



U.S. CHAMBER OF COMMERCE
Defense & Aerospace Export Council



**RECOMMENDATIONS
TO THE
ADMINISTRATION:
U.S. DEFENSE AND
AEROSPACE POLICY
PRIORITIES**

February 2021



**DEFENSE &
AEROSPACE**
EXPORT COUNCIL

The Defense and Aerospace Export Council

Recommendations to the Administration: U.S. Defense and Aerospace Policy Priorities

EXECUTIVE SUMMARY

On the basis of ongoing conversations with our Defense and Aerospace Export Council member companies, the U.S. Chamber of Commerce urges the administration of the United States to advance the following defense and aerospace policy priorities. If acted upon in a timely fashion, these priorities, listed in the executive summary below, will strengthen both national security and the defense and aerospace industrial complex.

Unmanned Aerial System and the Missile Technology Control Regime (MTCR)

- We recommend the U.S. explore options for reclassifying Unmanned Aerial Systems (UAS) as aviation platforms, vice missiles. Doing so will reinforce U.S. sovereign decision rights for international sales and cooperative development, thereby sustaining American leadership in this critical industry.

ITAR Exemptions for Australia, UK, and Axiom NTIB & Trade Treaty Implementation of Legislation

- We recommend the administration seeks legislation to expand the “Canadian Exemptions” to include the United Kingdom and Australia.

Institutionalize Focus on U.S. Dominance in Emergent Technologies

- We recommend the Department of Defense (DoD) provides an assessment on policies and investments needed to maintain and expand dominance in the defense and aerospace market.
- We recommend DoD be required to provide updated policies and procedures reflecting this assessment.
- We recommend emergent technologies vital to national security be identified annually to ensure appropriate export protection while loosening export controls on soon to be displaced or aging technologies in light of emerging global competitors.

Modernize Defense Department Technology Security Foreign Disclosure (TSFD) Policy Procedure

- We recommend the Arms Transfer Technology Release Senior Steering Group (ATTR SSG) and its Technology Security Foreign Disclosure Office (TSFDO) be realigned and become the independent advisor to the Under Secretary of Defense for Acquisition and Sustainment (USD A&S).
- We recommend TSFDO work in concert with the Military Industrial Base Policy (MIBP) Office to evaluate the impact to the military industrial base of all export transfer denials of SME and MDE.
- We recommend the administration revisit the ATTR SSG and its charter with a goal of fulfilling the intended vision for process reform with the support of the interagency and National Security Council (NSC).

Streamline Contracting and Modernize Pricing Structure for Foreign Military Sales to Increase American Competitiveness

- We recommend DoD fully implement NDAA reforms to FMS contracting. In Section 811 of the FY17 NDAA, Congress required DoD to definitize FMS contracts within 180 days of receiving a qualifying proposal.
- We recommend the administration convene a working group tasked with drafting a new model Federal Acquisition Regulation (FAR) or DFARS Part (or modifying an existing Part such as DFARS Subpart 225.73) to be titled, “Foreign Military Sales Expedited Contracting.”

Exportability

- We recommend DoD direct more programs as Defense Exportability Features (DEF) programs, secure greater funding to implement these programs, and modify Program Executive Officer charters to include international programs.

Market Capture

- We recommend DoD establish a market capture team that is devoted to utilizing information from U.S. government collected intelligence, U.S. embassy staff abroad, and U.S. industry executives to develop DoD capture objectives consistent with U.S. National Security goals.

Industrial Capacity

- We recommend DoD reprogram its appropriations to infuse additional funding into the Special Defense Acquisition Fund (SDAF) up to the authorized limit of \$2.5B.

- We recommend DoD work with Congress to increase the current fund limit from \$2.5B to \$4B.

Institutionalize Focus on U.S. Dominance in Emergent Technologies

- We recommend that the Secretary of Defense directs the Under Secretary of Defense for Research and Engineering (USD R&E), in partnership with the Defense Industrial Base, Departments of State and Commerce, and the intelligence community, to determine annually in writing the emergent technologies vital to national security.
- We recommend that the U.S. proposed rules to either control emergent technologies or loosen control of less critical technology should account for commercialization of former military technologies, changes in sensitivity assessments of listed items, foreign availability, and suggestions for how to describe the controls more clearly.

