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

Updated March 23, 2023

**Congressional Research Service**

<https://crsreports.congress.gov>

R46337



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

An extensive set of laws, regulations, policies, and procedures govern the sale and export of U.S.-origin weapons to foreign countries (“defense articles and defense services,” officially). 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 provided with U.S.-appropriated funds through security assistance/security cooperation programs. These transfers can occur under 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 under these authorities 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 international partners’ acquisition of defense articles and defense services, which allows partners to benefit from U.S. DOD technical and operational expertise, procurement infrastructure, and purchasing practices.
- For DCS, registered U.S. firms may sell defense articles directly to international partners. The U.S. government is not party to the arms agreement, but defense firms must still apply for an export license from the State Department. 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.

The State Department maintains responsibility for notifying Congress of proposed FMS cases and DCS export licenses, as required by the AECA.

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 116<sup>th</sup> 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.

R46337

March 23, 2023

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## Introduction

The sale of U.S.-origin armaments and other “defense articles<sup>1</sup>” to international partners has been a part of U.S. national security policy since at least the Lend-Lease programs in the lead-up to U.S. involvement in World War II.<sup>2</sup> Historically, Presidents have used sales of defense articles and services to international partners to further broad foreign policy goals, ranging from sales to countries that the U.S. government deemed to be strategically important during the Cold War, to sales intended to help build 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.<sup>3</sup> These laws specify the roles of both the Department of State (DOS) and the Department of Defense (DOD) 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.<sup>4</sup> Among other provisions, the FAA established broad policy guidelines for the overall transfer of defense articles and services from the United States to international partners 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 eligible international partners.<sup>5</sup> In DCS, the U.S. government does not act as a broker

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<sup>1</sup> “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.

<sup>2</sup> International partners refers broadly to U.S. allied and partner foreign governments as well as international organizations, such as NATO.

<sup>3</sup> See CRS Report R44602, *DOD Security Cooperation: An Overview of Authorities and Issues*, by Bolko J. Skorupski and Nina M. Serafino.

<sup>4</sup> The AECA superseded the Foreign Military Sales Act of 1968, P.L. 90-629.

<sup>5</sup> For information on criteria for FMS eligibility, see Defense Security Cooperation Agency (DSCA), Security

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 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.<sup>6</sup>

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.

Since the enactment of the FAA in 1961, Congress has amended both the FAA and the AECA, as well as Title 10 U.S.C. in order to limit the sale and export of U.S. defense articles to certain international partners. Congress has successfully included provisions in annual authorization and appropriations bills that have directed executive action regarding the sale and transfer of U.S.-origin defense articles. For example, through such provisions Congress has required the executive to prioritize certain regions or countries when making decisions about arms sales, sought to restrict sales based on human rights or other considerations, mandated additional reporting requirements on arms sales, and determined the amount of Foreign Military Financing intended to be made available to certain countries for purchasing U.S. arms (see the **Appendix** for examples of legislation aimed to increase or preserve congressional oversight of the U.S. arms sales process).

## **Sales and Security Assistance/Cooperation Programs**

In FY2022, the latest year for which complete agency data is available, the value of authorized U.S. arms sales to foreign governments and export licenses issued totaled about \$197 billion. Foreign entities purchased \$43.07 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 \$153.7 billion (**Table 1** and **Table 2**).<sup>7</sup>

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Assistance Management Manual (SAMM), C4.1. - Who May Purchase Using the FMS Program.

<sup>6</sup> Manufacturers must register, even if they are not currently exporting defense items.

<sup>7</sup> Defense Security Cooperation Agency, “FY22 Security Cooperation Figures Announcement,” January 25, 2023; “Fiscal Year 2021 Security Cooperation Figures,” December 22, 2021; “FY2020 Security Cooperation Numbers,” December 4, 2020; “Fiscal Year 2019 Arms Sales Total of \$55.4 Billion Shows Continued Strong Sales,” October 15, 2019; “Fiscal Year 2018 Sales Total \$55.56 Billion,” October 9, 2018. State Department, “Fiscal Year 2022 U.S. Arms Transfers and Defense Trade,” January 25, 2023; “Fiscal Year 2021 U.S. Arms Transfers and Defense Trade,” December 22, 2021; “U.S. Arms Transfers Increased by 2.8 Percent in FY 2020 to \$175.08 Billion,” January 20, 2021; “U.S. Arms Transfers Rise 13 Percent in 2018, Highlighting Administration’s Success Strengthening Security Partners While Growing American Jobs,” May 21, 2019. See also, Defense Department, “DOS and DOD Officials Brief Reporters on Fiscal 2020 Arms Transfer Figures,” December 4, 2020.

**Table 1. Foreign Military Sales (FMS) Totals, FY2018 to FY2022**

Fiscal Year	Partner-Nation Funded	U.S.-Funded Title 22 Authorizations	U.S.-Funded Title 10 Authorizations	Total
<b>FY2022</b>	\$43.07 billion	\$6.65 billion	\$2.21 billion	\$51.92 billion
<b>FY2021</b>	\$28.67 billion	\$3.80 billion	\$2.34 billion	\$34.81 billion
<b>FY2020</b>	\$44.79 billion	\$3.30 billion	\$2.69 billion	\$50.78 billion
<b>FY2019</b>	\$48.25 billion	\$3.67 billion	\$3.47 billion	\$55.4 billion
<b>FY2018</b>	\$47.71 billion	\$3.52 billion	\$4.42 billion	\$55.66 billion

**Source:** Defense Security Cooperation Agency; “FY22 Security Cooperation Figures Announcement,” January 25, 2023; “Fiscal Year 2021 Security Cooperation Figures,” December 22, 2021; “FY2020 Security Cooperation Numbers,” December 4, 2020; “Fiscal Year 2019 Arms Sales Total of \$55.4 Billion Shows Continued Strong Sales,” October 15, 2019; “Fiscal Year 2018 Sales Total \$55.56 Billion,” October 9, 2018.

