreme Court observed in *Perez*, issuing interpretive rules is "comparatively easier" than issuing legislative rules.<sup>20</sup> However, "that convenience comes at a price: interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'"<sup>21</sup>

Unlike notice-and-comment rulemaking under the APA, there is no uniform process that an agency must follow to issue guidance. Each agency publishes guidance in accordance with internal procedures for the draft, approval, and release of interpretive rules and policy statements. However, agencies are still expected to comply with some general guidelines.

Executive Order 13891, issued by the Trump administration in October of 2019, requires agencies to provide increased transparency for their guidance documents by creating "a single, searchable, indexed database that contains or links to all guidance documents in effect from such agency or component."<sup>22</sup> Executive Order 13891 also requires each guidance document issued by an agency to specify that the guidance is not legally binding, and the process by which the public may petition the agency to modify or remove the guidance.

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<sup>18</sup> *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87,99 (1995)).

<sup>19</sup> 5 U.S.C. § 553(b)(A). Note that while the APA contains the phrase "interpretative rule," the phrase "interpretive rule" is more commonly used, including by the Supreme Court. See Administrative Conference of the United States, "Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules," June 13, 2019, footnote 1, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

<sup>20</sup> *Perez*, 575 U.S. at 97.

<sup>21</sup> *Id.* (citing *Guernsey*, 514 U.S. at 99).

<sup>22</sup> Executive Office of the President, "Promoting the Rule of Law Through Improved Agency Guidance Documents," Executive Order 13891, October 15, 2019, <https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents>.

Agencies should also consider the recommendations of the Administrative Conference, most recently updated on June 13, 2019.<sup>23</sup> The most relevant recommendations concern transparency and public participation including: (1) providing “members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule,” (2) stating on the guidance document that the public is entitled to that opportunity, and providing detailed information about how and where an individual can submit their complaint,<sup>24</sup> and (3) avoiding the use of mandatory language (such as “shall” or “must”) to accurately reflect the non-legislative nature of the guidance.<sup>25</sup>

As discussed further below, the State Department should provide a reasoned explanation for the change and demonstrate an awareness of the reversal in policy in issuing this guidance. In this way, the new guidance document will not be identical to the 2002 document. The State Department should also acknowledge the possibility that the gun industry has relied on the Trump administration’s rescission of the earlier guidance, and address why those reliance interests are outweighed by public safety factors.

### C. Legal Justification

The Arms Export Control Act (AECA) authorizes the president to control the export and import of defense articles.<sup>26</sup> This authority includes creating and updating the USML, which lists items, technologies, and services that are properly classified as defense articles.<sup>27</sup> The AECA also requires the president to regulate the export and import of articles on the USML.<sup>28</sup> The AECA gives the president authority to designate items for additional controls in order to further world peace, national security, foreign policy, reduce international terrorism, and prevent the proliferation of armed conflict.<sup>29</sup> The president has delegated this authority to the secretary of State, who administers the International Traffic in Arms Regulations (ITAR) through the Directorate of Defense Trade Controls (DDTC).<sup>30</sup>

While changes in USML designations are required to go through the federal rulemaking process, placing additional guidelines over the issuance of licenses to export such items does not. Firearm silencers are listed on the USML as Category I “firearms and related articles.” This reversal in policy would not change that designation.

## IV. Risk analysis

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<sup>23</sup> Administrative Conference of the United States, “Administrative Conference Recommendation 2019-1: Agency Guidance through Interpretive Rules,” June 13, 2019, <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules>.

<sup>24</sup> *Id.* at 7.

<sup>25</sup> *Id.*

<sup>26</sup> 22 U.S.C. § 2778(a)(1). See also Exec. Order No. 13,637, 78 Fed. Reg. 49 (March 13, 2013).

<sup>27</sup> 22 U.S.C. § 2778(a)(1).

<sup>28</sup> *Id.*

<sup>29</sup> 22 U.S.C. § 2778(a)(1).

<sup>30</sup> 22 C.F.R. § 120.1(a).

