

Appendix 3

U.S. Department of Justice
Criminal Division

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

Mr. John D. Holum
Senior Advisor for Arms Control and Intelligence
Security Affairs (T) -Room 7208
Department of State
2201 C Street, N.W.
Washington D.C. 20520

Dear Mr. Holum:

I am writing to you on behalf of the Department of Justice to express our concerns about a Defense Department proposal to exempt from the licensing requirements of the Arms Export Control Act (the Act), exports of most defense articles and defense services to non-government end users in England and Australia. We believe that the creation of such an exemption will greatly impede the ability of the law enforcement community to detect, prevent and prosecute criminal violations of the Act, and that it will facilitate efforts on the part of countries and factions engaged in international terrorism to illicitly acquire sophisticated U.S. weaponry.

At present, commercial exports of military equipment and technology to non-government end users in England and Australia must be licensed by your Office of Defense Trade Controls (ODTC). In order to obtain a license, an exporter is required to submit a license application to ODTC identifying the articles to be exported, the ultimate and any intermediate consignees, and the articles; purported end use. Typically, a license application is filed with ODTC after lengthy and costly negotiations have taken place between the seller and an overseas purchaser.

The existence of the licensing requirement aids our enforcement efforts in several critical respects:

First, it creates an economic incentive for exporters to conduct background checks into the bona fides and representations of potential overseas customers, thereby increasing the likelihood that possible illicit procurement efforts will be detected and reported to law enforcement authorities. Legitimate firms typically will not enter into potentially protracted negotiations for the sale of weapons without first satisfying themselves that the end use and end user supplied by the foreign purchaser will ultimately be approved by the licensing officials in ODTC. These checks often provide the first indication that an illegal procurement effort is underway.

Second, the license requirement allows for thorough review of an arms transaction in advance of export, affording the government an opportunity to determine whether there is likelihood that the arms might be diverted or transshipped to a prohibited destination. Should a diversion scheme be uncovered, we can prevent the shipment and focus our efforts on prosecuting the parties who attempted to export the arms unlawfully.

And finally, the requirement makes it necessary for exporters intent on circumventing the law to take affirmative steps to evade the Act's proscriptions -- typically by lying on the license application or on shipping documents required to be filed with U.S. Customs at the time of export - thus creating a domestic evidentiary trail upon which any ensuing prosecution can be based.

The proposed exemption would eliminate the license requirement and with it an invaluable enforcement tool. Exporters would no longer have an incentive to examine the backgrounds of their overseas

customers prior to shipping weaponry abroad; the government would have the ability to conduct only the most cursory examination of an export transaction prior to shipment; and we would have to depend on our foreign counterparts to obtain and provide the evidence needed to maintain successful prosecutions. In essence, our first line of defense against diversions would be moved across the oceans to England and Australia.

In this regard, we are concerned that the exemption will prompt foreign terrorist groups and other potential adversaries to set up store-fronts in England and Australia in order to take advantage of the relaxed export control requirements. We have seen this happen in Canada, a country already exempt from most U.S. export license requirements. England and Australia are not contiguous with the United States and likely would be viewed by hostile elements as being even more attractive locations from which to stage an illicit procurement effort.

I would appreciate it if you would pass along our concerns to the officials who are considering the proposed exemption. Should you have any questions, please feel free to contact me at your convenience.

Sincerely,

Bruce C. Swartz
Deputy Assistant Attorney General