**Table 2. Value of Direct Commercial Sales (DCS) Licenses Issued, FY2018 to FY2022**

Fiscal Year	Value of DCS Licenses
<b>FY2022</b>	\$153.7 billion
<b>FY2021</b>	\$103.4 billion
<b>FY2020</b>	\$124.3 billion
<b>FY2019</b>	\$114.7 billion
<b>FY2018</b>	\$136.6 billion

**Source:** U.S. State Department; “Fiscal Year 2022 U.S. Arms Transfers and Defense Trade,” January 25, 2023; “Fiscal Year 2021 U.S. Arms Transfers and Defense Trade,” December 22, 2021; “U.S. Arms Transfers Increased by 2.8 Percent in FY 2020 to \$175.08 Billion,” January 20, 2021; “U.S. Arms Transfers Rise 13 Percent in 2018, Highlighting Administration’s Success Strengthening Security Partners While Growing American Jobs,” May 21, 2019.

## 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 relatively 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).<sup>8</sup>

Major Title 10 grant-based security cooperation authorities are

- §333: Authority to Build the Capacity of Foreign Security Forces,
- §331: Support to Conduct of Operations,
- §321: Training with Friendly Foreign Countries.<sup>9</sup>

DOD, primarily 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 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 international partners 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 international partners 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.<sup>10</sup>

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

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<sup>8</sup> “Major” authorities are those with their own budget line in the Department of State, *FY2023 Congressional Budget Justification—Department of State, Foreign Operations, and Related Programs*, accessed June 8, 2022. 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.

<sup>9</sup> “Major” authorities are those with their own budget line in the Office of the Secretary of Defense Security Cooperation Budget, *Fiscal Year (FY) 2023 President’s Budget: Justification for Security Cooperation Program and Activity Funding*, April 2022, accessed June 6, 2022. Since FY2021, the Defense Security Cooperation Agency has used the International Security Cooperation Programs (ISCP) Account to fund activities under 10 U.S.C. §332, §333, and P.L. 114-92 Section 1263 (Indo-Pacific Maritime Security Initiative).

<sup>10</sup> 22 U.S.C. §2301.

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.<sup>11</sup>

The FAA also establishes the U.S. policy for how international partners 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.<sup>12</sup>

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 the purchaser as a broker to procure defense articles for sales to certain foreign countries and organizations, also called *eligible purchasers*. Under this provision, the U.S. government may procure defense articles and services for sale to an international partner if the partner indicates a firm commitment, also referred to as a “dependable undertaking,” to pay the full amount of a contract.<sup>13</sup>

#### **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.”<sup>14</sup>

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 (ITAR), 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 (USML). All

<sup>11</sup> 22 U.S.C. §2751.

<sup>12</sup> 22 U.S.C. §2302.

<sup>13</sup> 22 U.S.C. §2762(a). See also, Defense Security Cooperation Agency (DSCA), Security Assistance Management Manual (SAMM), C9.8.3. Dependable Undertaking Status.

<sup>14</sup> P.L. 96-8, §3, 22 U.S.C. §3302 (a) and (b).

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.<sup>15</sup> 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.

**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.<sup>16</sup> While primarily applicable to grant-based security cooperation programs, the section with some relevance to arms transfers 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) Air domain awareness operations.
- (8) Operations or activities that contribute to an existing international coalition operation that is determined by the Secretary to be in the national interest of the United States.
- (9) Cyberspace security and defensive cyberspace operations."<sup>17</sup>

International partner countries may participate in Title 10 Building Partner Capacity programs, such as 10 U.S.C. §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.

## **The Conventional Arms Transfer (CAT) Policy**

Some U.S. Presidents have issued a Conventional Arms Transfer (CAT) Policy, which provides the executive with a framework for reviewing proposed arms transfers.<sup>18</sup> Six U.S. Presidents have issued CAT policies, beginning with President Jimmy Carter in 1977.<sup>19</sup> The current CAT Policy, National Security Memorandum (NSM)-18, was issued by the Biden Administration in February 2023.<sup>20</sup>

According to the Biden Administration, NSM-18 reflects the Administration's foreign policy priorities of prevailing in an era of complex strategic competition by leading with diplomacy,

<sup>15</sup> Manufacturers must register, even if they are not currently exporting defense items.

<sup>16</sup> CRS In Focus IF11677, *Defense Primer: DOD "Title 10" Security Cooperation*, by Christina L. Arabia.

<sup>17</sup> 10 U.S.C. §333.

<sup>18</sup> Government Accountability Office, *Conventional Arms Transfer Policy: Agency Processes for Reviewing Direct Commercial Sales and Foreign Military Sales Align with Policy Criteria*, September 9, 2019.

<sup>19</sup> *Ibid.*

<sup>20</sup> The White House, "Memorandum on United States Conventional Arms Transfer Policy," February 23, 2023.

renewing alliances, elevating human rights, and strengthening and advocating for the U.S. defense industrial base.<sup>21</sup> The policy directs the executive branch to consider potential arms transfers on a case-by-case basis, taking into account specific considerations such as the degree to which the transfer supports U.S. strategic and foreign policy interests, including interoperability with international partners; whether the transfer is consistent with U.S. international commitments and obligations; the potential risks that a transfer could have adverse or destabilizing effects within a partner country, including with regard to human rights and governance; the degree to which an international partner possesses well-governed security institutions and will be able to properly deploy and sustain U.S.-transferred equipment; whether the transfer helps allies and international partners defend themselves from and reduce reliance on strategic competitors; and the transfer's effect and contribution to U.S. defense industrial base innovation and technological advancement.<sup>22</sup> NSM-18 applies to decisions on whether to authorize the transfer of U.S. defense articles, related technical data, and defense services to an international partner, regardless of the authority, program, or U.S. government department or agency under which the transfer would occur.<sup>23</sup>

### **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.<sup>24</sup>

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.

## **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

<sup>21</sup> Department of State, Directorate of Defense Trade Controls News & Events, "U.S. Conventional Arms Transfer Policy," February 23, 2023.

<sup>22</sup> As compared with prior CAT policies, the Biden Administration's policy appears to strengthen restrictions on arms sales that could contribute to serious violations of international humanitarian or human rights law. The policy in part provides that "no arms transfer will be authorized where the United States assesses that it is more likely than not" that the arms will be used in connection with genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, or other serious violations of international humanitarian or human rights law.

<sup>23</sup> The White House, "Memorandum on United States Conventional Arms Transfer Policy," February 23, 2023.

