United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

July 16, 2015

The Honorable John Kerry
Secretary of State
U.S. Department of State
2201 C Street, NW
Washington, D.C. 20520

Dear Secretary Kerry:

We write to express concern about State Department's recently-proposed changes to the International Traffic in Arms Regulations (ITAR). If finalized, the proposal could significantly hinder the First and Second Amendment rights of millions of law-abiding citizens. In light of these serious constitutional concerns, we ask for your assistance in better understanding the legal rationale and the basis for the proposed ITAR changes.

As you are aware, the Arms Export Control Act (AECA) charges the President with the task of regulating international arms trafficking "in furtherance of world peace and the security and foreign policy of the United States."[1] The State Department has developed the ITAR regulatory framework to fulfill the statutory mission outlined in the AECA.[2] ITAR regulations are designed to regulate the transmission or sale of military equipment that has the "capacity for substantial military utility or capability such as tanks, high explosives, naval vessels, attack helicopters," and more.[3] The current ITAR framework regulates the dissemination of technical information referring to these weapons of war including information that is distributed in the "public domain."[4]

It appears that the proposed ITAR changes seek to regulate activities that extend beyond the original intent of the ACEA to cover items that previously were not subject to ITAR regulation. The Department's proposed rule expands "public domain" regulations to include published information relating to "technical data" of "defense articles."[5] The proposal expands the definition of "defense article" to include items such as firearms and accompanying software

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[1] 22 U.S.C. § 2778(a)(1).
[2] *The International Traffic in Arms Regulations (ITAR)*, Directorate of Defense Trade Controls, https://www.pmddtc.state.gov/regulations_laws/itar.html, (last visited July 8, 2015).
[3] *What is ITAR?*, Government Relations LLC, https://gov-relations.com/itar/ (last visited July 8, 2015).
[4] 79 Fed. Reg. 27185 (May 13, 2014) http://www.ecfr.gov/cgi-bin/text-idx?SID=2fc28ab4acb809959171d797493f5346&mc=true&node=se22.1.120_110&rgn=div8.
[5] International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions, 80 Fed. Reg. 31525 at 31534-35 (proposed June 3, 2015) (to be codified at 22 C.F.R. pt. 120) http://www.gpo.gov/fdsys/pkg/FR-2015-06-03/pdf/2015-12844.pdf.

or "technical data."[6] Under the proposal, "technical data" may even encompass information relating to repair and maintenance of "defense articles."[7] Further, under the proposal, people who intend to discuss "technical data" about firearms, firearm-related 3D printing, and explosives in the "public domain" may be forced to seek "proper authorization" from government authorities such as the Directorate of Defense Trade Controls before engaging in such discussions.[8] In application and effect, this governmental scheme appears to act as a prior restraint. As such, not only does the regulation arguably impede upon a person's ability to exercise their fundamental rights under the First Amendment but the Second Amendment, too.

While there are certainly benefits in preventing the exportation of sensitive information related to high-powered weaponry, the proposed regulation could extend to citizens engaging in legal activities, potentially exposing them to fines and criminal prosecutions. Millions of firearm owners and 3D printer users who use the Internet to discuss their hobbies could unintentionally violate the law if these changes to ITAR move forward.

Because the proposal grants the State Department the power to classify what is and what is not in the "public domain" for "defense articles" under ITAR, the Department will apparently have unilateral authority to require citizens to seek preapproval for what had previously been free speech.[9] Given the proposal's nexus to firearms, a number of Second Amendment and Constitutional rights organizations have expressed concern over the chilling effects that this regulation may have on free speech and the right to bear arms.[10] When asked about these constitutional implications, the State Department has been unable to adequately clarify what specific activities would be subject to preapproval under the proposal.[11] So far, during the public

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[6] *Id.* at 31534, § 120.6 (defense article means any item, software, or technical data designated in § 121.1 of this subchapter).

[7] *Id.*, § 120.10 ((information required for the development (see § 120.47) (including design, modification, and integration design), production (see § 120.48) (including manufacture, assembly, and integration), operation, installation, maintenance, repair, overhaul, or refurbishing of a defense article)).

