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Transfer of Defense Articles: Sale and Export of U.S.-Made Arms to Foreign Entities

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Transfer of Defense Articles: Sale and Export of U.S.-Made Arms to Foreign Entities

The sale and export of U.S.-origin weapons to foreign countries (“defense articles and defense services,” officially) are governed by an extensive set of laws, regulations, policies, and procedures. Congress has authorized such sales under two laws:

- The Foreign Assistance Act (FAA) of 1961, 22 U.S.C. §2151, et seq.
- The Arms Export Control Act (AECA) of 1976, 22 U.S.C. §2751, et seq.

The FAA and AECA govern all transfers of U.S.-origin defense articles and services, whether they are commercial sales, government-to-government sales, or security assistance/security cooperation grants (or building partnership capacity programs provided by U.S. military personnel). These measures can be provided by Title 22 (Foreign Relations) or Title 10 (Armed Services) authorities. Arms sold or transferred under these authorities are regulated by the International Traffic in Arms Regulations (ITAR) and the U.S. Munitions List (USML), which are located in Title 22, Parts 120-130 of the Code of Federal Regulations (CFR).

The two main methods for the sale and export of U.S.-made weapons are the Foreign Military Sales (FMS) program and Direct Commercial Sales (DCS) licenses. Some other arms sales occur from current Department of Defense (DOD) stocks through Excess Defense Articles (EDA) provisions.

- For FMS, the U.S. government procures defense articles as an intermediary for foreign partners’ acquisition of defense articles and defense services, which ensures that the articles have the same benefits and protections that apply to the U.S. military’s acquisition of its own articles and services.
- For DCS, registered U.S. firms may sell defense articles directly to foreign partners through licenses and agreements received from the Department of State. Firms are still required to obtain State Department approval, and for major sales DOD review and congressional notification is required. In some cases where U.S. firms have entered into international partnerships to produce some major weapons systems, comprehensive export regulations under 22 CFR 126.14 are intended to allow exports and technical data for those systems without having to go through the licensing process.

Congress has amended the FAA and AECA to restrict arms sales to foreign entities for a variety of reasons. These include restrictions on transfers to countries that violate human rights and states that support terrorism, as well as limitations on specific countries at certain times, such as any Middle East countries whose import of U.S. arms would adversely affect Israel’s qualitative military edge. Arms transfers to Taiwan are governed under the Taiwan Relations Act of 1979, P.L. 96-8, 22 U.S.C. § 3301 et seq. Under the AECA, Congress can also overturn individual notified arms sales via a joint resolution. During the 116th Congress, such joint resolutions were introduced in opposition to planned arms sales to Saudi Arabia, but did not pass.

All U.S. defense articles and defense services sold, leased, or exported under the AECA are subject to end-use monitoring (to provide reasonable assurance that the recipient is complying with the requirements imposed by the U.S. government with respect to use, transfers, and security of the articles and services) to be conducted by the President (Section 40A of the AECA) to ensure compliance with U.S. arms export rules and policies. FMS transfers are monitored under DOD’s Golden Sentry program and DCS transfers are monitored under the State Department’s Blue Lantern program.

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Introduction

The sale of U.S.-origin armaments and other “defense articles¹” has been a part of national security policy since at least the Lend-Lease programs in the lead-up to U.S. involvement in World War II. Historically, Presidents have used sales of defense articles and services to foreign governments and organizations to further broad foreign policy goals, ranging from sales to strategically important countries during the Cold War, to building global counterterrorism capacity following the terrorist attacks of September 11, 2001.

The sale of U.S. defense articles to foreign countries is governed by a broad set of statutes, public laws, federal regulations, and executive branch policies, along with international agreements. An interconnected body of legislative provisions, authorizations, and reporting requirements related to the transfer of U.S. defense articles appears in both the National Defense Authorization Acts (NDAA) and in the State Department, Foreign Operations, and Related Programs (SFOPS) Appropriations Acts.² These laws reflect the roles that both the Department of State and the Department of Defense (DOD) take in the administration of the sale, export, and funding of defense articles to foreign countries, which can be found in both Title 22 (Foreign Relations) and Title 10 (Armed Services) of the *United States Code*.

Congress enacted the current statutory framework for the sale and export of defense articles to other countries mainly through two laws—The Foreign Assistance Act of 1961 (FAA), 22 U.S.C. §2151, et seq., and the Arms Export Control Act of 1976 (AECA), 22 U.S.C. §2751, et seq.³ Among other provisions, the FAA established broad policy guidelines for the overall transfer of defense articles and services from the United States to foreign entities (foreign countries, firms, and/or individuals) to include both sales and grant transfers, while the AECA also governs the sales of defense articles and services to those entities.

This report describes the major statutory provisions governing the sale and export of defense articles—Foreign Military Sales (FMS) and Direct Commercial Sales (DCS)—and outlines the process through which those sales and exports are made. FMS is the program through which the U.S. government, through interaction with purchasers, acts as a broker to procure defense articles for sales to certain foreign countries and organizations, also called *eligible purchasers*. In DCS, the U.S. government does not act as a broker for the sale, but still must license it, unless export of the item is exempt from licensing according to regulations in the International Traffic in Arms Regulations (ITAR), contained in Subchapter M, 22 CFR 120-130, described below. The

¹ “Defense Article” is defined by Section 644 of the Foreign Assistance Act of 1961, 22 U.S.C. §2403, as:

- (1) any weapon, weapons system, munition, aircraft, vessel, boat or other implement of war;
- (2) any property, installation, commodity, material, equipment, supply, or goods used for the purposes of furnishing military assistance;
- (3) any machinery, facility, tool, material supply, or other item necessary for the manufacture, production, processing repair, servicing, storage, construction, transportation, operation, or use of any article listed in this subsection; or
- (4) any component or part of any article listed in this subsection; but shall not include merchant vessels or, as defined by the Atomic Energy Act of 1954, as amended (42 U.S.C. §2011), source material (except uranium depleted in the isotope 235 which is incorporated in defense articles solely to take advantage of high density or pyrophoric characteristics unrelated to radioactivity), by-product material, special nuclear material, production facilities, utilization facilities, or atomic weapons or articles involving Restricted Data.

² See CRS Report R44602, *DOD Security Cooperation: An Overview of Authorities and Issues*, by Bolko J. Skorupski and Nina M. Serafino.

³ The AECA superseded the Foreign Military Sales Act of 1968, P.L. 90-629.

President designates what items are deemed to be defense articles or defense services, and thus subject to DCS licensing, via the U.S. Munitions List (USML). All persons (other than U.S. government personnel performing official duties) engaging in manufacturing, acting as a broker, exporting, or importing defense articles and services must register with the State Department according to ITAR procedures.⁴

The State Department is required under the AECA to notify Congress 15 to 30 days prior to all planned FMS and DCS cases over a certain value threshold. Congress can, pursuant to the AECA, hold or restrict such sales via a joint resolution.

The report also provides a select list of specific legislative limitations on arms sales and end use monitoring requirements found in the Arms Export Control Act. Future updates will consider policy implications and issues for Congress.

Sales and Security Assistance/Cooperation Programs

In FY2018, the latest year complete agency data is available, the value of authorized U.S. arms sales to foreign governments and export licenses issued totaled about \$184.3 billion. Foreign entities purchased \$47.71 billion in FMS cases and the value of privately contracted DCS authorizations licensed by the State Department (distinct from actual deliveries of licensed articles and services) totaled \$136.6 billion (**Table 1** and **Table 2**).⁵ That same year, the State Department requested \$7.09 billion (base and OCO) for all of its Title 22 security assistance authorities in its International Security Assistance account, while DOD executed \$4.42 billion for Title 10 security cooperation authorities,⁶ totaling \$11.51 billion, or 24.1% of what foreign entities spent on FMS and 8.4% of the amount of DCS approved licenses.

Table 1. Foreign Military Sales (FMS) Totals, FY2016 to FY2018

Fiscal Year	Partner Nation Funded	U.S. Funded Title 22 Authorizations	U.S. Funded Title 10 Authorizations	Total
FY2018	\$47.71 billion	\$3.52 billion	\$4.42 billion	\$55.66 billion
FY2017	\$32.02 billion	\$6.04 billion	\$3.87 billion	\$41.93 billion
FY2016	\$25.7 billion	\$2.9 billion	\$5.0 billion	\$33.6 billion

Source: Defense Security Cooperation Agency, see footnote 5.

⁴ Manufacturers must register, even if they are not currently exporting defense items.

⁵ Defense Security Cooperation Agency, “Fiscal Year 2018 Sales Total \$55.56 Billion,” October 9, 2018, <https://dscamilitary.com/news-media/news-archive/fiscal-year-2018-sales-total-5566-billion/>; “Fiscal Year 2017 Sales Total \$41.93B,” <https://www.dscamilitary.com/news-media/news-archive/fiscal-year-2017-sales-total-4193b/>; “Fiscal Year 2016 Sales Total \$33.6B,” <https://www.dscamilitary.com/news-media/news-archive/fiscal-year-2016-sales-total-336b/>. Department of State, “U.S. Arms Transfers Rise 13 Percent in 2018, Highlighting Administration’s Success Strengthening Security Partners While Growing American Jobs,” May 21, 2019, <https://www.state.gov/u-s-arms-transfers-rise-13-percent-in-2018-highlighting-administrations-success-strengthening-security-partners-while-growing-american-jobs/>. DCS totals from FY2016 were provided by the State Department to CRS on April 28, 2020.

⁶ State Department, *FY2019 Congressional Budget Justification—Department of State, Foreign Operations, and Related Programs*, <https://www.state.gov/wp-content/uploads/2018/12/FY-2019-Congressional-Budget-Justification-Department-of-State-Foreign-Operations-and-Related-Programs.pdf>, accessed March 5, 2020.

Table 2. Value of Direct Commercial Sales (DCS) Licenses Issued, FY2016 to FY2018

Fiscal Year	Value of DCS Licenses
FY2018	\$136.6 billion
FY2017	\$128.1 billion
FY2016	\$117.9 billion

Source: U.S. State Department, see footnote 5.

Security Assistance/Security Cooperation Programs

While most arms sales and exports are paid for by the recipient government or entity, transfers funded by U.S. security assistance or security cooperation grants to foreign security forces comprise a small portion of arms exports, but they are beyond the scope of this report. These transfers are generally considered foreign assistance, and are authorized pursuant to the FAA, annual National Defense Authorization Acts, and other authorities codified in Title 22 and Title 10 of the U.S. Code. With the exception of Title 10 authorities, the FAA and AECA also govern all of the transfers of U.S.-origin defense articles and services, whether they are commercial sales, government-to-government sales, or security assistance/security cooperation.

