



## NATIONAL SHOOTING SPORTS FOUNDATION, INC.

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**LAWRENCE G. KEANE**  
SENIOR VICE PRESIDENT  
& GENERAL COUNSEL

August 18, 2016

U.S. Department of State  
Directorate of Defense Trade Controls  
2401 E Street, NW, SA-1, Room H1200  
Washington, D.C. 20522-0112

Attention: Brian Nilsson, Deputy Assistant Secretary, Bureau of Political Military Affairs

**Subject: Comments and Recommendations regarding the DDTC Guidance “Applicability of the ITAR Registration Requirement to Firearms Manufacturers and Gunsmiths” dated July 22, 2016**

Dear Mr. Nilsson:

The National Shooting Sports Foundation (NSSF), the trade association for America’s firearm industry, has a significant number of members who perform some type of gunsmithing activity and who are concerned about the required registration of gunsmiths with the Department of State. Directorate of Defense Trade Controls’ (DDTC) recent publication of the above referenced guidance has provided both clarity and confusion regarding the activities which would require a gunsmith to register under the International Traffic in Arms Regulations (ITAR). NSSF has been inundated with calls and inquiries from our members and congressional offices with questions on how to interpret the guidance. We note that to our knowledge this is the first time DDTC has issued guidance on this issue, and that DDTC has acknowledged to NSSF that it had been giving inconsistent and different *ad hoc* guidance to our industry members on the issue of registration.

The problem of determining which gunsmithing activities may or may not be considered manufacturing under ITAR, and thus requiring registration and payment of the fee, is a non-issue under the Export Administration Regulations (EAR), which does not require registration. Accordingly, we renew with increasing urgency our longstanding request that the Administration promptly publish the proposed rules on the transition of United States Munitions List (USML) Categories I, II and III to the Commerce Control List (CCL) under the Export Control Reform (ECR) initiative. The DDTC and corresponding Bureau of Industry Security (BIS) proposed rules have been approved by the interagency taskforce and ready for publication since December 2012. The government’s own ECR dashboard demonstrates that our products have been singled out for different treatment while virtually all other categories have already transitioned or are in progress of moving to BIS for export licensing. It is difficult to comprehend why a 22 caliber bolt action rifle used at a boy scout summer camp warrants greater national security scrutiny than directed energy weapons and toxins which recently transitioned as part of the ECR.

While firearms and ammunition remain on the USML, we also renew our longstanding request to lower registration fees for non-exporting manufacturers and non-SME component part manufacturers. The minimum annual registration fee of \$2,250 is excessive and overly burdensome to small companies who are not exporting and therefore not taxing DDTC's resources in any way. We understand that the AECA requires "registration" of "manufacturers," but it is entirely within DDTC's authority to set the fees for registration. Requiring such a high registration fee for these types of small companies does nothing to advance national security.

We would also take this opportunity to join and support the FAIR Trade Group's recent petition to DDTC to review and decrease the overall registration fee structure. With 18 of the 21 USML categories having gone through the transition process, DDTC has seen a 45% decrease in overall licensing workload. This strongly supports the rationale for reduced fees.

While we await publication of the ECR rules for USML Cats I, II and III, we wish to comment on DDTC's guidance. This letter will detail areas which we see as problematic and proposes changes which we believe will provide more clarity and consistency to the guidance.

### **Clarification of "Engages in the Business" and "One Occasion of Manufacturing"**

Section 38 of the Arms Export Control Act (22 U.S.C. 2778) (AECA), as amended, authorizes the President to control the export and import of defense articles and defense services. The AECA further states "every person..... **who engages in the business of manufacturing**, exporting, or importing any defense articles or defense services designated by the President under subsection (a)(1) of this section **shall register** with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations." (emphasis added).

Implementing regulations ITAR further define the registration requirement under §122.1 as follows: "**Any person who engages in the United States in the business of manufacturing** or exporting or temporarily importing defense articles, or furnishing defense services, is required to register with the Directorate of Defense Trade Controls under §122.2. For the purpose of this subchapter, **engaging in such a business requires only one occasion of manufacturing** or exporting or temporarily importing a defense article or furnishing a defense service. A manufacturer who does not engage in exporting must nevertheless register." (emphasis added).

These two criteria are the critical first step in determining whether an entity is required to register. The definition of "Person" per ITAR 120.14 includes "a natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization or group". Therefore, the ITAR 122.1 statement that "any person who engages" in the business of manufacturing also applies to individuals. When that is combined with the second statement of "engaging in such a business requires only one occasion of manufacturing", the outcome is that individuals who engage in one instance of any activity defined as "manufacturing" would be required to register.

While the guidance is directed towards gunsmiths who may or may not be performing activities which could be deemed “manufacturing” under ITAR, it is also extremely common for individual gun owners and enthusiasts to customize their own firearms by making minor changes or modifications to suit their intended use of the gun. With an estimated 20,000 or more gunsmiths, and more than 40 million hunters and shooters in the U.S., the effect of the above result could potentially impact a huge group of persons who perform work on firearms. This “catch-all” condition would result in overly broad registration controls applied to potential entities for something as simple as an individual rebedding the stock of his bolt action rifle.

The ATF regulations which implement the Gun Control Act (GCA) (18 U.S.C. § 921 *et. seq.*) include more specific definitions. The term “engaged in the business” is defined by 18 U.S.C. 921(a)(21)(A) and 27 CFR 478.11, as a “person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured.”

Therefore, individuals who are hobbyists or gun enthusiasts and who perform work on their firearms are not considered to be “engaged in the business”.

Recommendation: In keeping with the new concept introduced under the Export Control Reform initiative of “catch and release”, we recommend that both ITAR and the Guidance include “release” criteria to reduce the number of potential entities requiring registration to the much smaller set of entities who are actually engaged in activities that constitute manufacturing as a regular course of their business and for their livelihood and profit. This can be done by implementing a definition similar to the ATF definition of “engaged in the business” for USML controlled firearms and ammunition.

### **Ordinary, Common Definition of Manufacturing**

The Guidance states that DDTC applies the ordinary, common meaning of the term “manufacturing” since neither the AECA nor ITAR include a specific definition. However, the guidance does not include a definition. A simple online search of the definition of “manufacturing” resulted in the below six definitions from various sources. It is important to note that five out of these six definitions included the term “large scale”. Therefore, the commonly accepted definition of manufacturing is understood to mean the making of an item or product in volume, typically using machinery.

1. Wikipedia - manufacturing is the production of merchandise for use or sale using labor and machines, tools, chemical and biological processing, or formulation. The term may refer to a range of human activity, from handicraft to high tech, but is most commonly applied to industrial production, in which raw materials are transformed into finished goods on a **large scale**.
2. Merriam-Webster Dictionary - the process of making products especially with machines in factories.
3. Google - make (something) on a **large scale** using machinery.
4. Dictionary.com, based on the Random House Dictionary - the making of goods or wares by manual labor or by machinery, especially on a **large scale**

5. Businessdictionary.com - the process of converting raw materials, components, or parts into finished goods that meet a customer's expectations or specifications. Manufacturing commonly employs a man-machine setup with division of labor in a **large scale** production.
6. Thefreedictionary.com, based on the American Heritage® Dictionary - to make or process (a raw material) into a finished product, especially by means of a **large-scale** industrial operation.

The ATF regulations implementing the GCA define both manufacturer and dealer, including how it applies to gunsmiths. The term “manufacturer” is defined by 18 U.S.C. 921(a)(10) as any person engaged in the business of manufacturing firearms or ammunition for purposes of sale or distribution. The term “dealer” is defined by 18 U.S.C. 921(a)(11)(B) and 27 CFR 478.11 includes “any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms ...” (*i.e., a gunsmith*). As applied to a gunsmith, the term “engaged in the business” is defined by 18 U.S.C. 921(a)(21)(D) and 27 CFR 478.11 as a “person who devotes time, attention, and labor to engaging in such activity as a regular course of trade or business with the principal objective of livelihood and profit ...” (*emphasis added*)

Recommendation: Since the definition of manufacturing is commonly understood to include large scale production and/or machinery, we recommend that the Guidance be revised to include this as a criterion when determining whether or not an entity is performing a manufacturing activity. We also recommend DDTC adopt definitions similar to the ATF definitions for manufacturer and gunsmith as they relate to activities for the manufacture of firearms and ammunition controlled on the USML.

We recognize that the GCA and AECA are two distinct bodies of law with different missions. However, the ATF regulations are focused on domestic firearm activities with related definitions and processes to control this activity. We believe DDTC’s harmonization of some of ATF definitions specifically as they relate to domestic manufacturing activities involving firearms and ammunition on the USML would be beneficial to all parties. Again, this is in keeping with the changes being made under the Export Control Reform initiative.

### **Policy Guidance – Criteria for “Registration Not Required – Not Manufacturing”**

We appreciate the effort DDTC has put into creating this section which is meant to describe specific instances and activities which do not constitute manufacturing. However, when the “not manufacturing” criteria are compared to the “manufacturing” criteria, the information is not mirrored, and the qualifiers added to most points have caused some confusion.

For each item being qualified with some condition, it is assumed that the opposite statement would also be true.

