Audit Report

EXPORT LICENSING AT DOD RESEARCH FACILITIES

Report No. D-2000-110 March 24, 2000

Office of the Inspector General
Department of Defense

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Acronyms

DEA	Data Exchange Agreement
EAR	Export Administration Regulations
ITAR	International Traffic in Arms Regulations

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
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ARLINGTON, VIRGINIA 22202-2885

March 24, 2000

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR POLICY
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
DEPUTY UNDER SECRETARY OF DEFENSE
(INTERNATIONAL AND COMMERCIAL PROGRAMS)

SUBJECT: Audit Report on Export Licensing at DoD Research Facilities
(Report No. D-20000-110)

We are providing this audit report for your review and comment. We performed the audit in response to Public Law 106-65, National Defense Authorization Act for Fiscal Year 2000, section 1402, "Annual Report on Transfer of Militarily Sensitive Technology to Countries and Entities of Concern." The Under Secretary of Defense for Policy and the Director, Defense Research and Engineering, did not respond to the draft report; however, we considered comments from the Office of the Deputy Under Secretary of Defense (International and Commercial Programs), the Army, the Navy, and the Air Force in preparing the final report.

DoD Directive 7650.3 requires that all recommendations be resolved promptly. The Deputy Under Secretary of Defense (International and Commercial Programs) needs to clarify his position on Recommendation B.1. Army, Navy, and Air Force comments were responsive and conformed to the requirements of DoD Directive 7650.3; therefore additional comments are not required. We request that the Under Secretary of Defense for Policy; the Director, Defense Research and Engineering; and the Deputy Under Secretary of Defense (International and Commercial Programs) provide comments on the final report by May 15, 2000.

We appreciate the courtesies extended to the audit staff. Questions on the audit should be directed to Ms. Evelyn R. Klemstine at (703) 604-9172 (DSN 664-9172) (eklemstine@dodig.osd.mil). See Appendix D for the report distribution. The audit team members are listed inside the back cover.

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Office of the Inspector General, DoD

Report No. D-2000-110 **March 24, 2000**
(Project No. 9LG-5030)

Export Licensing at DoD Research Facilities

Executive Summary

Introduction. This is the first of several annual reports to be issued by the Inspector General, DoD, in accordance with the National Defense Authorization Act for Fiscal Year 2000, section 1402, which requires an annual report on the transfers of militarily sensitive technology to countries and entities of concern. Very large numbers of foreign nationals visit DoD research facilities under various international agreements and programs. Access to a research facility can be for a 1-day visit or for a period of several years. During those visits, foreign nationals may have access to export-controlled software or technology. To export means to send or take commodities (material and equipment), computer software, or technical data from the United States to a foreign destination or to transfer technical data, including computer software, by any means to a foreign destination or to a foreign national in the United States. The release of technical data that meets the criteria of the Export Administration Regulations or the International Traffic in Arms Regulations to a foreign national working in or visiting a DoD facility in the United States is considered an export. According to the Export Administration Regulations and the International Traffic in Arms Regulations the oral, visual, or written disclosure of technical data to a foreign national may require a "deemed" export license.

The Defense Data Exchange Program supports DoD efforts to enhance the technology base and identify areas for further research and development. Master data exchange agreements are established for each country participating in the Defense Data Exchange Program. Master data exchange agreements act as the umbrella authority for data exchanges and outline the provisions and procedures for transmitting information. An annex is prepared for each master data exchange agreement, as needed, to update and identify the scope of the exchange. There are no limits to the number of annexes a master data exchange agreement may have; however, information is to be exchanged only with countries whose research and development know-how enhances U.S. scientific or technical capabilities.

Objectives. The overall audit objective was to evaluate the adequacy of DoD policies and procedures to prevent the transfer of technologies and technical information with potential military application to countries and entities of concern. Specifically, we evaluated procedures for determining whether a deemed export license was required when a foreign national visited a DoD research facility. We also reviewed the management control program as it related to the overall objective.

Results. DoD research facilities did not have procedures for determining whether a deemed export license was required in conjunction with the disclosure or release of technical data to foreign nationals. In addition, Military Department program officials were not knowledgeable of the term "deemed" or of the licensing requirements for deemed exports. As a result, DoD research facilities provided technical data to foreign nationals without determining whether an export license was required (finding A).

DoD seldom provided proposed data exchange agreement annexes to the Department of Commerce for review. From calendar years 1994 through 1999, the Military Departments signed 316 data exchange agreement annexes; however, DoD provided only 48 to the Department of Commerce. As a result, DoD was not necessarily reflecting a U.S. Government consensus position when approving most data exchange agreement annexes (finding B).

See Appendix A for a discussion of our review of the management control program.

