



**WHITE PAPER:**

**Proposals to Relax Export Controls for Significant Military Equipment**

**January 14, 2013**

The following White Paper addresses the implications of the Obama Administration's plan to transfer control of the export of defense articles from the State Department's United States Munitions List ("USML") to the Commerce Department's Commerce Control List ("CCL").<sup>1</sup>

**I. Executive Summary**

Clarification of existing law and pending regulations is needed to ensure that the Administration's proposed arms export reform initiative will not undermine U.S. laws that prevent the export of weaponry to terrorists and those engaged in human rights abuses. These sweeping reforms require additional congressional scrutiny to ensure that they are consistent with statutory provisions requiring special controls for items with substantial military utility or capability.

While the Administration's effort to streamline our export control system to make it more efficient is laudable, it is essential that the Congress carefully review such reforms to ensure that U.S. weaponry will not end up in the hands of our enemies. As the House Foreign Affairs Committee noted, in the post 9/11 world, efforts to ease U.S. arms export controls could seriously undermine national security if they exacerbate existing loopholes in our enforcement system.<sup>2</sup>

The Administration has indicated that it intends to continue issuing regulations to transfer items from the U.S. Munitions List ("USML")—the list created to implement special controls created by the Arms Export Control Act ("AECA")—to the Commerce Control List ("CCL"). This includes items with significant military utility, including semi-automatic rifles and attendant ammunition. As the former director of the Directorate of Defense Trade Controls has noted, small arms are the "lifeblood" of the grey market.<sup>3</sup> The British Deputy Prime Minister has noted that 1,000 people are killed every day around the world by terrorists, insurgents and criminal

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<sup>1</sup> The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>2</sup> House Committee on International Relations, [U.S. Weapons Technology at Risk: The State Department's Proposal to Relax Arms Export Controls to Other Countries](#), (May 1, 2004).

<sup>3</sup> William J. Lowell, Comments on Public Notice 7256 Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VII; and Public Notice 7257 Revisions to the United States Munitions List, 3 (Feb. 7, 2011).

gangs using small arms.<sup>4</sup> We must ensure that efforts to reform our export control regime do not fuel trafficking in small arms among insurgents and those engaged in human rights abuses.

The United States exports, at least, tens of millions of dollars of small arms every year, including to nations in which there are dangerous terrorist groups and to governments with consistently poor human rights records.<sup>5</sup> These weapons are extremely hard to track.<sup>6</sup> While the United States has programs to monitor the “end-use” of U.S. weaponry, according to the Government Accountability Office (GAO), a significant percentage of post-export inspections revealed that such items are no longer in the possession of the intended recipient.<sup>7</sup> Therefore, we cannot ensure that U.S. origin materials are not ending upon the hands of those who present a risk to U.S. interests.

There is a danger that transferring defense articles to the CCL will exacerbate existing problems with our enforcement system. GAO has noted that the State Department has not evaluated the potential impact of control list reform on its enforcement system.<sup>8</sup>

As discussed in the legal analysis below, the USML—unlike the CCL—is part of a sophisticated statutory regime designed to protect sensitive weaponry. It requires the registration of manufacturers, detailed licensing applications and significant penalties for violations. These provisions enable the United States to monitor a significant volume of exports. They also establish an evidentiary trail that is essential to detecting diversions and prosecuting violators.

By transferring these items from the statutorily mandated USML, the reforms could seriously undermine the sophisticated system of controls created by the Congress in the AECA. Further, it would create ambiguity concerning the application of important counterterrorism and human rights provisions of the Foreign Assistance Act (“FAA”) that control the provision of security assistance, including the export of “defense articles” as defined under the AECA.<sup>9</sup> For example, the FAA prohibits the provision of assistance, including the export of “defense articles,” to state sponsors of terrorism<sup>10</sup> and to foreign military units that engage in human rights abuses.<sup>11</sup> By transferring these items from the USML to the CCL, the proposed reforms would create ambiguity as to which items are considered “defense articles” for the purpose of these important provisions of the FAA.

It is important that the Congress clarify that these provisions of the FAA would continue to apply to all defense articles, regardless of whether they are included on the USML. It is also important to ensure that small arms—whether or not they remain on the USML—are not

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<sup>4</sup> Associated Press, *UN Fails to Reach Agreement on Global Arms Treaty* (Jul. 27, 2012).

<sup>5</sup> See 2011 U.S. Department of State, Section 655 Report (reporting \$106,318 in small arms (Category I) exports to Nigeria); U.S. Department of State, 2011 Human Rights Report (reporting that serious human rights abuses were widespread and that “[a]uthorities generally did not hold police accountable for the use of excessive or deadly force or for the deaths of persons in custody.”).