<sup>24</sup> Government Accountability Office, *Joint Strike Fighter: Management of the Technology Transfer Process*, GAO-06-364, March 2006.

called the United States Munitions List (USML). 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 (ITAR)—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.<sup>25</sup>

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 Political-Military Affairs (PM) Bureau of the Department of State, which reports to the Under Secretary of State for International Security and Arms Control.<sup>26</sup> 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.<sup>27</sup>

### **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).”<sup>28</sup>

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 Defense Security Cooperation Agency (DSCA), on behalf of the Secretary of Defense and the Undersecretary of Defense for Policy, is responsible for directing, administering, and implementing many security assistance/security cooperation and arms transfer programs, as well as developing policy, procedures, and DOD-wide guidance on such programs. DSCA issues and regularly updates the Security Assistance Management Manual (SAMM), which includes policy and guidance for the administration and implementation of security assistance and arms transfer programs in compliance with the FAA, AECA, and other related statutes and directives.<sup>29</sup> DSCA

<sup>25</sup> 22 C.F.R. §121.

<sup>26</sup> 22 C.F.R. §120.1.

<sup>27</sup> U.S. Department of State, “Directorate of Defense Trade Controls.”

<sup>28</sup> 22 CFR §126.5, Canadian Exemptions.

<sup>29</sup> Defense Security Cooperation Agency (DSCA), “Security Assistance Management Manual (SAMM),” available at <http://www.samm.dscamilitary.com/>. 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.

regularly posts policy memoranda to denote policy changes that have been incorporated into the SAMM or include additional policy or implementation guidance.<sup>30</sup>

## **Sales and Exports of U.S. Defense Articles in International Agreements<sup>31</sup>**

The United States participates in two international agreements that 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.<sup>32</sup>

### **Missile Technology Control Regime**

The Missile Technology Control Regime is a 35-member voluntary export control regime whose participating governments adhere to common export policy guidelines applied to lists of controlled items. The MTCR guidelines call on each partner country to exercise restraint when considering transfers of equipment or technology, as well as “intangible” transfers, that would provide, or help a recipient country build, a missile capable of delivering a 500 kilogram warhead to a range of 300 kilometers or more.<sup>33</sup> The MTCR annex contains two categories of controlled items. Category I items are the most sensitive. There is “a strong presumption to deny” such transfers, according to the MTCR guidelines. Regime partners have greater flexibility with respect to exports of Category II items. The State Department’s Directorate of Defense Trade Controls (DDTC) administers the U.S. implementation of the MTCR and incorporates the MTCR guidelines and annex into the International Traffic in Arms Regulations (ITAR) and the U.S. Munitions List (USML).<sup>34</sup>

### **The Wassenaar Arrangement**

The 42-member Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies 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.”<sup>35</sup> The participating governments maintain two control lists. The first list contains weapons, including small arms, tanks, aircraft, and unmanned aerial systems. The second list includes dual-use technologies including material processing, electronics, computers, information security, and

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<sup>30</sup> DSCA, “DSCA’s Policy Memoranda,” available at <https://samm.dsca.mil/policy-memoranda-listing/policy-memoranda>.

<sup>31</sup> This section was authored by CRS Specialist in Nonproliferation Paul K. Kerr. 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.

<sup>32</sup> 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.

<sup>33</sup> The Missile Technology Control Regime, *Missile Technology Control Regime (MTCR) Equipment, Software, and Technology Annex*, October 12, 2019.

<sup>34</sup> Department of State, “The International Traffic in Arms Regulations (ITAR).” The AECA mandates inclusion of the MCTR Annex on the USML.

<sup>35</sup> The Wassenaar Arrangement, “About Us,” <https://www.wassenaar.org/about-us/>.

navigation/avionics. Dual-use goods are commodities, software, or technologies that have both civilian and military applications. DDTC incorporates the Wassenaar Arrangement into the ITAR and USML.<sup>36</sup> The Department of Commerce implements controls on the export of dual-use items.

## Foreign Military Sales Process

The FMS program is the U.S. government-brokered method for delivering U.S. arms to eligible foreign purchasers, normally allies and partner nations.<sup>37</sup> 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.

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)).<sup>38</sup>

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. DOD uses what it refers to as a *Total Package Approach* (TPA) to help ensure that FMS customers can operate and maintain their purchased items in the future and in a manner consistent with U.S. intent.<sup>39</sup> DOD follows the Defense Federal Acquisition Regulation Supplement (DFARS), except where deviations are authorized.<sup>40</sup> Acquisition on behalf of eligible FMS purchasers must be in accordance with DOD regulations and other applicable U.S. government procedures. This arrangement allows the international purchaser to acquire U.S.-origin export controlled technologies, access to U.S. supply chains, and mitigate risk afforded through leveraging DOD's contracting network and the U.S. procurement infrastructure.<sup>41</sup> Additionally, FMS requirements may be consolidated with U.S. requirements, which may provide the international purchaser a lower unit cost.<sup>42</sup>

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<sup>36</sup> Department of State, "ITAR."

<sup>37</sup> See 22 U.S.C. §2753 regarding provisions for eligibility for transfer of U.S. defense articles or services. According to DOD, "partnerships" are less formal than "alliances," can be short-term, and do not involve a treaty. For more information, see U.S. Department of Defense, "Alliances vs. Partnerships," March 2019.

<sup>38</sup> Defense Security Cooperation Agency (DSCA), Security Assistance Management Manual (SAMM), C1.3.1. Department of State.