Major Title 22 grant-based security assistance authorities pertaining to defense articles are

- Foreign Military Financing (FMF),
- Nonproliferation, Anti-Terrorism, Demining, and Related Programs (NADR),
- Peacekeeping Operations (PKO).⁷

Major Title 10 grant-based security cooperation authorities are

- Authority to Build the Capacity of Foreign Security Forces (“333 authority”),
- Defense Institution Reform Initiative (DIRI),
- Ministry of Defense Advisors (MDOA) program, and
- Southeast Asia Maritime Security Initiative (MSI).⁸

DOD, through its Defense Security Cooperation Agency (DSCA), executes most security assistance and security cooperation programs. FMF, IMET, EDA, and equipment lease cases involving the transfer of U.S.-origin arms are treated as FMS cases and reported as such by DSCA. Cases executed pursuant to Title 10 authorities are also treated as FMS cases, but are

⁷ “Major” authorities are those with their own budget line in the State Department, *FY2020 Congressional Budget Justification—Department of State, Foreign Operations, and Related Programs*, <https://www.state.gov/fy-2020-congressional-budget-justification-department-of-state-foreign-operations-and-related-programs/>. International Narcotics Control and Law Enforcement (INCLE) and International Military Education and Training (IMET) security assistance programs do not transfer military arms. See also CRS Report R44602, *DOD Security Cooperation: An Overview of Authorities and Issues*, by Bolko J. Skorupski and Nina M. Serafino.

⁸ “Major” authorities are those with their own budget line in the Defense Security Cooperation Agency, *Fiscal Year (FY) 2020 President’s Budget: Operation and Maintenance, Defense Wide, Defense Security Cooperation Agency*, March 2019. https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2020/budget_justification/pdfs/01_Operation_and_Maintenance/O_M_VOL_1_PART_1/DSCA_OP-5.pdf, accessed March 5, 2020. DSCA has, since FY2019, merged the Counterterrorism Partnership Fund (CTPF) and Building the Capacity of Foreign Security Forces lines into a single “Security Cooperation Account.”

referred to by practitioners as “pseudo-FMS” cases because they often involve a focus on training of foreign forces as well as on the transfer of arms.

Sales and Exports of U.S. Defense Articles in Statute, Administration Policy, and Regulation

The broad set of statutes, public laws, federal regulations, executive branch policies, and international agreements governing the sale of U.S. defense articles to foreign countries include the following.

The Foreign Assistance Act of 1961 and the Arms Export Control Act of 1976

As noted above, the primary statutes covering the sale and export of U.S. defense articles to foreign countries are the FAA (P.L. 87-195, as amended) and AECA (P.L. 90-629, as amended). The FAA expresses, as U.S. policy, that

the efforts of the United States and other friendly countries to promote peace and security continue to require measures of support based upon the principle of effective self-help and mutual aid, [and that its purpose is] to authorize measures in the common defense against internal and external aggression, including the furnishing of military assistance, upon request, to friendly countries and international organizations.⁹

The AECA states that

it is the sense of Congress that all such sales be approved only when they are consistent with the foreign policy of the United States, the purposes of the foreign assistance program of the United States as embodied in the Foreign Assistance Act of 1961, as amended, the extent and character of the military requirement and the economic and financial capability of the recipient country, with particular regard being given, where appropriate, to proper balance among such sales, grant military assistance, and economic assistance as well as to the impact of the sales on programs of social and economic development and on existing or incipient arms races.¹⁰

The FAA also establishes the U.S. policy for how recipient countries are to utilize defense articles sold or otherwise transferred. Section 502 states that

defense articles and defense services to any country shall be furnished solely for internal security (including for antiterrorism and nonproliferation purposes), for legitimate self-defense, to permit the recipient country to participate in regional or collective arrangements or measures consistent with the Charter of the United Nations, or otherwise to permit the recipient country to participate in collective measures requested by the United Nations for the purpose of assisting foreign military forces in less developed friendly countries (or the voluntary efforts of personnel of the Armed Forces of the United States in such countries) to construct public works or to engage in other activities helpful to the economic and social development of such friendly countries.¹¹

Section 22 of the AECA, provides the statutory basis for the U.S. Foreign Military Sales program and allows the U.S. government to interact with purchaser as a broker to procure defense articles for sales to certain foreign countries and organizations, also called *eligible purchasers*. Under this

⁹ 22 U.S.C. §2301.

¹⁰ 22 U.S.C. §2751.

¹¹ 22 U.S.C. §2302.

provision, the President may, without requirement for charge to any appropriation or contract authorization, enter into contracts to sell defense articles or defense services to a foreign country or international organization if it provides the U.S. government with a dependable undertaking to pay the full amount of the contract.¹²

The Taiwan Relations Act of 1979

An exception to the general arms transfer framework is Taiwan, to which the sale of defense articles and defense services are not subject to the FAA or AECA. Rather, the applicable statute governing FMS-like and DCS-like transfers to Taiwan is the Taiwan Relations Act of 1979, P.L. 96-8, 22 U.S.C. § 3301 et seq. The act states, “In furtherance of the policy set forth in section 3301 of this title, the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.” It also states, “The President and the Congress shall determine the nature and quantity of such defense articles and services based solely upon their judgment of the needs of Taiwan, in accordance with procedures established by law. Such determination of Taiwan’s defense needs shall include review by United States military authorities in connection with recommendations to the President and the Congress.”¹³

In addition, the FY2018 National Defense Authorization Act, P.L. 115-91, Section 1259A, requires congressional notification of all requests for transfers of defense articles or defense services to Taiwan no later than 120 days after the Secretary of Defense receives a Letter of Request. The act also states that the sense of Congress is “that any requests from the Government of Taiwan for defense articles and defense services should receive a case-by-case review by the Secretary of Defense, in consultation with the Secretary of State, that is consistent with the standard processes and procedures in an effort to normalize the arms sales process with Taiwan.”

Section 38 of the AECA furthermore provides the statutory basis for the U.S. Direct Commercial Sales of defense articles and services. Under this provision, the U.S. government does not act as a broker for the sale, but still must license it, unless specifically provided for in regulations in the International Traffic in Arms Regulations, contained in Subchapter M, 22 CFR 120-130, described below. The President designates what items are deemed to be defense articles or defense services, and thus subject to DCS licensing, via the U.S. Munitions List. All persons (other than U.S. government personnel performing official duties) engaging in manufacturing, acting as a broker, exporting, or importing defense articles and services must register with the State Department according to ITAR procedures.¹⁴ The provision also requires the President to review the items on the USML and to notify the House Foreign Affairs Committee, the Senate Foreign Relations Committee, and the Senate Banking Committee if any items no longer warrant export controls, pursuant to the ITAR.

¹² 22 U.S.C. §2762(a).

¹³ P.L. 96-8, § 3, 22 U.S.C. §3302 (a) and (b).

¹⁴ Manufacturers must register, even if they are not currently exporting defense items.

Title 10 United States Code, Armed Forces

U.S.-origin defense articles sold to foreign entities may be used by the recipient country's military in conjunction with DOD-led security cooperation programs. As such, the FY2017 NDAA, P.L. 114-238, consolidated many of DOD's core security cooperation authorities into a new chapter, Chapter 16, of Title 10.¹⁵ While primarily applicable to grant-based security cooperation programs, the section with some relevance to arms sales is 10 U.S.C §333, which states that the Secretary of Defense, in concurrence and coordination with the Secretary of State, "is authorized to conduct or support a program or programs to provide training and equipment to the national security forces of one or more foreign countries for the purpose of building the capacity of such forces to conduct one or more of the following:

- (1) Counterterrorism operations.
- (2) Counter-weapons of mass destruction operations.
- (3) Counter-illicit drug trafficking operations.
- (4) Counter-transnational organized crime operations.
- (5) Maritime and border security operations.
- (6) Military intelligence operations.
- (7) Operations or activities that contribute to an international coalition operation that is determined by the Secretary to be in the national interest of the United States."¹⁶

A partner country may participate in train and equip programs under Title 10, section 333, and simultaneously pay part of the equipment costs associated with those programs under traditional FMS or DCS. The country could also simultaneously receive Title 22 security assistance and could use those defense articles in conjunction with a Title 10 security cooperation program. U.S. Security Cooperation Office (SCO) personnel in country would oversee requirements applicable to all of those programs in such a case.

National Security Presidential Memorandum Regarding U.S. Conventional Arms Transfer Policy: NSPM-10

In April 2018, the Trump Administration, citing the AECA, issued a National Security Presidential Memorandum, NSPM-10, outlining its policy concerning the transfer of conventional arms. The memorandum reflects many of the policy statements of the FAA and AECA in aiming to "bolster the security of the United States and our allies and partners," while preventing proliferation by exercising restraint and continuing to participate in multilateral nonproliferation arrangements such as the Missile Technology Control Regime (MTCR) and Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. It explicitly commits the U.S. government to continue to meet the requirements of all applicable statutes, including the AECA, the FAA, the International Emergency Economic Powers Act, and the annual NDAA's. NSPM-10 also prioritizes efforts to "increase trade opportunities for United States companies, including by supporting United States industry with appropriate advocacy and trade promotion activities and by simplifying the United States regulatory environment."¹⁷

In addition, NSPM-10 directs the executive branch to consider the following in making arms transfer decisions:

- the national security of the United States, including the transfer's effect on the technological advantage of the United States;

¹⁵ CRS In Focus IF10582, *Security Cooperation Issues: FY2017 NDAA Outcomes*, by Liana W. Rosen.

¹⁶ 10 U.S.C. §333.

¹⁷ The White House, "National Security Presidential Memorandum Regarding U.S. Conventional Arms Transfer Policy," April 19, 2018, <https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-regarding-u-s-conventional-arms-transfer-policy/>.

- the economic security of the United States and innovation;
- relationships with allies and partners;
- human rights and international humanitarian law; and
- nonproliferation implications.¹⁸

Title 22, Code of Federal Regulations, Foreign Relations

The AECA, Section 38, also authorizes the President to issue regulations on the import and export of defense articles. As noted above, the catalog of defense articles subject to these regulations is called the United States Munitions List. The USML is found in federal regulations at 22 CFR 121. The series of federal regulations for importing and exporting of defense articles—the International Traffic in Arms Regulations—is contained in Subchapter M, 22 CFR 120-130. The USML lists defense articles by category and identifies which of those articles are “significant military equipment” further restricted by provisions in the AECA.¹⁹

The President has delegated authority for administering the USML and associated regulations to the Secretary of State, who in turn has delegated this authority to the Deputy Assistant Secretary of State for Defense Trade Controls in the Bureau of Political-Military Affairs (PM).²⁰ The Directorate of Defense Trade Controls (DDTC) is responsible for ensuring that commercial exports of defense articles and defense services advance U.S. national security objectives. DDTC also administers a public web portal for U.S. firms seeking assistance with exporting defense articles and services.²¹

Global Comprehensive Export Authorizations: The F-35

In cases where U.S. defense manufacturers are involved in international partnerships with NATO countries, Australia, Japan, and/or Sweden for major defense article programs, 22 CFR 126.14 allows DDTC to provide a comprehensive “Global Project Authorization.” The authorization applies to registered U.S. exporters for exports of defense articles, technical data, and defense services in support of government-to-government cooperative projects (authorized under Section 27 of the AECA, 22 U.S.C. §2767) with one of these countries. Such cooperation would occur pursuant to an agreement between the U.S. Government and the government of the foreign country or a memorandum of understanding (MOU) between the DOD and the foreign country’s ministry of defense.