<sup>6</sup> Damien Spleeters, “Small Arms, Big Problems, Foreign Policy”, FOREIGN POLICY (Nov. 19, 2012).

<sup>7</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-613, U.S. AGENCIES NEED TO ASSESS CONTROL LIST REFORM’S IMPACT ON COMPLIANCE ACTIVITIES 16 (2012).

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

<sup>9</sup> 22 U.S.C. § 2794(3)(A).

<sup>10</sup> 22 U.S.C. § 2378(a).

<sup>11</sup> 22 U.S.C. § 2378d(a).

transferred to private parties in foreign countries, the governments of which would not be entitled to receive them due to restrictions in the Foreign Assistance Act. Given the difficulty of tracking these items, more oversight of their export is needed. The current reform initiative presents an opportunity to address this long-standing defect in the export control system.

The Administration may propose a regulation or policy that these items should continue to be subject to these statutory provisions. However, such regulations are easy to amend and are not an adequate substitute for the carefully crafted statutory regime enacted by the Congress.

While the Administration has authority to determine what constitutes a defense article, the Congress clearly intended for “significant military equipment” that has “substantial military utility” to be subject to the special controls of the AECA.<sup>12</sup> Semi-automatic rifles that can fire up to 60 rounds per minute clearly have substantial military utility. It is therefore inconsistent with the AECA to transfer such items from the USML where they will no longer be subject to the special controls of that statute.

## **RECOMMENDATIONS**

1. Significant military equipment should remain on the USML and subject to the special controls of the AECA.
2. The Congress should clarify that the counterterrorism and human rights provisions of the FAA would continue to apply to all defense articles, regardless of whether they remain on the USML. This understanding should also be reflected in any regulations concerning the transfer of defense articles to the CCL.
3. Significant military equipment – whether or not it remains on the USML – should not be transferred to private parties in foreign countries if the government of the country would not be entitled to receive the equipment due to restrictions in the Foreign Assistance Act.
4. The Congress should continue to be notified of the export of defense articles consistent with the reporting provisions of the AECA even if such items are transferred to the CCL.

## **II. Introduction**

Since August 2009, the Obama Administration has been engaged in a comprehensive review and overhaul of the U.S. export control system to ensure that the system is “updated to address the threats we face today and the changing economic and technological landscape.”<sup>13</sup> The effort—dubbed the Export Control Reform Initiative—aims at a “fundamental reform in all four areas of our current system: in what we control, how we control it, how we enforce those controls, and how we manage our controls.”<sup>14</sup> The “cornerstone” of the Administration’s export

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<sup>12</sup> 22 U.S.C. §§ 2794(9)(A)–(B).

<sup>13</sup> Press Release, White House Office of the Press Secretary, Statement of the Press Secretary (Aug. 13, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Statement-of-the-Press-Secretary](http://www.whitehouse.gov/the_press_office/Statement-of-the-Press-Secretary).

<sup>14</sup> Press Release, White House Office of the Press Secretary, President Obama Announces First Steps Toward Implementation of New U.S. Export Control System (Dec. 9, 2010), <http://www.whitehouse.gov/the-press-office/2010/12/09/president-obama-announces-first-steps-toward-implementation-new-us-expor>.

reform project has been its effort to review and revise the two export control lists<sup>15</sup>: the United States Munitions List (“USML”) and the Commerce Control List (“CCL”), respectively administered by the State Department’s Directorate of Defense Trade Controls (“DDTC”) through the International Traffic in Arms Regulations (“ITAR”), 22 C.F.R. §§ 120–130, and the Commerce Department’s Bureau of Industry and Security (“BIS”) through the Export Administration Regulations (“EAR”), 15 C.F.R. §§ 730–774. The stated end-result is the creation of a single, tiered control list.

Beginning in December 2010, DDTC and BIS, with input from other interested departments and agencies, embarked on a top-to-bottom reassessment of the USML to ensure that it “control[s] only the items that provide the United States with a critical military or intelligence advantage or otherwise warrant controls of the ITAR . . . .”<sup>16</sup> Over the course of the past 22 months, DDTC and BIS have reviewed multiple USML categories and issued proposed rulemakings describing which items the Administration intends to transfer to the control of the EAR.<sup>17</sup> Items so placed under the control of the EAR would receive a new Export Control Classification Number (“ECCN”) with a “6” as the third ECCN character. The Commerce Department intends to apply a consistent licensing policy to this “600 series” of military items, which has been informally referred to as the “Commerce Munitions List” (“CML”).

