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The Honorable Robert Menendez
Ranking Member
Committee on Foreign Relations
United States Senate

Conventional Arms Transfer Policy: Agency Processes for Reviewing Direct Commercial Sales and Foreign Military Sales Align with Policy Criteria

From 2014 through 2018, the U.S. government authorized hundreds of billions of dollars in arms transfers to foreign entities, including foreign governments, with more than \$180 billion in fiscal year 2018 alone. The United States uses two key arms transfer programs to support foreign policy and national security goals: (1) Direct Commercial Sales (DCS), for which a U.S. corporation and a foreign buyer negotiate the sale of arms, and (2) Foreign Military Sales (FMS), for which the U.S. government and a foreign government negotiate an agreement for the purchase of arms.¹ The Department of State (State) is responsible for authorizing both DCS and FMS transfers. State oversees the licensing process for direct commercial sales, while the Department of Defense (DOD) implements foreign military sales. Both DCS and FMS transfers undergo extensive review processes, including national security and foreign policy reviews, intended to ensure these arms transfers safeguard U.S. interests. In addition, five different U.S. Presidents, beginning with President Carter in May 1977, have issued conventional arms transfer (CAT) policies, which provide a framework for the Executive Branch to consider these transfers.

The two most recent CAT policies were the Obama administration’s Presidential Policy Directive–United States Conventional Arms Transfer Policy (PPD-27), issued in January 2014, and the Trump administration’s National Security Presidential Memorandum Regarding U.S. Conventional Arms Transfer Policy (NSPM-10), issued in April 2018.² Both the prior and current policies required that executive branch entities take into consideration a set of criteria when evaluating proposed arms transfers.

¹For the purposes of this report, arms transfers include defense articles and services authorized for sale through direct commercial sale, as well as defense articles and services that the U.S. government sells to foreign governments and international organizations through the FMS program. They do not include transfers under the Department of Commerce’s jurisdiction including less sensitive items, dual-use items, and basic commercial items. For more information on the roles of various agencies in the U.S. government’s export control system, which is intended to manage risks associated with exporting sensitive items and ensure that legitimate trade can still occur, see *Export Controls: State and Commerce Should Share Watch List Information If Proposed Rules to Transfer Firearms are Finalized*, [GAO-19-307](#) (Washington, D.C.: March 1, 2019).

²A CAT Policy Implementation Plan was also released in July 2018. According to State, the implementation plan is intended to provide a whole of government approach to better align conventional arms transfers with national security and economic interests. The plan also seeks to modernize U.S. government policies and processes related to arms transfers. State assesses and reports on progress toward achieving the plan’s aims on a quarterly basis, and issued its most recent update in May 2019.

You asked us to review the U.S. government's implementation of the CAT policy. Specifically, we determined (1) whether State's and DOD's processes for reviewing proposed arms transfers align with the CAT policy criteria; and (2) what differences, if any, exist between the content, processes, and outcomes associated with the prior and current CAT policies.

To determine whether State's and DOD's processes for reviewing proposed arms transfers align with the CAT policy criteria, we analyzed State and DOD documentation, including available DCS and FMS manuals, guidance, and standard operating procedures detailing agency processes for reviewing arms transfers. We also interviewed officials, from relevant State bureaus and DOD offices, to obtain information about agency processes for considering CAT policy criteria when reviewing proposed arms transfers and how these processes have changed over time. We then reviewed State's and DOD's processes to determine if they aligned with the CAT policy criteria.

To identify any differences between the prior and current CAT policies, we conducted a content analysis of the two policies, through which two analysts independently coded each policy to identify similarities and differences between the two, reconciled any differences in their analysis through discussion, and summarized the results. We also analyzed select data for DCS from calendar years 2014 through 2018, to identify trends in approvals and denials for those years. To assess select DCS data for 2014 to 2018, we reviewed documentation related to the data, interviewed State officials about any limitations of the data, performed spot checks, and reviewed prior GAO assessments of data reliability for similar data. We found the data sufficiently reliable for our purposes. In addition, to better understand external stakeholder perspectives on the effect of the CAT policy on arms transfers, we interviewed officials from, and reviewed reports by, several arms industry associations and non-governmental organizations.

