To amend the Arms Export Control Act to modify certification and report requirements relating to sales of major defense equipment with respect to which nonrecurring costs of research, development, and production are waived or reduced under the Arms Export Control Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 28, 2018

Ms. SPEIER (for herself, Mr. DUNCAN of Tennessee, Mr. LEWIS of Minnesota, Mr. TED LIEU of California, Mr. MEADOWS, and Mr. RASKIN) introduced the following bill; which was referred to the Committee on Foreign Affairs

A BILL

To amend the Arms Export Control Act to modify certification and report requirements relating to sales of major defense equipment with respect to which nonrecurring costs of research, development, and production are waived or reduced under the Arms Export Control Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 

SECTION 1. SHORT TITLE.

This Act may be cited as the “Return Expenses Paid and Yielded Act” or “REPAY Act”.

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SECTION 1. SHORT TITLE.

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This Act may be cited as the “Return Expenses Paid

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SEC. 2. MODIFICATION OF CERTIFICATION AND REPORT REQUIREMENTS RELATING TO SALES OF MAJOR DEFENSE EQUIPMENT WITH RESPECT TO WHICH NONRECURRING COSTS OF RESEARCH, DEVELOPMENT, AND PRODUCTION ARE WAIVED OR REDUCED UNDER THE ARMS EXPORT CONTROL ACT.

(a) Certification.—Section 36(b) of the Arms Export Control Act (22 U.S.C. 2776(b)) is amended by adding at the end the following:

“(7)(A) In the case of any letter of offer to sell any major defense equipment for $14,000,000 or more, in addition to the other information required to be contained in a certification submitted to the Congress under this subsection, or a similar certification prior to finalization of a letter of offer to sell, each such certification shall include the value of any charge or charges for the proportionate amount of any nonrecurring costs of research, development, and production of the major defense equipment that was waived or reduced under section 21(e).

“(B) Each such certification shall also include information on—

“(i) the type of waiver or reduction;

“(ii) the percentage of otherwise obligated nonrecurring costs with respect to which the waiver or reduction comprises;
“(iii) a justification for issuance of the waiver or reduction;

“(iv) in the case of a waiver or reduction made under paragraph (2)(A) of section 21(e)—

“(I) the manner in which a sale would significantly advance standardization with the foreign countries or international organization described in such section; and

“(II) the extent to which the sale’s significance should be considered relative to the existing capabilities of the foreign country or international organization and the manner in which the major defense equipment would enhance the capacity of the country or organization in joint operations; and

“(v) in the case of a waiver or reduction made under paragraph (2)(B) of section 21(e)—

“(I) the military needs and ability to pay of the foreign country or international organization;

“(II) the price and capability of other relevant options that are or likely would be considered by the foreign country or international organization for purchase in lieu of the major def-
fense equipment described in the letter of offer;

and

“(III) the previous buying history and exist-
ing capabilities of the foreign country or
international organization.”.

(b) REPORT.—Section 36(a) of the Arms Export
Control Act (22 U.S.C. 2776(a)) is amended—

(1) in paragraph (11), by striking “and” at the
end;

(2) in paragraph (12), by striking the period at
the end and inserting “; and”; and

(3) by adding at the end the following:

“(13) with respect to requests to waive or re-
duce nonrecurring costs with respect to the sale of
major defense equipment for $14,000,000 or more
under this Act, a report on—

“(A) the total number of such requests
that have been approved or denied during the
quarter, including the total number of such re-
quests that are currently under review and
pending a decision; and

“(B) for each such request—

“(i) an identification of the foreign
country or international organization re-
questing the waiver or reduction; and
“(ii) the total amount of nonrecurring costs to be waived or reduced;

“(iii) a description of the major defense equipment to be purchased; and

“(iv) the justification for the waiver or reduction; and

“(C) for each such request that is approved, the actual amount of nonrecurring costs that are waived or reduced that are attributable to quantities of major defense equipment sold under such request.”.

(c) Repeal of Waiver Authority in Case of Sales of Major Defense Equipment Also Being Procured for Use by United States Armed Forces.—Section 21(e)(2) of the Arms Export Control Act (22 U.S.C. 2761(e)(2)) is amended—

(1) in subparagraph (B)—

(A) in the matter preceding clause (i)—

(i) by striking “The President” and inserting “Except as provided subparagraphs (D) and (E), the President”; and

(ii) by striking “that—” and all that follows through “(i) imposition” and inserting “that imposition”;
(B) by striking “sale; or” and inserting “sale.”; and

(C) by striking clause (ii); and

(2) by inserting at the end the following new subparagraphs:

“(D) The President may not waive the charge or charges for a proportionate amount of any non-recurring costs that would otherwise be considered appropriate under paragraph (1)(B) for a particular sale to a country or international organization for a two-year period that begins on any of the following dates:

“(i) The date of approval of a waiver under paragraph (1)(B) of a charge or charges that are valued at $16,000,000 or more under this Act with respect to a sale to the country or organization.

“(ii) The date that is the last day of any five-year period in which the country or organization receives 15 or more waivers of a charge or charges under paragraph (1)(B) with respect to sales to the country or organization.