Although the President has clear statutory authority under the Arms Export Control Act of 1976 (“AECA”), Pub. L. No. 94-329, 90 Stat. 734, to effect the transfer of defense articles from the USML to the CCL, the President remains constrained by Congress’s determination that certain defense articles considered to be “significant military equipment” (“SME”) warrant stricter export controls. Indeed, the specific de-listing of firearms from Category I: Firearms, Close Assault Weapons and Combat Shotguns of the USML would have serious implications for the government’s visibility into their manufacture, sale, and export, as well as for exporter accountability. Such a transfer would also affect various statutes linked specifically to AECA and not to export control regulations more generally. Indeed, the transfer of items from the USML to the CCL would create ambiguity with respect to congressionally imposed limitations on U.S. security assistance to state sponsors of terrorism and certain countries based on human rights concerns and the ability of the public and Congress to monitor such assistance through various notification and reporting requirements found in AECA and the Foreign Assistance Act of 1961 (“FAA”), Pub. L. No. 87-195, 75 Stat. 424. The transfer of articles from USML control to CCL control also has implications for both the Foreign Military Sales (“FMS”) and Foreign

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<sup>15</sup> *Id.*

<sup>16</sup> Proposed Revisions to the Export Administration Regulations: Implementation of Export Control Reform; Revisions to License Exceptions After Retrospective Regulatory Review, 77 Fed. Reg. 37524 (proposed June 21, 2012) (to be codified at 15 C.F.R. pts. 734, 736, 740, 742, 743, 744, 750, 758, 762, 764, 774) [hereinafter “Implementation of Export Control Reform”].

<sup>17</sup> *See, e.g.*, Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category IX, 77 Fed. Reg. 35317 (proposed June 13, 2012) (to be codified at 22 C.F.R. pt. 121); Revisions to the Export Administration Regulations (EAR): Control of Military Training Equipment and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 77 Fed. Reg. 35310 (proposed June 13, 2012) (to be codified at 15 C.F.R. pts. 742 and 774); Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VIII, 76 Fed. Reg. 68694 (proposed Nov. 7, 2011) (to be codified at 22 C.F.R. pt. 121); Revisions to the Export Administration Regulations (EAR): Control of Aircraft and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. 68675 (proposed Nov. 7, 2011) (to be codified at 15 C.F.R. pts. 738, 740, 742, 770, 772, and 774).

Military Financing (“FMF”) programs, which, like the security assistance provisions of the FAA, are intertwined with AECA and not export control regulations more generally.

Given the export control system’s many deficiencies and inefficiencies, the Administration’s goals of rationalizing the USML, streamlining licensing procedures, and de-conflicting enforcement agency overlap are laudable. However, such goals should not result in opening the door to increasing the flow of arms to regimes with suspect terrorism or human rights records. For its part, the Administration contends that various Foreign Policy and National Security controls under the CCL and the Clinton-era Conventional Arms Transfer Policy will ensure that defense articles do not fall into the hands of terrorists, drug traffickers, or rogue states, and that their transfer will not contribute to human rights abuses. While various CCL controls might, in practice, provide a similar degree of control as the USML, the Administration’s reliance on the Conventional Arms Transfer Policy<sup>18</sup> as a backstop measure offers little comfort, as its status as an Administration “policy” means it easily could be ignored by future presidents.

Even if the Administration could guarantee that such controls would sufficiently guard against exports to problematic countries and individuals, transferring items from USML to CCL control would greatly confuse Congress’s carefully crafted statutory scheme. Indeed, Congress deliberately drafted a host of statutes related to foreign assistance that rely upon the term “defense article,” a term that derives its substance from AECA and ITAR, not the Export Administration Act of 1979 (“EAA”), Pub. L. No. 96-72, 93 Stat. 503, as amended, or its implementing regulations, the EAR. Removing items from the USML strips them of “defense article” status for certain statutory purposes (*i.e.*, licensed commercial exports), but not necessarily others (*i.e.*, government-to-government sales). In effect, the Administration would be creating a new “defense article” list, but without the controls and protections of ITAR. Such wide-ranging effects should not be achieved through a regulatory rewrite. Instead, the Administration must closely consult with Congress to ensure the preservation of its intricate system designed to protect national security, regional stability, and human rights.