We conducted this performance audit from December 2018 to September 2019 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Several U.S. laws authorize the transfer of arms from the U.S. government or from U.S. companies to foreign countries or, in certain cases, foreign entities. These laws also establish requirements to review requests for such transfers and report on them to Congress. The Arms Export Control Act (AECA), as amended, provides the President the authority to control the transfer of arms,³ and establishes congressional notification requirements for both FMS and DCS.⁴ In addition, the Foreign Assistance Act provides authority for the transfer of excess defense articles to foreign governments and Title 10 of the U.S. Code includes authorities to provide equipment to foreign national security forces.⁵

State oversees DCS licensing and approves FMS sales of defense articles to foreign countries, while DOD is the implementing agency for FMS. State processed approximately 38,000 DCS cases annually in 2017 and 2018, and processed approximately 1,500 new FMS cases annually, excluding modifications to existing agreements, in the same years. However, according to State officials, large portions of the DCS cases are renewals or amendments to existing licenses that State has already reviewed.⁶ More information on the agencies' roles in these processes follows.

- State's Directorate of Defense Trade Controls, within the Bureau of Political-Military Affairs, administers DCS. For DCS, U.S. industry and a foreign buyer negotiate the sale of arms, and State adjudicates license applications, and when approved State issues an export license for the sale, which may result in a transfer.⁷ Under the AECA, the DCS review process is conducted to further the national security and foreign policy of the United States. State implements the AECA requirements for DCS through the International Traffic in Arms Regulations. A number of State bureaus and offices—including the Bureau of Democracy, Human Rights, and Labor, the Bureau of International Security and Nonproliferation, the Office of Regional Security and Arms Transfers within the Bureau of Political-Military Affairs, and State's regional bureaus—review DCS cases to ensure they are conducive to U.S. interests.
- DOD's Defense Security Cooperation Agency administers FMS. An FMS authorization is a negotiated agreement between the U.S. government and a foreign government for the

³Pub. L. No. 90-629, *as amended and codified* at 22 U.S.C. §§ 2751 *et seq.*

⁴Sales under the DCS and FMS to NATO member states, Australia, Israel, Japan, New Zealand, or South Korea require congressional notification 15 calendar days before the sale, enhancement, or upgrade of (1) major defense equipment of \$25 million or more; (2) defense articles and defense services of \$100 million or more; or, in the case of FMS, (3) design and construction services of \$300 million or more. Requests from other countries require congressional notification 30 calendar days before the sale of (1) major defense equipment valued at \$14 million or more; (2) defense articles or services valued at \$50 million or more (or, with respect to DCS licenses for a defense article that is a firearm controlled under category I of the United States Munitions List, \$1,000,000 or more); or, in the case of FMS, (3) design and construction services valued at \$200 million or more. The AECA has additional reporting requirements for requests for some articles or services listed on the Missile Technology Control Regime, and the grant of a DCS license for commercial satellite for launch from, and by nationals of, the Russian Federation, Ukraine, and Kazakhstan are subject to a 15-day, rather than 30-day, congressional notification requirement. See 22 U.S.C. § 2776.

⁵22 U.S.C. § 2321j and 10 U.S.C. §§ 331 *et seq.*

⁶State and DOD will review renewals and amendments to licenses, when appropriate, according to State officials.