The Defense and Aerospace Export Council

Recommendations to the Administration: U.S. Defense and Aerospace Policy Priorities

Unmanned Aerial System and the Missile Technology Control Regime (MTCR)

The U.S. Chamber of Commerce urges the new administration to take further action in recognizing the importance of modernizing U.S. export policies regulating Unmanned Aerial Systems (UAS) by exploring options for reclassifying UAS as aviation platforms, vice missiles. On July 24, 2020 the Trump administration introduced policies that treat a subset of MTCR Category I UAS, which cannot travel faster than 800 kilometers per hour, as Category II. In doing so, the administration has worked toward overcoming the MTCR's strong presumption of denial for this UAS subset; however, the policies do not lessen restrictions on co-production/co-development opportunities for CAT I UAS. MTCR's three-decade old standards provide an unfair advantage to countries operating outside the MTCR. For more than two years, the U.S. has been unable to reach a consensus with MTCR partners on over-due reform, which will continue to restrain U.S. industries while jeopardizing national security. Treating UAS as aviation platforms restores U.S. sovereign decision rights for international sales and cooperative development, thereby sustaining American leadership in this critical industry and allowing American companies to effectively compete with foreign manufacturers.

ITAR Exemptions for Australia, UK, and Axiom NTIB & Trade Treaty Implementation of Legislation

We recommend the administration expand the "Canadian Exemptions" to include the United Kingdom and Australia. To realize the full benefit of the newly expanded National Technology and Industrial Base (NTIB) community, we recommend the historic ITAR exemption granted to Canada be expanded to include the entire approved NTIB community.

Instead of adding the United Kingdom and Australia by name to Section 38(j)(1)(B) of the Arms Export Control Act (AECA) (22 U.S.C. §2778), we recommend replacing Canada with "NTIB Partner Countries" and referencing 10 U.S.C. §2500. Doing so will provide greater flexibility as we likely will see the addition by statute of other

Allies within NTIB to support U.S. Armed Forces capability superiority. The U.S. participates in a dynamic and complex threat environment complicated by rapid commercial sector innovation, which is bolstered through cross-border collaboration, making this effort critical to national security.

Institutionalize Focus on U.S. Dominance in Emergent Technologies

The U.S. government's non-proliferation offices have traditionally focused on monitoring and maintaining U.S. obligations under non-proliferation treaties and non-proliferation regimes. However, this model of non-proliferation is no longer sufficient to prevent proliferation and the transfer of defense industrial and technological base capabilities abroad.

Recommended Action: The Department of Defense (DoD) shall provide a written assessment on necessary policies and investments to maintain and expand U.S. dominance in key sectors of the global defense and aerospace market. Working with the interagency, DoD should then provide an action plan to update policies and procedures reflecting the assessment. This plan shall address several issues, including aging technologies that could be exported more liberally, whether current technologies require protection, and the control and proliferation of emergent technologies.

Recommended Action: The Secretary of Defense shall direct the Under Secretary of Defense for Research and Engineering (USD R&E) to determine annually in writing the emergent technologies vital to national security that should be controlled. Furthermore, the USD R&E shall reevaluate controlled legacy technologies with the purpose of loosening controls where there is evidence of emerging global competitors. These competitors have the potential to dominate key market segments that can undermine the health of the U.S. military industrial complex and the bi-lateral defense relations of the U.S. with allies and partners globally.