An example is the F-35 Joint Strike Fighter, manufactured through a partnership between the United States and eight partner countries (as well as through FMS agreements with three other countries). The global comprehensive export authorization for the F-35 allows approved U.S. manufacturers to export items or technical data involved in the research and development, testing and evaluation, and procurement of the system to firms in partner countries without going through the formal DDTC licensing process.²²

The Global Project Authorization is one of three special comprehensive export authorizations allowed in 22 CFR 126.14. The other two, Major Project Authorization and Major Program Authorization, are based on the principal registered U.S. exporter/prime contractor or a single registered U.S. exporter that identifies a large-scale cooperative project or program with a NATO member, Australia, Japan, or Sweden.

¹⁸ Ibid.

¹⁹ 22 C.F.R. § 121.

²⁰ 22 C.F.R. § 120.1.

²¹ U.S. Department of State, “Directorate of Defense Trade Controls,” https://www.pmdtcc.state.gov/ddtc_public.

²² Government Accountability Office, *Joint Strike Fighter: Management of the Technology Transfer Process*, GAO-06-364, March 2006, <https://www.gao.gov/products/GAO-06-364>.

Canadian Exemptions in Federal Regulations

In some cases, Canadian purchasers are exempt from export license requirements for defense articles and services. According to 22 CFR 126.5, “Except as provided in Supplement No. 1 to part 126 of this subchapter and for exports that transit third countries, Port Directors of U.S. Customs and Border Protection and postmasters shall permit, when for end-use in Canada by Canadian Federal or Provincial governmental authorities acting in an official capacity or by a Canadian-registered person, or for return to the United States, the permanent and temporary export to Canada without a license of unclassified defense articles and defense services identified on the U.S. Munitions List (22 CFR 121.1).”²³

Canadian purchasers must still obtain licenses for defense articles and services that are, among other categories: classified articles, technical data and defense services, all Missile Technology Control Regime (MTCR) Annex Items, any transaction involving the export of defense articles and defense services for which congressional notification is required, firearms listed in Category I of the USML, and nuclear weapons strategic delivery systems and all components, parts, accessories and attachments.

DOD’s Security Assistance Management Manual

The Department of Defense has a substantial role in the sale of defense articles to foreign countries through FMS, which DOD administers in coordination with the Department of State mainly through the Defense Security Cooperation Agency. DSCA provides procedures for FMS and certain other transfers of defense articles and defense services to foreign entities in its Security Assistance Management Manual (SAMM). The SAMM is used mainly by the military services, the Office of the Secretary of Defense, Special Operations Command (SOCOM), the regional combatant commanders, and country teams in U.S. embassies overseas, and it may also be consulted by foreign countries and U.S. defense contractors. The SAMM also provides the timelines and methods for coordinating FMS, cases with the State Department.²⁴

Sales and Exports of U.S. Defense Articles in International Agreements²⁵

The United States participates in two international agreements that broadly affect the transfer of U.S. defense articles: The Missile Technology Control Regime and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. Other international agreements, such as the Treaty on the Nonproliferation of Nuclear Weapons (NPT), the Convention on the Physical Protection of Nuclear Material, the Chemical Weapons Convention, and the Biological and Toxin Weapons Convention, may limit exports of defense-

²³ 22 CFR 126.5, https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=70e390c181ea17f847fa696c47e3140a&mc=true&r=PART&n=pt22.1.126#se22.1.126_15 .

²⁴ Defense Security Cooperation Agency, “Security Assistance Cooperation Manual,” <https://samm.dsca.mil/listing/esamm>. The procedures found in the SAMM apply to sales and exports of defense articles, as well as to the defense articles provided as grant assistance to foreign countries. When DOD is involved in the transfer of defense articles or services funded by appropriations under either DOD (Title 10) or DOS (Title 22) authorities, DSCA manages the transfer through the same infrastructure as it does for Foreign Military Sales (FMS) cases, and reports the transfers in its yearly total of sales of defense articles and services.

²⁵ In addition to the agreements discussed in this section, the United Nations Register of Conventional Arms and the Arms Trade Treaty have implications for U.S. policy regarding arms sales. They are, however, beyond the scope of this report, as they are not specifically mentioned in NSPM-10.

related material, but only material linked to the development of nuclear, chemical, and biological weapons.²⁶

Missile Technology Control Regime

The Missile Technology Control Regime, while not a treaty, is an informal and voluntary association of countries seeking to reduce the number of systems capable of delivering weapons of mass destruction (other than manned aircraft), and seeking to coordinate national export licensing efforts aimed at preventing their proliferation. The MTCR was originally established in 1987 by Canada, France, Germany, Italy, Japan, the United Kingdom and the United States. Since then, participation has grown to 35 countries.²⁷

Member nations, by consensus, agree on common export guidelines (the MCTR Guidelines) on transfer of systems capable of delivering weapons of mass destruction, as well as an integral common list of controlled items (the MTCR Equipment, Software and Technology Annex). The annex is a list of controlled items – both military and dual-use – including virtually all key equipment, materials, software, and technology needed for the development, production, and operation of systems capable of delivering nuclear, biological, and chemical weapons. The annex is divided into “Category I” and “Category II” items.²⁸ Partner countries exercise restraint when considering transfers of items contained in the annex, and such transfers are considered by each partner country on a case-by-case basis.²⁹

The State Department, Directorate of Defense Trade Controls, administers the U.S. implementation of the MTCR and incorporates the MTCR guidelines and annex into the International Traffic in Arms Regulations and the U.S. Munitions List.³⁰

The Wassenaar Arrangement

In 1996, 33 countries, including the United States, agreed to the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. The arrangement aims “to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations.”³¹ It maintains two control lists. One is a list of

²⁶ For a detailed discussion of the MTCR and agreements limiting the export of materials related to nuclear, biological, and chemical weapons, see CRS Report RL31559, *Proliferation Control Regimes: Background and Status*, coordinated by Mary Beth D. Nikitin.

²⁷ The Missile Technology Control Regime, *Missile Technology Control Regime (MTCR) Equipment, Software, and Technology Annex*, October 12, 2019, https://mtrc.info/wordpress/wp-content/uploads/2019/10/MTCR-TEM-Technical_Annex_2019-10-11-1.pdf.

²⁸ According to the MTCR, Category I items are the most sensitive and include complete UAS “capable of delivering a payload of at least 500 kg to a range of at least 300 km, their major complete subsystems ... and related software and technology,” as well as “specially designed” production facilities for these UAS and subsystems. Regime partners have greater flexibility with respect to authorizing exports of Category II items, which include less sensitive and dual-use missile related components. This category also includes complete UAS, regardless of payload, capable of ranges of at least 300 km, as well as other UAS with certain characteristics. See CRS In Focus IF11069, *U.S.-Proposed Missile Technology Control Regime Changes*, by Paul K. Kerr.

²⁹ *Ibid.*, p. iii.

³⁰ Department of State, “The International Traffic in Arms Regulations (ITAR),” https://www.pmddtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=24d528fddbfc930044f9ff621f961987. The AECA mandates inclusion of the MCTR Annex on the USML.

³¹ The Wassenaar Arrangement, “About Us,” <https://www.wassenaar.org/about-us/>.

weapons, including small arms, tanks, aircraft, and unmanned aerial systems. The second is a list of dual-use technologies including material processing, electronics, computers, information security, and navigation/avionics. Dual-use, in this context, means items and technologies that can be used in both civilian and military applications.

DDTC incorporates the Wassenaar Arrangement into the ITAR and USML.³² Under the Export Control Act of 2018 (Subtitle B, Part 1, P.L. 115-232), the Department of Commerce is to “establish and maintain a list” of controlled items, foreign persons, and end-uses determined to be a threat to U.S. national security and foreign policy. The legislation also directs the Commerce Department to require export licenses; “prohibit unauthorized exports, re-exports, and in-country transfers of controlled items”; and “monitor shipments and other means of transfer.”³³

Foreign Military Sales Process

The FMS program is the U.S. government-brokered method for delivering U.S. arms to eligible foreign purchasers, normally friendly nations, partner countries, and allies.³⁴ The program is authorized through the AECA, with related authorities delegated by the President, under Executive Order 13637, to the Secretaries of State, Defense, and Commerce.

The State Department (DOS) is responsible for the export (and temporary import) of defense articles and services governed by the AECA, and reviews and submits to Congress an annual Congressional Budget Justification (CBJ) for security assistance. This also includes an annual estimate of the total amount of sales and licensed commercial exports expected to be made to each foreign nation as required by 22 U.S.C §2765(a)(2)).³⁵

DOD generally implements the FMS program as a military-to-military program and serves as intermediary for foreign partners’ acquisition of U.S. defense articles and services. Using what is commonly called the *Total Package Approach*, U.S. security assistance organizations must offer, in addition to specific defense articles, a sustainment package to help the buyer maintain and operate the article(s) effectively and in accord with U.S. intent.³⁶ DOD follows the Defense Federal Acquisition Regulation Supplement (DFARS), except where deviations are authorized.³⁷ Acquisition on behalf of eligible FMS purchasers must be in accordance with DOD regulations and other applicable U.S. government procedures. This arrangement affords the foreign purchaser the same benefits and protections that apply to DOD procurement, and it is one of the principal reasons why foreign governments and international organizations might choose to procure defense articles through FMS. FMS requirements may be consolidated with U.S. requirements or placed on separate contracts, whichever is more expedient and cost-effective.³⁸

³² Department of State, “The International Traffic in Arms Regulations (ITAR),” https://www.pmddtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=24d528fddbfc930044f9ff621f961987.

³³ CRS In Focus IF11154, *Export Controls: New Challenges*, by Ian F. Fergusson.

³⁴ See 22 U.S.C. § 2753 regarding provisions for eligibility for transfer of U.S. defense articles or services.

