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Modifying or Ending Sales of U.S.-Origin Defense Articles

The U.S. government has in law a number of mechanisms by which it can alter or end the sales of U.S.-origin defense articles when foreign countries misuse such items.

Arms Export Control Act and Foreign Assistance Act of 1961

The Arms Export Control Act (AECA; P.L. 90-629, as amended; 22 U.S.C. 2751 et seq.) and the Foreign Assistance Act of 1961 (FAA; P.L. 87-195, as amended; 22 U.S.C. 2151 et seq.) establish the statutory foundations governing Foreign Military Sales (FMS) and Direct Commercial Sales (DCS) to foreign consumers, including foreign governments. FMS refers to the sale of U.S.-origin defense articles, equipment, services, and training (hereinafter referred to as “defense articles”) on a government-to-government basis. DCS refers to the sale of U.S. government-licensed defense articles and services directly from U.S. firms to eligible foreign governments and international organizations.

These laws require that such sales be for specific authorized military purposes and establish eligibility prerequisites for potential foreign customers. Prospective recipients of FMS must agree to refrain from transferring title or possession of the articles to unauthorized persons, as well as from diverting articles for unauthorized purposes or end-use. Recipients must also agree to maintain security of U.S.-origin defense articles (Section 3(a), AECA (22 U.S.C. 2753(a)). The International Traffic in Arms Regulations (ITAR; 22 CFR Parts 120-130) contain comparable provisions for DCS transfers.

The Department of State’s Office of Regional Security and Arms Transfers, in the Bureau of Political-Military Affairs, administers FMS transactions. The department’s Directorate of Defense Trade Controls, also in the Political-Military Affairs Bureau, administers licenses for commercial sales. The ITAR implements the AECA and state licensing policy for the export of defense articles.

The AECA and FAA also prohibit the sale or delivery of U.S.-origin defense articles if either the President (by determining such and reporting to Congress) or Congress (by passing a joint resolution) finds that a recipient country has used such articles “for a purpose not authorized” by Section 4, AECA (22 U.S.C. 2754), Section 502, FAA (22 U.S.C. 2302), or in substantial violation of other limitations contained in an agreement with the United States governing the articles’ provision (Section 3(c)(1)(B), AECA (22 U.S.C. 2753(c)(1)(B)), and Section 505(d), FAA (22 U.S.C. 2314(d)). Section 4, AECA, and Section 502, FAA, state that defense articles may be sold only for certain purposes, including internal security, legitimate self-defense, impeding weapons of mass destruction proliferation, and

participation in collective measures requested by the United Nations or comparable organizations.

Section 614, FAA (22 U.S.C. 2364), permits the President to engage in FMS transactions up to a value of \$750 million in any fiscal year without regard to any AECA provisions, “any Act authorizing or appropriating funds for use under” the AECA, or “any law relating to receipts and credits accruing to the United States.” Such transactions must be “in furtherance of any” AECA purpose; the President must also determine that engaging in a particular such transaction “is vital to the national security interests of the United States.” This section, which does not apply to export licenses for DCS, requires the President to notify and consult with Congress if and when the President chooses to exercise this authority.

Other Defense Article Transfer Mechanisms

The U.S. government transfers U.S.-origin defense articles via other mechanisms. Section 516, FAA (22 U.S.C. 2321j), for example, authorizes the President to transfer excess defense articles to foreign governments. Executive Order (E.O.) 12163 (September 29, 1979, 22 U.S.C. 2381 note) delegates this function to the Secretary of State. In addition, the U.S. government transfers U.S.-origin defense articles pursuant to Defense Department-led programs that build foreign partner government capacity. The U.S. government may also transfer such articles as part of a covert action.

End-Use Monitoring

U.S.-origin defense articles are subject to end-use monitoring (EUM) for the purpose of verifying that recipients use such articles only for permitted purposes (see Sections 38(g)(7) and 40A(a), AECA (22 U.S.C. 2778(g)(7) and 2785(a)). EUM also applies to defense articles retransferred to other parties. The standard terms and conditions of a Letter of Offer and Acceptance (LOA), which itemizes the defense articles offered by the U.S. government for a particular FMS transfer, contain the AECA-mandated restrictions described above, as well as provisions permitting EUM; Section 3(g), AECA, requires this language. According to State Department guidance, an export license application must include written confirmation from the proposed recipient “regarding the specific end-user and end use.” Export licenses for U.S.-origin defense articles specify that licensed transactions may be subject to EUM.

Terminating or Prohibiting Transfers

The United States does not have the legal authority to compel the return of items exported via either the FMS or DCS processes. Both the executive branch and Congress

have options for terminating planned or ongoing sales, as well as prohibiting future FMS and DCS transfers.