Summary of Recommendations. We recommend that the Under Secretary of Defense for Policy coordinate with the Departments of Commerce and State to develop guidance for applying Federal deemed export licensing requirements and revise DoD Directive 2040.2, "International Transfers of Technology, Goods, Services, and Munitions," and DoD Directive 5230.20, "Visits, Assignments, and Exchanges of Foreign Nationals," to direct implementation of that guidance to the Military Departments. In addition, we recommend that the Director, Defense Research and Engineering, coordinate with the Departments of Commerce and State to develop guidance for applying deemed export licensing requirements at DoD research facilities and develop an export control program and procedures that will guide DoD research facilities in determining when to apply, and how to execute, export control requirements, with regard to foreign national visits to DoD research facilities. Also, we recommend that the Deputy Under Secretary of Defense (International and Commercial Programs) rescind the 1994 policy memorandum, "Implementing Arrangements to Research and Development Agreements," and revise DoD Instruction 2015.4, "Mutual Weapons Development Data Exchange Program and Defense Development Exchange Program," giving the Military Departments direct coordination authority with the Department of Commerce for all data exchange agreement annexes. Further, we recommend that the Military Departments update existing guidance to require data exchange agreement annexes be coordinated with the Department of Commerce.

Management Comments. The Deputy Under Secretary of Defense (International and Commercial Programs) stated an ongoing review, which includes representatives from the Departments of Commerce and State, will help identify process improvements in the review and approval processes for international agreements. This audit report would be considered in the development of further policy and process enhancements. The Army partially concurred and the Navy and Air Force concurred with the recommendations addressed to them and provided details of planned updates to their applicable guidance. A discussion of management comments is in the Findings section of the report and the complete text is in the Management Comments section.

We provided a draft of this report to the Under Secretary of Defense for Policy and the Director, Research and Engineering on February 8, 2000. As of March 17, 2000, we had not received management comments from those offices.

Audit Response. The Deputy Under Secretary of Defense (International and Commercial Programs) comments were partially responsive. Although we commend DoD for conducting a review of its internal processes for international cooperation and trade, it is unclear what management's position is on the recommendation to rescind the 1994 policy memorandum and revise DoD Instruction 2015.4, "Mutual Weapons Development Data Exchange Program and Defense Development Exchange Program." We request that the Under Secretary of Defense for Policy; the Director, Defense Research and Engineering; and the Deputy Under Secretary of Defense (International and Commercial Programs) provide comments on the final report by May 15, 2000.

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Background

Public Law 106-65, National Defense Authorization Act for Fiscal Year 2000, section 1402, "Annual Report on Transfer of Militarily Sensitive Technology to Countries and Entities of Concern," October 5, 1999, requires that the Inspectors General of the Departments of Commerce, Defense, Energy, and State, in consultation with the Director, Central Intelligence Agency, and the Director of the Federal Bureau of Investigation, conduct annual reviews of the transfer of militarily sensitive technologies to countries and entities of concern. This report addresses the DoD portion of the required FY 2000 interagency review. An interagency report will also be issued.

Foreign nationals may have access to export-controlled software or technology when visiting DoD research facilities.[1] To export means to send or take commodities (material and equipment), computer software, or technical data from the United States to a foreign destination or to transfer technical data, including computer software, by any means to a foreign destination or to a foreign national in the United States. The release of technical data that meets Department of Commerce (Commerce) criteria in the Export Administration Regulations (EAR), 15 Code of Federal Regulations, part 730, or Department of State criteria in the International Traffic in Arms Regulations (ITAR), 22 Code of Federal Regulations, part 120, to a foreign national working in or visiting a DoD facility in the United States is considered an export.

Commerce Requirements. The Commerce Bureau of Export Administration controls the export of dual-use commodities using the authority provided in the Export Administration Act of 1979, as amended (title 50, United States Code, appendix section 2401, et seq.). The Export Administration Act expired in August 1994 and has not been reenacted. However, pursuant to Executive Order 12924, "Continuation of Export Control Regulations," August 19, 1994, the President declared a national emergency and, under the authority of the International Emergency Economic Powers Act (title 50, United States Code, section 1701, et seq.), continued and amended the provisions of the Export Administration Act. Each year thereafter, and most recently on August 11, 1999, the President issued a notice, "Continuation of Emergency Regarding Export Control Regulations," continuing the emergency declared by Executive Order 12924. The EAR implements the Export Administration Act and Executive Order 12924 requirements for executing the export licensing process for dual-use commodities. In addition, the EAR contains the Commerce Control List that identifies all dual-use commodities, technology, or software subject to the export licensing process as well as the conditions under which they may be exported. According to the EAR, any release to a foreign national of software or technology that is subject to the EAR is "deemed to be an

[1]For the purposes of this report, the term research facility is used to connote any DoD research center, laboratory, or entity in which research and development activities occur.

export" to the home country of the foreign national. Those exports are commonly referred to as "deemed exports." Software or technology can be exported through:

- visual inspection by foreign nationals of U.S.-origin equipment and facilities;
- oral exchanges of information in the United States or abroad; or
- the application to situations abroad of personal knowledge or technical experience acquired in the United States.

The U.S. hosts are generally required to obtain an export license before providing a foreign national access to software or technology that may be subject to export licensing requirements.