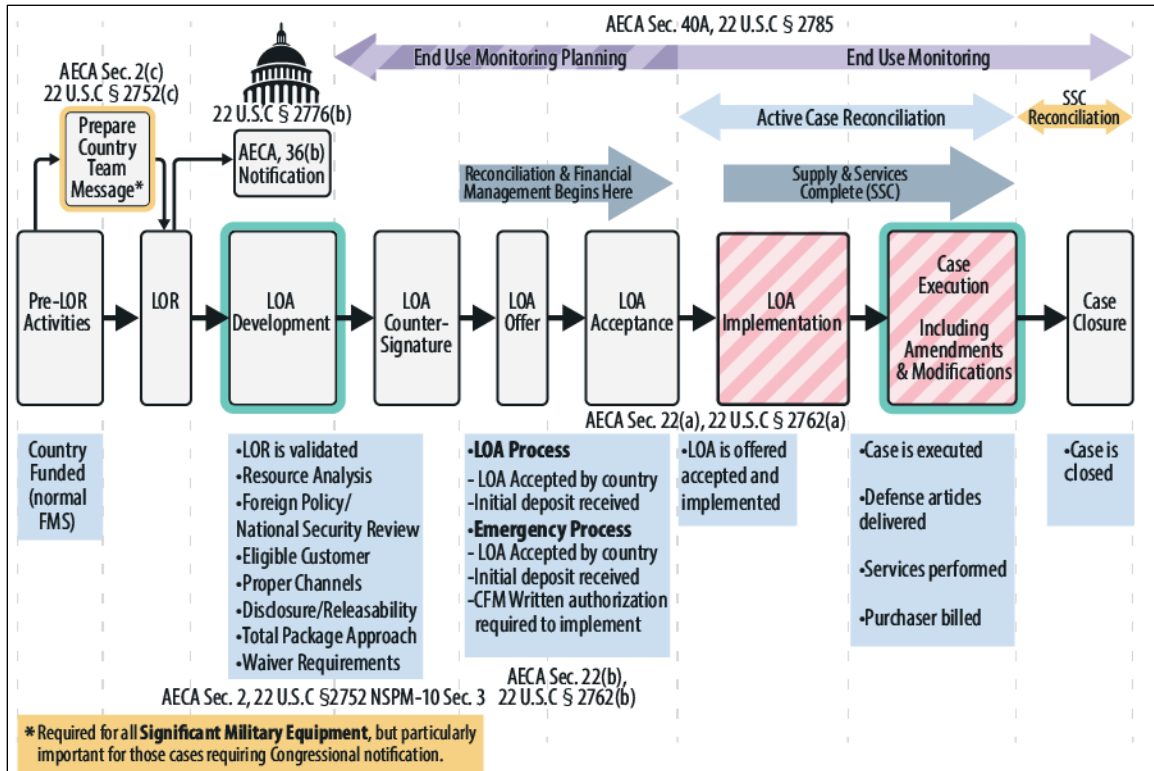
³⁵ Department of Defense (DOD), Security Assistance Management Manual (SAMM), C1.3.1. at <https://samm.dsca.mil/chapter/chapter-1>. at <https://samm.dsca.mil/chapter/chapter-1>.

³⁶ DOD, SAMM, C4.3.2., at <https://www.samm.dsca.mil/chapter/chapter-4#C4.3>. <https://www.samm.dsca.mil/chapter/chapter-4#C4.3>.

³⁷ DOD, SAMM, C4.3.9., at <https://www.samm.dsca.mil/chapter/chapter-4#C4.3>. <https://www.samm.dsca.mil/chapter/chapter-4#C4.3>.

³⁸ DOD, SAMM, C.6.3.1., at <https://samm.dsca.mil/chapter/chapter-6#C6.3>. <https://samm.dsca.mil/chapter/chapter-6#C6.3>.

Figure 1. Foreign Military Sales (FMS) Process



Source: Defense Security and Cooperation Agency, annotated by CRS.

Notes: LOR: Letter of Request; LOA: Letter of Offer and Acceptance; SAMM: Security Assistance Manual.

Purchasers must agree to pay in U.S. dollars, by converting their own national currency or, under limited circumstances, through reciprocal arrangements.³⁹ When the purchase cannot be financed by other means, credit financing or credit guarantees can be extended if allowed by U.S. law. FMS cases can also be directly funded by DOS using Foreign Military Financing appropriations.⁴⁰

Letters of Request (LOR) Start the Process

When an eligible foreign purchaser (government or otherwise) decides to purchase or otherwise obtain a U.S. defense article or service, it begins the process by making the official request in the form of a letter of request (LOR) (See **Figure 1** for an illustration of the process from receipt to case closure.) The letter may take nearly any form, from a handwritten request to a formal letter, but it must be in writing. The purchaser submits the LOR to a U.S. security cooperation organization (SCO),⁴¹ normally an Office of Defense Cooperation nested within the U.S.

³⁹ DOD, SAMM, C9.3.2. at <https://samm.dsca.mil/chapter/chapter-9#C9.3.>, see also 22 U.S.C. 2761 and 22 U.S.C. 2762.

⁴⁰ DOD, SAMM, C9.7.2.1., at <https://www.samm.dsca.mil/chapter/chapter-9#C9.7.2.7>. <https://www.samm.dsca.mil/chapter/chapter-9#C9.7.2.7>

⁴¹ DOD, SAMM, Glossary, at <https://www.samm.dsca.mil/glossary/security-cooperation-organization-sco>. SCO is a generic term for those DOD organizations permanently located in a foreign country and assigned responsibilities for carrying out security cooperation management functions under Title 22 U.S.C. § 2321i. The actual names given to such DOD components may include military assistance advisory groups, military missions and groups, offices of defense or

Embassy in the country, or directly to DSCA or an implementing agency (IA). The IA is usually a military department or DOD agency (e.g., Army Security Assistance Command, Navy International Programs Office, Air Force International Affairs). The LOR can be submitted in-country or through the country's military and diplomatic personnel stationed in the United States. Unless an item has been designated as "FMS Only," DOD is generally neutral as to whether a country purchases U.S.-origin defense articles/services through FMS or DCS (discussed below).⁴² The AECA gives the President discretion to designate which military end-items must be sold exclusively through FMS channels.⁴³ This discretion is delegated to the Secretary of State under Executive Order 13637 and, as a matter of policy, this discretion is generally exercised upon the recommendation of DOD.

Once the U.S. SCO receives the LOR, it transmits the request to the relevant agencies (e.g., DSCA, IA) for consideration and export licensing. U.S. government responses to LORs include price and availability (P&A) data, letters of offer and acceptance (LOAs), and other appropriate actions that respond to purchasers' requests. If the IA recommends disapproval, it notifies DSCA, which coordinates the disapproval with DOS, as required, and formally notifies the customer of the disapproval.⁴⁴

Letters of Offer and Acceptance (LOA) Set Terms

After approving the transfer of a defense article, the United States responds with a letter of offer and acceptance. The LOA is the legal instrument used by the USG to sell defense articles, defense services including training, and design and construction services to an eligible purchaser. The LOA itemizes the defense articles and services offered and when implemented becomes an official tender by the USG. Signed LOAs and their subsequent amendments and modifications are also referred to as "FMS cases." The time required to prepare LOAs varies with the complexity of the sale.⁴⁵

Reports to Congress

Within 60 days after the end of a quarter, the State Department, on behalf of the President, sends to the Speaker of the House, HFAC, and the chairman of the SFRC a report of, inter alia,

- LOAs offering major defense equipment valued at \$1 million or more;
- all LOAs accepted and the total value;
- the dollar amount of all credit agreements with each eligible purchaser; and
- all licenses and approvals for exports sold for \$1 million or more.⁴⁶

military cooperation, and liaison groups. The term SCO does not include units, formations, or other ad hoc organizations that conduct security cooperation activities such as mobile training teams, mobile education teams, or operational units conducting security cooperation activities.

⁴² DOD, SAMM, C4.3.4., at <https://samm.dsca.mil/chapter/chapter-4#C4.3>.<https://samm.dsca.mil/chapter/chapter-4#C4.3>.

⁴³ The U.S. Munitions List is prescribed in 22 U.S.C. 2778(a)(1).

⁴⁴ DOD, SAMM, C5.2.2.1., at <https://samm.dsca.mil/chapter/chapter-5#C5.2>.<https://samm.dsca.mil/chapter/chapter-5#C5.2>.

⁴⁵ DOD, SAMM, C5.4., at <https://samm.dsca.mil/chapter/chapter-5#C5.4>.<https://samm.dsca.mil/chapter/chapter-5#C5.4>.

⁴⁶ 22 U.S.C. §2776 .

Congressional Notification Requirements for FMS⁴⁷

The AECA, Section 36(b) (22 U.S.C. §2776(b)), requires State Department reporting to Congress as follows:

- 30 calendar days before issuing a Letter of Offer and Acceptance (LOA) for major defense equipment valued at \$14 million or more, defense articles or services valued at \$50 million or more, or design and construction services valued at \$200 million or more.
- 15 calendar days before issuing an LOA for NATO member states, NATO, Japan, Australia, South Korea, Israel, or New Zealand for sale, enhancement, or upgrading of major defense equipment valued at \$25 million or more, defense articles or services at \$100 million or more, or design and construction services of \$300 million or more.

Section 36(b)(5)(a) of the AECA contains a reporting requirement for defense articles or equipment items whose technology or capability has, prior to delivery, been "enhanced or upgraded from the level of sensitivity or capability described" in the original congressional notification. For such exports, the President must submit a report to the relevant committees at least 45 days before the exports' delivery that describes the enhancement or upgrade and provides "a detailed justification for such enhancement or upgrade."

Section 36(i) of the AECA also requires the President to notify the Foreign Relations/Foreign Affairs Committees 30 calendar days prior to the shipment of FMS items requiring Congressional notification under Section 36(b) if the chairman or ranking member of either committee request such notification.

Congress reviews formal notifications pursuant to procedures in the AECA and has the authority to block a sale.

Case Executions Deliver Articles

The IA takes action to implement a case once the purchaser has signed the LOA and necessary documentation *and* provided any required initial deposit. The standard types of FMS cases are defined order, blanket order, and cooperative logistics supply support arrangement (CLSSA). A CLSSA usually accompanies sales of major defense articles, providing an arrangement for supplying repair parts and other services over a specified period after delivery of the articles.⁴⁸ Defined order cases or lines are commonly used for the sale of items that require item-by-item security control throughout the sales process or that require separate reporting; blanket order cases or lines are used to provide categories of items or services (normally to support one or more end items) with no definitive listing of items or quantities. Defined order and blanket order cases are routinely used to provide hardware or services to support commercial end items, obsolete end items (including end items that have undergone system support buyouts), and selected non-U.S. origin military equipment.⁴⁹ The case must be implemented in all applicable data systems (e.g., Defense Security Assistance Management System [DSAMS], Defense Integrated Financial System [DIFS], DSCA 1200 System, and Military Department [MILDEP] systems) before case execution occurs. The IA issues implementing instructions to activities that are involved in executing the FMS case.⁵⁰

Case execution is the longest phase of the FMS case life cycle. Case execution includes acquisition, logistics, transportation, maintenance, training, financial management, oversight, coordination, documentation, case amendment or modification, case reconciliation, and case

⁴⁷ CRS Report RL31675, *Arms Sales: Congressional Review Process*, by Paul K. Kerr.

