EXIM Bank’s Charter prohibits it from supporting sales of defense articles and services, with two limited statutory exceptions. EXIM defines defense articles and services based on the identity of the foreign end-user, the nature of the item, and the use to which the item will be put; items designed primarily for military use and items for which the end-user is a military organization are presumed to be defense articles. For this reason, sales of exports ranging from “pencils for the general,” to missile launchers and tanks, are not eligible for EXIM financing.

By Congressional design, the financing of exports for military goods primarily resides with the U.S. Department of Defense (DOD) via the Defense Export Loan Guarantee (DELG) program and both the U.S. Department of Defense and the U.S. State Department through the Foreign Military Financing Program (FMFP). As these agencies are directly involved with implementing strategic foreign policy, they maintain expertise for these types of sales.

HISTORY

Prior to 1968, EXIM Bank’s Charter neither expressly permitted nor prohibited the financing of military equipment. During the 1960s, Vietnam, a developing country, appears to have purchased military arms using EXIM loans that were guaranteed by DOD. Under these “country-x loans”, neither the names of the recipient countries nor the items being sold were revealed to EXIM. These loans totaled nearly $800 million, representing about a third of EXIM military financing activity in those years. In response to this unpopular activity, many in Congress raised significant concerns over EXIM Bank’s role in the financing of military exports. Primarily, Congress believed that military assistance was beyond the Bank’s intended purposes. As a result, in 1968, Congress prohibited EXIM Bank financing of military exports to less developed countries and established a percentage limit on the amount that could be financed (P.L. 90-267).

In 1974, based on an interpretation of legislative intent, EXIM extended the prohibition on financing of military exports to all countries, except in limited circumstances. This ban reflected Congress’ continued belief that military sales could not be divorced from foreign policy and military policy concerns, and that the responsibility for military sales transactions rested with the DOD, which was better equipped to interface with foreign military counterparts. In 1992, Congress expressly prohibited EXIM Bank from financing military exports to any country (i.e., not just less developed countries) (P.L. 102-429). Since that time EXIM has limited ability to support military exports. In 1988, the anti-narcotics exception was added to the Charter under the International Narcotics Control Act (P.L. 101-240).

In the 1990 Appropriations Act, Congress provided a limited exception to permit the Bank to finance commercial sales of defense related exports to Greece and Turkey in FY 1990 provided that they were not used on Cyprus.

The Bank’s “dual use” exception was added to the Charter in 1994 (P.L. 103-428). With this addition, Congress also established a cap on the amount of financing available for dual-use exception defense article exports to ensure that EXIM’s financing of defense articles would be limited. Congress also expanded the Bank’s reporting requirements requiring EXIM to report to Congress at least 15 calendar days in advance of final approval of a dual use item as well as provide quarterly reports to Congress on any transactions financed under this authority (along with any munitions list articles not put to military use), se portfolio activity and report on the end use of articles financed under the dual use provision during the second preceding fiscal year to provide follow-up assessment on the actual use of the articles financed.

1 Anti-narcotics exception under 12 U.S.C. 635(b)(6)(B-G) and dual use exception under 12 U.S.C. 635(b)(6)(I), outlined in the next section of this memo.

2 July 17, 1967 Hearing of the House Committee on Banking and Currency
Additionally, the charter limits the amount of EXIM financing that can be devoted to funding dual use sales to “not more than 10 percent of the loan, guarantee, and insurance authority available to the Bank for a fiscal year ...” (Charter Sec. 2(b)(6)(I)(ii)).

PROHIBITION ON EXIM BANK FINANCING DEFENSE ARTICLES OR SERVICES

The Export-Import Bank Act of 1945, as amended, contains a general prohibition on EXIM Bank support for defense articles and services. Section 2(b)(6)(A) states that “The Bank shall not guarantee, insure, or extend credit, or participate in an extension of credit in connection with any credit sale of defense articles and defense services to any country.” There are limited exceptions to this prohibition for two categories of defense articles and services – anti-narcotics exports and dual use exports.

Definition of Defense Articles and Services:

Outside of the context of the anti-narcotics exception, “defense articles and services” are not defined in the statute; accordingly, EXIM Bank must make that determination based upon the facts and circumstances of each case. In determining whether or not an export is a “defense article or service,” EXIM Bank looks to the identity of the buyer and end-user, the nature of the export, and the use to which it will be put. If the goods or services are sold to or will be used by a military organization or designed primarily for military use, they are presumed to be defense articles unless proven otherwise.

Pursuant to EXIM Bank policies, the following exports are not considered to be defense articles, even if purchased or used by a military organization:

- Humanitarian items such as lifesaving, rescue and medical equipment (ambulances, hospital supplies, etc.).
- Small craft (marine vessels, small aircraft) used for routine border patrol, drug interdiction and natural resource monitoring.
- Exports of food that ultimately will be consumed by the U.S. military.

Dual-Use Exception:

Under Section 2(b)(6)(I), EXIM Bank can provide a loan, guarantee or insurance to support the financing of non-lethal defense articles or services where the “primary end use...will be for civilian purposes.” Exports having both military and commercial or civilian applications are referred to as “dual use” exports. EXIM Bank requires convincing evidence that the item is non-lethal in nature and will be used primarily for civilian activities, and typically requires that requires the buyer or end-user provide certification to that point. Specifically, EXIM Bank’s investigation must indicate that the item is non-lethal, that the end user has a legitimate civilian requirement which the dual-use item will meet, and that the primary motivation for the purchase is based on the civilian requirement. The Bank reports dual use transactions to its Congressional committees on a quarterly basis in accordance with Charter Section 2(b)(6)(H).

Anti-Narcotics Exception:

Under Sections 2(b)(6)(B)-(G), EXIM Bank may guarantee or insure “defense articles or services” (which, in the context of this exception, are specifically defined as items on the U.S. munitions list) where the items are for “primarily anti-narcotics purposes” only if a Presidential determination of national interest is obtained in accordance with the Charter requirements. This exception is only available for defense articles or services that are on the U.S. munitions list, and must meet other requirements set out in the Charter.

For more information call EXIM’s Office of Congressional and Intergovernmental Affairs at 202.565.3230, or email at OCIA@exim.gov.