Department of State Requirements. The Department of State Office of Defense Trade Controls is responsible for registering persons or companies involved in controlling the export of defense-related articles and services, approving or denying export licenses, and ensuring compliance with the Arms Export Control Act (title 22, United States Code, section 2751) and other applicable laws and regulations. The ITAR implements the Arms Export Control Act and contains the U.S. Munitions List, which identifies Defense articles, services, and related technical data that may be exported as well as the conditions under which munitions may be exported. That list includes those items, technologies, and services that are inherently military in character and could, if exported, jeopardize national security or foreign policy interests of the United States.

The ITAR states that, unless otherwise exempted, a license is required for the oral, visual, or written disclosure of technical data to a foreign national in connection with visits by U.S. citizens to foreign countries and visits by foreign nationals to the United States. An export license is required regardless of the manner in which the technical data is transmitted. Although the ITAR does not use the term deemed exports, for the purposes of this report the term deemed exports includes the oral, visual, or documentary disclosure of technical data to a foreign national.

International Agreements. DoD uses international agreements, through memorandums of understanding or memorandums of agreement, to establish programs for cooperative research, development, test, evaluation, data exchange; cooperative or reciprocal logistics support; and coproduction and licensed production, as well as related standardized efforts. The primary objectives of those programs are to increase military effectiveness through standardization and interoperability and to reduce weapon acquisition costs by avoiding duplication of developmental efforts with our allies.

Defense Data Exchange Program. The Defense Data Exchange Program supports DoD efforts to enhance the technology base and identify areas for further research and development. Master data exchange agreements (DEAs) are established for each country participating in the Defense Data Exchange Program.

Master DEAs act as the umbrella authority for data exchanges and outline the provisions and procedures for transmitting information. A DEA annex is prepared for each master DEA, as needed, to update and identify the scope of the exchange. There are no limits to the number of DEA annexes a master DEA may have; however, information is to be exchanged only with countries whose research and development know-how enhances U.S. scientific or technical capabilities.

Objectives

The overall audit objective was to evaluate the adequacy of DoD policies and procedures to prevent the transfer of technologies and technical information with potential military application to countries and entities of concern. Specifically, we evaluated procedures for determining whether a deemed export license was required when a foreign national visited a DoD research facility. We also reviewed the management control program as it related to the overall objective. See Appendix A for a discussion of the scope and methodology and our review of the management control program. See Appendix B for prior coverage related to the objectives.

A. Licensing DoD Research and Development Efforts

DoD research facilities did not have procedures for determining whether a deemed export license was required in conjunction with the disclosure or release of technical data to foreign nationals. In addition, Military Department program officials were not knowledgeable of the term "deemed" or of the licensing requirements for deemed exports. DoD guidance does not clearly state policies, procedures, and responsibilities of DoD and Military Department hosts for determining whether a deemed export license was required when a foreign national visited a DoD research facility, and guidance does not prescribe circumstances that would exclude DoD research facilities from the requirements of the EAR or the ITAR. As a result, DoD research facilities provided technical data to foreign nationals without determining whether an export license was required.

Procedures for Deemed Export Licenses

DoD research facilities did not have procedures for determining whether a deemed export license was required in conjunction with the disclosure or release of technical data to foreign nationals. According to export licensing reports by the Departments of Commerce and State, DoD had not submitted any deemed export license applications during FY 1998 or FY 1999. We visited research facilities at the Army Armament Research, Development and Engineering Center, Picatinny Arsenal, New Jersey; the Army Communications-Electronics Command, Fort Monmouth, New Jersey; the Naval Air Warfare Center, Aircraft Division, Patuxent River, Maryland; the Naval Air Warfare Center, Weapons Division, China Lake, California; and the Air Force Research Laboratories at Kirtland Air Force Base, New Mexico, and Wright-Patterson Air Force Base, Ohio. During FY 1998 and FY 1999, those six sites had 11,544 approved foreign visitors.

Foreign nationals visit DoD research facilities under various international agreements and programs (see Appendix C). Technical data at DoD research facilities can be released to a foreign national during a short-term visit (normally less than 30 days) or during the period of the foreign visitor's assignment through either the individual's integration into the installation workforce as an extended visitor or through the individual's specific request for release of technical information or documentation. Although DoD hosts reviewed and approved the release of technical data for accuracy and security implications, those reviews did not include a determination of whether a deemed export license was needed prior to the disclosure or release of the technical data.

Army Research Facilities. Army research facilities visited did not have procedures for determining whether a deemed export license was required in conjunction with the disclosure or release of technical data to foreign nationals.

