

Assessing the Trump Administration's Proposed Changes to the Small-Arms Export Regime

By **Eric Halliday, Rachael Hanna** Monday, December 2, 2019, 9:16 AM

The National Defense Authorization Act (NDAA) for fiscal 2020 is currently in House-Senate Conference Committee reconciliation negotiations. Among the several differences between the House and Senate versions is an amendment that could decide whether a Trump administration proposal to loosen export controls on firearms goes into effect. On Nov. 21, the Trump administration gave formal notification to Congress of the proposed rule changes, which could go into effect as early as Dec. 20 if Congress does not block the initiative within 30 days.

The United States exports firearms and related technology on a massive scale. During fiscal 2013 to 2017, the State Department reviewed approximately 69,000 commercial export license applications for firearms, artillery and ammunition reported at a value of \$7.5 billion. Roughly two-thirds of these applications were for firearms, mostly nonautomatic and semiautomatic guns.

The Trump administration's proposal would transfer control over the export of firearms and related technology from the State Department to the Commerce Department. The differences between the current and proposed regimes—which are discussed below—could have significant implications for the global trade in small arms, particularly in conflicts across Latin America and the Middle East.

Current Small-Arms Export Control Regime

Under the current export control regime, the State Department oversees the export of weapons included in the United States Munitions List (USML). Established by the Arms Export Control Act (AECA) of 1976, the list outlines 21 different categories of weapons, ranging from small arms like handguns and shotguns (Category I) to chemical agents (Category XIV).

The AECA dictates that weapons and related technology included on the USML be designated as “defense articles” and “defense services”—technology that has national security implications. The purpose of the USML is to ensure that the federal government keeps a tight leash on all sales of sensitive military technology or other weapons that could threaten national security if found in the wrong hands.

The AECA empowers the president to regulate the export of defense articles and services, but presidents have historically delegated that power to the State Department.

The State Department has implemented an extensive series of regulations governing the export of items included on the USML. First, manufacturers that wish to export any defense article or service must register with the State Department's Directorate of Defense Trade Controls (DDTC) and pay an annual fee. Then, registered exporters must apply for and receive a license from the DDTC before they can proceed with any proposed sales. The licenses are valid for four years. Finally, before receiving approval, the manufacturer must provide extensive information about the proposed sale. The information required depends on whether or not the design of the defense article is classified but includes, at a bare minimum, complete purchase documentation, identifying information of the end user (the ultimate recipient of the weapons), and identifying information of any foreign entities that will assist in the transfer of the export to the end user.

If, for any reason, the defense article will be transferred to an end user other than the one included in the application, the DDTC must approve that change before the transfer is made.

Exporters who avoid the export requirements imposed by the State Department or provide false information on their application paperwork face strict criminal penalties: a fine of up to \$1,000,000 and a maximum prison sentence of 20 years.

Finally, the AECA requires the State Department to notify Congress of any proposed sale of \$1,000,000 or more of firearms included in Category I of the USML. Examples of Category I weapons include nonautomatic and fully automatic handguns and rifles, combat shotguns, silencers, and rifle scopes. The congressional oversight requirement is discussed in more detail below.

This regime is already porous in practice. In February 2019, the State Department’s Office of the Inspector General (OIG) released an audit report on the department’s DDTC Export Licensing Process, which reviews and approves export licenses for defense articles covered by the USML. Over the course of the audit, OIG reviewed 21 firearms export license applications filed with the DDTC in the previous year. Of those, 20 had been approved despite the applications lacking required information. Most notably, 62 percent of the audited applications were submitted with purchase orders that did not have required information on the end use or end user of the firearms. Congressional Democrats have also raised concerns that shifting firearms export control to Commerce will mean even fewer end-user checks on firearms exports.