Executive Branch Options

As noted, Section 3(c)(1)(B), AECA (22 U.S.C. 2753(c)(1)(B)) prohibits the sale or delivery of U.S.-origin defense articles if the President finds that a recipient country has used such articles for unauthorized purposes. Sections 3(c)(3) and 3(c)(4), AECA (22 U.S.C. 2753(c)(3) and (c)(4)) stipulate that such countries would, absent a presidential waiver, be ineligible for future U.S. arms sales until the President determines the violation has ceased and recipients assure violations will not recur. E.O. 13637, “Administration of Reformed Export Controls,” (March 8, 2013, 22 U.S.C. 2751 note) delegates this AECA function to the Secretary of State. The law does not provide for such a waiver if Congress has adopted a joint resolution, which would be subject to presidential veto.

The executive branch also has wide-ranging authority to cancel an FMS transaction prior to the articles’ delivery. The standard LOA terms and conditions permit the U.S. government, under “unusual and compelling circumstances, when the national interest of the U.S. requires,” to “cancel or suspend all or part” of such a letter “at any time prior to the delivery of defense articles.” This provision applies even if the United States has delivered some of the LOA-covered items.

The U.S. government similarly has extensive authority to cancel or modify export licenses for U.S.-origin defense articles. Section 126.7 of the ITAR states that such licenses “may be revoked, suspended, or amended without prior notice whenever” the State Department “believes that” the recipient has violated “the terms of any U.S. Government export authorization.” The department may also take these actions if it deems them to be “in furtherance of world peace, the national security or the foreign policy of the United States, or is otherwise advisable.” The preceding reasons are also grounds for the department to deny export license applications.

Congressional Options

As noted, Section 3(c)(1)(B), AECA (22 U.S.C. 2753(c)(1)(B)) prohibits the sale or delivery of U.S.-origin defense articles if a joint resolution of Congress finds that a recipient country has used such articles for unauthorized purposes. If found to be in violation by joint resolution of Congress, Sections 3(c)(3) and 3(c)(4), AECA (22 U.S.C. 2753(c)(3)) stipulate that such countries would be ineligible for future U.S. arms sales until the President determines the violation has ceased and recipients assure violations will not recur.

Congress may prohibit certain FMS and DCS transfers by adopting a joint resolution of disapproval within a time period prescribed by Section 36, AECA (22 U.S.C. 2776). Congress can also prohibit or modify a proposed sale of defense articles via the regular legislative process. (For details, CRS Report RL31675, *Arms Sales: Congressional Review Process*, by Paul K. Kerr).

Selected AECA- and FAA-Mandated Notifications and Reports

The AECA requires the President to notify Congress about violations of the requirements described above. Section 3(e), AECA (22 U.S.C. 2753(e)), requires the President to notify the relevant House and Senate committees “immediately” upon receiving “any information” that a recipient has transferred a defense article to an unauthorized destination; E.O. 13637 delegated this function to the Secretary of State. In addition, the President, pursuant to Section 3(c)(1)(B)(2), AECA (22 U.S.C. 2753(c)(1)(B)(2)), must notify Congress “promptly” after receiving information that a recipient has used U.S.-origin defense articles for unauthorized purposes described in Section 3(c)(1)(B), AECA, discussed above. Section 505(d)(2)(B), FAA (22 U.S.C. 2314(d)(2)(B)) contains a similar requirement.

Section 3(c)(3)(A), AECA (22 U.S.C. 2753(c)(3)(A)), requires the President to notify Congress if a foreign entity has misused U.S.-origin defense articles (see above discussion concerning Section 3(c)(1)(B), AECA). Section 505(d)(2)(A), FAA (22 U.S.C. 2314(d)(2)(A)), contains a similar requirement. Section 40A(c), AECA (22 U.S.C. 2785(c)), requires the President to submit an annual report to Congress “describing the actions taken to implement” the EUM provisions under Section 40A(a), AECA, described above. E.O. 13637 delegated this function to the Secretaries of Defense and State for monitoring concerning FMS and DCS, respectively.

Congressional Requests for Additional Information

The FAA provides a mechanism for Congress to request information about any findings and determinations that the President is required to report to Congress under AECA and FAA. Section 654(d), FAA (22 U.S.C. 2414(d)) says no “committee or officer of either” the Senate or House of Representatives “shall be denied any requested information relating to” such findings or determinations, regardless of whether the President has already provided them.

Other Statutory Limitations

The AECA, FAA, and other U.S. laws state prohibitions and limitations on FMS and DCS transactions for a range of foreign policy reasons. For example, such restrictions can be applied to foreign governments that engage in a consistent pattern of gross violations of internationally recognized human rights. Governments that engage in certain other activities, such as providing support for terrorism; failing to adhere to international drug control commitments; recruiting and/or using child soldiers; developing or obtaining certain nuclear weapons capabilities; discriminating against or harassing people in the United States; or discriminating against a U.S. person on the basis of race, religion, national origin, or sex, may be subject to restrictions on arms trade under AECA, FAA, and other statutes. Certain U.S. country-specific limitations on arms sales also exist.

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