⁴⁸ DOD, SAMM, C5.4.3., at <https://samm.dsca.mil/chapter/chapter-5#C5.4>. <https://samm.dsca.mil/chapter/chapter-5#C5.4>

⁴⁹ DOD, SAMM, C5.4.3., at <https://samm.dsca.mil/chapter/chapter-5#C5.4>. <https://samm.dsca.mil/chapter/chapter-5#C5.4>. For Taiwan case documents, all milestones are entered in DSAMS and the IA is responsible for transferring signature dates and information onto the cover memorandum to the American Institute in Taiwan.

⁵⁰ DOD, SAMM, C6.1.1., at <https://www.samm.dsca.mil/chapter/chapter-6>. <https://www.samm.dsca.mil/chapter/chapter-6>.

reporting. Case managers, normally assigned to the IAs, track FMS delivery status in coordination with SCOs.⁵¹ FMS records, such as case directives, production or repair schedules, international logistics supply delivery plans, requisitions, shipping documents, bills of lading, contract documents, billing and accounting documents, and work sheets, are normally unclassified. All case transactions, financial and logistical, must be recorded as part of the official case file. Cost statements and large accounting spreadsheets must be supported by source documents.⁵²

LOA requirements are fulfilled through existing U.S. military logistics systems. With the exception of excess defense articles (EDA) or obsolete equipment, items are furnished only when DOD plans to ensure logistics support for the expected item service life. This includes follow-on spare parts support. If an item will not be supported through its remaining service life, including EDA and obsolete defense articles, an explanation should be included in the LOA.⁵³

FMS cases may be amended or modified to accommodate certain changes. An amendment is necessary when a change requires purchaser acceptance. The scope of the case is a key issue for the IA to consider in deciding whether to prepare an amendment, modification, or new LOA. In defined order cases, scope is limited to the quantity of items or described services, including specific performance periods listed on the LOA. In blanket order cases, scope is limited to the specified item or service categories and the case or line dollar value. In CLSSAs, scope is limited by the LOA description of end items to be supported and dollar values of the cases. A scope change takes place when the original purpose of a case line or note changes. U.S. government unilateral changes to an FMS case are made by a modification and do not require acceptance by the purchaser.⁵⁴

“Pseudo LOAs” For Title 10 Authorizations

DSCA (along with DOS and DOD elements) use the FMS infrastructure to manage some programs that are not actual FMS cases. These occur when the U.S. government provides defense articles and defense services aimed at Building Partner Capacity, or BPC. Authorized under Title 10 (the most common is 10 U.S.C. §333), and often associated with train and equip programs, cases are coordinated and processed through established security assistance automated systems designed to handle FMS. When these occur, practitioners refer to the process as a “pseudo LOA” to distinguish the cases from FMS.⁵⁵

Customs Clearance

In all FMS cases, the firms then ship the defense articles to the foreign partner via a third-party freight forwarding company. The security cooperation organization, part of the U.S. embassy country team, may receive the item and hand it over to the purchaser, or the purchaser may receive it directly. The U.S. government and the purchaser’s advanced planning for transportation

⁵¹ DOD, SAMM, C.6.2.2, at <https://samm.dsca.mil/chapter/chapter-6#C6.2>.<https://samm.dsca.mil/chapter/chapter-6#C6.2>.

⁵² DOD, SAMM, C6.2.5., at <https://samm.dsca.mil/chapter/chapter-6#C6.2>.<https://samm.dsca.mil/chapter/chapter-6#C6.2>.

⁵³ DOD, SAMM, C6.4., at <https://samm.dsca.mil/chapter/chapter-6#C6.4>.<https://samm.dsca.mil/chapter/chapter-6#C6.4>.

⁵⁴ DOD, SAMM, C6.7., at <https://samm.dsca.mil/chapter/chapter-6#C6.7>.<https://samm.dsca.mil/chapter/chapter-6#C6.7>.

⁵⁵ Defense Security Cooperation Agency, *The Management of Security Cooperation*, p. 6-4, https://www.discs.dscu.mil/documents/greenbook/06_Chapter.pdf?id=1. See also CRS Report R44313, *What Is “Building Partner Capacity?” Issues for Congress*, coordinated by Kathleen J. McInnis.

of materiel is critical for case development and execution. DOD policy requires that the purchaser is responsible for transportation and delivery of its purchased materiel. Purchasers can use DOD distribution capabilities on a reimbursable basis at DOD reimbursable rates via the Defense Transportation System (DTS). Alternatively, purchasers may employ an agent, known as a Foreign Military Sales freight forwarder, to manage transportation and delivery from the point of origin (typically the continental United States) to the purchaser's desired destination.⁵⁶ Ultimately, the purchaser is responsible for obtaining overseas customs clearances and for all actions and costs associated with customs clearances for deliveries of FMS materiel, including any intermediate stops or transfer points.⁵⁷

Generally, title to FMS materiel is transferred to the purchaser upon release from its point of origin, normally a DOD supply activity, unless otherwise specified in the LOA. However, U.S. government security responsibility does not cease until the recipient's designated government representative assumes control of the consignment.⁵⁸

Direct Commercial Sales Process

DOS Role in DCS

While an export license is not required for the FMS transfers,⁵⁹ registered U.S. firms may sell defense articles directly to foreign partners via licenses received from the State Department. In this case, the request for defense articles and/or defense services may originate as a result of interaction between the U.S. firm and a foreign government, may be initiated through the country team in U.S. embassies overseas, or may be generated by foreign diplomatic or defense personnel stationed in the United States. A significant difference between DCS licenses and FMS cases is that in DCS, the U.S. government does not participate in the sale or broker the defense articles or services for transfer by the U.S. government to the foreign country.

While DCS originates between registered U.S. firms and foreign customers, an application for an export license goes through a review process similar to FMS (**Figure 2**, below). DOS and DOD have agency review processes that assess proposed DCS transfers for foreign policy, national security, human rights, and nonproliferation concerns. In order for a U.S. firm to export defense articles or services on the U.S. Munitions List, it must first register with the State Department, Directorate of Defense Trade Controls. It must then obtain export licenses for all defense articles and follow the International Traffic in Arms Regulations.⁶⁰ Once granted, an export license is valid for four years, after which a new application and license are required.⁶¹

⁵⁶ DOD, SAMM, C7.1.1., at <https://www.samm.dsca.mil/chapter/chapter-7#C7.2>.<https://www.samm.dsca.mil/chapter/chapter-7#C7.2>.

⁵⁷ DOD, SAMM, C3.3.3.2. and C3.3.3.4.3., at <https://samm.dsca.mil/chapter/chapter-3#C3.3>.<https://samm.dsca.mil/chapter/chapter-3#C3.3>.

⁵⁸ DOD, SAMM, C7.3, at <https://samm.dsca.mil//chapter//chapter-7#C7.3>. A supply activity can be either a DOD storage depot or a commercial vendor that furnishes materiel under a DOD-administered contract.

⁵⁹ DOD, SAMM, C3.3.1, at <https://samm.dsca.mil/chapter/chapter-3#C3.3>.<https://samm.dsca.mil/chapter/chapter-3#C3.3>.

⁶⁰ Firms may do so through DDTC's website: https://www.pmdtcc.state.gov/ddtc_public.

⁶¹ 22 CFR 123.21.

Congressional Notification Requirements for DCS⁶²

The AECA, Section 36(b) (22 U.S.C. §2776(c)), specifies reporting to Congress on the following:

- 30 calendar days before issuing an export license for major defense equipment valued at \$14 million or more, or defense articles or services valued at \$50 million or more.
- 15 calendar days before issuing an export license for NATO member states, NATO, Japan, Australia, South Korea, Israel, or New Zealand for sale, enhancement, or upgrading of major defense equipment valued at \$25 million or more, defense articles or services at \$100 million or more, or design and construction services of \$300 million or more.

Congress reviews formal notifications pursuant to procedures in the AECA and has the authority to block a sale.

To export a defense article through DCS, a U.S. defense firm must comply with ITAR requirements. The three Directorates of the State Department's Bureau of Political-Military Affairs publish policy, issue licenses, and enforce compliance in accord with the ITAR in order to ensure commercial exports of defense articles and defense services advance U.S. national security and foreign policy objectives.⁶³ If marketing efforts involve the disclosure of technical data or the temporary export of defense articles, the defense firm must also obtain the appropriate export license from DDTC.⁶⁴

DOD's Defense Technology Security Administration (DTSA) serves as a reviewing agency for the export licensing of dual-use commodities and munitions items and provides technical and policy assessments of export license applications. Specifically, it identifies and mitigates national security risks associated with the international transfer of critical information and advanced technology in order to maintain the U.S. military's technological edge and to support U.S. national security objectives.⁶⁵

The ITAR includes many exemptions from the licensing requirements. Some are self-executing by the exporting firm who is to use them and normally are based on prior authorizations. Other exemptions (for example, the exemption in 22 CFR 125.4(b)(1) regarding technical data) may be requested or directed by the supporting military department or DOD agency.⁶⁶

⁶² CRS Report RL31675, *Arms Sales: Congressional Review Process*, by Paul K. Kerr.