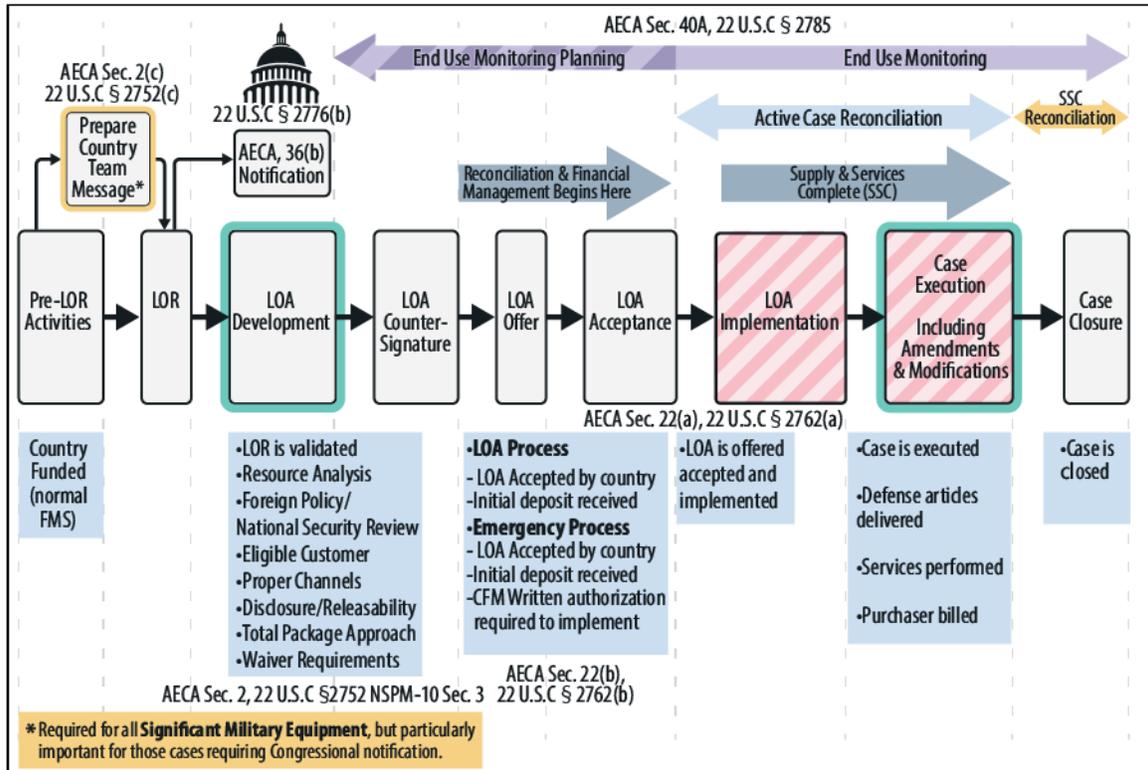
<sup>39</sup> DSCA, SAMM, C4.3.2. Total Package Approach (TPA) and C15.2.4.6. Total Package Approach (TPA).

<sup>40</sup> DSCA, SAMM, C4.3.9. Use of Federal Acquisition Regulation (FAR) and DOD FAR Supplement (DFARS).

<sup>41</sup> For more information on potential benefits of FMS, see Defense Security Cooperation University's (DSCU) Security Cooperation Management "Greenbook," Edition 42, pages 15-5 through 15-13 (Fiscal Year 2022).

<sup>42</sup> DSCA, SAMM, C.6.3.1. Compliance with DOD Regulations and Procedures.

**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.<sup>43</sup> 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.<sup>44</sup>

### 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),<sup>45</sup> normally an Office of Defense Cooperation (ODC) nested within the U.S.

<sup>43</sup> DSCA, SAMM, C9.3.2. Payment in U.S. Dollars. See also, 22 U.S.C. § 2761 and 22 U.S.C. § 2762.

<sup>44</sup> DSCA, SAMM, C9.7. Methods of Financing.

<sup>45</sup> DSCA, SAMM, Glossary, Security Cooperation Organization. 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 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

Embassy in the country, or directly to DSCA or an implementing agency (IA).<sup>46</sup> The LOR can be submitted in-country or through the country's military and diplomatic personnel stationed in the United States.

DOD policy guidance states that DOD is generally neutral as to whether an international partner purchases U.S.-origin defense articles/services through FMS or DCS.<sup>47</sup> The AECA gives the President discretion to designate which defense articles must be sold exclusively through FMS channels.<sup>48</sup> This discretion is delegated to the Secretary of State under Executive Order 13637. As such, DOS maintains responsibility for reviewing whether a sale should be "FMS Only." DOD, through the Defense Security Cooperation Agency (DSCA), can provide recommendations and rationales to DOS for adding or removing the "FMS Only" designation.<sup>49</sup>

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.<sup>50</sup>

### **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 (LOA). 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.<sup>51</sup>

### **Reports to Congress<sup>52</sup>**

Within 60 days after the end of a quarter, the State Department, on behalf of the President, is required by law to send to the Speaker of the House, HFAC, and the chair 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.<sup>53</sup>

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cooperation activities.

<sup>46</sup> For a list of IAs, see DSCA, SAMM, Table C5.T2. IAs Authorized to Receive Letters of Request.

<sup>47</sup> DSCA, SAMM, C4.3.4. Neutrality. For a list of "FMS Only" items, see DSCA, SAMM, C4.3.5.2.

<sup>48</sup> The U.S. Munitions List is prescribed in 22 U.S.C. §2778(a)(1).

<sup>49</sup> DSCA, SAMM, C4.3.5. FMS-Only Determinations. For a list of criteria used by DOS to determine "FMS Only" designations, see DSCA, SAMM, C4.3.5.3.

<sup>50</sup> DSCA, SAMM, C5.2.2. Negative Responses to LORs.

<sup>51</sup> DSCA, SAMM, C5.4.2. LOA Document Preparation Timeframe.

<sup>52</sup> For a list of required reports, see DOD, SAMM, A5.1. - DSCA Reporting Requirements (Congressional).

<sup>53</sup> 22 U.S.C. §2776 .

### Congressional Notification Requirements for FMS<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

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 reporting. Case managers, normally assigned to the IAs, track FMS delivery status in

<sup>54</sup> CRS Report RL31675, *Arms Sales: Congressional Review Process*, by Paul K. Kerr.

<sup>55</sup> DSCA, SAMM, C5.4.3.3. Cooperative Logistics Supply Support Arrangements (CLSSAs).

<sup>56</sup> DSCA, SAMM, C5.4.3. Types of FMS Cases. 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.

<sup>57</sup> DSCA, SAMM, C6.1.1. Routine Case Implementation.

coordination with SCOs.<sup>58</sup> 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.<sup>59</sup>

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.<sup>60</sup>

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.<sup>61</sup>

#### **“Pseudo-LOAs” For Title 10 Security Cooperation**

DSCA uses the FMS infrastructure to implement grant-based security cooperation programs authorized under Title 10, also known as a Building Partner Capacity (BPC) cases. Similar to an FMS LOR, a BPC case starts with a Memorandum of Request (MOR), which will identify the required defense services, equipment, and legal authority.<sup>62</sup> During case development, the IA and the SCO or Combatant Command coordinate to document the requirements and costs of BPC MOR on a “pseudo-Letter of Offer and Acceptance (LOA).”<sup>63</sup> DSCA then conducts a quality assurance review, prepares the final version of the LOA, and coordinates review and approval by DSCA and the U.S. Department of State.<sup>64</sup>

## **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

<sup>58</sup> DSCA, SAMM, C.6.2. Case Execution - General Information.

<sup>59</sup> DSCA, SAMM, C6.2.5. Execution Records.

<sup>60</sup> DSCA, SAMM, C6.4. Case Execution - Logistics.

<sup>61</sup> DSCA, SAMM, C6.7.1. Amendments.

<sup>62</sup> MORs have a specific format, which includes an Excel spreadsheet, PowerPoint “Quad Charts,” and Country Team Assessment. For more information, see DOD, Defense Security Cooperation Agency, *Security Assistance Management Manual* (SAMM), Chapter 15 (C15) Table 4 (T4), “MOR Information.”

<sup>63</sup> DSCA, SAMM, C15.3.2. Initiating a Pseudo LOA and Table C15.T5. Instructions for Preparing Pseudo LOAs.

<sup>64</sup> Defense Security Cooperation University’s (DSCU) Security Cooperation Management “Greenbook,” Edition 42, p. 6-5 (Fiscal Year 2022). 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.<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup>

## Direct Commercial Sales Process

### DOS Role in DCS

While an export license is not required for FMS transfers,<sup>68</sup> registered U.S. firms may sell defense articles directly to foreign partners when they receive licenses to do so 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 (USML), it must first register with the State Department, Directorate of Defense Trade Controls (DDTC). It must then obtain export licenses for all defense articles and follow the International Traffic in Arms Regulations (ITAR).<sup>69</sup> Once granted, an export license is valid for four years, after which a new application and license are required.<sup>70</sup>

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<sup>65</sup> DSCA, SAMM, C7.5. FMS Freight Forwarders.

<sup>66</sup> DSCA, SAMM, C3.3.3.2. Overseas Customs Clearance Requirements for DoD-Sponsored Shipments and C3.3.3.4.3. Overseas Customs Clearance Requirements for Purchaser-Sponsored Shipments.

<sup>67</sup> DSCA, SAMM, C7.3. Title Transfer. A supply activity can be either a DOD storage depot or a commercial vendor that furnishes materiel under a DOD-administered contract.

<sup>68</sup> DSCA, SAMM, C3.3. Export License and Customs Clearance.

<sup>69</sup> Firms may do so through DDTC's website: [https://www.pmddtc.state.gov/ddtc\\_public](https://www.pmddtc.state.gov/ddtc_public).

<sup>70</sup> 22 CFR §123.21.

### **Congressional Notification Requirements for DCS<sup>71</sup>**

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. Within DDTC, the offices of Defense Trade Controls Policy (DTCP), Defense Trade Controls Licensing (DTCL), and Defense Trade Controls Compliance (DTCC) are responsible for publishing policy, issuing licenses, and enforcing 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.<sup>72</sup> 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.<sup>73</sup>

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.<sup>74</sup>

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.<sup>75</sup>

<sup>71</sup> CRS Report RL31675, *Arms Sales: Congressional Review Process*, by Paul K. Kerr.

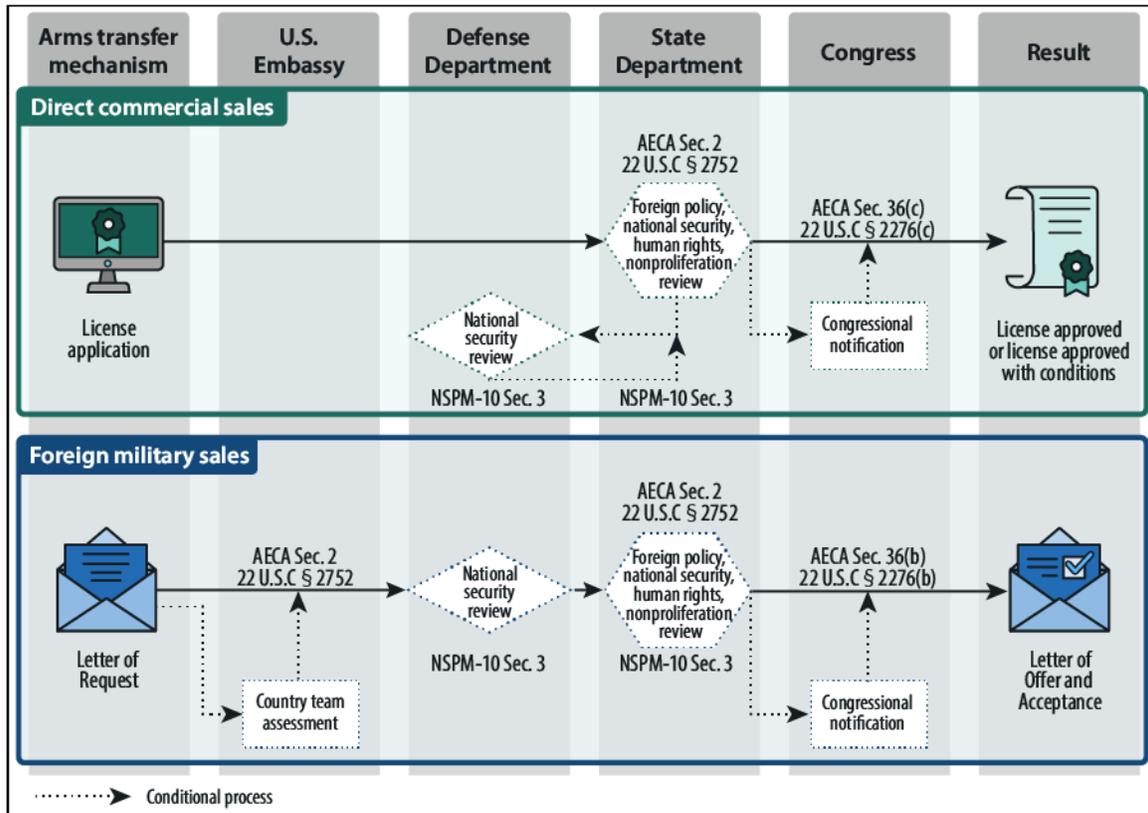
<sup>72</sup> Department of State, Directorate of Defense Trade Controls, "About DDTC," accessed August 18, 2022.

<sup>73</sup> DSCA, SAMM, C3.3.1. International Traffic in Arms Regulations (ITAR) Requirements.

<sup>74</sup> Defense Technology Security Administration, "DTSA Export Control Directorate," and "DTSA International Engagement Directorate," accessed August 18, 2022. See also, DoDD 5105.72, April 26, 2016. DTSA serves as the focal point for development and implementation of DOD policy positions on matters concerning technology security transfer.