Army Regulation 380-10, "Security: Technology Transfer, Disclosure of Information and Contacts with Foreign Representatives," December 1994, addresses the protection of militarily critical technologies as they relate to the objective of the Army Technology Security Program. Foreign national visits to Army installations can be initiated through the Foreign Disclosure and Technical Information System using the Foreign Visits System; by writing to the Office of the Deputy Chief of Staff for Intelligence, Department of the Army; or directly with the Army agency or command ("out of channel"). The Office of the Deputy Chief of Staff for Intelligence exercises authority over foreign national visits and certifications of liaison officers and exchange personnel to Army elements, but may delegate its authority to Army subordinate commands. Before approving a foreign national's visit, the foreign disclosure officer at the agency or command to be visited usually coordinates with the responsible engineer or scientist and technical control project manager or officer. In addition, the foreign disclosure officer may coordinate with officials from the visited installation's counter-intelligence office. Army Regulation 380-10 generally delegates the approval authority for disclosure of public domain and "unclassified but not in the public domain" information to the foreign disclosure officer without requiring external coordination. Army Regulation 380-10 does not address export license criteria, conditions, or limitations related to the disclosure of any type of information, including applied research and development at Army research facilities.

Army Procedures for Release of Technical Data. Army policy and procedures require that the developing scientist or assigned host provide any briefing charts or technical documents that are to be released during the visit of the foreign national to an assigned contact officer for review. Those documents are initially reviewed for technical accuracy and other security implications by the contact officer and coordinated with the Foreign Disclosure Office as appropriate. A contact officer is designated to control the activities of any foreign visitors, liaison officers, and exchange personnel at Army installations. All contact officers must be familiar with the requirements of Army Regulation 380-10, other applicable guidelines governing the release of classified military information and controlled unclassified information, and specific disclosure guidelines established in the delegation of disclosure authority letter.[2] The contact officers provide the immediate supervision and classification assessment or recommendation for the technological efforts being worked on, or submitted for release, by the scientist or assigned foreign visitor. In addition, under some circumstances, documents submitted for release may be required to be reviewed by the project manager or research facility director; the installation operations security manager; or the installation contracting, legal, or patent personnel. Final release approval of the technical data is granted by the agency or command through either its Foreign Disclosure Office or Office of Public Affairs. However, none of the reviews involve a determination of whether a deemed export license is needed before the release of the technical data.

[2]A delegation of disclosure authority letter is issued by the appropriate designated disclosure authority explaining categories, classification levels, limitations, and scope of technical data under the Military Departments' disclosure jurisdiction that may be disclosed to a foreign national.

Navy Research Facilities. Navy research facilities visited did not have procedures for determining whether a deemed export license was required in conjunction with the disclosure or release of technical data to foreign nationals. Secretary of the Navy Instruction 5510.34, "Manual for the Disclosure of Department of the Navy Military Information to Foreign Governments and International Organizations," November 4, 1993 (Navy Instruction 5510.34), addresses the control of foreign nationals and the release of information to foreign nationals within the Navy community. Navy Instruction 5510.34 does not address deemed export license criteria, conditions, or limitations related to the disclosure of any type of information, including applied research and development at Navy research facilities.

Foreign national visits to Navy installations can be initiated through the Foreign Disclosure and Technical Information System using the Foreign Visits System; by writing to the Navy International Programs Office; or directly with the command or facility to be visited. The Navy International Programs Office exercises authority over foreign national visits and certifications of liaison officers and exchange personnel to Navy elements, but may delegate its authority to subordinate commands. Navy Instruction 5510.34 generally delegates limited disclosure authority and visit approval authority to Navy Systems Commands. Disclosure and visit authority may be exercised without external coordination. Before approving a visit by a foreign national, the foreign disclosure officer at the facility to be visited coordinates with the responsible engineer, scientist, or project manager. In addition, the foreign disclosure officer coordinates with the organization's counter-intelligence officer as necessary.

Navy Procedures for Release of Technical Data. Navy policies and procedures require that the developing scientist or assigned host ensures that any briefing charts or technical documents to be released during the visit of the foreign representative have been reviewed and approved for release. Those documents are initially reviewed and approved for technical accuracy and other security implications by an assigned contact officer and submitted to the Foreign Disclosure Office for information. The same process is followed for briefing materials that have not been previously approved. A contact officer is designated for each visit to control the activities of any foreign visitors, liaison officers, cooperative program personnel, and exchange personnel at Navy installations. All contact officers must be familiar with the requirements of Navy Instruction 5510.34, program-specific release policies, and other applicable guidelines governing the release of classified military information and controlled unclassified information. However, none of the reviews involve a determination of whether a deemed export license is needed prior to the release of the technical data.

Air Force Research Facilities. Air Force research facilities visited did not have procedures for determining whether a deemed export license was required in conjunction with the disclosure or release of technical data to foreign nationals. Air Force Instruction 16-201, "Disclosure of Military Information to Foreign Governments and International Organizations," October 24, 1994, establishes controls, policies, and procedures for the disclosure of military information to foreign governments, foreign nationals, and international organizations while emphasizing the importance of adequate protection for disclosures. It also defines

policies and procedures governing the release of information to foreign governments, international organizations, and foreign nationals. Air Force Instruction 16-201 includes the protection of militarily critical technologies and disclosures involving oral or visual transmission of information through approved channels to authorized representatives of a foreign government or international organization. However, Air Force Instruction 16-201 did not address export license criteria, conditions, or limitations related to the disclosure of any type of information, including applied research and development at Air Force research facilities.

