

116TH CONGRESS
1ST SESSION

H. R. 1033

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

FEBRUARY 7, 2019

Ms. SPEIER (for herself, Mr. JONES, Mr. RASKIN, Mr. MEADOWS, Mr. TED LIEU of California, Mr. KHANNA, and Mr. POCAN) 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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

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

1 **SEC. 2. MODIFICATION OF CERTIFICATION AND REPORT**
2 **REQUIREMENTS RELATING TO SALES OF**
3 **MAJOR DEFENSE EQUIPMENT WITH RESPECT**
4 **TO WHICH NONRECURRING COSTS OF RE-**
5 **SEARCH, DEVELOPMENT, AND PRODUCTION**
6 **ARE WAIVED OR REDUCED UNDER THE ARMS**
7 **EXPORT CONTROL ACT.**

8 (a) CERTIFICATION.—Section 36(b) of the Arms Ex-
9 port Control Act (22 U.S.C. 2776(b)) is amended by add-
10 ing at the end the following:

11 “(7)(A) In the case of any letter of offer to sell any
12 major defense equipment for \$14,000,000 or more, in ad-
13 dition to the other information required to be contained
14 in a certification submitted to the Congress under this
15 subsection, or a similar certification prior to finalization
16 of a letter of offer to sell, each such certification shall in-
17 clude the value of any charge or charges for the propor-
18 tionate amount of any nonrecurring costs of research, de-
19 velopment, and production of the major defense equipment
20 that was waived or reduced under section 21(e).

21 “(B) Each such certification shall also include infor-
22 mation on—

23 “(i) the type of waiver or reduction;

24 “(ii) the percentage of otherwise obligated non-
25 recurring costs with respect to which the waiver or
26 reduction comprises;

1 “(iii) a justification for issuance of the waiver
2 or reduction;

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

5 “(I) the manner in which a sale would sig-
6 nificantly advance standardization with the for-
7 eign countries or international organization de-
8 scribed in such section; and

9 “(II) the extent to which the sale’s signifi-
10 cance should be considered relative to the exist-
11 ing capabilities of the foreign country or inter-
12 national organization and the manner in which
13 the major defense equipment would enhance the
14 capacity of the country or organization in joint
15 operations; and

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

18 “(I) the military needs and ability to pay
19 of the foreign country or international organiza-
20 tion;

21 “(II) the price and capability of other rel-
22 evant options that are or likely would be consid-
23 ered by the foreign country or international or-
24 ganization for purchase in lieu of the major de-

1 fense equipment described in the letter of offer;
2 and

3 “(III) the previous buying history and ex-
4 isting capabilities of the foreign country or
5 international organization.”.

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

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

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

12 (3) by adding at the end the following:

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

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

22 “(B) for each such request—

23 “(i) an identification of the foreign
24 country or international organization re-
25 questing the waiver or reduction;

1 “(ii) the total amount of nonrecurring
2 costs to be waived or reduced;

3 “(iii) a description of the major de-
4 fense equipment to be purchased; and

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

7 “(C) for each such request that is ap-
8 proved, the actual amount of nonrecurring costs
9 that are waived or reduced that are attributable
10 to quantities of major defense equipment sold
11 under such request.”.

12 (c) REPEAL OF WAIVER AUTHORITY IN CASE OF
13 SALES OF MAJOR DEFENSE EQUIPMENT ALSO BEING
14 PROCURED FOR USE BY UNITED STATES ARMED
15 FORCES.—Section 21(e)(2) of the Arms Export Control
16 Act (22 U.S.C. 2761(e)(2)) is amended—

17 (1) in subparagraph (B)—

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

19 (i) by striking “The President” and
20 inserting “Except as provided subpara-
21 graphs (D) and (E), the President”; and

22 (ii) by striking “that—” and all that
23 follows through “(i) imposition” and in-
24 serting “that imposition”;

1 (B) by striking “sale; or” and inserting
2 “sale.”; and

3 (C) by striking clause (ii); and

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

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

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

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

23 “(iii) The date that is the last day of any
24 five-year period in which the country or organi-
25 zation receives waivers of a charge or charges

1 under paragraph (1)(B) that are valued at
2 \$425,000,000 or more under this Act with re-
3 spect to sales to the country or organization.

4 “(E)(i) In the case of any proposed waiver of
5 the charge or charges which would otherwise be con-
6 sidered appropriate under paragraph (1)(B) for a
7 particular sale to a country or international organi-
8 zation of major defense equipment for \$10,000,000
9 or more under this Act, the President shall submit
10 to the Speaker of the House of Representatives, the
11 Committee on Foreign Affairs of the House of Rep-
12 resentatives, and to the chairman of the Committee
13 on Foreign Relations of the Senate a notification
14 with respect to such proposed waiver.