<sup>75</sup> DSCA, SAMM, C3.3.2. ITAR Exemptions.

**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 international partner 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.<sup>76</sup> If a company or international partner prefers that a sale be made commercially rather than via FMS, and when a company receives a request for proposal from an international partner and prefers DCS, the company may request that DSCA issue a DCS preference for that particular sale. The particulars of each international partner, U.S. firm, and sale determine whether FMS or DCS is preferred.<sup>77</sup>

Before approving DCS preference for a specific transaction, DSCA considers the following:<sup>78</sup>

<sup>76</sup> DSCA, SAMM, C2.1.8.6. Direct Commercial Sales (DCS) Versus FMS Sales.

<sup>77</sup> Defense Security Cooperation University’s (DSCU) Security Cooperation Management “Greenbook,” Edition 42, pages 15-5 through 15-13 (Fiscal Year 2022).

<sup>78</sup> DSCA, SAMM, C4.3.6. Direct Commercial Sales (DCS) Preference. See also, DSCU, “Greenbook,” p. 15-3 and 15-13 through 15-17.

- Items provided through blanket order and those required in conjunction with a system sale do not normally qualify for DCS preference.
- 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.<sup>79</sup>

U.S. firms may request defense articles and services from DOD to support a DCS to an international partner.<sup>80</sup> 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).

SCO chiefs often interact with visiting U.S. defense industry representatives and respond to follow-up inquiries from industry representatives with respect to any reactions from international partner officials. However, SCOs 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 international partner, the SCO chief relays these concerns, along with a request for guidance, up the chain to DSCA.<sup>81</sup>

## Excess Defense Articles

If an international partner is unable to purchase, or wishes to avoid purchasing, a newly-manufactured U.S. defense article, they may request transfer of Excess Defense Articles (EDA) from DOD.<sup>82</sup> 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 international partners on an “as is, where is” basis.<sup>83</sup> As such, EDA is a hybrid between sales and grant transfer programs. DOD 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.<sup>84</sup> 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

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<sup>79</sup> DSCA, SAMM, *Ibid.*

<sup>80</sup> DSCA, SAMM, C4.3.13. Department of Defense Support to Direct Commercial Sales.

<sup>81</sup> DSCA, SAMM, C2.1.8. SCO Support to Industry.

<sup>82</sup> 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.dscamill/programs/excess-defense-articles-eda>, last updated June 15, 2020.

<sup>83</sup> DSCA, SAMM, C11.3.1. Definition and Purpose. In practice, this means that international partners must pay all refurbishment costs and transportation costs. In some cases, international partners 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.

<sup>84</sup> *Ibid.*

for military assistance programs.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

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.

## Presidential Drawdown Authority

The President can authorize the immediate transfer of defense articles and services from U.S. stocks without congressional approval in response to an “unforeseen emergency” via the Presidential Drawdown Authority (PDA; 22 U.S.C. §2318(a)(1)).<sup>88</sup> Under PDA, the President directs DOD to provide on-stock defense articles or military services to a foreign country or international organization. The aggregate value of all drawdowns authorized in any fiscal year under 22 U.S.C. §2318(a)(1) may not exceed \$100 million. Once authorized, the drawdown may cross fiscal years until exhausted or the U.S. response to the emergency ends.<sup>89</sup>

Prior to exercising PDA, the President must notify Congress, in accordance with 22 U.S.C. §2411, that an emergency exists which requires the immediate provision of U.S. military assistance, including a justification for the scope and value of the approved drawdown. The State Department must determine recipient country eligibility pursuant to 22 U.S.C. §2311 and obtain the necessary assurances from the proposed recipient country pursuant to 22 U.S.C. §2314. Similar to other legal authorities used to transfer U.S. defense articles, drawdowns require certain safeguards such as human rights vetting, technological and security reviews, as well as U.S. operational readiness impact assessments.<sup>90</sup> Upon delivery or completion of a drawdown, DOD is required to provide a report to Congress detailing all defense articles, defense services, and military education or training provided to the recipient country or international organization.<sup>91</sup>

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<sup>85</sup> DSCA, SAMM, C11.3.2.2. Eligibility for EDA Grants. See also 22 U.S.C. §2321j.

<sup>86</sup> DSCA, SAMM, C11.3.2.2. Eligibility for EDA Grants.

<sup>87</sup> 22 USC §2321j(f)(1).

<sup>88</sup> There are different types of drawdowns; however, this section only discusses the drawdown authorized by 22 U.S.C. §2318(a)(1). This section does not include drawdowns authorized under 22 U.S.C. §2318(a)(2) or 22 U.S.C. §2348a(c)(2).

<sup>89</sup> DSCA, SAMM, C11.2. Drawdowns.

<sup>90</sup> DSCA, SAMM, Table C11.T5. Drawdown Process.

<sup>91</sup> DSCA, SAMM, C11.2.7. Congressional Reporting for Drawdowns.

### Presidential Drawdowns Authorized for Ukraine

Prior to and immediately following Russia's renewed invasion of Ukraine on February 24, 2022, Congress increased the PDA (22 U.S.C. §2318(a)(1)) funding cap for FY2022 from \$100 million up to \$200 million via P.L. 117-70; up to \$300 million via P.L. 117-86; up to \$3 billion via P.L. 117-103; and up to \$11 billion via P.L. 117-128. For FY2023, Congress established a PDA funding cap of \$14.5 billion via P.L. 117-328. Since August 2021, the Biden Administration has authorized 34 drawdowns totaling nearly \$20 billion in U.S. defense articles and services from DOD stocks.<sup>92</sup>

## 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 the President's use of that authority. 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 and arms transfer programs are subject to the supervision and general direction of the Secretary of State, to be consistent with U.S. foreign policy interests. DOS is responsible for ensuring partner and purchaser eligibility for arms transfer(s) and obtaining required assurances from international partners.<sup>93</sup> The State Department also reviews and approves export license requests for direct commercial sales of items on the United States Munitions List (USML). As mentioned above, DOS is required to submit 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.<sup>94</sup>

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.<sup>95</sup>

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.<sup>96</sup> 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

<sup>92</sup> For more information, see CRS In Focus IF12040, *U.S. Security Assistance to Ukraine*, by Christina L. Arabia, Andrew S. Bowen, and Cory Welt.