### **III. Congressional Limitations on Presidential Authority to Transfer Items from the United States Munitions List to the Commerce Control List**

The Arms Export Control Act of 1976, 22 U.S.C. § 2751 *et seq.*, grants the President the authority “to control the import and the export of defense articles and defense services . . . .” 22 U.S.C. § 2778(a)(1). AECA further authorizes the President “to designate those items which shall be considered as defense articles and defense services for the purposes of [section 38 of AECA] and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.” *Id.* Additionally,

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<sup>18</sup> See Press Release, White House Office of the Press Secretary, Fact Sheet: Conventional Arms Transfer Policy (Feb. 17, 1995). The substance of the Conventional Arms Transfer Policy was embodied in Presidential Decision Directive 34 (PDD-34) issued by President Clinton on February 17, 1995 and continued by Presidents George W. Bush and Obama. See DEFENSE INSTITUTE OF SECURITY ASSISTANCE MANAGEMENT, THE MANAGEMENT OF SECURITY COOPERATION (GREEN BOOK) A2-17 (31st ed. 2012); Conventional Arms Transfer Policy, Office of Regional Security and Arms Transfers (RSAT), U.S. Department of State, <http://www.state.gov/t/pm/rsat/c14023.htm> (last accessed on Aug. 22, 2012).

Congress sought to insulate the President's decisions<sup>19</sup> as to which items should be classified as defense articles and placed on the USML by prohibiting judicial review of those determinations. 22 U.S.C. § 2778(h).

Recognizing that threats and technologies constantly change, Congress also provided for periodic review of items on the USML and established a procedure that the President must follow if he decides to remove items from the USML. Under section 22 U.S.C. § 2778(f)(1), the President is instructed to “periodically review the items on the United States Munitions List to determine what items, if any, no longer warrant controls under this section.” The President must then report the result of any such review to the Speaker of the House and to the Senate Committees on Foreign Relations and Banking, Housing, and Urban Affairs. *Id.* The President, however, may not remove any items from the USML “until 30 days after the date on which the President has provided notice of the proposed removal to the Committee on International Relations of the House of Representatives and to the Committee on Foreign Relations of the Senate . . . .” *Id.* The notice must also “describe the nature of any controls to be imposed on that item under any other provision of law.” *Id.*

Through various proposed rulemakings, the Administration has taken the position that the legal authorities described above are sufficient to complete its overhaul of the export control system.<sup>20</sup> While AECA certainly gives the President the authority to revise the USML and transfer items to the CCL, the Administration should not construe this “revise and transfer” power as permission to disrupt Congress’s elaborate statutory scheme for furnishing assistance to foreign countries.

Contrary to the Administration’s assertion in these proposed rulemakings, Congress has established constraints on the Executive Branch that go beyond AECA’s notice requirements. Indeed, Congress did not intend to give the President unfettered discretion in determining which items should be placed on the USML, but rather made clear that certain defense articles considered to be “significant military equipment” must be more closely controlled. ITAR has long identified SME as those defense articles “for which special export controls are warranted because of their capacity for substantial military utility or capability,” 22 C.F.R. § 120.19(a) (1984), 22 C.F.R. § 120.7(a) (1997), and has clearly distinguished those items on the USML. Congress, in its 1996 revisions to the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 *et seq.*, and AECA, amended AECA to include a definition for SME, which had previously only been defined in ITAR. *See* Pub. L. No. 104-164, § 144, 110 Stat. 1421, 1434 (1996) (codified at 22 U.S.C. § 2794(9)). Congress’s definition, however, merely copied the definition of SME from ITAR—SME are defense articles “for which special export controls are warranted because of the capacity of such articles for substantial military utility or capability” and “identified on the [USML].” 22 U.S.C. § 2794(9)(A)–(B) (*see also* H.R. REP. NO. 104-519, pt. 1, at 10 (1996)) (stating that “Section 144 amends the Arms Export Control Act to provide a definition of

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<sup>19</sup> The President has delegated his authority to determine which items should be considered defense articles to the Secretary of State, in consultation with the Secretary of Defense. *See* Exec. Order No. 11,958, 42 Fed. Reg. 4311 (Jan. 24, 1977).

<sup>20</sup> *See, e.g.,* Implementation of Export Control Reform, 77 Fed. Reg. at 37524 (“The July 15 rule proposed a regulatory framework to control items on the USML that, in accordance with section 38(f) of the [AECA], the President determines no longer warrant control under the AECA. These items would be controlled under the [EAR] once the congressional notification requirements of section 38(f) and corresponding amendments to the [ITAR] and its USML and the EAR and its [CCL] are completed.”).

significant military equipment as defined in the International Traffic in Arms Regulations (ITAR”).