[8] *Id.* at 31535, note 1 to § 120.11 ((section 127.1(a)(6) of this subchapter prohibits, without written authorization from the Directorate of Defense Trade Controls, U.S. and foreign persons from exporting, reexporting, retransfering, or otherwise making available to the public technical data or software if such person has knowledge that the technical data or software was made publicly available without an authorization described in paragraph (b) of this section.))

[9] *Id.*

[10] *See Stop Obama's Planned Gag Order on Firearm-Related* Speech, NRA Institute for Legislative Action (June 5, 2015) https://www.nraila.org/articles/20150605/stop-obamas-planned-gag-order-on-firearm-related-speech; Charles C.W. Cooke, *The State Department's Dangerous New Proposal to Regulate Gun Enthusiasts' Internet Speech*, Nat'l Review (June 9, 2015) http://www.nationalreview.com/article/419489/obama-administration-supports-free-internet-except-when-it-comes-gun-enthusiasts.

[11] Press Release, U.S. Dept. of State, Daily Press Briefing (June 10, 2015) (when asked if the proposed regulations would restrict discussions regarding firearms, the Department spokesperson stated "[w]ell, I go back to the – also the point that general descriptions – that is general, not technical and detailed ones – general descriptions or public discussions and imagery of defense articles would – have never been subject to these regulations and wouldn't." The spokesperson does not address the fact that videos or information on firearm repair and maintenance could be considered "technical" under the proposed changes) http://www.state.gov/r/pa/prs/dpb/2015/06/243337.htm.

comment period, over six thousand comments have been submitted by citizens, with the overwhelming majority opposing these proposed changes.[12]

As currently constructed, the State Department's proposal seems to conflict with constitutional principles. In order to understand the State Department's authority and rationale behind the proposed changes, I ask that you please provide the following information and materials:

1. Please provide an explanation of the State Department's legal authority for the proposed ITAR changes.

2. Did State Department officials communicate with the White House or other Executive Branch agencies about the drafting of the proposed changes under ITAR? Please provide all communications between or among State Department employees and employees of the White House or any other Executive Branch agency or department referring or relating to the promulgation of the proposed ITAR regulation.

3. There is tremendous uncertainty surrounding the Department's proposal. Could the following scenarios constitute a discussion of "technical data" of "defense articles" in the "public domain" and thereby require "proper authorization" from the government before engaging in such discussions? Please explain:

    a. An American citizen posts a video to YouTube showing other gun owners how to disassemble and clean an AR-15 rifle;

    b. A Wisconsin or Iowa hunter creates a website dedicated to hunting birds (e.g. ducks, pheasants, etc.) On the website, the user posts a diagram on a forum detailing the individual parts and pieces of a shotgun commonly used to hunt birds. The same user also posts on the website videos explaining how to properly shoot a flying duck without ruining the meat on the bird. The website is read and commented upon by many Canadian bird hunters;

    c. An American user comments on a foreign gun manufacturer's Internet forum on the technical specifications of a handgun they are considering purchasing from the foreign manufacturer; and

    d. An American owner of a World War II-era Browning Automatic Rifle e-mails an instructional guide to a fellow World War II-era gun enthusiast in Germany on how to use a 3D printer to make a firing pin that will enable the operation of the weapon.

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[12] *International Traffic in Arms: Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions*, Regulations.gov, http://www.regulations.gov/#!documentDetail;D=DOS-2015-0023-0483 (last visited July 8, 2015).

4. The State Department has publicly stated that only "technical" and "detailed" descriptions of "defense articles" would be subject to the new proposed ITAR regulations while "general descriptions" would not. Please explain when and how an online discussion regarding a firearm would shift from being "general" to "technical" under the proposed ITAR changes.

Please provide this material as soon as possible but no later than 5:00 p.m. on July 30, 2015.

If you have any questions please contact Kyle Brosnan or Scott Wittmann of Chairman Johnson's Staff at 202-224-4751 and Josh Flynn-Brown of Chairman Grassley's Staff at 202-224-5225. Thank you for your attention to this important matter.

Sincerely,

Ron Johnson
Chairman
Committee on Homeland Security and
Governmental Affairs

Charles E. Grassley
Chairman
Committee on the Judiciary

cc: The Honorable Thomas R. Carper
Ranking Member
Committee on Homeland Security and Governmental Affairs

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary