DDTC Issues Conflicting Guidance Concerning Firearms and Congressional Notification

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A trade group recently requested that the Directorate of Defense Trade Controls clarify informal guidance and licensing provisos some of its members have received. In particular, the request pertains to Congressional notification requirements involving firearms under the Arms Export Control Act. The trade group noted that the notification requirement only involves actual firearms identified within Category I paragraphs (a) through (d) of the U.S. Munitions List, and not paragraphs (e) through (g) involving items such as barrels and receivers. Yet, it has been learned that DDTC is nevertheless notifying items within paragraphs (e) through (g).

In support of its position, the trade group cited a regulatory interpretation within Category I and a DDTC guidance document. Both of these sources address the issue consistently, directly, and unambiguously. But DDTC rejected the trade group's arguments. In its response, DDTC argues that the word "firearm" is not defined by the statute, and therefore it is free to define its meaning. DDTC then discusses how, in the absence of a statutory definition, it can also consider the "overall objective of the reporting requirement" when determining its meaning. Thus, DDTC states it is reasonable for it to interpret "firearm" to include the items contained within paragraphs (e) through (g) of Category I. Moreover, DDTC distanced itself from its regulations by stating that they do not apply to the statute.

Here is where DDTC's analysis goes awry. As DDTC recently explained in another advisory opinion response involving registration requirements for gunsmithing, when a word is not defined within a statute (such as "manufacturer" or "firearm") then its common and ordinary meaning is applied. This meaning is derived from its usage in dictionaries. As it relates to "firearm," dictionaries are all in common agreement that it means a rifle or pistol that is intended to fire a projectile. Conspicuously absent from that common definition are the components that make up a firearm, such as a barrel or receiver. Thus, DDTC's statement over the lack of a "precise statutory definition" is a red-herring because the law does apply it a definition: the common and ordinary meaning. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). As such, DDTC's newly-revealed conflicting and informal definition of a "firearm" does not conform to its common and ordinary meaning.

DDTC also fares no better at the next stage of analysis since it has interpreted the meaning of "firearm" within the regulations. This is a critical point because regulations are legally binding. *United States v. Mead Corp*., 533 U.S. 218, 227 (2001). This means that both the public and DDTC are bound to the regulatory interpretation of "firearm" embodied within the ITAR. That a regulation is binding is merely common sense since a regulatory agency's interpretation has no higher legal footing than when an agency places it into publicly-noticed regulations. There is also nothing about the ITAR's regulatory interpretation of "firearm" that is unreasonable, as it merely conforms to the common and ordinary meaning. For example, a simple review of how a dictionary defines "firearm" shows that the ITAR's interpretative note simply provides the identical meaning: "A firearm is a weapon . . . which is designed to expel a projectile by the action of an explosive or which may be readily converted to do so." ITAR § 121.1, Category I(j)(1).

Accordingly, the ITAR's definition is binding on DDTC as its definitive interpretation of "firearm." This does not change because "firearm" is only specifically mentioned under the Congressional notification requirements within Section 36(c) of the statute rather than Section 38 (which establishes the ITAR). In short, the issue here is not over the notification requirements directly, but what defense articles within Category I are defined as a "firearm." In particular, the text of the statute plainly yields to the regulations within Category I to answer that question. 22 U.S.C. § 2776(c) ("in the case of a defense article that is a firearm controlled under category I of the United States Munitions List"). And Congress clearly deferred, through a delegation of authority, to DDTC to designate firearms as defense articles and to develop regulations accordingly. 22 U.S.C. § 2778(a)(1). Those designations are supported by DDTC's binding regulatory interpretation of what a "firearm" means.

Stated differently, the reference within the Congressional notification section of the statute does not relate to any separate statutory definition of "firearm." Rather, it simply refers back to the regulations for that meaning, and thus DDTC's attempt to paint this issue as over a separate meaning of "firearm" for the ITAR and for statutory notification fails. Similarly, DDTC's argument that it considered how "firearm" is defined by other statutes and regulations is immaterial, because the controlling definition is the one DDTC promulgated in its regulations. Moreover, the existing interpretative note within Category I has been in the ITAR for over fifty years, even before the Arms Export Control Act superseded the Mutual Security Act. 22 C.F.R. § 121.03(a) (1965). Thus, Congress not only knew its meaning when it wrote the Arms Export Control Act, but DDTC's action here of attempting to informally infringe upon well-established law is even more untenable.

Finally, DDTC attacks its own firearms guidance by arguing that it does not supersede statutory requirements. Specifically, the statement that is relevant here reads: "Per §123.15(a)(3) of the ITAR, a license application for the export of firearms in Categories I(a) through I(d)with a total value of $1 million or higher will require Congressional Notification." As already discussed, the real issue is a regulatory matter and not a statutory one. Therefore, this guidance document is interpreting regulations and the specific statement is consistent with those regulations. Thus, DDTC's interpretation of its own regulations in this guidance document is valid as it is not plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461(1997). Moreover, there is no deference to DDTC in this case because the regulation is unambiguous, as DDTC conceded in its response. It is also evidence to show that contrary to its dubious assertion, DDTC has no "long-standing practice" of notifying to Congress items within paragraphs (e) through (g) of Category I. Even if it did, a "long-standing practice" that is contrary to law does not somehow make it valid, though it does reveal DDTC's non-compliance with the ITAR.

In conclusion, DDTC should immediately withdraw this newly revealed informal position that directly conflicts with well-established law. Seven years ago, the Seventh Circuit unanimously admonished DDTC over its constitutionally dubious practices of carrying out and enforcing secret laws, which that court noted were akin to the behavior of a totalitarian regime. *United States v. Pulungan*, 569 F.3d 326, 328 (7th Cir. 2009). It is certainly deeply troubling that DDTC now tacitly acknowledges it secretly disavows publicly-noticed, unambiguous regulations. This is once again contrary to the Seventh Circuit's contempt for DDTC's practices, noting that a "regulation is published for all to see" and DDTC "must operate through public laws and regulations."

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