Congressional and Agency Oversight Under the Current Regime

Beyond the enforcement mechanisms enforced by State, perhaps the most powerful check in the current regime is the ability of Congress to oversee and, to a certain extent, control small-arms sales. As noted above, under the AECA (22 U.S.C. § 2776(c)) and the current arms classification regime, State is required to notify Congress only when it is set to approve firearm sales of \$1,000,000 or more. For sales to most countries, State must provide Congress with formal notification 30 days prior to the transaction being executed. Only 15 days’ prior notice is required for sales to NATO members, Japan, Australia, South Korea, Israel and New Zealand. Upon receiving formal notification of the pending sale, Congress must take legislative action, either by joint resolution or by other legislation, before the arms are delivered if it wants to block the sale. In many cases, such legislation will need to have the support of two-thirds of Congress to override a likely presidential veto.

Given the logistical challenges of drafting and passing legislation in fewer than 30 days and the political implications of blocking a sale for bilateral relationships, an informal, classified notification process has also been in place since 1976. Under that informal system, the executive branch notifies the House and Senate foreign affairs committees to gauge if there is any pushback on large firearms sales. In 2012, the State Department implemented a revised version of this informal notification process that provides the foreign affairs committees with notice of 20–40 calendar days, depending on the arms and destination, before triggering the formal notification process.

State includes the proposed seller’s license applications for commercial arms sales as part of its informal notification to the committees. This allows the administration and the committees to address any concerns confidentially to protect the relevant bilateral relationship. If any concerns cannot be resolved, State will often cancel the sale before triggering the formal notification process in order to avoid a fight with Congress.

In emergency scenarios, the president has the authority to waive the statutory review periods under the AECA. By formally notifying Congress, the president can state that an emergency situation requires the firearms sale to be executed without delay to protect national security interests. Under 22 U.S.C. § 2776(c)(2)(C), the president’s notification must include a “detailed justification for his determination, including a description of the emergency circumstances” that necessitated immediate action and a “discussion of the national security interests involved.”

In two recent episodes, Congress has used its oversight authority to block controversial small-arms deals. In 2016, Sen. Ben Cardin, ranking member of the Senate Foreign Relations Committee, opposed a proposed sale of approximately 26,000 assault rifles to the Philippines National Police, causing the State Department to abort the transaction. Cardin cited concerns about human rights abuses by the Philippines government in its war on drugs as the reason for blocking the sale. In 2017, the State Department informally notified Congress of a \$1.2 million proposed sale of Sig Sauer semiautomatic handguns to the Turkish government a day before Turkish President Recep Erdogan’s bodyguards violently attacked protesters outside the White House during Erdogan’s state visit. In response, Cardin and Rep. Edward Royce, chairman of the House Foreign Affairs Committee, voiced their opposition to selling the 1,600 handguns to Turkey, and the State Department promptly scuttled the sale.

The Trump Administration’s Proposed Small-Arms Export Regime

The Trump administration’s proposal—announced through rule changes simultaneously released by the Commerce Department and the State Department in May 2018— would substantially overhaul the current regime. The centerpiece of the proposal is the transfer of most defense articles included in Categories I, II and III from the USML to the Commerce Control List (CCL). Category I covers small arms like semiautomatic handguns and rifles, fully automatic weapons up to .50 caliber in size, assault rifles, combat shotguns, silencers, rifle

scopes, and other related small-arms technology. Category II includes weapons over .50 caliber such as howitzers, mortars and grenade launchers. Category III covers all ammunition and ordnance for the defense articles included in Categories I and II. Under the proposal, only fully automatic firearms, shotguns, and their ammunition and related technology would remain under State’s control.

The goal of the proposal is to “limit the items that State controls to those that provide the United States with a critical military or intelligence advantage or, in the case of weapons, are inherently for military end use.” Items that do not meet these criteria, including firearms, will be transferred to Commerce’s control.

Under the Commerce Department, exports of these weapons will be subject to a less rigorous approval process. At the request of Congress, the U.S. Government Accountability Office (GAO) issued a report in March 2019 detailing how this shift from State to Commerce would impact export controls, including licensing, registration, end-use monitoring and congressional notification requirements currently in place.

According to the GAO, items in Commerce’s jurisdiction are subject to different AECA requirements for registration, licensing and end-use monitoring than are those in State’s jurisdiction. The AECA mandates that manufacturers, exporters and brokers of USML items register with the State Department’s DDTC, but it does not contain a similar registration requirement for manufacturers, exporters and brokers of items on the CCL. Commerce does not have its own registration requirements for those entities either.