An agency action is subject to judicial review only after it is final. Whether an agency action is final in this context has two components. First, the action must mark the “consummation” of the agency’s decision making process—it cannot be of a tentative or intermediate nature. Second, the action must be one by which “rights or obligations have been determined” or from which “legal consequences will flow.”<sup>31</sup> Consequently, the guidance document proposed by this memorandum may not qualify as a final agency action. However, if a court determines the guidance document is a final agency action, or if a potential exporter of silencers challenges a denial of an export license pursuant to this guidance, these actions can only be challenged if they are subject to judicial review (and, as described below, there is a strong argument that they are not). If a court finds these actions are subject to judicial review, the challengers might argue that they are beyond the agency’s statutory authority, violate a constitutional right, constitute arbitrary or capricious agency action, or that the agency failed to follow procedural requirements.<sup>32</sup>

### **Action committed to agency discretion by law**

The Administrative Procedures Act withdraws judicial review where “an agency action is committed to agency discretion by law.”<sup>33</sup> “[I]f the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion,” then it is unreviewable.<sup>34</sup>

The AECA states:

Decisions on issuing export licenses under this section shall take into account whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.<sup>35</sup>

This broad language does not provide a meaningful standard against which to judge the president’s exercise of discretion with regards to the export of items on the USML. Furthermore, as one court has opined:

...the AECA’s delegation of authority to control arms exports is decidedly one involving foreign affairs and national security. As the Court of Appeals for the Federal Circuit has stated, “the broad statutory delegation in the AECA incorporates the ‘historical authority of the President in the fields of foreign commerce.’” [Citation omitted.] Specifically, the AECA provides that the President, or his delegate, may approve the exportation of defense articles when he determines that such action is “consistent with the foreign

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<sup>31</sup> *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

<sup>32</sup> 5 U.S.C. § 706.

<sup>33</sup> 5 U.S.C. § 701(a)(2).

<sup>34</sup> *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).

<sup>35</sup> 22 U.S.C. § 2778(a)(2).

policy interests of the United States," 22 U.S.C. § 2751, and "in furtherance of world peace and the security and foreign policy of the United States." *Id.* § 2778(a)(1). Congress has also authorized the Secretary of State to "revoke, suspend, or amend" an export license "without prior notice, whenever the Secretary deems such action to be advisable." *Id.* § 2791(2)(A). Such express statutory language "fairly exudes deference" to the executive branch, and therefore, precludes judicial review under the APA.<sup>36</sup>

The State Department's authority to deny export licenses for items on the USML is clear, and there is a strong argument that the renewed guidance on the issue of silencer exports would not be subject to judicial review.

### **Procedural requirements**

The APA establishes a procedure for agency rulemaking (publication of a notice of proposed rulemaking in the Federal Register, followed by an opportunity for public comment; collectively "§ 553 procedures") that agencies must follow, unless the rule in question falls within certain exceptions, including an exception for situations where there is a military or foreign affairs function involved.<sup>37</sup> As described above, silencer export license applications involve foreign affairs and are thus subject to the discretion of the president.

Under the APA, agencies also do not need to follow notice-and-comment rulemaking procedures for interpretive rules, even if the new guidance constitutes a significant change or deviates drastically from a previous interpretation adopted by the agency.<sup>38</sup> Agencies are free to issue "interpretative rules" to advise the public of the agency's construction of a statute that it administers. Agencies are likewise free to issue "general statements of policy" to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power. As a result of these exceptions, a court is not likely to strike down the State Department's renewal of its silencer export policy on procedural grounds.

### **Arbitrary and capricious challenges under the APA**

The arbitrary-and-capricious test is used by courts to review the factual basis for agency rulemaking. When analyzing whether a rule passes the test, a court will look to whether the agency examined the relevant data, offered a satisfactory explanation for its action, and established a nexus between the facts and the agency's choice.<sup>39</sup> When an agency fails to consider important facts or when its explanation is either unsupported or contradicted by the facts, the court has grounds to find the rule "arbitrary or capricious."<sup>40</sup>

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<sup>36</sup> *U.S. Ordnance, Inc. v. United States Dep't of State*, 432 F. Supp. 2d 94, 98-99 (D.D.C. 2006).

<sup>37</sup> 5 U.S.C. § 553(a)(1).

<sup>38</sup> *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95 (2015).

<sup>39</sup> See *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>40</sup> *Id.* at 43.

Agencies are free to change their existing policies, as long as they provide a reasoned explanation for the change and demonstrate an awareness of the new policy.<sup>41</sup> However, the agency must provide good reasons for such change, and an explanation as to why such change may ignore or disregard any “facts and circumstances that underlay or were engendered by the prior policy.”<sup>42</sup> The agency’s document must contain an acknowledgment of reliance interests and address why those interests are outweighed by public safety factors. Even if such reliance interests are serious, public safety factors can outweigh them.<sup>43</sup>

Here the State Department should acknowledge that silencer manufacturers and importers may have relied on its rescission of the 2002 policy and begun expanding their investment in the silencer trade. However, as described above, silencers present serious threats to public safety and these threats outweigh these reliance interests.

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<sup>41</sup> *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 529 (2009).

<sup>42</sup> *Id.*

<sup>43</sup> *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1914 (2020).