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

19 (d) MAXIMUM AGGREGATE AMOUNT OF CHARGES
20 FOR ADMINISTRATIVE SERVICES.—Section 21(e) of the
21 Arms Export Control Act (22 U.S.C. 2761(e)) is amend-
22 ed—

23 (1) in paragraph (1), by inserting “subject to
24 paragraph (4),” before “administrative services”;
25 and

1 (2) by adding at the end the following new
2 paragraph:

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

6 “(i) determine a maximum aggregate
7 amount of charges for administrative services
8 that would be required by paragraph (1)(A)
9 based on the ability of the Department of De-
10 fense to issue and administer letters of offer for
11 sale of defense articles or the sale of defense
12 services pursuant to this section or pursuant to
13 section 22 of this Act; and

14 “(ii) submit to Congress a report that con-
15 tains the determination and specifies the max-
16 imum aggregate amount of charges for adminis-
17 trative services.

18 “(B)(i) Except as provided in clause (ii),
19 charges for administrative services that are required
20 by paragraph (1)(A) may not exceed the maximum
21 aggregate amount of charges for administrative serv-
22 ices determined under subparagraph (A) for the fis-
23 cal year involved.

24 “(ii) The President may waive the requirement
25 of clause (i) on a case-by-case basis if the amount

1 of charges for administrative services that are re-
2 quired by paragraph (1)(A) with respect to a sale of
3 defense articles or a sale of defense services would
4 exceed the maximum aggregate amount of charges
5 for administrative services determined under sub-
6 paragraph (A) for the fiscal year.”.

7 (e) MODIFICATION OF ADMINISTRATIVE EX-
8 PENSES.—

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

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

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

16 (C) by striking paragraph (3).

17 (2) CONFORMING AMENDMENT.—Section
18 21(e)(1)(A) of the Arms Export Control Act (22
19 U.S.C. 2761(e)(1)(A)) is amended by striking “and
20 section 43(c)”.

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

23 (1) IN GENERAL.—Notwithstanding any other
24 provision of law, the Secretary of Defense, acting
25 through the Director of the Defense Security Co-

1 operation Agency, shall, not less than once every two
2 years—

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

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

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

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

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

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

25 (a) REVIEW.—

1 (1) IN GENERAL.—The Secretary of Defense,
2 acting through the Director of the Defense Security
3 Cooperation Agency, shall review options for expand-
4 ing the use of administrative surcharges under the
5 foreign military sales program, including practices
6 for managing administrative surcharges and con-
7 tract administrative services surcharges.

8 (2) MATTERS TO BE INCLUDED.—The review
9 conducted under paragraph (1) shall include the fol-
10 lowing:

11 (A) A determination of which specific ex-
12 penses are incurred by the United States Gov-
13 ernment in operation of the foreign military
14 sales program that the administrative surcharge
15 does not currently pay for.

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

18 (C) An assessment of the costs and bene-
19 fits of funding such specific expenses through
20 the administrative surcharge, including any
21 data to support such an assessment.

22 (D) An assessment of how the Department
23 of Defense could calculate an upper bound of a
24 target range for the administrative surcharge
25 account and the contract administration serv-

1 ices surcharge account, including an assessment
2 of the costs and benefits of setting such a
3 bound.

4 (E) An assessment of how the Department
5 of Defense calculates the lower bound, or safety
6 level, for the administrative surcharge account
7 and the contract administration services sur-
8 charge account, including what specific factors
9 inform the calculation and whether such a
10 method for calculating the safety level is still
11 valid or should be revisited.

12 (F) An assessment of the process used by
13 the Department of Defense to review and set
14 rates for the administrative surcharge and the
15 contract administration services surcharge, in-
16 cluding the extent to which outside parties are
17 consulted and any proposals of the Department
18 of Defense may have for better ensuring that
19 the fee rates are set appropriately.

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

22 (b) REPORT.—Not later than 120 days after the date
23 of the enactment of this Act, the Secretary of Defense,
24 acting through the Director of the Defense Security Co-

1 operation Agency, shall submit to the congressional de-
2 fense committees a report on—

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

5 (2) any legislative changes needed to allow the
6 surcharge under the foreign military sales program
7 to pay for any expenses currently not covered by ad-
8 ministrative surcharge under the foreign military
9 sales program.