⁷The export authority is for that transaction only and is valid generally for 48 months for licenses and for 10 years for agreements.

purchase of arms, known as a Letter of Offer and Acceptance.⁸ Under the AECA, it is the sense of Congress that FMS should only be approved when consistent with U.S. foreign policy and national security interests. A number of DOD entities may review FMS cases as part of DOD’s national security review, including technology review panels, the Joint Chiefs of Staff, U.S. Combatant Commands, and the Office of the Secretary of Defense.⁹ DOD guidance to implement the AECA requirements for FMS is contained in DOD’s Security Assistance Management Manual.¹⁰

State’s and DOD’s Review Processes Align with Conventional Arms Transfer Policy Criteria

Conventional Arms Transfer Policy Requires State and DOD to Consider Criteria When Reviewing Arms Transfers

The CAT policy acts as Presidential direction to the Executive branch regarding the implementation of conventional arms transfers. The two most recent CAT policies, articulated by the Obama administration in PPD-27 and the Trump administration in NSPM-10, require State and DOD to consider specific criteria when they review proposed arms transfers. However, CAT policy is designed to give State and DOD flexibility to consider the criteria on a case-by-case basis, according to State and DOD officials. The CAT policy does not require State or DOD to evaluate the criteria in any specific way or take any specific actions. In addition, the policy does not require State or DOD to weigh the importance of any particular criterion over another or to consider each criterion equally.

State and DOD have existing agency review processes, as detailed below, that assess proposed DCS and FMS transfers for foreign policy, national security, human rights, and nonproliferation concerns. These review processes evaluate arms transfers against the criteria outlined in the CAT policy. State considers cases compliant with CAT policy if they are approved after undergoing these State and DOD reviews, according to State officials. For FMS cases, State explicitly informs DOD that a case is compliant with CAT policy before DOD implements the FMS case. At the end of State’s review of FMS cases, State’s Office of Regional Security and Arms Transfers, an office within the Bureau of Political-Military Affairs, sends DOD an email that states the bureau “has reviewed the proposed transfer and found it meets the criteria outlined in the Conventional Arms Transfer Policy, as detailed in NSPM-10 dated April 19, 2018.” State does not provide this type of language for DCS cases because State approves the export license, according to State officials.

⁸A FMS Letter of Offer and Acceptance is finalized when an authorized official signs the Letter of Offer and Acceptance and provides any required initial deposit, and the deposit is accepted by DOD. Letters of Offer and Acceptance include an offer expiration date indicating the last date on which the purchaser may accept the offer. The offer expiration date is normally 85 days, which includes 25 days for administrative processing and 60 days for the purchaser to review it.