Recommended Action: On a rolling basis, the Directorate of Defense Trade Controls (DDTC) and the Bureau of Industry and Security (BIS), after consultation with their respective industry advisory committees, the Defense Trade Advisory Group (DTAG) and the Technical Advisory Committees (TACs), shall publish Federal Register Notices of Proposed Rulemaking for public comment to proposed U.S. Munitions List (USML) category and their corresponding Commerce Control List (CCL) categories. The U.S. proposed rules should account for the commercialization of former military technologies, changes in sensitivity assessments of listed items,

foreign availability, and suggestions for how to describe the controls more clearly. After consideration of these comments and similar internal interagency input on these topics, as well as whether emerging technologies of concern shall be added to the lists, updated proposed rules should be published describing changes to the relevant categories. Following consideration of industry comments on such notices, the agencies shall then publish final rules. The goal of such efforts is that the jurisdictional status of items on the USML that no longer provide the United States with a critical military or intelligence advantage shall be changed so that they are controlled appropriately on the CCL. In particular, the agencies should ensure that items that are in normal or reasonably anticipated commercial applications shall not be on the USML. If such items are nonetheless sensitive, they shall be controlled accordingly on the CCL. No more than two years shall elapse between a material change to a category and the initiation of this process.

Modernize Defense Department Technology Security Foreign Disclosure (TSFD) Policy Procedure

The Department of Defense's policy position on arms trade and transfer is shaped in the Arms Transfer and Technology Release Senior Steering Group (ATTR SSG) and supported by the Technology Security Foreign Disclosure Office (TSFDO). The TSFD process impacts both pending and potential future transfers through a Direct Commercial Sale (DCS) export authorization, FMS Letter of Offer and Acceptance (LOA) or a combination of both. The ATTR SSG primarily serves as a forum to balance the protection of critical technologies with building military capacities of foreign allies and partners.

Policy recommendations for the ATTR SSG are developed by the TSFDO, the DoD's advocate for priority technology security and foreign disclosure review. The ATTR SSG is a DoD forum currently co-chaired by Under Secretaries of Defense for Acquisition and Sustainment, and Policy. The TSFD process considers factors associated with National Disclosure Policy, Low Observable/Counter Low Observable, Anti-Tamper, Positioning, Navigation and Timing/GPS, Communications Security, and Data links/Waveforms. The TSFD process, currently managed with a primary focus on case-by-case reviews, lacks sufficient transparency and predictability to allow American industry to efficiently develop products for export in a timely and cost-competitive manner. For example, the TSFD process develops recommendations based on the opinions of the DoD's military departments that are not always consistent amongst the three services. One service may

recommend the release of a technology that is restricted by another service. The lack of a standardized and predictable determination process that addresses broad categories of technologies and capabilities causes uncertainty that retards private sector investment, wastes time and resources, and stifles efficient business planning by American exporters. It also adds significant cost to U.S. products.

The federal government has 13 independent organizations chartered to review and approve (or deny) the transfer of cutting-edge defense capability to our allies and foreign military partners. The baseline position by these organizations is to deny the sale; they are not readily inclined to approve a foreign transfer and assume risk with such a favorable decision. There have been multiple attempts to modify and streamline this decision process with minimal success. The ATTR SSG was unable to achieve its stated objective for several reasons. The group was not authorized permanent staffing; no legal or significant policy change was implemented across the interagency to collapse portfolios to streamline this process; and the monthly meetings were delegated to less empowered senior executives thus diluting the influence and decision authority of the ATTR SSG.

Recommended Action: The administration shall revisit the ATTR SSG and its charter with the goal of fulfilling the intended vision for process reform. When the group meets, the Under Secretaries or their political deputies shall attend to ensure needed leadership influence. With the Under Secretaries committed to attending, representation from the other participants will increase in response, ensuring that each attendee is of the appropriate rank to represent and speak for their organizational component.

Recommended Action: The Secretary of Defense shall direct that the ATTR SSG and its TSFDO shall be realigned under and become the independent advisor to the Under Secretary of Defense for Acquisition and Sustainment (USD A&S) and work in concert with the Military Industrial Base Policy (MIBP) Office. The goal of this realignment will be the evaluation of the impact to the military industrial base of all export transfer denials of Significant Military Equipment (SME) and Major Defense Equipment (MDE). In pursuit of this goal, the ATTR SSG shall convene industry representatives in discussions with the Services, DTSA, Special Programs, Under Secretary of Defense for Policy (OUSDP), MIBP, etc., to evaluate the national security and economic implications of DoD policies. These discussions shall produce determinations that will be implemented by the MILDEPs and TSFD components under predictable and consistent timelines.