With regard to licensing, State and Commerce rely on different internal watch lists to screen applicants, and Commerce has noted that it does not have access to the relevant State watchlists, which are likely to be more comprehensive because State had been responsible for maintaining negative information about exporters and end users of these items. Consequently, the GAO report warns that “critical information needed to effectively screen applicants and target licenses for end use monitoring may be unavailable to Commerce unless State shares its watch list data.”

Moreover, while State allows license exceptions only for certain exports to Canada, the United Kingdom, and Australia, Commerce has license exceptions—called Strategic Trade Authorization (STA) exemptions—for exports to numerous countries. Commerce organizes countries that receive STA benefits into different tiers; within each tier are different sublevels, all of which denote the array of trade benefits the selected countries receive. The highest range of STA benefits are awarded to the countries listed on level A:5 of the Tier 1 List, which includes NATO partners and other close allies, a total of 37 countries. Level A:5 provides the broadest range of STA benefits, including exports of items that would otherwise be controlled for reasons of national security, regional stability and crime control. Commerce estimates that several hundred license applications for items transferred from State’s to Commerce’s oversight would be approved under STA exemptions. As a NATO ally, Turkey is automatically on the Tier 1 list; notably, Argentina is also included in the Tier 1 list. Those exemptions would not apply under the current regime. As noted above, Congress recently used its oversight powers to terminate an arms sale to Turkey. Without congressional oversight and with the benefits of Tier 1 STA benefits, such a sale would have been more likely to go through.

State and Commerce also conduct end-use monitoring of selected controlled exports differently. State relies primarily on embassy staff to conduct end-use checks, while Commerce typically assigns that duty to export control officers (ECOs) based overseas. However, the ECOs do not provide global coverage like that provided by U.S. embassy staff. Commerce, for example, has no ECOs positioned in the Western Hemisphere, where from 2013 to 2017 the State Department conducted more than 40 percent of its firearms-related end-use checks. Moreover, Commerce does not plan to create a new ECO position or assign a current ECO responsibility for the Western Hemisphere. Instead, Commerce will rely primarily on its Bureau of Industry and Security special agents to travel to countries outside of ECO coverage to conduct end-use checks. Also, no ECO is responsible for Afghanistan, where end-use control is extremely difficult.

Finally, Commerce’s end-user certification requirements are less systematic than the equivalent required by State. For firearms and ammunition, State’s export controls require applicants to provide a written certification from end users that they will not reexport, resell or otherwise dispose of the commodity outside of the designated country on the license. In comparison, Commerce does not require end-user certification for items on the CCL unless it has not verified an end user’s legitimacy or on a case-by-case basis.

Echoing the concerns of other critics and congressional Democrats with the proposed changes, Rep. Ami Bera, chairman of the House Foreign Affairs Subcommittee on Oversight and Investigations, noted that while the current regime “is not perfect, the State Department is more equipped to ensure that our national security interests come first when it comes to firearm exports,” and that elimination of congressional notification of “certain weapons exports that raise national security or human rights concerns” will undermine Congress’s ability to “conduct effective oversight.”

Background and Legislative History of the Trump Administration’s Proposal

President Obama originally floated a similar proposal during his presidency, but Secretary of State John Kerry shelved it in 2016 after pushback from Senate Democrats, who wanted export control to remain under State’s control.

With its different view on gun control, the Trump administration has signaled that it would pursue such changes since 2017. In its proposal, the administration argues that the weapons that would be switched from the Munitions List to the Commerce List are “essentially commercial items widely available in retail outlets and less sensitive military items.” The administration has explained the rule change by touting the economic benefits of increased exports, with one anonymous official telling Reuters in 2017 that its proposal would allow “more leeway to do arms sales” and “turn the spigot [of small-arms sales] on if you do it the right way.”