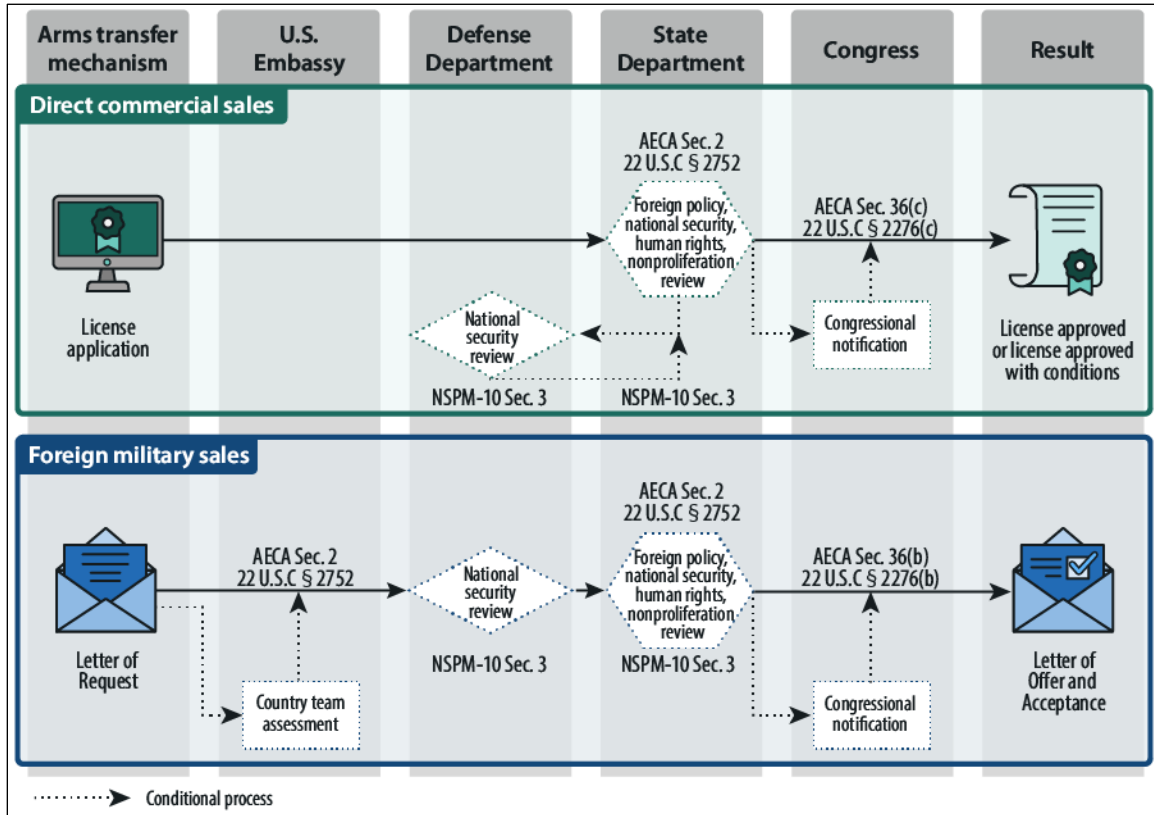
⁶³ https://www.pmdtc.state.gov/ddtc_public?id==ddtc_public_portal_homepage, accessed January 16, 2020.

⁶⁴ DOD, SAMM, C3.3.1, at <https://samm.dsca.mil/chapter/chapter-3#C3.3><https://samm.dsca.mil/chapter/chapter-3#C3.3>.

⁶⁵ <https://www.dtsa.mil/SitePages/about-dtsa/mission-culture-history.aspx>, accessed January 16, 2020 and <https://www.dtsa.mil/SitePages/about-dtsa/510572p.pdf>. DTSA serves as the focal point for development and implementation of DoD policy positions on matters concerning technology security transfer.

⁶⁶ DOD, SAMM, C3.3.2. ITAR Exemptions, <https://samm.dsca.mil/chapter/chapter-3#C3.3><https://samm.dsca.mil/chapter/chapter-3#C3.3>.

Figure 2. Direct Commercial Sales (DCS) Licensing Process in Comparison with FMS



Source: Adapted from GAO, “Conventional Arms Transfer Policy: Agency Processes for Reviewing Direct Commercial Sales and Foreign Military Align With Policy Criteria,” GAO-19-673R, September 9, 2019. Annotated by CRS.

DOD Role in DCS

In contrast to FMS, DOD does not directly administer sales or facilitate transportation of items purchased under DCS, although, unless the host country requests that purchase be made through FMS, DOD tries to accommodate a U.S. defense firm’s preference for DCS, if articulated. In addition, DOD does not normally provide price quotes for comparison of FMS to DCS.⁶⁷ If a company or country prefers that a sale be made commercially rather than via FMS, and when a company receives a request for proposal from a country and prefers DCS, the company may request that DSCA issue a DCS preference for that particular sale. The particulars of each recipient country, U.S. firm, and sale determine whether FMS or DCS is preferred.

Before approving DCS preference for a specific transaction, DSCA considers the following:⁶⁸

- Items provided through blanket order and those required in conjunction with a system sale do not normally qualify for DCS preference.

⁶⁷ DOD, SAMM, C2.1.8.6, at <https://samm.dscamilitary.com/chapter/chapter-2>.

⁶⁸ DOD, SAMM, C.4.3.6., at <https://samm.dscamilitary.com/chapter/chapter-4#C4.1>.

- FMS procedures may be required in sales to certain countries and for sales financed with Military Assistance Program (MAP) funds or, in most cases, with FMF funds.
- The DSCA Director may also recommend to the DOS that it mandate FMS for a specific sale.
- DCS preferences are valid for one year; therefore, during this time, if the IA receives from the purchaser a request for pricing and availability (P&A) or an LOA for the same item, it should notify the purchaser of the DCS preference.⁶⁹

U.S. firms may request defense articles and services from DOD to support a DCS to a foreign country or international organization.⁷⁰ Defense articles must be provided pursuant to applicable statutory authority, including 22 U.S.C. 2770, which authorizes the sale of defense articles or defense services to U.S. companies at not less than their estimated replacement cost (or actual cost in the case of services).

The SCO chief and other relevant members of the country team normally meet with visiting U.S. defense industry representatives regarding their experiences in country. The SCO chief responds to follow-up inquiries from industry representatives with respect to any reactions from host country officials or subsequent marketing efforts by foreign competitors. The SCO chief alerts embassy staff to observe reactions of the host country officials on U.S. defense industry marketing efforts. As appropriate, the SCO chief can pass these reactions to the U.S. industry representatives. However, the SCO may not work on behalf of any specific U.S. firm; its only preference can be for purchasers to “buy American.” If the SCO chief believes that a firm’s marketing efforts do not coincide with overall U.S. defense interests or have potential for damaging U.S. credibility and relations with the country, the SCO chief relays these concerns, along with a request for guidance, throughout the country team and to the Combatant Command, Military Department, and DSCA.⁷¹

Excess Defense Articles

If a partner is unable to purchase, or wishes to avoid purchasing, a newly-manufactured U.S. defense article, it may request transfer of Excess Defense Articles from DOD to its designated recipient.⁷² EDA refers to DOD and United States Coast Guard (USCG)-owned defense articles that are no longer needed and, as a result, have been declared excess by the U.S. Armed Forces. This excess equipment is offered at reduced or no cost to eligible foreign recipients on an “as is, where is” basis.⁷³ As such, EDA is a hybrid between sales and grant transfer programs. DOD

⁶⁹ DOD, SAMM, C.4.3.6.1-3, at <https://samm.dsca.mil/chapter/chapter-4#C4.1>. <https://samm.dsca.mil/chapter/chapter-4#C4.1>.

⁷⁰ DOD, SAMM, C4.3.13, at <https://samm.dsca.mil/chapter/chapter-4#C4.1>. <https://samm.dsca.mil/chapter/chapter-4#C4.1>.

⁷¹ DOD, SAMM, C2.1.8., at <https://samm.dsca.mil/chapter/chapter-2#C2.1>. <https://samm.dsca.mil/chapter/chapter-2#C2.1>.

⁷² 22 U.S.C. §2761, 22 U.S.C. §2321j, and 22 U.S.C. §2314 authorize sales and grants from DOD stocks. DSCA maintains a database of EDA at <https://www.dsca.mil/programs/excess-defense-articles-eda>, which is accessible to foreign partners interested in requesting items from SCOs.

⁷³ DOD, SAMM, C11.3.1., at <https://samm.dsca.mil/chapter/chapter-11#C11.3>. In practice, this means the recipient must pay all refurbishment costs and transportation costs. In some cases, recipients may use FMF to open a transportation case that enables them to receive the EDA. The cost of refurbishment is often a deterrent to seeking EDA transfer.

states that the EDA program works best in assisting friends and allies to augment current inventories of like items with a support structure already in place.⁷⁴ All FMS eligible countries can request EDA. An EDA grant transfer to a country must be justified to Congress for the fiscal year in which the transfer is proposed as part of the annual congressional justification documents for military assistance programs.⁷⁵ There is no guarantee that any EDA offer will be made on a grant basis; each EDA transfer is considered on a case-by-case basis.⁷⁶ EDA grants or sales that contain significant military equipment or with an original acquisition cost of \$7 million or more require a 30-calendar day congressional notification.⁷⁷

Title to EDA items transfers at the point of origin, except for items located in Germany; those EDA items transfer title at the nearest point of debarkation outside of Germany. All purchasers or grant recipients must agree that they will not transfer title or possession of any defense article or related training or other defense services to any other country without prior consent from DOS pursuant to 22 U.S.C. §2753 and 22 U.S.C. §2314.

Interagency Relationships in Arms Sales

The decision-making and execution involved in a transfer of defense articles or services includes myriad stakeholders, from the President and Congress to small, two-person Security Cooperation Organizations in embassies around the world. Having granted to the President authority to carry out arms sales and exports, Congress oversees its conduct. In further delegation of authority, the Secretaries of State and Defense, through their departments, carry out functions outlined in statute, federal regulations, and executive orders.

State Department Policy Prerogatives

All security assistance programs are subject to the continuous supervision and general direction of the Secretary of State, to be consistent with U.S. foreign policy interests. DOS ensures partner and purchaser eligibility for arms transfer(s) and obtains required assurances from recipient countries and organizations.⁷⁸ The State Department also reviews and approves export license requests for direct commercial sales of items on the United States Munitions List. As mentioned above, DOS submits to Congress, in its Congressional Budget Justification, an annual estimate of the total amount of transfers expected to be made to each foreign nation and an annual arms sale proposal report (Javits Report) required by law.⁷⁹

Within the State Department, the Bureau of Political-Military Affairs (PM) is the main administrator for arms transfers, whether FMS or DCS. PM provides policy direction for sale and export of defense articles related to international security, security assistance, military operations, defense strategy and plans, and defense trade.⁸⁰

⁷⁴ Ibid.

⁷⁵ DOD, SAMM, C11.3.2.2, at <https://samm.dsca.mil//chapter//chapter-11#C11.3>. See also 22 U.S.C. §2321j.

⁷⁶ DOD, SAMM, C11.3.2.2., at <https://samm.dsca.mil//chapter//chapter-11#C11.3>.

⁷⁷ 22 USC §2321j(f)(1).

⁷⁸ 22 U.S.C. 2311; 22 U.S.C. 2314(a).

⁷⁹ 22 U.S.C. §2765(a)(2).

⁸⁰ <https://www.state.gov/bureaus-offices/under-secretary-for-arms-control-and-international-security-affairs/bureau-of-political-military-affairs/>.