Recommended Action: The Combatant Commands (COCOMs) shall provide input to the TSFDO through an annual classified report on (a) key MDE and SME capabilities and (b) interoperability mechanisms, including cross domain integration, required by U.S. allies and partners to decrease risk to U.S. military missions and risk to U.S. forces party to those missions. This report will be based on COCOM wartime planning and reflect SME/MDE capabilities required by partner and allied militaries to prevail in future military contingencies. The TSFDO will utilize the reports to drive anticipatory DoD policies for the key capabilities applicable to coalition operations across the COCOMs. For MDE/SME sales, the COCOMs shall be informed of any intent to deny and/or heavily proviso export authorizations or to deny or frustrate an FMS sale to potential buyers of U.S. systems, which would affect the requirements identified in the COCOM classified annual report.

Recommended Action: All denials or returns without action of MDE/SME, whether FMS, DCS, or a combination of both, will require a TSFDO assessment in writing that an export authorization or FMS denial will or will not result in the denial of the military capability or a near equivalent capability to the end user in question leveraging intel assessments regarding foreign availability.

Modernize Pricing Structure for Foreign Military Sales to Increase American Competitiveness

The Security Assistance Management Manual (SAMM) and the Financial Management Regulation (FMR) direct U.S. military departments and others to price military equipment and services provided via the FMS program for foreign customers. The FMR aims to ensure that the U.S. government is compliant with the Arms Export Control Act, ensuring that the U.S. government operates the FMS program at no loss. DoD 7000.14-R FMR Vol 15 Chapter 7 states that “on the Letter of Acceptance (LOA), the estimated price is to be a reasonable approximation of the amount which will ultimately be billed, to include the Office of the Under Secretary of Defense (Comptroller) (OUSD (C)) inflation indices and other factors.” The result is often an inflated FMS offer which is not socialized with industry, not aligned with industry estimating, and often not competitive with foreign offers. This situation is compounded by a formal Congressional notification total program value that is inflated even further beyond the FMS LOA total case value. These are long standing practices that have historically been beneficial, but now disadvantage American industry in the competitive acquisition process most foreign governments have adopted.

Recommended Action: The DoD shall work with U.S. defense industry representatives to revisit the pricing policies and develop pricing options when an FMS LOA is used in a foreign government competitive acquisition, including hybrid FMS/DCS cases. In such scenarios, DoD shall revisit FMS-only transfer policies for the end item being sold (with the intent to allow a DCS) or invoke an FMR exception on price computation that reduces the per unit price consistent with what would have been offered under a DCS arrangement while ensuring the fundamental indemnities legally available to the U.S. government, under an FMS LOA arrangement, are addressed within the offer other than as an element of the per unit price. Furthermore, DoD will share with the U.S. company the LOA draft pricing to ensure they are informed prior to the delivery of the LOA to the foreign government in accordance with Section 1297(b) of the Fiscal Year 2017 (FY17) National Defense Authorization Act (NDAA).

Streamline Foreign Military Sale Contracting to Ensure Market Availability

FMS contract definitization and award timelines are too long. This impacts the price and availability of critical military capability for foreign allies and partners.

Recommended Action: Through regulation, DoD shall implement NDAA reforms to FMS contracting. In Section 811 of the FY17 NDAA, Congress required DoD to definitize FMS contracts within 180 days of receiving a qualifying proposal. Section 811 also revised the definition of a qualifying proposal which reduced the amount of information required for submission and consideration. If implemented in the Department of Defense Federal Acquisition Regulations Supplement (DFARS), these reforms will streamline the contract negotiation process and reduce administrative burdens on the government and the contractor. We encourage the administration to ensure DoD complies in achieving the 180-day goal.

Recommended Action: The administration shall convene a working group tasked with drafting a new model Federal Acquisition Regulation (FAR) or DFARS Part (or modifying an existing Part such as DFARS Subpart 225.73) to be titled, “Foreign Military Sales Expedited Contracting.” Their objective will be to develop and implement FMS specific contracting procedures that will greatly reduce the time required to award a contract. This working group shall be empowered to engage directly with those representing industry or individual companies to receive input for this new regulation. This working group shall focus on regulatory changes that do not require additional legislative action by Congress.