Secretary of State Mike Pompeo formally notified Congress of the proposed rule change on Feb. 4. In response, Sen. Robert Menendez, the ranking member of the Senate Foreign Relations Committee, placed a 30-day hold on the proposal beginning on Feb. 26 by refusing to accept formal congressional notification, a procedural move that temporarily halted the shift of control from the Department of State to the Department of Commerce.

During the congressional negotiations in July over the NDAA for fiscal 2020, the House of Representatives passed a version with an amendment that would prevent the Trump administration from transferring firearms export control from the State Department to the Commerce Department. The amendment’s sponsor, Rep. Norma Torres, stated that the purpose of trying to prevent the oversight transfer was to keep “deadly weapons from falling into the hands of drug cartels and terrorists.” No senators have specifically addressed the issue in the NDAA. It remains unclear whether the final version of the fiscal 2020 bill will include this amendment or similar language. However, the Trump administration succeeded in giving formal congressional notification on Nov. 21, which triggered the 30-day period Congress has to take legislative action to prevent the changes from going into effect.

Potential Downstream Impacts

Many international observers, including the United Nations, have repeatedly noted the widespread availability of small arms as a “key enabler” of conflicts around the world. Despite calls for states to exercise tighter arm controls, the Trump administration is proposing to do just the opposite. In light of the potential opening of the “spigot,” to quote the anonymous Trump official in 2017, it is worth exploring the potential downstream effects of the proposal with regard to organized crime in Latin America and terrorism in the Middle East and Central Asia, regions that have been flooded with U.S. guns during recent periods of protracted violence.

Gun Violence in Latin America

The Trump administration’s proposal has potentially enormous implications for organized crime in Latin America. Mexican drug cartels, street gangs like MS-13 and Barrio 18 in El Salvador, and Brazilian narco-trafficking groups all rely on firearms to carry out their illegal activities. There is a strong correlation between such groups and high crime rates in those countries. After years of widespread violence and instability, Mexico’s homicide rate rocketed to an all-time high of an average of 91 murders a day in 2018, with much of that violence attributable to cartels battling for territory. Similarly, a 2016 study of global gun deaths found that El Salvador had the highest rate, with 39.2 firearm deaths per 100,000 residents, while Mexico was 15th, with a rate of 10.2 per 100,000.

The surprising truth hidden among these statistics is that, on the whole, Latin American countries have strict gun control regimes. A 2003 Brazilian law restricted the carrying of firearms to members of law enforcement agencies, the armed forces and certain private security companies. In Mexico, there is only one gun store in the entire country, and it’s located on a military base in Mexico City, where potential customers must first provide six different identification documents before entering the premises.

The bridge between those tight gun control regulations and high rates of homicide by firearm is often American-made guns. A 2016 GAO study determined that, from 2009 to 2014, 70 percent of all firearms (73,684 in total) seized in Mexico were U.S.-made. In fact, an American gun is more likely to be used in a homicide in Mexico than in the U.S. In 2018, the Brazilian Federal Police pointed to the United States as the largest source of illegal small arms seized by police. A 2016 report by the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives noted that 49 percent of all guns seized in El Salvador were manufactured in the U.S.

A large portion of the U.S.-made weapons found in Latin America are smuggled illegally out of the country. For example, in June 2019 Argentinian officials captured a massive arsenal of illegal weapons, including 2,500 firearms, the bulk of which had been smuggled out of the U.S. Yet many other weapons are legally exported to Latin American governments, only for corrupt officials to then sell them to organized criminal groups. The nonprofit group ATT Monitor, which studies issues relating to the global Arms Trade Treaty (ATT), has documented the forging of end-use agreements by corrupt officials in the region who then pass on the arms to unapproved users.

Even with the flow of American-made weapons into Latin American countries, these nations do not have comparatively high gun ownership rates. A 2017 study by the Graduate Institute of International and Development Studies in Geneva found that the rate of guns—legally and illegally owned—per 100 civilians was low throughout the region. Mexico had a rate of 12.7 guns per 100 civilians, Honduras was similarly situated at 14.1, while Brazil’s rate was even lower, at 8.3. For comparison, Serbia’s rate was 39.1 and Canada’s was 34.7; the United States was overwhelmingly first, at 120.5.