In accordance with Air Force Instruction 16-201, any foreign national visiting Air Force facilities must obtain prior approval. Foreign national visits to Air Force research facilities were most frequently initiated through the Foreign Disclosure and Technical Information System using the Foreign Visits System. Approximately six other DoD or Air Force scientific, engineering, or professional exchange or employment programs allowed foreign nationals, either short-term visitors or extended visitors, access to research facilities, technologies, and programs. Regardless of how a visitor enters an Air Force research facility, foreign disclosure officers conduct thorough reviews on visiting foreign nationals. Those reviews include the purpose and type of visit (or employment), consideration of the level and classification of technology that could be accessed, and that proper disclosure authority is obtained before approval of the request. In addition, the foreign disclosure officer may coordinate with officials from the visited installation's counter-intelligence office and the regional Office of the Federal Bureau of Investigation for visitor background information.

Air Force Procedures for Release of Technical Data. Air Force policies and procedures require technical data to be reviewed for accuracy and security implications before release to a foreign national. Each activity, program, or project had prepared a list of critical information that was to be protected from public disclosure. Procedures prior to the release of technical data to foreign nationals at Air Force research facilities include the following.

- The author reviews the technical data for security or controlled items. The program managers identify whether the data is to be used for briefings, publications, symposiums, training, or fulfillment of a foreign national's personal request for information. The branch and division chief conduct technical reviews of the documents to be released.

- Managers determine whether information is releasable as public domain, Freedom of Information Act, For Official Use Only, unclassified, controlled unclassified, or classified and identify the authority for its release either by a DEA, memorandum of understanding, memorandum of agreement, or treaty. Managers match the technical data against the DoD Militarily Critical Technologies List and sometimes the U.S. Munitions List, but rarely against the Commerce Control List. The match against the Militarily

  Critical Technologies List and the U.S. Munitions List is to verify that

the technology under review is a critical technology, not to determine export licensing requirements.

- In some cases, the public affairs officer and the science and technology information officer conduct reviews. Additional reviews may be conducted by the operations security officer or the foreign disclosure officer. Also, depending on the security level of the data or its military criticality or sensitivity, controls are tightened by additional levels of review by the Aeronautical Systems Center, the Air Force Research Laboratory, the Air Force Materiel Command, the Air Force Office of Scientific Research, or higher.

- Reviewing officials maintain and file all coordination "signature sheets" and review notes showing reasons for concurrence or nonconcurrence, approvals or denials.

However, none of the reviews involved a determination of whether a deemed export license was needed prior to the release of the technical data.

Awareness of Deemed Export Licensing Requirements

Military Department program officials were not knowledgeable of the term "deemed" or of the licensing requirements for deemed exports.

Army Program Officials. Army officials at different levels who had management and oversight responsibilities for approving or denying foreign national visits to laboratories and controlling militarily critical or sensitive technologies within Army laboratories were unaware of the term or licensing requirements for deemed exports. The Deputy Chief of Staff for Intelligence, Army Materiel Command, was unaware of any DoD policies and procedures for deemed export licenses and his awareness of export licensing requirements was limited to the Foreign Military Sales program. We visited research facilities at the Armament Research, Development and Engineering Center and the Communications-Electronics Command. We met with the commanding general, the foreign disclosure officer, the chief of security, the public affairs officer, directors, division chiefs, and assigned contact officers at each installation. At the research facilities, we met with selected technical control product or project managers and selected engineers and scientists associated with foreign national visits.

None of the officials with whom we met were knowledgeable of the term or licensing requirements for deemed exports. Except for Foreign Military Sales officials, personnel were not knowledgeable of the EAR or the ITAR export licensing requirement for the release of technical data. Officials were familiar with the policies and procedures governing identification of militarily critical technologies and disclosure of classified military information and controlled unclassified information, but did not relate those policies and procedures to the need for a deemed export license. In addition, they were unaware of the

Commerce Control List and had no knowledge of which Army research and development technologies should be matched against the Commerce Control List.

Navy Program Officials. Navy officials at different levels who had management and oversight responsibilities for approving or denying foreign national visits to laboratories and controlling militarily critical or sensitive technologies within Navy laboratories were unaware of the term or licensing requirements for deemed exports. The Navy International Programs Office was unaware of any DoD policies and procedures for deemed export licenses. We visited research facilities at the Naval Air Warfare Center, Aircraft Division, and the Naval Air Warfare Center, Weapons Division. We met with the foreign disclosure officers, the chiefs of security, directors, division chiefs, assigned contact officers, selected project managers, and selected engineers and scientists associated with foreign national visits.

A few of the officials with whom we met were knowledgeable of the term and licensing requirements for deemed exports. The majority were aware of situations in which technical data or documents required export license markings prior to release. Also, officials had some general knowledge of export controls and licensing of materials or systems related to the Foreign Military Sales programs. Officials were familiar with the EAR and the ITAR policies and procedures governing identification of militarily critical technologies and disclosure of classified military information and controlled unclassified information, but did not relate those policies and procedures to the need for a deemed export license. In addition, they were unaware of the Commerce Control List and had no knowledge of which Navy research and development technologies should be matched against the Commerce Control List.

Air Force Program Officials. Air Force officials at different levels who had management and oversight responsibilities for approving or denying foreign national visits to laboratories and controlling militarily critical or sensitive technologies within Air Force facilities were unaware of the term or licensing requirements for deemed exports. Officials from the Office of the Deputy Under Secretary of the Air Force (International Affairs), to include the International Affairs Policy Division, Security and Special Programs Division, Disclosure Division, Operations Support Division, and representatives from the Air Force Office of Special Investigations, were not familiar with the term deemed exports and were generally unaware of any DoD policies and procedures addressing deemed exports. We visited research facilities at Kirtland and Wright-Patterson Air Force Bases. At those bases, we interviewed the commanding officer, the foreign disclosure officer, the chief of security, directors, division chiefs, and assigned contact officers. We interviewed personnel at the Aeronautical Systems Center International Programs Division, the Air Force Research Laboratory headquarters, and five subordinate Air Force Research Laboratory Directorates. We also interviewed headquarters and directorate-level security managers, foreign disclosure officers and staff, agents from the Office of Special Investigations, public affairs officers, computer systems security officers, scientific and technical information officers, and

specific engineers and scientists designated as project leaders and managers having administrative, supervisory, and technical responsibilities for short-term and extended visits by foreign nationals.

None of the officials with whom we met were knowledgeable of the term or licensing requirements for deemed exports. They were aware of situations in which technical data or documents required export license markings prior to release. Also, officials had some general knowledge of export controls and licensing of materials or systems related to the Foreign Military Sales program. Officials were familiar with the EAR and the ITAR policies and procedures governing identification of militarily critical technologies and disclosure of classified military information and controlled unclassified information, but did not relate the policies and procedures to the need for a deemed export license. In addition, they were unaware of the Commerce Control List and had no knowledge of which Air Force research and development technologies should be matched against the Commerce Control List.

Policies, Procedures, and Responsibilities

DoD guidance did not clearly state policies, procedures, and responsibilities of DoD and Military Department hosts for determining whether a deemed export license was required when a foreign national visited a DoD research facility, and the guidance did not prescribe circumstances that would exclude DoD research facilities from the requirements of the EAR or the ITAR. According to Commerce licensing officials, before releasing software or technology, a U.S. host must:

- determine who will hear, see, or receive the specific software or technology;
- review the software or technology and match it against the Commerce Control List; and
- complete and submit a deemed export license application if the commodity, software, or technology is on the Commerce Control List.

DoD Requirements. DoD Directive 2040.2, "International Transfers of Technology, Goods, Services, and Munitions," January 1984, and DoD Directive 5230.20, "Visits, Assignments, and Exchanges of Foreign Nationals," August 1998, do not clearly state policies, procedures, and responsibilities for determining whether a deemed export license is required when a foreign national visits a DoD research facility.

DoD Directive 2040.2. DoD Directive 2040.2 implements relevant portions of the Export Administration Act, the Arms Export Control Act, and the National Security Decision Directive by establishing policy, prescribing procedures, and assigning responsibilities for the international transfer of Defense-related goods, munitions, services, and technologies. DoD Directive 2040.2 applies to the Office of the Secretary of Defense, the Joint Staff,

the Military Departments, and the Defense agencies (referred to collectively as DoD Components). DoD Directive 2040.2 states that DoD Components are to apply export controls in a manner that minimally interferes with the conduct of legitimate trade and scientific endeavors. The Under Secretary of Defense for Policy is assigned responsibility for preparing technology transfer control and enforcement policy guidance as well as coordinating overall application of DoD policy. The Director, Defense Research and Engineering, is assigned responsibility for overseeing the implementation of the DoD technology transfer policy for all research and development matters. However, DoD Directive 2040.2 does not clearly state policies, procedures, and responsibilities for determining whether a deemed export license is required when a foreign national visits a DoD research facility.

DoD Directive 5230.20. DoD Directive 5230.20 establishes the International Visits Program, the Foreign Liaison Officers Program, the Defense Personnel Exchange Program, and the policy for the assignment of Cooperative Program personnel. DoD Directive 5230.20 applies to all arrangements whereby foreign visitors are assigned to DoD Components or to contractor facilities over which DoD Components have security responsibility. DoD Directive 5230.20 states that access by foreign nationals to controlled unclassified information will be in accordance with the EAR and the ITAR and that DoD visitor authorizations are not to be used to circumvent export licensing requirements. In addition, it states that access to classified or controlled unclassified information shall not be permitted until it has been verified that the appropriate license approval or other authorization has been obtained. However, DoD Directive 5230.20 does not clearly state policies, procedures, and responsibilities for determining whether a deemed export license is required when a foreign national visits a DoD research facility.