Recommended Action: The working group shall consider drafting regulatory changes specific to level of cost or pricing data required for FMS contracts so that such data requirements are commensurate with what is already required for domestic contracts. Given the substantial data already required to support pricing the program of record, the working group shall consider reducing the data required for pricing subsequent FMS contracts, absent a request to the contrary from the foreign customer. Current FMS pricing pilot programs go beyond what is reasonable and compliant, delaying contract awards and undermining the goal of reducing FMS program cycle times.

Exportability

Over 80% of DoD programs are not designed with foreign sales in mind. Therefore, the U.S. suppliers will be directed to proceed with costly design changes to simplify the product capability, such that when sold and delivered to a foreign military it does not pose a risk to U.S. forces in a future conflict. DoD has legal authority, in financial partnership with U.S. industry, to develop requirements in advance for designs that would allow future export without having to reengineer a product in full rate production. This occurs through the Defense Exportability Features (DEF) program run by the DoD Acquisition Chief. The success of this program has been impeded by several factors including the lack of sufficient DoD funding, DoD program managers at the military department level not being directed to include their programs, and industry executives who do not see a return on their investment for at least ten years if ever.

Recommended Action: DoD shall direct more programs as DEF programs, secure greater funding to implement the DEF program, and modify Program Executive Officer charters to include international programs. Industry and its shareholders shall agree to a long-term investment strategy to effect early program design that will enable timely and cost competitive sales internationally.

Market Capture

DoD approaches international sales with a limited set of objectives: interoperability with allied and friendly militaries and enabling partner nations to defend themselves supporting production to achieve efficiencies both due to economies of scale and infusion of foreign capital into DoD Research & Development (R&D) programs. Both foreign buyers and competing defense industries are often driven by clashing or

disconnected objectives. Some of which are limiting dependence on the U.S. and its industries for defense programs; acquiring capability that is more cost effective; creating a national defense industrial base through offsets; and securing foreign intellectual property rights that the U.S. prohibits.

Recommended Actions: DoD staff are uniquely positioned in their access to information. They have at their disposal intelligence collected by the U.S. government, the knowledge of U.S. embassy staff abroad who are aware of requirements in their host nation, and the understanding U.S. industry executives who work globally have about market trends and opportunities. These three sources of information should be used routinely by the DoD to understand where emerging sales opportunities that are consistent with U.S. national security objectives exist. The DoD shall establish a market capture team that is devoted to utilizing these three sources of information by country and region to develop DoD capture objectives. Once these capture objectives are created, the DoD working with regional embassy staff and combatant commanders, as well as U.S. industry, should follow critical capture goals with a harmonized and forceful U.S. capability campaign, country by country.

Industrial Capacity

Selling a military capability that takes five years to deliver can undermine U.S. market capture. DoD is struggling with the best approach to reduce lengthy production timelines in order to provide military capability sooner to allies and friends globally.

Recommended Action: The Special Defense Acquisition Fund (SDAF) was established as a revolving fund used to acquire and store defense articles in anticipation of their sale to eligible foreign countries and international organizations. Originally limited to \$1B in value, DoD has been able to secure authority to increase the fund ceiling to \$2.5B. However, DoD has only been able to secure funds up to \$900M to date. DoD shall consider reprogramming its appropriations to infuse additional funding into this program up to the authorized limit of \$2.5B. Furthermore, DoD should work with Congress to revise the current fund limit from \$2.5B to \$4B.

To achieve effective and lasting reform, DoD will need to partner with the interagency to seriously consider organizational, ownership, process, procedural and legislative reform. Legally, the program of international sales is owned by the Secretary of State who assigns the responsibility for the execution of the program to the Secretary of Defense. The NSC will need to lead the discussion and reformation effort. Regarding sectors in need of special attention for international sale advocacy,

the Chamber has identified the defense aviation sector, both fixed wing and rotorcraft, given the supply chain connection with the commercial aviation sector which has been decimated by the pandemic.