10 (c) FOREIGN MILITARY SALES PROGRAM DE-
11 FINED.—In this subsection, the term “foreign military
12 sales program” means the program authorized under
13 chapter 2 of the Arms Export Control Act (22 U.S.C.
14 2761 et seq.).

15 **SEC. 4. PERFORMANCE MEASURES TO MONITOR FOREIGN**
16 **MILITARY SALES PROGRAM.**

17 (a) IN GENERAL.—The Secretary of Defense, acting
18 through the Director of the Defense Security Cooperation
19 Agency and in consultation with the heads of other rel-
20 evant components of the Department of Defense, shall en-
21 hance the ability of the Department of Defense to monitor
22 the performance of the foreign military sales program by
23 taking the following actions:

24 (1) Develop performance measures to monitor
25 the timeliness of deliveries of defense articles and

1 defense services to purchasers in accordance with
2 the delivery schedule for each sale under the foreign
3 military sales program.

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

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

15 (b) REPORT ON PERFORMANCE MEASURES.—

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

23 (2) MATTERS TO BE INCLUDED.—The report
24 required by paragraph (1) shall—

1 (A) define the performance measures, in-
2 cluding targets set for the performance meas-
3 ures;

4 (B) identify the data systems used to mon-
5 itor the performance measures;

6 (C) identify any concerns related to the re-
7 liability of the data used to monitor the per-
8 formance measures; and

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

11 (3) PLAN.—If the performance measures devel-
12 oped and identified under subsection (a) cannot be
13 included in the report required by paragraph (1) for
14 the most recent fiscal year based on reliable and ac-
15 cessible data, the report shall include a plan for en-
16 suring that such data will be monitored within a de-
17 fined period of time.

18 (4) UPDATE.—

19 (A) IN GENERAL.—For each fiscal year
20 after the fiscal year in which the report re-
21 quired by subsection (b) is submitted to the
22 congressional defense committees, the Secretary
23 of Defense shall submit to the congressional de-
24 fense committees an update of the report re-
25 quired by paragraph (1).

1 (B) MATTERS TO BE INCLUDED.—Each
2 update of the report required by paragraph (1)
3 shall also include the following:

4 (i) For any performance measures
5 that indicate a decreased level of perform-
6 ance from the prior year—

7 (I) a description of the factors
8 that led to such decreased level of per-
9 formance; and

10 (II) plans to improve such level
11 of performance.

12 (ii) For any performance measures
13 that remain unable to be monitored due to
14 lack of reliable and accessible data, an up-
15 date on plans to improve the monitoring of
16 data.

17 (c) BRIEFING.—Not later than 180 days after the
18 date on which the Secretary of Defense, acting through
19 the Director of the Defense Security Cooperation Agency,
20 submits to the congressional defense committees the re-
21 port required by subsection (b), the Comptroller General
22 of the United States shall provide a briefing to the con-
23 gressional defense committees on the report, including an
24 evaluation of the performance measures developed and
25 identified under subsection (a).

1 **SEC. 5. REPORT AND BRIEFING ON ADMINISTRATIVE**
2 **BUDGETING OF FOREIGN MILITARY SALES**
3 **PROGRAM.**

4 (a) **IN GENERAL.**—Not later than one year after the
5 date of the enactment of this Act, the Comptroller General
6 of the United States shall provide a briefing to the con-
7 gressional defense committees and submit to the congres-
8 sional defense committees a report on the methodology
9 used by the Department of Defense to determine future-
10 year needs for administrative surcharges under the foreign
11 military sales program.

12 (b) **MATTERS TO BE INCLUDED.**—The briefing and
13 report required by subsection (a) shall include the fol-
14 lowing:

15 (1) A description of the methodology the De-
16 partment of Defense used to develop the overall ad-
17 ministrative budget of the foreign military sales pro-
18 gram and the administrative budgets for each other
19 relevant component of the Department of Defense
20 that receives funds from the foreign military sales
21 program.

22 (2) An assessment of the extent to which the
23 methodology described in paragraph (1) reflects rel-
24 evant best practices.

25 (3) Any other related matters the Comptroller
26 General determines to be appropriate.

1 **SEC. 6. DEFINITIONS.**

2 In this Act:

3 (1) CONGRESSIONAL DEFENSE COMMITTEES.—

4 The term “congressional defense committees” has
5 the meaning given such term in section 101 of title
6 10, United States Code.

7 (2) FOREIGN MILITARY SALES PROGRAM.—The

8 term “foreign military sales program” means the
9 program authorized under chapter 2 of the Arms
10 Export Control Act (22 U.S.C. 2761 et seq.).

○