Since at least 1984, when ITAR had its first major post-AECA revision, small arms of the type the Administration is considering for transfer to the CCL have been identified as SME. *See* 22 C.F.R. § 120.19(b) (1984) (“Articles designated as significant military equipment . . . include . . . the articles enumerated in § 121.1 in Categories I (a) and (c) . . .”). In 1984, this included “[n]onautomatic, semi-automatic and fully automatic firearms to caliber .50 inclusive” and “[i]nsurgency-counterinsurgency type firearms or other weapons having a special military application (e.g. close assault weapon systems) regardless of caliber . . . .” Under the current version of ITAR, these firearms remain SME. *See* 22 C.F.R. § 121.1, Category I—Firearms, Close Assault Weapons and Combat Shotguns (a)–(c).

By adopting the ITAR definition of SME in 1996, Congress gave clear indication as to which items it believes warrant “special export controls”—those defense articles on the USML marked as SME. For example, there is little question that terrorist organizations and insurgents agree that small arms have “substantial military utility or capability,” given that they are the “weapons of choice” for many of these groups.<sup>21</sup> Indeed, “[s]mall arms fuel civil wars, organized criminal violence, and terrorist activities.”<sup>22</sup> Given small arms’ status as SME, the Administration’s plan to remove them from the USML would run counter to Congress’s intent to ensure that SME receive “special export controls,” such as those provided by ITAR.

#### **IV. Implications for Government Visibility and Exporter Accountability**

Congress intended significant military equipment, such as firearms, to be subject to tighter export controls. Between the two export control regimes—ITAR and EAR—ITAR is far more robust. By regulating the manufacture, sale, and export of a defense article, ITAR provides government regulators substantial visibility into that defense article’s life cycle. Indeed, transferring defense articles from the USML to the CCL would detach those items from this regulatory structure—a structure not matched under the EAR regulatory framework. First, ITAR closely regulates the manufacture of USML items—under 22 C.F.R. § 122.1(a), “[a]ny person who engages in the United States in the business of either manufacturing or exporting defense articles . . . is required to register with the [DDTC]. . . . Manufacturers who do not engage in exporting must nevertheless register.” Second, ITAR governs the use of brokers—the middlemen hired as “agent[s] for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles . . . in return for a fee, commission, or other consideration,” 22 C.F.R. § 129.2—by requiring them to register with DDTC, *see* 22 C.F.R. § 129.3, and file yearly reports describing the “quantity, type, U.S. dollar value, and purchaser(s) and recipient(s)” of their brokering activities. *See* 22 C.F.R. § 129.9. Third, distributors and manufacturers must also report on any fees, commissions, or political contributions paid as part of the sale and export of firearms. *See* 22 C.F.R. §§ 130.2, 130.7, 130.8, 130.9. The EAR has no such requirements.

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<sup>21</sup> Matt Schroeder and Rachel Stohl, “Small Arms, Large Problem: The International Threat of Small Arms Proliferation and Misuse,” *ARMS CONTROL TODAY* (June 2006), *available at* [http://www.armscontrol.org/act/2006\\_06/SmallArmsFeature](http://www.armscontrol.org/act/2006_06/SmallArmsFeature).

<sup>22</sup> RACHEL STOHL AND E.J. HOGENDOORN, CENTER FOR AMERICAN PROGRESS, STOPPING THE DESTRUCTIVE SPREAD OF SMALL ARMS: HOW SMALL ARMS AND LIGHT WEAPONS PROLIFERATION UNDERMINES SECURITY AND DEVELOPMENT 1 (2010), *available at* [http://www.americanprogress.org/wp-content/uploads/issues/2010/03/pdf/small\\_arms.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2010/03/pdf/small_arms.pdf).

In addition, AECA and ITAR encourage distributors and manufacturers to go above and beyond mere compliance with the export licensing rules. Indeed, under 22 C.F.R. § 127.7, exporters face debarment if they have been convicted of violating various other criminal statutes listed in 22 C.F.R. § 120.27, such as the Foreign Corrupt Practices Act. Again, the EAR regulatory structure does not impose such high levels of accountability on exporters licensed under the EAA.