Under PM, the Office of Regional Security and Arms Transfers (RSAT) manages the sale/transfer of U.S.-origin defense articles and services to foreign governments.⁸¹ PM/RSAT, which is responsible for ensuring that all FMS cases are properly reviewed within the State Department for consistency with U.S. foreign policy and national security objectives, receives all FMS cases from DSCA, DOD's FMS implementing agency. PM/RSAT officers coordinate with other department bureaus and offices and provide recommendations to PM leadership on whether to approve potential FMS sales. Finally, PM/RSAT officers work with PM leadership and DOD to make the required notifications, to include briefing congressional staff on the Javits Report.⁸²

Each U.S. embassy country team, under the direction of the State Department and led by the Chief of Mission (usually the U.S. Ambassador), prepares an Integrated Country Strategy (ICS) detailing mission plans for engagements with the host country, including defense education, training, arms transfers, and other cooperation. Within the country team, the senior defense official (SDO) directs the preparation of the defense cooperation portion of ICS. The embassy's SCO (see footnote 41), normally called the Chief of the Office of Defense Cooperation (ODC Chief), annually forecasts and documents the budget for defense cooperation activities, based upon his or her own contacts with the host nation military and those of the SDO and other military stationed in-country. Both the SDO and ODC Chief work under the direct supervision of the Chief of Mission but report to, and are evaluated by, the geographic combatant command (COCOM) in the operational area where the host nation lies. They manage the delicate task of balancing the COCOM's view of necessary security cooperation and capacity-building activities with relevant State Department officials' views. The SDO and ODC Chief may submit their recommendations directly to both the Head of Mission and to the COCOM. Where there is a large ODC, with subordinate service representative offices, the service representatives may submit service-specific forecasts and budgets to their service and its implementing agency as well. The COCOM views may or may not be reflected in the mission's ICS submission, as the Head of Mission ultimately decides what the mission will forward.

Many countries that receive U.S.-made defense articles and services have organizations similar to an ODC in their embassies or consulates in the United States. They interact with both State Department and DOD officials, as well as U.S. defense contractors, to initiate and coordinate pre-LOR (for FMS) or pre-DCS actions.

DOD Policy and Implementation Role

Notwithstanding the primary role of the State Department, DOD plays a central role in shaping arms sales policy and implementing arms transfers (as noted in sections above outlining the processes for FMS and DCS). DOD Directive 5132.03 promulgates DOD Policy and Responsibilities Relating to Security Cooperation, based on the National Defense Strategy and the National Military Strategy.⁸³

Within DOD security cooperation, the Theater Campaign Plan (TCP) balances U.S. government strategic imperatives with host nation military-to-military engagement. Each country section of the TCP identifies significant security cooperation initiatives planned for the country and articulates specific, measurable, attainable, relevant, and time-bound objectives in support of such

⁸¹ <https://www.state.gov/bureaus-offices/under-secretary-for-arms-control-and-international-security-affairs/bureau-of-political-military-affairs/office-of-regional-security-and-arms-transfers/>.

⁸² <https://2009-2017.state.gov/t/pm/rsat/c14021.htm>.

⁸³ In effect, DOD's system is a bottom-up defense and security cooperation planning method, starting with the recommendations from the SDO and ODC Chief.

initiatives.⁸⁴ The regional COCOM's corresponding, subordinate country cooperation plans drive the specific transfers of defense articles and services, including major arms transfers and training events. The objectives set within these strategies take into account the host nation's security environment, political will, willingness and ability to protect sensitive information and technologies, and absorptive capacity, as well as policy and legal constraints.⁸⁵

The COCOM then passes its recommendations for FMS and EDA arms transfers to the Chairman of the Joint Chiefs of Staff (CJCS) and to the Under Secretary of Defense for Policy (USD (P)) for inclusion in the integrated country strategy and the joint regional strategy; they also identify obstacles to execution of plans, including shortfalls in security cooperation authorities or resources, joint capability shortfalls, or shortfalls in partners' capabilities.⁸⁶ The CJCS is generally charged with providing military advice to the Secretary of Defense concerning security cooperation.⁸⁷ The CJCS and the USD(P) are charged with developing and managing a process to address obstacles to campaign plan execution that the COCOMs identify.⁸⁸

The office of the USD(P) is generally charged with representing DOD in security assistance and security cooperation matters, setting DOD's security cooperation priorities, and harmonizing these within a whole-of-government approach to engagements with allied and partner nations.⁸⁹ The one assistant charged purely with leading security cooperation is the Director of the Defense Security Cooperation Agency. Selected tasks of this officer, normally a 3-star general or flag officer, working directly for the USD (P), include

- providing guidance to the DOD Components and DOD representatives to U.S. missions (i.e. senior defense officials) for the execution of DOD security cooperation programs;
- managing and administering those Title 10 and 22 programs for which DSCA has responsibility, consistent with security cooperation priorities; and
- coordinating the development of foreign disclosure and sales policies and procedures for defense information, technology, and systems (with the USD(P) and USD (Sustainment)).

In sum, DOD generally implement security cooperation programs on behalf of the Department of State, as part of broader foreign policy and national security strategies. Based on its authority under Title 22, the State Department must arbitrate among a large number stakeholders (e.g., partner nations, embassy country teams, COCOMs, Joint Staff and Office of the Secretary of Defense) and interests (e.g., economic gain for U.S. firms, technology security, long-term national security of the United States and its partners).

⁸⁴ DOD Directive 5132.03, p.14, 3.1, 3.2, and 3.3.

⁸⁵ DOD Directive 5132.03, p.14, 3.3.b.

⁸⁶ DOD Directive 5132.03, p. 12, 2.14.i.

⁸⁷ DOD Directive 5132.03, p. 11, 2.13.a.

⁸⁸ DOD Directive 5132.03, p. 11, 2.13.f.

⁸⁹ DOD Directive 5132.03, p. 5, 2.1. USD(P) or a delegate, in coordination with the USD(AT&L) or a delegate, co-chairs the Arms Transfer and Technology Release Senior Steering Group, in accordance with DoDD 5111.21 and directs the operation of the National Disclosure Policy Committee, in accordance with DoDD 5230.11.

End-Use Monitoring (EUM)

The Arms Export Control Act (AECA) directs the President to establish a program that provides for the end-use monitoring for all defense articles and defense services sold, leased, or exported under the act.⁹⁰ The program is required to provide reasonable assurance that the recipient is complying with the requirements imposed by the U.S. government with respect to use, transfers, and security of the articles and services, as well as that such articles and services are being used for the purposes for which they were provided.⁹¹ The executive branch has two formal EUM programs: Blue Lantern is for Direct Commercial Sales, while Golden Sentry is for Foreign Military Sales. If exported defense articles require specialized physical security and accounting, the Golden Sentry program conducts specialized Enhanced EUM.

State Department's Blue Lantern Program (DCS)

The State Department's Directorate for Defense Trade Controls administers the Blue Lantern program for articles and services on the USML exported via DCS. According to DOS, it includes pre-license, post-license, and post-shipment checks to verify the bona fides of foreign country consignees and end users, as well as verifying the legitimacy of proposed transactions and the compliance with U.S. defense export rules and policies. Typically conducted by U.S. embassy and consular staff, verifications occur in over 100 countries every year. If the Blue Lantern check determines an unfavorable use, it may result in the denial or revocation of the export license, the violator's entry on DDTC's watch list, or referral to Homeland Security Investigations or the FBI.⁹² In FY2018, with 35,779 authorized DCS export license applications, DOS initiated 466 Blue Lantern checks (268 pre-license, 89 post-shipment, and 109 containing both pre-license and post-shipment checks) in over 70 countries. In the same year, DOS closed 585 Blue Lantern cases, with 168 labeled "unfavorable."⁹³

DOD's Golden Sentry Program (FMS)

The Defense Security Cooperation Agency administers DOD's Golden Sentry program, which is the FMS counterpart of State's Blue Lantern program. Golden Sentry's objective is to ensure compliance with technology control requirements and to provide reasonable assurance that the recipients are complying with U.S. government requirements with respect to the use, transfer, and security of defense articles and services. The program includes actions to prevent misuse or unauthorized transfer of the articles or services from title transfer until disposal, with the type of article or service generally determining the level of monitoring required.⁹⁴

In routine EUM, DOD's Security Cooperation Organizations (SCOs) are required to observe and report any potential misuse or unapproved transfer of FMS articles or services to the regional

⁹⁰ P.L. 90-629, Section 40A (22 U.S.C. §2785).

⁹¹ 22 U.S.C. §2795.

⁹² Testimony of Acting Assistant Secretary of State for Political-Military Affairs Tina S. Kaidanow in U.S. Congress, House Subcommittee of Terrorism, Nonproliferation, and Trade, Committee on Foreign Affairs, *Foreign Military Sales: Process and Policy*, June 15, 2017, <https://docs.house.gov/meetings/FA/FA18/20170615/106129/HHRG-115-FA18-Transcript-20170615.pdf>.

⁹³ Department of State, "End-Use Monitoring of Defense Articles and Defense Services Commercial Exports FY 2018," https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=d53a84efdb9177045564ff1e0f961910.

⁹⁴ DOD, SAMM, C8.2, at <https://www.samm.dsca.mil/chapter/chapter-8>.

COCOM, DSCA, and the State Department. They must conduct their checks at least quarterly, and must document their checks in reporting to DSCA. In the case of arms, ammunition, and explosives, SCOs are required to apply the same standards of U.S. control to the items upon release to the purchaser.⁹⁵

Enhanced EUM—Golden Sentry

Some security-sensitive exported or transferred defense articles require specialized physical security and accounting. These items are designated as requiring Enhanced End-Use Monitoring (EEUM) by a military service's export policy, or by interagency agreement, or through DOD policy resulting from consultation with Congress.⁹⁶ The EEUM program is administered through Golden Sentry and requires DOD's SCOs in-country to conduct planned and coordinated visits to host nation installations, where they verify by serial number each EEUM-designated item on an annual basis.⁹⁷

Questions for Congressional Consideration

Do Current Levels of Arms Sales and Exports Fulfill Statutory and Policy Objectives?

Section 1 of the AECA states, “An ultimate goal of the United States continues to be a world which is free from the scourge of war and the dangers and burdens of armaments; in which the use of force has been subordinated to the rule of law; and in which international adjustments to a changing world are achieved peacefully. In furtherance of that goal, it remains the policy of the United States to encourage regional arms control and disarmament agreements and to discourage arms races.”⁹⁸ The AECA proceeds to acknowledge and allow that arms transfers and cooperation are necessary to “maintain and foster the environment of international peace and security essential to social, economic, and political progress.”⁹⁹ These two paragraphs appear to draw a distinction between the policy aims of arms production and transfer on the one hand and, on the other, the *burden* [emphasis added] thereof as separate from economic endeavor and progress.

Current Administration policy contained in NSPM-10 is to “bolster the security of the United States and our allies and partners,” while preventing proliferation by exercising restraint and continuing to participate in multilateral nonproliferation arrangements such as the Missile Technology Control Regime and the Wassenaar Arrangement. It explicitly commits the U.S. government to continue to meet the requirements of all applicable statutes, including the AECA, the FAA, the International Emergency Economic Powers Act, and the annual NDAs.