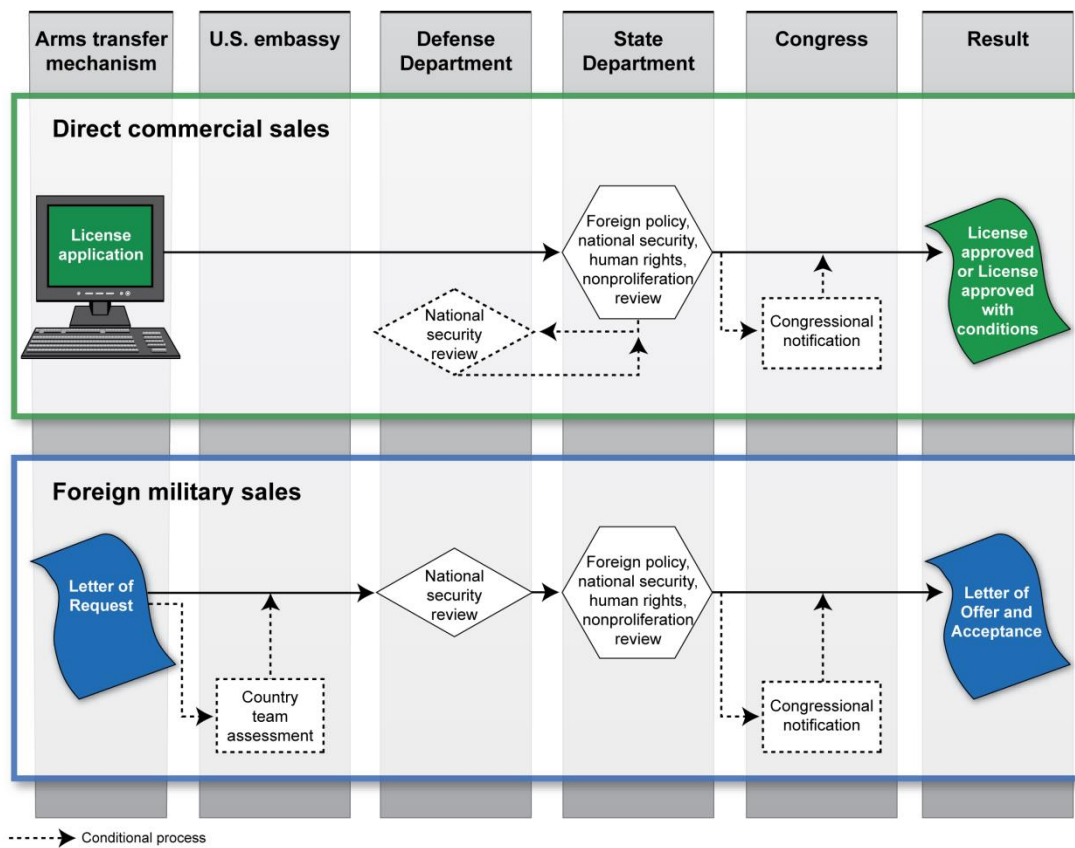
⁹These DOD entities may also review DCS cases referred by State’s Directorate of Defense Trade Controls.

¹⁰DOD 5105.38-M, “*Security Assistance Management Manual*” (Current online version accessible at <https://samm.dsca.mil/>). This manual provides guidance for the administration and implementation of security assistance and related activities in compliance with the Foreign Assistance Act, the AECA, and related statutes and directives.

State and DOD Use Review Processes to Examine if Arms Transfers Are Consistent with U.S. Interests

State and DOD share responsibilities for reviewing DCS and FMS transfers to assess whether they are consistent with U.S. interests.¹¹ As noted previously, these agency reviews also evaluate proposed arms transfers against the criteria identified in the CAT policy, among other things. Figure 1 illustrates the State and DOD review processes for DCS and FMS requests.

Figure 1: DCS and FMS Review Process for Arms Transfer Requests That Result in Authorization



Within State, several entities are responsible for reviewing these arms transfers to assess their impact on national security and foreign policy concerns. When embassy officials become aware that a corporation or country may have an interest in a potential sale, a consultation process begins regarding the arms in question, according to State officials. Prior to the submission of a DCS license application or FMS request, officials from State and DOD may work with country or U.S. industry representatives to review the needs and capabilities of the country and the type and intended use of the arms to determine the appropriateness of the transfer.¹² After the submission of a DCS application or an FMS request, and on a case-by-case basis, State's

¹¹Denials may be for a variety of reasons set forth in 22 C.F.R. § 126.7 including foreign policy or national security reasons such as ineligible parties, prohibited and embargoed parties and destinations, country or regional specific issues, and non-proliferation concerns or compliance issues.

¹²State refers to this informal, undocumented, process as pre-work, in which U.S. officials attempt to match a recipient country with appropriate capabilities, prior to submission of an official request for which they are eligible. This is a normal practice for FMS, but rare for DCS cases, according to State.

Office of Regional Security and Arms Transfers conducts a foreign policy review and DOD conducts a national security review.