## **V. Implications for Counterterrorism and Human Rights Limitations on Security Assistance**

Transferring items from the USML to the CCL has the potential to allow items that have long been considered SME to flow more easily into the international grey arms market and reach governments and individuals with ties to terrorists or are known to engage in human rights abuses.<sup>23</sup> Indeed, such transfers could seriously undermine Congress's intent, as expressed through the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 *et seq.*, that the United States “promote and encourage increased respect for human rights.” 22 U.S.C. § 2301(a)(1). Congress has made clear that “no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights,” except under “extraordinary” circumstances requiring certification from the President. 22 U.S.C. § 2304(a)(2). For the purposes of the FAA, the term “security assistance” is defined in 22 U.S.C. § 2304(d)(2) to include “military assistance” provided under 22 U.S.C. § 2311 *et seq.*, sales of defense articles or services, or “any license in effect with respect to the export of defense articles or services to or for the armed forces, police, intelligence, or other internal security forces of a foreign country under section 38 of the Arms Export Control Act (22 U.S.C. § 2778).” More broadly, Congress has generally prohibited the Executive Branch from providing assistance, including security assistance under the FAA, to countries and governments that support terrorism or hinder U.S. humanitarian assistance. *See* 22 U.S.C. § 2378(a)(1), § 2378-1(a). In addition, the “Leahy Law” specifically prohibits any assistance under the FAA or AECA “to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.”<sup>24</sup> 22 U.S.C. § 2378d(a).

The definition of security assistance under 22 U.S.C. § 2304(a)(2), therefore, is closely linked to the definition of a “defense article.” That is, items classified as defense articles cannot be provided to those countries whose governments engage in human rights violations. The Foreign Assistance Act provides that a “defense article” includes “any weapon . . . or other implement of war.” 22 U.S.C. § 2403(d)(1). The same term appears in AECA. Indeed, under section 2794(3)(A), a “defense article” is defined to include “any weapon . . . or other implement of war . . . .” AECA’s legislative history shows that Congress added this definition of defense

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<sup>23</sup> *See* Zach Toombs and R. Jeffrey Smith, “Why is the U.S. Selling Billions in Weapons to Autocrats?”, FOREIGN POLICY, June 21, 2012,

[http://www.foreignpolicy.com/articles/2012/06/21/why\\_is\\_the\\_us\\_selling\\_billions\\_in\\_weapons\\_to\\_autocrats](http://www.foreignpolicy.com/articles/2012/06/21/why_is_the_us_selling_billions_in_weapons_to_autocrats) (identifying countries cited by the State Department for human rights shortcomings in calendar year 2011 that received defense articles through commercial contracts in fiscal year 2011).

<sup>24</sup> Under 22 U.S.C. § 2378d(b), the prohibition does not apply if the Secretary of State determines and reports to the Senate Foreign Relations Committee, the House Foreign Affairs Committee, and the House and Senate Appropriations Committees “that the government of such country is taking effective steps to bring the responsible members of the security forces unit to justice.”

article to AECA “to make clear as a matter of law that the same definitions apply to sales [of defense articles] as to grant assistance [under the FAA].” H.R. REP. NO. 94-1144 at 39 (1976).

Section 2794(3)(A) of AECA, however, does not contain the statute’s only definition of “defense article.” Under section 2794(7), Congress included the term “defense articles and defense services,” which means, “with respect to commercial exports subject to the provisions of section 38 of [AECA], those items designated by the President pursuant to subsection (a)(1) of such section.” Again, the legislative history provides insight into congressional intent. According to the House Report accompanying AECA,

[t]he definition of “defense articles and defense services” is included . . . to differentiate this term for purposes of commercial export control from the same words as used for purposes of government-to-government sales. For purposes of commercial export control under this act, it is the nature of the item which determines whether it is included in the term “defense articles and services,” and not its intended use as is the case for purposes of government-to-government sales.

H.R. REP. NO. 94-1144 at 39 (1976). Guidelines for determining which items should be considered “defense articles” for purposes of section 38 are found in the regulations implementing AECA.<sup>25</sup> According to 22 C.F.R. § 120.3(a)–(b), an article may be designated a defense article if it: “is specifically designed, developed, configured, adapted, or modified for a military application,” “[d]oes not have predominant civil applications,” and “[d]oes not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications,” or “[i]s specifically designed, developed, configured, adapted, or modified for a military application, and has significant military or intelligence applicability such that control under this subchapter is necessary.” If an article is so designated, it is placed on the USML.

Even though AECA contains multiple definitions of the term “defense article,” both fall within the FAA’s definition of security assistance. *See* 22 U.S.C. § 2304(d)(2)(B)–(C) (covering sales of defense articles and licenses with respect to the export of defense articles under 22 U.S.C. § 2778). Nevertheless, with respect to commercial export licenses issued under section 38 of AECA (22 U.S.C. § 2778), security assistance under the FAA is expressly limited to those licenses for exports of defense articles “to or for the armed forces, police, intelligence, or other internal security forces of a foreign country.” 22 U.S.C. § 2304(d)(2)(C). As such, the FAA’s prohibition on security assistance to governments of countries that engage in gross violations of human rights would not—and currently does not—stop the private commercial export of firearms to individuals located in those countries, unless those individuals were specifically barred from receiving U.S. exports.