It also prioritizes efforts to “increase trade opportunities for United States companies, including by supporting United States industry with appropriate advocacy and trade promotion activities

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Testimony of Acting Assistant Secretary of State for Political-Military Affairs Tina S. Kaidanow in U.S. Congress, House Subcommittee of Terrorism, Nonproliferation, and Trade, Committee on Foreign Affairs, *Foreign Military Sales: Process and Policy*, June 15, 2017, <https://docs.house.gov/meetings/FA/FA18/20170615/106129/HHRG-115-FA18-Transcript-20170615.pdf>.

⁹⁸ 22 U.S.C. §2751.

⁹⁹ Ibid.

and by simplifying the United States regulatory environment.” The document adds “a dynamic defense industrial base” as a named employment source and stipulates “economic security” as a requirement for national security and defense.¹⁰⁰

Congress may consider whether current sales and exports of defense articles and services, at current levels, bolster the security of the U.S. and its allies, while simultaneously fostering U.S. industry and innovation. Overall, should the goals of increasing trade opportunities for U.S. companies be an explicit goal of U.S. arms sales policy?

In light of the potential differences between 10 U.S.C. § 2151 and the current United States Conventional Arms Transfer Policy, Congress may consider

- whether to reformulate the goals of the Arms Export Control Act in light of the contemporary national security situation,
- whether and to what extent economic security comprises a facet of national security including any effect on the defense industrial base (DIB) and the national technical industrial base (NTIB),¹⁰¹ and
- whether to determine the value of U.S. national arms production and export as part of overall U.S. exports and the degree to which desirability of arms production contributes to real long term economic growth.

Are Current Methods of Conducting Sales of Defense Articles and Services Consistent with the Intent and Objectives of the AECA?

In FY2018, foreign entities purchased \$47.71 billion in FMS cases and the value of privately contracted DCS authorizations licensed by the State Department totaled \$136.6 billion (see **Table 1** and **Table 2**, above). Congress may consider if this amount of annual arms sales is consistent with the intent of statute governing these sales. The FAA expresses, as U.S. policy, “the efforts of the United States and other friendly countries to promote peace and security continue to require measures of support based upon the principle of effective self-help and mutual aid.”¹⁰² The AECA states that “all such sales be approved only when they are consistent with the foreign policy of the United States, the purposes of the foreign assistance program..., and the economic and financial capability of the recipient country, with particular regard being given, where appropriate, to proper balance among such sales, grant military assistance, and economic assistance as well as to the impact of the sales on programs of social and economic development and on existing or incipient arms races.”¹⁰³

Section 1 of the AECA further limits U.S. arms sales, as policy, to levels extant when it was enacted:

It is the sense of the Congress that the aggregate value of defense articles and defense services-

¹⁰⁰ The White House, “National Security Presidential Memorandum Regarding U.S. Conventional Arms Transfer Policy,” April 19, 2018, <https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-regarding-u-s-conventional-arms-transfer-policy/>.

¹⁰¹ For more information on the DIB see CRS In Focus IF10548, *Defense Primer: U.S. Defense Industrial Base*, by Heidi M. Peters. For more information on the NTIB see CRS In Focus IF11311, *Defense Primer: The National Technology and Industrial Base*, by Heidi M. Peters.

¹⁰² 22 U.S.C. §2301.

¹⁰³ 22 U.S.C. §2751.

- (1) which are sold under section 2761 or section 2762 of this title; or
 - (2) which are licensed or approved for export under section 2778 of this title to, for the use, or for benefit of the armed forces, police, intelligence, or other internal security forces of a foreign country or international organization under a commercial sales contract;
- in any fiscal year should not exceed current levels.¹⁰⁴

Congress may consider whether and how it measures the relation between the 1976 level of arms sales and any contemporary level.

Are End Use Monitoring Programs Resourced Adequately?

Some critics of current EUM programs point to a potential disparity between the number of defense articles exported and the number of EUM investigations completed. For example, in the State Department's Blue Sentry Program in FY2018, DDTC authorized 35,779 export license applications. DOS initiated 466 Blue Lantern checks (268 pre-license, 89 post-shipment, and 109 containing both pre-license and post-shipment checks) in over 70 countries. This represents approximately 1.3 percent of adjudicated license applications. The State Department employed five full-time employees and six contractors to administer the program.¹⁰⁵ Some analysts have argued that such a small staff could not possibly track everything that happens to billions of dollars' worth of defense articles transferred to dozens of foreign countries each year.¹⁰⁶ Acting Assistant Secretary of State for Political-Military Affairs Tina Kaidanow testified that under current programs, there are a number of steps that the U.S government can take to endure proper end use of exported defense articles. She noted further that most U.S defense manufacturers are responsible for ensuring compliance with the ITAR, with personnel dedicated to ensuring such compliance while working closely with the State Department to address any compliance issues that may arise.¹⁰⁷

¹⁰⁴ 22 U.S.C. §2751.

¹⁰⁵ Department of State, "End-Use Monitoring of Defense Articles and Defense Services Commercial Exports FY 2018," https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=d53a84efdb9177045564ff1e0f961910 .

¹⁰⁶ A. Trevor Thrall and Caroline Dorminey, *Risky Business: The Role of Arms Sales in U.S. Foreign Policy*, Cato Institute, March 13, 2018, <https://www.cato.org/publications/policy-analysis/risky-business-role-arms-sales-us-foreign-policy>.

¹⁰⁷ Kaidanow testimony.

Appendix. Selected Legislative Restrictions on Sales and Export of U.S. Defense Articles

Since the enactment of the Foreign Assistance Act (FAA) in 1961, Congress has amended both the FAA and the AECA, as well as Title 10 U.S.C. (governing DOD) in order to limit the sale and export of U.S. defense articles to certain foreign countries. Additional limitations have been enacted in the annual State/Foreign Operations and Related Programs Appropriations Acts, and through the National Defense Authorization Acts. The following illustrative examples are not intended to be comprehensive.

Restrictions Based on Human Rights Violations¹⁰⁸

- Section 502B(a)(2) of the FAA (22 U.S.C. 2304(a)(2)) prohibits, absent the exercise of a presidential waiver, security assistance to any country where the government engages in a consistent pattern of gross violations of internationally recognized human rights. “Security assistance” is defined here to include “sales of defense articles or services, extensions of credits (including participations in credits), and guaranties of loans” under the AECA.¹⁰⁹
- The U.S. “Leahy Laws,” Section 620M of the FAA and 10 U.S.C. § 362, prohibit U.S. security assistance to foreign security force units when credible evidence exists that the unit has committed a gross violation of human rights. However, these laws do not define security assistance, and in practice the executive branch applies them only to U.S.-funded transactions, excluding FMS or DCS.¹¹⁰
- The Child Soldiers Prevention Act of 2008 (P.L. 110-547, 22 U.S.C §2370c-1), prohibits assistance to and licensing for direct commercial sales of military equipment to the government of a country that is clearly identified as having governmental armed forces, police, or other security forces, or government-supported armed groups, that recruit or use child soldiers.
- The Victims of Trafficking and Violence Protection Act of 2000, P.L. 106-386, amended Section 502B of the FAA to require that the President report to the Congress on countries found to be involved in extreme forms of trafficking of persons. The act prohibits nonhumanitarian and nontrade-related aid, including security assistance, to countries that do not comply with minimum standards for eliminating trafficking in persons, subject to presidential waiver.

Restrictions on Countries Supporting Terrorism

- Section 40 of the AECA (22 U.S.C. §2780) prohibits exporting or otherwise providing, directly or indirectly, any munitions item to a country whose government has repeatedly provided support for acts of international terrorism. Section 40A (22 U.S.C. §2781) prohibits any defense article or defense service from being sold or licensed for export to any county the President determines is not cooperating fully with United States antiterrorism efforts. The prohibitions contained in this section do not apply with respect to any transaction subject to

¹⁰⁸ See CRS In Focus IF11197, *U.S. Arms Sales and Human Rights: Legislative Basis and Frequently Asked Questions*, by Paul K. Kerr and Liana W. Rosen.

¹⁰⁹ Section 502B(d)(2) of the FAA (22 U.S.C. 2304(d)(2)); *Ibid.*

¹¹⁰ *Ibid.*

reporting requirements under title V of the National Security Act of 1947, 50 U.S.C. §3091 et seq.

Restrictions on the Process of Foreign Military Sales

- Section 830 of the FY2017 National Defense Authorization Act, P.L. 114-328, required the Secretary of Defense to prescribe regulations to require the use of firm fixed-price contracts for Foreign Military Sales.

Restrictions and Limitations on Specific Countries and Regions

- **Libya:** Section 404 of the International Security and Cooperation Act of 1985, P.L. 99-83, which amended the FAA (22 U.S.C. §2439aa-8), authorized the President to prohibit any goods or technology, including technical data or other information, from being exported to Libya.
- **Middle East Countries, Excluding Israel:** Section 36(h)(1) of the AECA, P.L. 90-629, 22 U.S.C §2776(h)(1), requires any certification relating to a proposed sale to Middle East countries, excluding Israel, to include a determination that the sale or export of the defense articles or defense services will not adversely affect Israel’s qualitative military edge over military threats to Israel.
- **West Bank and Gaza:** Section 699 of the FY2003 Foreign Relations Authorization Act, P.L. 107-228, prohibits the sale of defense articles or defense services to any person or entity whom “the President determines, based on a preponderance of the evidence, ... has knowingly transferred proscribed weapons to Palestinian entities in the West Bank or Gaza,” for two years after congressional notification.
- **Iraq:** The FY2008 NDAA, Section 1228, P.L. 110-181, required the President to implement a policy to control the export and transfer of defense articles into Iraq, with no defense articles to be provided to the Government of Iraq until the President certified to Congress that a registration and monitoring system was in place.
- **Arab League Boycott of Israel:** Section 564 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, P.L. 103-236, stated, “No defense article or defense service may be sold or leased by the United States Government to any country or international organization that, as a matter of policy or practice, is known to have sent letters to United States firms requesting compliance with, or soliciting information regarding compliance with, the Arab League secondary or tertiary boycott of Israel...”
- **Saudi Arabia and Kuwait:** Section 104 of the Dire Emergency Supplemental Appropriations and Transfers for Relief from the Effects of Natural Disasters, for Other Urgent Needs, and for Incremental Costs of “Operation Desert Shield/Desert Storm” Act of 1992, P.L. 102-229, prohibited any funds appropriated in the act to conduct, support, or administer any sale of defense articles or defense services to Saudi Arabia or Kuwait until that country paid in full their commitments to the United States made during Operation Desert Shield/Storm.

Restrictions on Defense Articles Related to Nuclear, Biological, and Chemical Weapons

The AECA has a series of provisions limiting the export of defense items related to nuclear, biological, and chemical weapons (22 U.S.C. §2799aa). Those controls are explained in detail in CRS Report R41916, *The U.S. Export Control System and the Export Control Reform Initiative*, by Ian F. Fergusson and Paul K. Kerr.

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