Low gun ownership rates throughout Latin America—even with the current flow of American arms into the region—could leave the region vulnerable to the flood of legally available weapons envisioned by the Trump administration’s proposal. Because the U.S. is the largest single supplier of guns in the world, including to Latin American countries, the expected increase in those exports, which a gun industry lobbying group has estimated could hit 20 percent, could cause a corresponding jump in the historic rates of gun ownership and firearms violence plaguing those states with unstable security situations. Should the Trump administration’s proposal be enacted, analysts will be watching to see if increased gun sales to Latin American countries result in even more guns falling into the hands of organized criminal groups that are already responsible for hundreds of thousands of homicides every year.

Armed Conflict in the Middle East and Central Asia

Independent observers have voiced similar concerns about an increase in de facto unsupervised weapons exports to countries in the Middle East and Central Asia that are wracked by terrorist and armed rebel groups. In countries marked by terrorism and insurgency, easier access to weapons manufactured and exported by the U.S. would increase the capacity of armed groups to continue fighting.

The status of the United States as the leading global small-arms exporter is also relevant to the Middle East because a significant portion of its annual exports are sent to the region. From 2017 to 2018, total U.S. firearms exports increased by more than 12 percent, from \$662 million to \$759 million. Saudi Arabia alone accounted for \$579 million and the United Arab Emirates (UAE) for another \$32 million in firearm sales.

In the Arabian Peninsula, both Saudi Arabia and the UAE have violated end-user agreements with the United States by transferring legally exported U.S. weapons, including assault rifles, to militias they support in Yemen. Meanwhile, as militias backed by the Saudi-coalition have created alliances with al-Qaeda in the Arabian Peninsula (AQAP), American weapons have landed in the hands of U.S. enemies. The demand for American guns on the Yemeni black market is high, with arms dealers selling to AQAP, the Houthi rebels and other groups.

In the fight against the Islamic State, the United States attempted to bolster both Iraqi security forces and moderate Syrian rebel groups with funds and arms. However, between 2014 and 2018, many U.S. M16 assault rifles that were exported to Iraq as part of security assistance programs fell into the hands of various jihadist groups. In 2018, al-Qaeda-linked militants in Syria were selling U.S. assault rifles to other jihadists in the country.

According to a 2016 study by Action on Armed Violence, over the course of 14 years, the United States has supplied the military and police forces of Iraq and Afghanistan with almost 1 million assault rifles, 266,000 pistols and nearly 112,000 machine guns—a total of 1.45 millions small arms. At the time of the study, the Pentagon could account for fewer than half, highlighting the shortcomings of existing end-user controls.

In Afghanistan, significant numbers of those missing guns have ended up in the hands of Afghan and Pakistani Taliban militants. A major portion of U.S. weapons for American and Afghan troops are delivered into the country over land from Karachi, Pakistan. Long-standing ties between the Pakistani security services and Taliban militants result in the theft of many U.S. guns in transit. As a result, U.S. M4s are commonly sold on the open market in the Pakistani cities of Quetta and Peshawar and in the Federally Administered Tribal Areas, where both the Pakistani and Afghan Taliban have a significant presence.

With Congress’s oversight capacity eliminated and Commerce’s limited capacity to run end-user checks, critics warn the proposed rule change will likely increase the flow of American guns into protracted conflicts in the Middle East and Central Asia and, ultimately, the number of those arms that end up in the hands of some of the United States’s most deadly enemies.

Editor’s Note: A previous version of this article mistakenly categorized Mexico as a Central American country.

Topics: Trade and Security

Tags: firearms, Trump Administration

Eric Halliday is a student at Harvard Law School. Before law school, Eric worked for two years at Mintz Levin, where he focused on white collar, anti-money laundering, and pro bono domestic violence matters. He graduated from Tufts University with a B.A. in Political Science and Italian Studies.

Rachael Hanna is a student at Harvard Law School. Prior to law school, Rachael spent two years working at Mintz Levin, where she focused on white collar and anti-money laundering matters. She holds an A.B. in Government from Harvard College.