Nevertheless, the Administration’s plan to transfer items from the USML to the CCL creates substantial ambiguity for Congress’s regulatory regime. If the President makes a determination under section 38 of AECA that certain items “no longer warrant[] control” under ITAR, 22 U.S.C. § 2778(f)(1), then those items would be removed from the USML and would

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<sup>25</sup> Under 22 C.F.R. § 120.2, “[s]uch designations are made by the Department of State with the concurrence of the Department of Defense.”

no longer be “defense articles” as that term is used in section 2778(a)(2) or section 2794(7) of AECA. Such a determination, however, does not change the status of certain items, such as small arms, with respect to section 2794(3)(A), as they certainly would remain “weapons.” Indeed, one would have a situation in which firearms would be defense articles for purposes of the Foreign Military Sales (“FMS”) program, but not for purposes of a commercial export license. In effect, the Administration would be creating a new “defense article” list that it would need to consult when providing security assistance or conducting a foreign military sale, because it could no longer rely on the USML to determine what is considered a “defense article.”

Transferring items to the CCL only exacerbates the human rights concerns. The applicability of the Foreign Assistance Act’s human rights-based limitations extend to only those licenses issued under the EAA “for the export of crime control and detection instruments and equipment . . .” 22 U.S.C. § 2304(a)(2). If items are not classified under the EAR to be “crime control” items, then they will fall outside the FAA’s human rights protections. To ensure that items transferred to the CCL do not escape the legislative framework created by Congress to limit assistance to governments engaging in human rights violations, the Administration must classify CCL series 600 equipment as “crime control” items.

## **VI. Implications for Reporting and Notification Requirements**

By removing items from the USML, the Administration would also reduce the transparency of U.S. participation in the international arms market. First, equipment no longer considered defense articles for the purposes of commercial export licensing would not be tracked by the State and Defense Department’s Section 655 Annual Military Assistance Reports, mandated by section 655 of the Foreign Assistance Act, 22 U.S.C. § 2415 (“Section 655 Report”). Section 655 of the FAA requires annual reporting of the “aggregate dollar value and quantity of defense articles . . . authorized by the United States and of such articles . . . provided by the United States . . . to each foreign country and international organization.” 22 U.S.C. § 2415(b). The Section 655 Report must specify whether the defense article was licensed for export under section 38 of AECA or furnished as part of the Foreign Military Sales (“FMS”) program, 22 U.S.C. § 2311 *et seq.*, including those defense articles furnished with the financial assistance of the United States government, such as through the Foreign Military Financing (“FMF”) program. The State Department Section 655 Reports are limited to those defense articles and defense services licensed for export under AECA as direct commercial sales and do not cover defense articles provided via the FMS program.<sup>26</sup> For defense articles licensed for export under 22 U.S.C. § 2778, the State Department must specify “those defense articles that were exported during the fiscal year covered by the report . . .” 22 U.S.C. § 2415(b)(3). Section 2415(c) requires the unclassified portion of the Section 655 Report to be made available to the public via the Internet. Currently, only the State Department makes its reports available online.<sup>27</sup>

As noted above, the State Department’s Section 655 Reports are limited to those items licensed for export under section 38 of AECA; that is, exports of defense articles on the USML.

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<sup>26</sup> See Section 655 Annual Military Assistance Reports, Directorate of Defense Trade Controls, [http://www.pmdtc.state.gov/reports/655\\_intro.html](http://www.pmdtc.state.gov/reports/655_intro.html) (accessed on August 22, 2012).

<sup>27</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-952, DEFENSE EXPORTS: REPORTING ON EXPORTED ARTICLES AND SERVICES NEEDS TO BE IMPROVED 11 (2010).

If items are removed from the USML—and thus are no longer “defense articles” for purposes of section 38 of AECA—then the State Department would no longer be required by the FAA to include information on their export in its Section 655 Report.

Second, any items removed from the USML would no longer be included in notifications to Congress required from the President under section 36(c) of AECA, 22 U.S.C. § 2776(c), for transfers of defense articles exceeding certain dollar threshold amounts. Indeed, with respect to commercially licensed arms sales involving Category I firearms valued at \$1 million or more, the President currently must formally notify Congress thirty (30) calendar days prior to the approval of the license. 22 U.S.C. § 2776(c)(1). The purpose of the notifications is to provide Congress with an opportunity to review the transaction and, if it disagrees with it, to enact a joint resolution to block or modify it.<sup>28</sup> If firearms are removed from the USML, then they would no longer be covered by section 36(c) of AECA.