In addition, other State bureaus, such as the Bureau of Democracy, Human Rights, and Labor, the Bureau of International Security and Nonproliferation, and State's regional bureaus, may review select DCS applications for human rights, nonproliferation, and foreign policy concerns. State's bureaus may choose to conduct these reviews based on issues pertaining to the recipient country or type of defense article or service selected for transfer, or based on whether State had approved a similar transfer in the past, according to State officials. After concluding their reviews, these bureaus can make recommendations to approve, approve with conditions, return without action (such as when there are errors in the application), or deny a license.¹³ According to State officials, if the bureaus disagree on a particular case, they attempt to reach consensus at bi-monthly working groups, according to State officials. If they cannot reach consensus, the bureaus elevate the case to the Director of the Office of Trade Control Licensing, within State's Bureau of Political-Military Affairs. On a case-by-case basis, proposed sales may also be escalated to the Deputy Assistant or Assistant Secretary of State's Political Military Bureau for adjudication or, if necessary, up to the Under Secretary level.

DOD also plays a role in reviewing proposed DCS and FMS transfers. DOD conducts work on FMS cases prior to the submission of a formal transfer request in an attempt to match the recipient countries with appropriate capabilities, according to DOD officials. During the coordination on select FMS cases and after the submission of DCS applications, DOD's Defense Technology Security Administration—which develops and implements DOD technology security policies on international transfers of defense-related goods, services, and technologies—conducts a national security review of the sale that includes a technical assessment and makes a recommendation to support or oppose the transfer with or without conditions. Specifically, the Defense Technology Security Administration, in consultation with the relevant military departments and DOD subject matter experts, assesses whether the transfer impacts U.S. national security and U.S. military technological advantages. The Defense Security Cooperation Agency ensures technical reviews are conducted by the implementing agency—typically the Army, Navy, or Air Force—responsible for the sale.

In addition, country team¹⁴ assessments are to occur for FMS transfers when these cases (1) are likely to require Congressional notification; (2) involve a new capability for the recipient country, regardless of cost; or (3) include a defense article that is sensitive in nature, such as Stinger Missiles or Night Vision devices. DOD's Defense Security Cooperation Agency can also request such assessments. These assessments incorporate the criteria identified in the CAT policy and address human rights, national security, nonproliferation, and the potential for misuse of the defense articles. Country team assessments may provide a justification for the arms

¹³In February 2019, the Department of State's Office of the Inspector General reviewed State's export licensing process, and found weaknesses related to its internal controls associated with standard operating procedures ensuring export licenses had complete and accurate information. The Inspector General made two recommendations intended to strengthen controls and enhance communications related to the licensing review process. State's Bureau of Political and Military Affairs concurred and is taking steps to implement the recommendations, which included developing and implementing controls for license applications referred to other State bureaus and offices and documenting and communicating the guidance it provides to all licensing officers to assist their review of proposed arms transfers. See the United States Department of State, Office of Inspector General, Audit of Department of State Directorate of Defense Trade Controls Export Licensing Processes, AUD-SI-19-07 (Washington, D.C., February 2019).

¹⁴A country team is a group of senior U.S. Embassy officials, from State and other agencies, that meets regularly to share information and coordinate activities.

transfer request and an overall recommendation on whether the U.S. government should authorize the sale.

We spoke with officials from State’s Bureau of Democracy, Human Rights, and Labor, Bureau of International Security and Nonproliferation, and Office of Regional Security and Arms Transfers, as well as DOD’s Defense Security Cooperation Agency, and none indicated they had concerns with the review processes or how State incorporated their input when authorizing proposed transfers. For example, an official from State’s International Security and Nonproliferation Bureau indicated that State’s Directorate of Trade Control Licensing typically followed its recommendations on cases with nonproliferation issues. Officials from the Bureau of Democracy, Human Rights, and Labor noted that they believe State’s Directorate of Defense Trade Control licensing officials give their input consideration during the review process, even if they do not ultimately follow their recommendations. These officials noted that while they may oppose a case for human rights concerns, Directorate of Defense Trade Control officials may subsequently approve the case because human rights is only one of five general criteria being considered. These bureau officials stated that in such instances, a record of their opposition—and the directorate’s subsequent approval—exists in the case file. Officials from Democracy, Human Rights, and Labor and the Directorate of Defense Trade Control noted the importance of maintaining such a record for cases where there was non-consensus among U.S. government entities involved in the review process, such as in the event that an approved country subsequently uses the weapons to violate human rights.¹⁵

