

Buy American, Pack American: The New Conventional Arms Transfer Policy

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On April 19, 2018, President Trump issued National Security Presidential Memorandum No. NSPM-10 (the "Memorandum"), which outlined a new Conventional Arms Transfer ("CAT") Policy. Based on announcements from administration officials, the new CAT Policy will be a catalyst for the economy and operate to further the Trump administration's "Buy American, Hire American" policies.

The new CAT Policy appears to be the first of what may be many proposals being prepared by the Trump administration's National Security Council in an effort to streamline international arms sales. According to Tina Kaidanow, the Deputy Assistant Secretary for Political-Military Affairs, the goal of the Memorandum is to make sure "U.S. industry faces fewer barriers and less confusion when they are attempting to compete against other countries."

Aligning CAT with National and Economic Interests

Broadly, the policy requires that any arms transfers by the United States must take into account five factors: national security, economic security, relationships with allies and partners, human rights and international humanitarian law, and nonproliferation. The Memorandum states that the "executive branch will also streamline procedures, clarify regulations, increase contracting predictability and flexibility, and maximize the ability of the United States industry to grow and support allies and partners." Given the current regulations governing arms sales, it is difficult to imagine any sort of implementation of the Memorandum that would not result in the promulgation of new regulations that must be followed by industry.

Under Section 36(b) of the Arms Export Control Act ("AECA"), Congress must be formally notified 30 calendar days before the administration can take the final steps to conclude a government-to-government foreign military sale of:

- Major defense equipment valued at \$14 million or more,
- Defense articles or services valued at \$50 million or more, and/or
- Design and construction services valued at \$200 million or more.

In the case of such sales to NATO member states, NATO, Japan, Australia, or New Zealand, Congress must be formally notified 15 calendar days before the administration can proceed with the sale. However, the prior notice threshold values are higher for sales to NATO members, Australia, Japan, or New Zealand.

Commercially licensed arms sales also must be formally notified to Congress 30 calendar days before the export license is issued if they involve the sale of:

- Major defense equipment valued at \$14 million or more, and/or
- Defense articles or services valued at \$50 million or more (Section 36(c) AECA).

In the case of such sales to NATO member states, NATO, Japan, Australia, or New Zealand, Congress must be formally notified 15 calendar days before the administration is authorized to proceed with a given sale. As with government-to-government sales, the prior notice threshold values are higher for sales to NATO members, Australia, Japan, or New Zealand.

Furthermore, formal notification for congressional review must be submitted 30 days prior to the approval of any export license for commercial arms sales cases involving defense articles that are firearms controlled under Category I of the United States Munitions List (“USML”) and valued at \$1 million or more. In the case of proposed licenses for such sales to NATO members, Australia, Japan, or New Zealand, 15-day advance notification is required.

In general, the executive branch, after complying with the terms of applicable U.S. law, principally contained in the AECA, is free to proceed with an arms sales proposal unless Congress passes legislation prohibiting or modifying the proposed sale. Presumably, in order to streamline any of the foregoing, new legislation amending the AECA is necessary. Here, the Secretary of State has until June 18, 2018, to propose an “action plan” to implement the new CAT policy. The timeline includes interagency consultation with the secretaries of the Department of Commerce, the Department of Defense, and the Department of Energy. It is difficult to foresee how the agencies, without Congress, can effectively and efficiently implement the new policies.

Rest Assured, the United States Is a Gold Medalist in the Global Arms Trade

The United States remains, *by far*, the world’s largest arms exporter. According to the Stockholm International Peace Research Institute, the United States accounted for 34% of total arms exports from 2013 to 2017. Our nearest competitor, Russia, accounted for 22% of weapon exports. Germany, France, and China accounted for approximately 5% of global exports each.

The arms trade, at least for the United States, has been a growth industry. For example, the Trend Indicator Values for the United States from 2013 through 2017 have increased each year, at times by a significant amount. In 2017 alone, under the Foreign Military Sales (“FMS”) program, the United States government managed the transfer of some \$40 billion in defense equipment. An additional \$110 billion in sales of defense equipment occurred through the Direct Commercial Sales (“DCS”) program.