For example, paragraph 1.a. states “Occasional assembly of firearm parts and kits that do not require cutting, drilling, or machining” is not manufacturing. What about routine assembly of firearm parts without cutting, drilling or machining? Some firearm manufacturers outsource assembly of pistol magazines to local rehabilitation centers because it is a simple task and it provides a benefit to a

community organization. Is that rehabilitation center manufacturing? Or is “occasional assembly” meant to indicate someone who is not regularly “engaged in the business” of manufacturing?

We note in the section of “Not Manufacturing”, there are four references to activities that “do not improve the accuracy, caliber, or other aspects of firearm operation beyond its original capabilities”. We disagree with the use of accuracy as a defining criterion for manufacturing activity. The vast majority of firearms are mass produced within a specification range that impacts the performance and accuracy of the gun. For example, some manufacturers may manufacture a bolt action rifle with a standard accuracy specification which produces groups of 2 to 2.5 inches. However, most hunters are not satisfied with this range, and it is extremely common and routine for them to customize their rifles in order to achieve an improved 1” target group. This could include a variety of actions such as installing a target stock, rebedding the stock to float the barrel, installing better sights or a scope, polishing the feed ramp within the chamber, and similar.

Paragraph 1.c. states “repairs involving replacement parts that do not improve the accuracy, caliber, or other aspects of firearm operation” are not manufacturing. The converse statement would be “repairs that improve the accuracy, caliber, or other aspects of firearm operation” are manufacturing, and require registration. So if you apply the fact set in the above paragraph, the result is that the hunter who modified his rifle to a 1” target group has performed a manufacturing activity and must register with DDTC.

Along the same lines, paragraph 1.g. also states “machining new dovetails or drilling and tapping new holes for the installation of sights which do not improve the accuracy... of the firearm” is not manufacturing. However, the most common reason to install new sights on a firearm IS to improve the accuracy. Does that mean this activity has crossed the line into manufacturing?

Within the qualifying statement “do not improve the accuracy, caliber, or other aspects of firearm operation”, we request clarification. We are not sure what is meant by “improving the caliber”. The caliber is a characteristic of the firearm, not a feature or operation. The performance of the firearm can vary depending on the caliber and the type of ammunition used. And within each caliber, there are a variety of ammunition types that provide different results (e.g. .38 Special vs. .38 +P ammunition). But it is not an “improvement” of the caliber. We believe the intention here was meant to refer to a change in caliber, such as re-barreling a firearm to a different caliber which may change the performance of the firearm.

Recommendation: We recommend that DDTC remove the qualifiers which are causing confusion; “occasional” in paragraph 1.a., and “that do not improve the accuracy, caliber, or other aspects of firearm operation” in paragraphs 1.c., f., g., and the last paragraph of the section. Alternatively, it may be simpler to remove the section on “Not Manufacturing” in favor of providing a definitive list of “Manufacturing” activities and stating that any activities not specifically listed are not considered manufacturing.

### **Policy Guidance – Registration Required – Manufacturing**

The section was very helpful in providing definitive activities which constitute manufacturing. We have comments on two of the items:

Paragraph 2.a. states “Use of any special tooling or equipment upgrading in order to improve the capability of assembled or repaired firearms”. The term “special tooling” needs clarification. Does this apply to machine tools or hand tools or both? There are a wide variety of firearm tools that could be considered “special tooling” since they are specific to firearms, such as certain specialized wrenches, disassembly tools, vises or fixtures to assist when working on a firearm, etc. Does “special tools” also apply to gauges and measuring tools, such as headspace gauges, trigger pull gauges, barrel erosion gauge, barrel straightening gauge, extractor gauge, etc.? These types of tools and gauges are commonly available and widely used by hunters and shooters.

Paragraph 2.b. states “Modifications to a firearm that change round capacity”. This needs clarification which states it does not apply to firearms with detachable magazine where a user can simply insert a higher capacity magazine. Also, the revision should exclude magazine extension attachments which simply fit into the existing magazine well of a firearm.

In summary, we strongly urge both the State and Commerce departments to fulfill their respective commitment to Congress, both in testimony before the House Small Business Committee in February 2016 and in correspondence to a bipartisan group of House and Senate members, and publish the Export Control Reform proposed rules for USML Cats. I – III. In the meantime, DDTC should lower the onerous annual registration fee for non-exporting manufacturers and non-SME component parts manufacturers, as well as to revise its guidance in accordance with our recommendation.

We thank you for your consideration and review of the above comments and recommendations. If you have any questions or need more information, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink that reads "Lawrence G. Keane". The signature is written in a cursive, flowing style.

Lawrence G. Keane