<sup>93</sup> 22 U.S.C. 2311; 22 U.S.C. §2314(a).

<sup>94</sup> 22 U.S.C. §2765(a)(2). See also, DSCA, SAMM, C2.1.3.5.Javits and FMS Forecasting.

<sup>95</sup> Department of State, Bureau of Political-Military Affairs, "Our Mission," accessed August 18, 2022.

<sup>96</sup> Department of State, Bureau of Political-Military Affairs, "Key Topics – Office of Regional Security and Arms Transfers," accessed August 18, 2022.

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.<sup>97</sup>

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. The Chief of Mission, or COM, is the principal officer in charge of each U.S. diplomatic mission to a foreign country, foreign territory, or international organization. Each COM thus serves as the President's personal representative, leading diplomatic efforts for a particular mission or in the country of assignment under the general supervision of the Secretary of State.<sup>98</sup> As per Section 515 of the Foreign Assistance Act (FAA; 22 U.S.C. §2321i), all U.S. military personnel assigned to a partner country for the purpose of implementing or managing U.S. security assistance and arms transfers under the FAA or Arms Export Control Act are under the direction and supervision of that COM.

## **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 Security Strategy (NSS).<sup>99</sup> The National Defense Strategy (NDS) supports the NSS and provides a framework for all other DOD strategic guidance, including the National Military Strategy and the Joint Strategic Campaign Plan. At the regional level, these strategies inform the Geographic Combatant Command (COCOM) Theater Campaign Plan. At the country level, the COCOMs works with the SCO to develop the Country-specific Security Cooperation Sections (CSCS) in support of the Campaign Plan. The CSCS serves as the core organizing documents for articulating DOD country-level security cooperation objectives and should inform and be informed by corresponding Integrated Country Strategies (ICS).<sup>100</sup>

At the country level, a senior defense official (SDO) directs the preparation of the security cooperation portion of ICS. The in-country SCO annually forecasts potential arms transfers and documents the budget for security cooperation activities, based upon their interactions with the host nation or international partner military.<sup>101</sup> Both the SDO and SCO work under the direct supervision of the COM and are responsible for balancing the COCOM's view of necessary arms transfers and security cooperation activities with relevant State Department officials' views.<sup>102</sup>

The COCOM 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

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<sup>97</sup> Ibid.

<sup>98</sup> For more on the COM authority see, CRS Report R45203, *State Department Personnel: Background and Selected Issues for the 117th Congress*, by Cory R. Gill, and CRS Report R43422, *U.S. Diplomatic Missions: Background and Issues on Chief of Mission (COM) Authority*, by Matthew C. Weed and Nina M. Serafino.

<sup>99</sup> 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.

<sup>100</sup> DOD Directive 5132.03, p.14, 3.1, 3.2, and 3.3. See also, DSCU, "Greenbook," Figure 19-1 DOD/DOS Side-by-Side Comparison: Combatant Command Campaign Planning, p. 19-2.

<sup>101</sup> See footnote 45.

<sup>102</sup> In matters that are not functions or responsibilities of the COM, the SCO falls under the command and supervision of the COCOM. DOD Directive 5132.03. See also, DSCA, SAMM, C2.1. - Security Cooperation Organizations.

inclusion in the country and regional level strategy and provides identified obstacles to execution of plans, including shortfalls in security cooperation authorities or resources, joint capability shortfalls, or shortfalls in partners' capabilities.<sup>103</sup> The CJCS provides military advice to the Secretary of Defense concerning security cooperation and shares responsibility with USD(P) for planning how to address obstacles to campaign plan execution that the COCOMs identify.<sup>104</sup>

USD(P) exercises overall direction, authority, and control over security cooperation and FMS matters.<sup>105</sup> DSCA represents the interests of USD(P) in security cooperation matters and is tasked with directing, administering, and executing many security cooperation programs; developing security cooperation policy; and providing DOD-wide security cooperation guidance. DSCA is also DOD's main interlocutor between international partners, IAs, and the U.S. defense industry. DSCA is also responsible for coordinating the development of foreign disclosure and sales policies and procedures for defense information, technology, and systems.<sup>106</sup>

## **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.<sup>107</sup> 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.<sup>108</sup> 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, U.S. embassy and consular staff conduct pre-license, post-license, and post-shipment checks to verify the bona fides of international partner consignees and end users, and to verify the legitimacy of proposed transactions and their compliance with U.S. defense export rules and policies. 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.<sup>109</sup> In FY2021, with 19,125 authorized DCS export license applications,

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<sup>103</sup> DOD Directive 5132.03, p. 12, 2.14.i.

<sup>104</sup> DOD Directive 5132.03, p. 11, 2.13.a. and p. 11, 2.13.f.

<sup>105</sup> 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 (ATTR SSG), in accordance with DoDD 5111.21 and directs the operation of the National Disclosure Policy Committee, in accordance with DoDD 5230.11.

<sup>106</sup> DOD Directive 5111.21, p. 4, 3.7. and p. 9, 2. DSCA coordinates with the ATTR SSG on DOD technology security and foreign disclosure (TSFD) recommendations and coordinates relevant security cooperation- and security assistance-related TSFD activities with the Technology Security and Foreign Disclosure Office.

<sup>107</sup> P.L. 90-629, Section 40A (22 U.S.C. §2785).

<sup>108</sup> 22 U.S.C. §2795.

<sup>109</sup> 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.

DOS initiated 281 Blue Lantern checks (62 pre-license, 164 post-shipment, and 55 that involved both pre-license and post-shipment checks) in over 70 countries. In the same year, DOS closed 256 Blue Lantern cases, with 77 labeled “unfavorable.”<sup>110</sup>

## **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 international purchasers 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.<sup>111</sup>

In routine EUM, DOD’s SCOs are required to observe and report any potential misuse or unapproved transfer of FMS articles or services to the regional 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 international purchaser.<sup>112</sup>

## **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.<sup>113</sup> 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.<sup>114</sup> In FY2021, over 545 LOAs and other transfer agreements were reviewed by Golden Sentry personnel. In the same year, SCOs in over 107 countries conducted over 2,418 physical security checks and accounted for the inventories of over 206,000 EEUM-designated defense articles.<sup>115</sup> DSCA employs five full-time civilian employees to manage and implement the Golden Sentry program as well as provide training to SCOs. Three contractor personnel operate, maintain, and develop the necessary software applications for the Security Cooperation

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<sup>110</sup> Department of State, “End-Use Monitoring of Defense Articles and Defense Services Commercial Exports FY 2021.”