Exemptions to Deemed Export Licensing Requirements. The EAR and the ITAR contain provisions that exempt a DoD host from obtaining a deemed export license when visited by a foreign national.

Exemptions to EAR Requirements. The EAR states that not all items are subject to the export licensing process, including publicly available software and technology, except software controlled for encryption reasons on the Commerce Control List. Publicly available software and technology includes items that are already published or will be published; arise during or result from fundamental research; are educational; or are included in certain patent applications. According to the EAR, fundamental research is defined as:

> . . . basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community. Such research can be distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons or national security reasons.

The EAR contains certain exemptions from export licensing requirements for North Atlantic Treaty Organization countries. In addition, the EAR states that items subject to the ITAR export licensing process are not subject to the EAR.

Exemptions to ITAR Requirements. Part 125 of the ITAR, "Licenses for the Export of Technical Data and Classified Defense Articles," provides exemptions to ITAR export licensing requirements. Section 125.4, "Exemptions of general applicability," provides some exemptions for technical data, including classified information, for which the exporter may not require an export license. Section 125.4 states that technical data can be approved for public release by the cognizant U.S. Government department or agency or the Directorate for Freedom of Information and Security Review. The exemption applies to information approved by the cognizant U.S. Government department or agency for public release in any form. It does not require that the information be published in order to qualify for the exemption. Section 125.5, "Exemptions for plant visits," states that a license is not required for the oral and visual disclosure of unclassified technical data during the course of a classified plant visit by a foreign national provided that the:

- classified visit was authorized pursuant to a license issued by the Department of State;
- classified visit was approved in connection with an actual or potential government-to-government program or project by a U.S. Government agency having classification jurisdiction over the classified defense article or classified technical data; and
- unclassified information to be released is directly related to the classified defense article or technical data for which approval was obtained and does not disclose the details of the design, development, production, or manufacture of any other defense articles.

However, section 125.6 of the ITAR, "Certification requirements for exemptions," requires that exemptions be certified. It states that:

> . . . to claim an exemption for the export of technical data under the provisions of Sec. 125.4 and 125.5 of the ITAR, an exporter must certify that the proposed export is covered by a relevant paragraph of that section. For Sec. 125.4, certification consists of marking the package or letter containing the technical data: "22 CFR 125.4 (identify subsection) applicable." This certification must be made in written form and retained in the exporter's files for a period of five years. A Shippers Export Declaration is not required for exports of unclassified technical data . . . .

However, those exemptions and certification requirements are not addressed in DoD Directive 2040.2 and DoD Directive 5230.20.

Release of Technical Data

Export controls for the release of technical data to foreign nationals at DoD research facilities did not exist. As a result, DoD research facilities provided technical data to foreign nationals without determining whether an export license was required. We found no evidence that DoD hosts had made a determination as

to whether an export license was required or exempt, per the EAR fundamental research exemption, or had certified that technical data released was exempt from ITAR licensing requirements. Such a determination would evaluate whether the technical data was related to basic, applied, advanced technology development, with the latter not subject to a possible EAR exemption. Export license applications were not submitted by hosts of foreign visitors, even though an export license may have been required because of the information accessed by or released to the visitor. Because we could not determine the extent of the daily activities in which foreign nationals were involved, or the specific information and technologies to which they may have had access, we could not definitively determine that DoD should have obtained deemed export licenses for any of the foreign visitors. However, the foreign nationals did obtain information and had access to technologies considered militarily critical.

Defense Security Service Study. There was a close correlation between the research and development technology areas that a foreign national visited and the Defense Security Service's ranking of technologies that were the subject of illicit foreign collection efforts. The Defense Security Service study, "1999 Technology Collection Trends in the U.S. Defense Industry," undated, reports that the four most often sought after technology categories by foreign entities (in descending order of number of occurrences) were lasers and sensors; information systems; aeronautics systems; and armaments and energetic materials.[3] Those four technology categories are included in the Commerce Control List and the U.S. Munitions List.

According to the study, the most sought after militarily critical technology category in 1998 were lasers and sensors. Cleared contractors[4] reported 4 foreign collection incidents targeting lasers and 73 targeting sensors. The most frequent method used by foreign entities to collect data about a given technology was specific requests for information. The second method most frequently used was visits to U.S. facilities. The Defense Security Service study states that instead of targeting complete weapon systems and military equipment, foreign entities were more intensely targeting weapon components, developing technologies, and technical information.

Army Research Facilities Visited. Army research facilities provided technical data to foreign nationals without determining whether an export license was required. The Defense Security Service study identified information systems, fusing, and the Object Individual Combat Weapon group of small arms weapons, as the most frequently sought after technology by foreign nations. During our visit to the Army Armament Research, Development and Engineering Center and the Army Communications-Electronics Command research facilities, we found foreign nationals had visited those facilities to review technology related to lasers and sensors, information systems, and armaments and energetic materials.