By de-listing items from the USML, the State Department would no longer be required to report on the export of these items as part of its Section 655 Reports, which are linked to exports under AECA, not to exports under the EAA. To fully understand the degree of military assistance being provided by the Executive Branch, Congress must have such information at its disposal. In addition, by transferring items to the CCL, Congress will no longer receive notifications regarding items exported under license under section 36(c) of AECA and thus will not be given an opportunity to weigh in on transactions with potentially far-reaching implications for U.S. foreign policy and national security. The Administration’s plan to transfer items from the USML, therefore, would greatly reduce Congress’s visibility into a substantial portion of the international market for arms and thereby undermine one of AECA’s central purposes.

## **VII. Implications for Foreign Military Sales, Direct Commercial Contracting, and Foreign Military Financing**

The United States’ Foreign Military Sales, Direct Commercial Contracts (“DCCs”), and Foreign Military Financing programs are also closely intertwined with the definition of “defense article” under AECA. Under section 503(a) of the FAA, 22 U.S.C. § 2311, the President is authorized to furnish “military assistance” to eligible foreign government or international organization purchasers. Such assistance includes the provision of “defense articles.” Indeed, according to section C4.4 of Defense Security Cooperation Agency (“DSCA”) Manual 5105.38-M, *Security Assistance Management Manual* (2012) (“SAMM”)<sup>29</sup>, the “FMS program transfers defense articles and services to eligible countries and international organizations.” The SAMM specifically cites section 47 of AECA, 22 U.S.C. § 2794, for the definitions of “defense article” and “defense service” and notes that the USML “designates specific items that fall into these categories . . . .” *Id.*

Direct Commercial Contracts financed through the Foreign Military Financing program under AECA are also tied to the term “defense article.” According to DSCA’s *Guidelines for Foreign Military Financing of Direct Commercial Contracts*, “FMF may be used to fund DCCs, when approved on a case-by-case basis by [DSCA], for the purchase of defense articles, defense services, and design and construction services.” DSCA, GUIDELINES FOR FOREIGN MILITARY

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<sup>28</sup> For more information on the notification process, see Richard F. Grimmett, CONG. RESEARCH SERV., RL 31675, ARMS SALES: CONGRESSIONAL REVIEW PROCESS (2012).

<sup>29</sup> The SAMM is available online at <http://www.dscamilitary.com/samm/ESAMM/ESAMM.htm>.

FINANCING OF DIRECT COMMERCIAL CONTRACTS 1 (2009). The use of FMF funds to finance DCCs is limited to Israel, Egypt, Jordan, Morocco, Tunisia, Turkey, Portugal, Pakistan, Yemen, and Greece. SAMM at C9.7.3.

The SAMM's specific reference to the USML is particularly noteworthy given the two definitions of "defense article" under AECA. As discussed above, Congress intended to distinguish between "defense articles" transferred as part of the FMS program and "defense articles" transferred as part of a commercially licensed export. By noting that 22 U.S.C. § 2794 provides the definition for "defense article" and that the USML contains those items that fall within that term, the SAMM, which provides guidance on the implementation of the FMS program, strongly suggests that the Defense Department uses the two "defense article" definitions interchangeably. Even though as a matter of law the removal of firearms from the USML would not affect their availability under the FMS program, the transfer would likely lead to substantial confusion within DSCA and among security assistance officials.

## **VIII. Conclusion**

The President's Export Control Reform Initiative is an ambitious and worthy endeavor and ensuring that the export control system is well suited to meet present and future national security, technological, and economic challenges is an essential task. Indeed, rationalizing the USML to ensure that it only includes those items requiring ITAR controls will enhance national security. At the same time, however, the Administration's determination that significant military equipment, including firearms, should be transferred from USML to CCL control would have implications far beyond export control reform. Detaching such equipment from the ITAR's regulatory structure would diminish government visibility into their manufacture and export. Unburdened by ITAR's debarment rules, manufacturers and exporters may have less incentive to ensure their compliance with other U.S. criminal statutes. Transfer from the USML to the CCL also would create ambiguity as to how and where such equipment fit into Congress's carefully crafted web of statutes related to the protection of human rights, terrorism, reporting on defense exports, and the provision of military assistance. Given the long-standing status of firearms as significant military equipment under ITAR, it is unlikely that Congress intended for such sweeping change to occur through Executive action alone. Before significant military equipment can be removed from the USML, the Administration must closely consult with Congress to ensure that it does not undermine this well-established statutory framework.