<sup>111</sup> DOD, SAMM, C8.2. Golden Sentry.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> 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.

<sup>115</sup> Department of Defense, End-Use Monitoring of Defense Articles and Services, Government-to-Government Services, FY2021.”

Information Portal (SCIP)-EUM database.<sup>116</sup> Over 535 SCO personnel performed EUM functions in support of Golden Sentry.<sup>117</sup>

## Select Questions Facing Congress

### **Are the Required Congressional Notifications and Reports Sufficient for Congressional Oversight?**

The ability of Congress to effectively perform oversight largely depends on access to information. As the U.S. arms sales process stands, information on arms sales requires consistent, complete, and timely reporting by the executive. Data on congressional notifications for arms sales through FMS are published on the DSCA website.<sup>118</sup> Accompanying information of a sensitive nature may be provided to congressional committees of jurisdiction. Congressional notifications for DCS are much less transparent; they are not published in a comparable manner to FMS notifications, and public information about them may often be inconsistent or incomplete.

Congress could consider whether or not the required notifications and reports are sufficient for congressional oversight of U.S. arms transfers, including whether or not such notifications and reports could be expanded, reduced, streamlined, or otherwise altered to improve congressional visibility into certain aspects of U.S. arms transfers, including the ultimate end-use of U.S. defense items and the U.S. foreign policy implications thereof.

### **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 FY2021, DDTC authorized 19,125 export license applications. DOS initiated 281 Blue Lantern checks (62 pre-license, 164 post-shipment, and 55 that involved both pre-license and post-shipment checks) in over 70 countries. This represents approximately 1% of adjudicated license applications. The State Department employed six full-time employees and four contractors to administer the program.<sup>119</sup> 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.<sup>120</sup> Former 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 ensure 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

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<sup>116</sup> SCIP-EUM database tracks U.S. defense articles transferred to the partner nation and is used to conduct periodic reporting, amongst other capabilities. For more information, see the Security Cooperation Automation Appendix in the Defense Security Cooperation University's (DSCU) Security Cooperation Management "Greenbook," Edition 41 (May 2021).

<sup>117</sup> Ibid.

<sup>118</sup> See "Major Arms Sales" on the Defense Security Cooperation Agency (DSCA) website, <http://www.dsca.mil>. Also see Table C5.T13. Congressional Notification Criteria and Requirements, DSCA.

<sup>119</sup> Department of State, "End-Use Monitoring of Defense Articles and Defense Services Commercial Exports FY 2021."

<sup>120</sup> A. Trevor Thrall and Caroline Dorminey, *Risky Business: The Role of Arms Sales in U.S. Foreign Policy*, Cato Institute, March 13, 2018.

compliance while working closely with the State Department to address any compliance issues that may arise.<sup>121</sup>

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

In FY2022, foreign partners purchased \$43.07 billion in FMS cases and the value of privately contracted DCS authorizations licensed by the State Department totaled \$153.7 billion (see **Table 1** and **Table 2**, above). Congress could consider whether or not 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.”<sup>122</sup> 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.”<sup>123</sup>

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-

- (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.<sup>124</sup>

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

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<sup>121</sup> Kaidanow testimony.

<sup>122</sup> 22 U.S.C. §2301.

<sup>123</sup> 22 U.S.C. §2751.

<sup>124</sup> 22 U.S.C. §2751.

## 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 international partners. 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 examples are illustrative, but not exhaustive.

### Restrictions Related to Human Rights

- Section 502B(a)(2) of the FAA (22 U.S.C. §2304(a)(2)) prohibits security assistance to any country where the government engages in a consistent pattern of gross violations of internationally recognized human rights.<sup>125</sup> “Security assistance” is defined here to in part include “sales of defense articles or services, extensions of credits (including participations in credits), and guaranties of loans” under the AECA.<sup>126</sup> Certain exceptions can apply if the President certifies to Congress that “extraordinary circumstances” warrant the provision of assistance.
- The U.S. “Leahy Laws,” Section 620M of the FAA (22 U.S.C. §2378d) and 10 U.S.C. §362, prohibit U.S. assistance to foreign security force units when there is credible information that the unit has committed a gross violation of human rights.<sup>127</sup> However, these laws do not define “assistance,” and in practice the executive branch considers the term to apply only to support provided with U.S.-appropriated funds, excluding FMS or DCS.
- The Child Soldiers Prevention Act of 2008 (Title II, Subtitle B of P.L. 110-457, as amended; 22 U.S.C §2370c et seq.) prohibits certain security assistance, including FMF, and licenses for DCS of military equipment, to the government of a country that the Secretary of State identifies as having governmental armed forces, police, or other security forces, or government-supported armed groups, that recruit or use child soldiers. The President has authority to waive these restrictions.<sup>128</sup>
- The Trafficking Victims Protection Act of 2000 (Division A of P.L. 106-386) mandates that the Secretary of State identify countries that do not comply with minimum standards for eliminating trafficking in persons and are not making significant efforts to do so. The governments of such countries are subject to certain restrictions, including on sales and financing authorized by the AECA (with the exception of those provided for narcotics-related purposes if

<sup>125</sup> 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.

<sup>126</sup> Section 502B(d)(2) of the FAA (22 U.S.C. 2304(d)(2)).

<sup>127</sup> See CRS In Focus IF10575, *Global Human Rights: Security Forces Vetting (“Leahy Laws”)*, by Michael A. Weber.

<sup>128</sup> See CRS In Focus IF10901, *Child Soldiers Prevention Act: Security Assistance Restrictions*, by Michael A. Weber.

congressionally notified). The President has authority to waive these restrictions.<sup>129</sup>

### **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 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,

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<sup>129</sup> See CRS Report R44953, *The State Department’s Trafficking in Persons Report: Scope, Aid Restrictions, and Methodology*, by Michael A. Weber, Katarina C. O’Regan, and Liana W. Rosen.

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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## **Acknowledgments**

This report is based on a number of years’ work in CRS, most notably by Richard Grimmett, then-Specialist in International Security. The report is also based upon CRS Report *U.S. Military Sales and Assistance Programs: Laws, Regulations, and Procedures*, written by Robert D. Shuey, then-Specialist in U.S. Foreign Policy and National Defense, July 23, 1985.

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