“(iii) The date that is the last day of any five-year period in which the country or organization receives waivers of a charge or charges
under paragraph (1)(B) that are valued at $425,000,000 or more under this Act with respect to sales to the country or organization.

“(E)(i) In the case of any proposed waiver of the charge or charges which would otherwise be considered appropriate under paragraph (1)(B) for a particular sale to a country or international organization of major defense equipment for $10,000,000 or more under this Act, the President shall submit to the Speaker of the House of Representatives, the Committee on Foreign Affairs of the House of Representatives, and to the chairman of the Committee on Foreign Relations of the Senate a notification with respect to such proposed waiver.

“(ii) The President may not waive such charge or charges if Congress, not later than 60 calendar days after receiving such notification, enacts a joint resolution prohibiting the proposed waiver.”.

(d) M AXIMUM AGGREGATE AMOUNT OF CHARGES FOR ADMINISTRATIVE SERVICES.—Section 21(e) of the Arms Export Control Act (22 U.S.C. 2761(e)) is amended—

(1) in paragraph (1), by inserting “subject to paragraph (4),” before “administrative services”; and
(2) by adding at the end the following new paragraph:

“(4)(A) For each fiscal year beginning on or after the date of the enactment of the Return Expenses Paid and Yielded Act, the President shall—

“(i) determine a maximum aggregate amount of charges for administrative services that would be required by paragraph (1)(A) based on the ability of the Department of Defense to issue and administer letters of offer for sale of defense articles or the sale of defense services pursuant to this section or pursuant to section 22 of this Act; and

“(ii) submit to Congress a report that contains the determination and specifies the maximum aggregate amount of charges for administrative services.

“(B)(i) Except as provided in clause (ii), charges for administrative services that are required by paragraph (1)(A) may not exceed the maximum aggregate amount of charges for administrative services determined under subparagraph (A) for the fiscal year involved.

“(ii) The President may waive the requirement of clause (i) on a case-by-case basis if the amount
of charges for administrative services that are re-
quired by paragraph (1)(A) with respect to a sale of
defense articles or a sale of defense services would
exceed the maximum aggregate amount of charges
for administrative services determined under sub-
paragraph (A) for the fiscal year.”.

(e) MODIFICATION OF ADMINISTRATIVE EX-
PENSES.—

(1) IN GENERAL.—Section 43(b) of the Arms
Export Control Act (22 U.S.C. 2792(b) is amend-
ed—

(A) in paragraph (1), by adding “and” at
the end;

(B) in paragraph (2), by striking “; and”
and inserting a period; and

(C) by striking paragraph (3).

(2) CONFORMING AMENDMENT.—Section
21(e)(1)(A) of the Arms Export Control Act (22
U.S.C. 2761(e)(1)(A)) is amended by striking “and
section 43(e)”.

(f) BIENNIAL REVIEW AND MODIFICATION OF USER
CHARGES.—

(1) IN GENERAL.—Notwithstanding any other
provision of law, the Secretary of Defense, acting
through the Director of the Defense Security Co-
operation Agency, shall, not less than once every two
years—

(A) carry out a review of user charges
under the foreign military sales program and,
based on the results of the review, modify the
user charges as appropriate; and

(B) submit to the appropriate congressional committees a report that contains the re-
sults of the review carried out under subpara-
graph (A) and a description of any user charges
that, based on the results of the review, were
modified under subparagraph (A).

(2) APPOSITE CONGRESSIONAL COMMIT-
TEES DEFINED.—In this subsection, the term “ap-
propriate congressional committees” means—

(A) the Committee on Armed Services and
the Committee on Foreign Affairs of the House
of Representatives; and

(B) the Committee on Armed Services and
the Committee on Foreign Relations of the Sen-
ate.

SEC. 3. REVIEW AND REPORT ON USE AND MANAGEMENT
OF ADMINISTRATIVE SURCHARGES UNDER
THE FOREIGN MILITARY SALES PROGRAM.

(a) Review.—
(1) IN GENERAL.—The Secretary of Defense, acting through the Director of the Defense Security Cooperation Agency, shall review options for expanding the use of administrative surcharges under the foreign military sales program, including practices for managing administrative surcharges and contract administrative services surcharges.

(2) MATTERS TO BE INCLUDED.—The review conducted under paragraph (1) shall include the following:

   (A) A determination of which specific expenses are incurred by the United States Government in operation of the foreign military sales program that the administrative surcharge does not currently pay for.

   (B) The estimated annual cost of each of such specific expenses.

   (C) An assessment of the costs and benefits of funding such specific expenses through the administrative surcharge, including any data to support such an assessment.

   (D) An assessment of how the Department of Defense could calculate an upper bound of a target range for the administrative surcharge account and the contract administration serv-
ices surcharge account, including an assessment of the costs and benefits of setting such a bound.

(E) An assessment of how the Department of Defense calculates the lower bound, or safety level, for the administrative surcharge account and the contract administration services surcharge account, including what specific factors inform the calculation and whether such a method for calculating the safety level is still valid or should be revisited.