New Drone Transfer Conditions

Concurrently, the Secretary of State released the new U.S. policy on the export of unmanned aerial systems (“UAS”), or drones, including recommendations on potential changes to current restrictions on exporting Category I drones, which are capable of flying long distances with heavy payloads. The new policy will allow U.S. defense contractors to sell armed drones to allies through DCS, as opposed to going through the State Department, the Pentagon, and Congress as part of the FMS program.

The new policy applies to all U.S.-origin UAS transfers, whether under the authority of the USML or the Commerce Control List. Specifically:

- **Armed UAS:** Transfers of armed UAS may be made via DCS or FMS, unless other guidance or restrictions relevant to that particular case requires the transfer to take place using FMS. Recipients must agree as a condition of transfer not to arm armed UAS with a foreign system or unauthorized U.S. system without prior U.S. Government authorization.
- **Unarmed UAS:** Transfers of unarmed UAS may be made via DCS or FMS, unless other guidance or restrictions relevant to that particular case require the transfer to take place using FMS. Recipients must agree as a condition of transfer not to arm, whether with U.S. or foreign equipment, a U.S.-origin UAS without U.S. Government permission.
- **Civil UAS:** All Civil UAS will continue to be subject to the licensing requirements and policies of the Export Administration Regulations and will take into account the objectives outlined in this policy and the six nonproliferation factors in section 3 of the Missile Technology Control Regime (MTCR) Guidelines.
- **End-Use Assurances for Military UAS:** Each recipient state shall agree to use U.S.-origin military UAS in accordance with applicable international law; applicable provisions of the AECA and its implementing regulation; the International Traffic in Arms Regulations; other relevant provisions of U.S. law; and for FMS cases, the transfer agreement. Specifically, each recipient state must agree not to transfer title to or possession of any defense article or related training or other defense service associated with a U.S.-origin military UAS or furnish it to anyone not an officer, employee, or agent of that country.
- **Recipient nations must agree not to use or permit the use of a U.S.-origin military UAS for purposes other than those for which the UAS was furnished unless the consent of the U.S. Government has first been obtained.** Prior to a potential transfer, the recipient country shall have agreed that it will maintain the security of the military UAS and its related components and will provide substantially the same degree of security protection afforded to such article or service by the U.S. Government. All military UAS systems will also be transferred only with appropriate technology security measures.
- **End-Use Monitoring and Additional Security Conditions:** All military UAS transfers may be subject to enhanced end-use monitoring and may also be subject to additional security conditions. Transfers of U.S.-origin armed and MTCR Category I UAS shall require periodic consultations with the U.S. Government on their use of U.S.-origin UAS systems.

Conclusion

In 2011, Jeff Immelt, then the Chief Executive Officer of General Electric Co., noted that the United States wasn't trying hard enough to export U.S. goods. "Chancellor (Angela) Merkel flies from Berlin to Beijing, there's 25 German CEOs that go on the plane right behind her. And they connect the dots. They play hard, they play to win." Although Mr. Immelt was referring to turbine sales, this administration appears to have taken his point to heart regarding arms sales.

The administration's expectation is that the new CAT and UAS policies will increase trade opportunities for U.S. companies, remove barriers to the global UAS market, and prevent ceding export opportunities to our competitors. In addition, the administration believes that it will bolster the security and counterterrorism capabilities of our allies inasmuch as it will facilitate their access to U.S. arms generally, and UAS specifically, thereby advancing shared security or counterterrorism objectives.

Another stated objective is that, at least with regard to UAS transfers, the new policy will be a means to strengthen U.S. security relationships when stronger bilateral ties and greater interoperability serve broader U.S. national security and foreign policy interests. The foregoing, presumably, will be calibrated to prevent state or non-state actors from gaining capabilities that would undermine the safety and security of the United States and its allies.

The foregoing may very well be achieved with respect to UAS transfers. We'll have to wait until June 18, 2018, to see how the State Department's "action plan" will implement the remainder of the new CAT policy.