The Prior and Current CAT Policies Have Broadly Similar Content and Implementation Processes, and Have Similar Approval and Denial Rates

The Obama and Trump administrations’ CAT policies are broadly similar in content. While some differences exist in the organization and wording of the two documents—for example, the current policy discusses economic criteria more extensively than the prior policy and includes some new language on working with partners to reduce the risk of operations causing harm to civilians—both identify the same five general criteria for consideration when evaluating proposed arms transfers. These five criteria are: (1) National Security, (2) Economic Security, (3) Relationships with Allies, (4) Human Rights, and (5) Nonproliferation. In addition, none of the officials with whom we spoke from State’s Bureaus of Economic and Business Affairs, Democracy, Human Rights, and Labor, and International Security and Nonproliferation; State’s Office of Regional Security and Arms Transfers; and DOD’s Defense Security Cooperation Agency identified any significant differences between the two policies, aside from the language related to economic security and civilian harm.¹⁶

State and DOD officials indicated that the issuance of the new CAT policy did not change their processes for reviewing proposed arms transfers. Specifically, officials from State’s Bureaus of Democracy, Human Rights, and Labor, and International Security and Nonproliferation; State’s Directorate of Defense Trade Controls and Office of Regional Security and Arms Transfers; and DOD’s Defense Security Cooperation Agency and Defense Technology Security Administration all stated that issuance of the updated CAT policy did not change how they reviewed proposed

¹⁵USXports—State’s case management system for DCS licensing case records—is the system of record. The Departments of Commerce, Defense, and Energy also have access to this system.

¹⁶The 2018 policy included a purpose statement that asserted that the policy regarding conventional arms transfers is more closely aligned with national and economic security interests, and that where a proposed transfer is in the national security interest (defined as including economic security) and the U.S. foreign policy interest, the executive branch will “advocate strongly on behalf of U.S. companies.”

FMS and DCS cases. In addition, officials from State's Directorate of Defense Trade Controls and Office of Regional Security and Arms Transfers noted that their processes for authorizing DCS and FMS cases did not change as a result of the new CAT policy. However, as previously noted, both CAT policies allow the executive branch the flexibility to weigh, prioritize, and evaluate potential transfers on a case-by-case basis. As a result, officials noted that the outcomes of certain individual cases might change because of executive branch priorities or shifting international circumstances.

We found that rates for approvals and denials for arms transfers were fairly constant in recent years.

- While the select available data, from fiscal years 2014 through 2018, do not allow us to make any statements about the impact of the new policy, they indicate that DCS denial and approval rates have been fairly constant in recent years. Likewise, data from various State bureaus indicate similar results under both policies. For instance, State's Bureau of Democracy, Human Rights, and Labor and Office of Regional Security and Arms Transfers recommended denial for approximately the same percentage of cases they reviewed under both policies, during the same timeframe.
- Regarding FMS transfers, State officials indicated that they review 100 percent of the Letters of Offer and Acceptance DOD provides, and approve almost all of them,¹⁷ since State and DOD heavily vet and review these cases before they formally come to State. The level of FMS approvals has not changed between the two policies, according to State officials.

Agency Comments

We provided a draft of this report to the Departments of Commerce, Defense, and State for comment. The Departments of Defense and State provided technical comments, which we incorporated as appropriate.

We are sending copies of this report to the Secretaries of State, Defense, and Commerce, and to the appropriate congressional committees. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-2775 or fielde1@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report include Joe Carney (Assistant Director), Julie Hirshen (Analyst-in-Charge), Owen Starlin, Martin de Alteriis, Mark Dowling, and Aldo Salerno.

Sincerely Yours,

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¹⁷Approval in this instance includes approval with conditions.