(F) An assessment of the process used by the Department of Defense to review and set rates for the administrative surcharge and the contract administration services surcharge, including the extent to which outside parties are consulted and any proposals of the Department of Defense may have for better ensuring that the fee rates are set appropriately.

(G) Such other matters as the Secretary of Defense determines to be appropriate.

(b) REPORT.—Not later than 120 days after the date of the enactment of this Act, the Secretary of Defense, acting through the Director of the Defense Security Co-
operation Agency, shall submit to the congressional defense committees a report on—

(1) the findings of the review conducted under paragraph (1); and

(2) any legislative changes needed to allow the surcharge under the foreign military sales program to pay for any expenses currently not covered by administrative surcharge under the foreign military sales program.

(c) FOREIGN MILITARY SALES PROGRAM DEFINED.—In this subsection, the term “foreign military sales program” means the program authorized under chapter 2 of the Arms Export Control Act (22 U.S.C. 2761 et seq.).

SEC. 4. PERFORMANCE MEASURES TO MONITOR FOREIGN MILITARY SALES PROGRAM.

(a) IN GENERAL.—The Secretary of Defense, acting through the Director of the Defense Security Cooperation Agency and in consultation with the heads of other relevant components of the Department of Defense, shall enhance the ability of the Department of Defense to monitor the performance of the foreign military sales program by taking the following actions:

(1) Develop performance measures to monitor the timeliness of deliveries of defense articles and
defense services to purchasers in accordance with 
the delivery schedule for each sale under the foreign 
military sales program.

(2) Identify key choke points, processes, and 
tasks that contribute most significantly to delays, 
shortcomings, and issues in the foreign military sales 
program.

(3) Review existing performance measures for 
the foreign military sales program to determine 
whether such measures need to be updated, replaced, 
or supplemented to ensure that all key aspects of the 
foreign military sales program’s efficiency and serv-
vice of United States national interests are able to be 
monitored and informed by reliable data.

(b) REPORT ON PERFORMANCE MEASURES.—

(1) IN GENERAL.—Not later than 180 days 
after the date of the enactment of this Act, the Sec-
retary of Defense, acting through the Director of the 
Defense Security Cooperation Agency, shall submit 
to the congressional defense committees a report 
that lists the performance measures developed and 
identified under subsection (a).

(2) MATTERS TO BE INCLUDED.—The report 
required by paragraph (1) shall—
(A) define the performance measures, including targets set for the performance measures;

(B) identify the data systems used to monitor the performance measures;

(C) identify any concerns related to the reliability of the data used to monitor the performance measures; and

(D) report the results for the performance measures for the most recent fiscal year.

(3) PLAN.—If the performance measures developed and identified under subsection (a) cannot be included in the report required by paragraph (1) for the most recent fiscal year based on reliable and accessible data, the report shall include a plan for ensuring that such data will be monitored within a defined period of time.

(4) UPDATE.—

(A) IN GENERAL.—For each fiscal year after the fiscal year in which the report required by subsection (b) is submitted to the congressional defense committees, the Secretary of Defense shall submit to the congressional defense committees an update of the report required by paragraph (1).
(B) MATTERS TO BE INCLUDED.—Each update of the report required by paragraph (1) shall also include the following:

(i) For any performance measures that indicate a decreased level of performance from the prior year—

(I) a description of the factors that led to such decreased level of performance; and

(II) plans to improve such level of performance.

(ii) For any performance measures that remain unable to be monitored due to lack of reliable and accessible data, an update on plans to improve the monitoring of data.

(c) BRIEFING.—Not later than 180 days after the date on which the Secretary of Defense, acting through the Director of the Defense Security Cooperation Agency, submits to the congressional defense committees the report required by subsection (b), the Comptroller General of the United States shall provide a briefing to the congressional defense committees on the report, including an evaluation of the performance measures developed and identified under subsection (a).
SEC. 5. REPORT AND BRIEFING ON ADMINISTRATIVE BUDGETING OF FOREIGN MILITARY SALES PROGRAM.

(a) IN GENERAL.—Not later than one year after the date of the enactment of this Act, the Comptroller General of the United States shall provide a briefing to the congressional defense committees and submit to the congressional defense committees a report on the methodology used by the Department of Defense to determine future-year needs for administrative surcharges under the foreign military sales program.

(b) MATTERS TO BE INCLUDED.—The briefing and report required by subsection (a) shall include the following:

(1) A description of the methodology the Department of Defense used to develop the overall administrative budget of the foreign military sales program and the administrative budgets for each other relevant component of the Department of Defense that receives funds from the foreign military sales program.

(2) An assessment of the extent to which the methodology described in paragraph (1) reflects relevant best practices.

(3) Any other related matters the Comptroller General determines to be appropriate.
SEC. 6. DEFINITIONS.

In this Act:

(1) CONGRESSIONAL DEFENSE COMMITTEES.—The term “congressional defense committees” has the meaning given such term in section 101 of title 10, United States Code.

(2) FOREIGN MILITARY SALES PROGRAM.—The term “foreign military sales program” means the program authorized under chapter 2 of the Arms Export Control Act (22 U.S.C. 2761 et seq.).