[3]Any explosive, propellant, and pyrotechnic component, including high-energy detonators.

[4]A cleared contractor is any commercial, educational, industrial, or other entity that has been granted a facility security clearance by a cognizant security office.

Army Armament Research, Development and Engineering Center. In FY 1998, research facilities at the Army Armament Research, Development and Engineering Center had 312 approved foreign visitors; in FY 1999, there were 389 approved foreign visitors. The Close Combat Armaments Center is the primary research, development, testing, and evaluation facility of the Army Armament Research, Development and Engineering Center. It provides the core efforts of 6.2 (Applied Research)[5] and 6.3 (Advanced Technology Development)[6] research technology at the Center and manages and conducts research, development, and engineering of close combat systems, including small arms, fuses, ancillary items, and other assigned systems. It is the Army's lead material developer for the nonlethal program and serves as the DoD Management Executive for the Joint Service Small Arms Program.

In September 1999, a visit was approved for an Israeli foreign national. No delegation of disclosure authority letter existed at that time, although a draft delegation of disclosure authority letter was in development. The Request for Visit Authorization and subsequent visit briefing charts showed that the visit discussion addressed armament and energetic technology related to small arms for the Object Individual Combat Weapon and the fusing devices for mortars.

Army Communications-Electronics Command. In FY 1998, research facilities at the Army Communications-Electronics Command had 1,669 approved foreign visitors; in FY 1999, there were 2,690 approved foreign visitors. The Logistics and Readiness Center provides quality worldwide production, quality management, and logistics support of Army Communications-Electronics Command equipment. It provides 6.6 (Research, Development, Test and Evaluation Management Support)[7] research technology support at the Command. The focus of the Logistics and Readiness Center is to provide total support capability for fielded programs, as well as new and emerging programs. The Center's mission includes support areas such as production planning and risk assessment, engineering data development, and management of the Industrial Base Technology Insertion Program.[8]

Seven People's Republic of China foreign nationals were granted approval to visit the Logistics and Readiness Center during FY 1998. The purpose of the visit was to enable the foreign nationals to see a demonstration of the Mantech Aurora Series Tester that was located on the Army Communications-Electronics Command property. Visit documentation from FY 1998 was no longer available.

[5]6.2 (Applied Research) – A research "breakthrough" has occurred and the research facility tries to identify a military weapon system, or weapon systems, where it can be effectively used.

[6]6.3 (Advanced Technology Development) – The research effort is focused towards a particular weapons system, or weapons systems, and a determination is made whether the technology can be expanded, contracted, or is compatible for integration into the weapon system.

[7]6.6 (Research, Development, Test and Evaluation Management Support) – The research and development effort is directed toward support of operations required for general research and development, to include test facilities, studies, and analyses in support of research and development programs.

[8]The Industrial Base Technology Insertion Program is a DoD research, development, test, and evaluation program established to convert promising technologies from a research facility version to a production version.

However, the Foreign Disclosure Officer recalls approving the Chinese foreign nationals to only come onto and exit the Army Communications-Electronics Command property. The Foreign Disclosure Officer approved the release of unclassified information to the visitors. However, the Foreign Disclosure Officer believes that there was no release of Army technical information, as the Army is not the proponent of the system. The visit was for contractor purposes, the contractor was present, and a Army representative of the Logistics and Readiness Center provided escort for the Chinese and contractor visitors. The Army Communications-Electronics Command visit authorization documents do not identify any applicable memorandum of understanding, DEA, or delegation of disclosure authority letter to justify disclosure of information. No export license or other documents were provided from the Army Communications-Electronics Command that would identify the specifics of the visit or technologies and technical information that were released or transferred to the Chinese foreign nationals.

Navy Research Facilities Visited. Navy research facilities provided technical data to foreign nationals without determining whether an export license was required. The Defense Security Service study identified information systems and aeronautics systems as some of the most sought after technology by foreign nations. We visited the Aircraft and Weapons Divisions of the Naval Air Warfare Center and found that foreign visitors had been to those facilities reviewing technologies related to aeronautics systems, armaments, energetic materials and sensors.

Naval Air Warfare Center, Aircraft Division. In FY 1998, the Naval Air Warfare Center, Aircraft Division, had 139 approved foreign visitors; in FY 1999, there were 701 approved foreign visitors. The Aircraft Division is the Navy's "full spectrum research, development, test and evaluation, engineering and fleet support center." It provides core research and development efforts from 6.1 (Basic Research)[9] through 6.4 (Demonstration and Validation).[10] It is considered the Navy's leader in the design, development, and engineering of aircraft systems; shipboard, fixed, and mobile communications; and information technology systems.

In November 1999, two Russian foreign nationals visited the Aircraft Division to discuss issues regarding aeronautics systems. During their visit, they received oral and visual information pertaining to aeronautics. The visit was authorized by a Navy contract. The foreign visitors' host provided only verbal information on aeronautics systems. No export license or other documents were provided from the Aircraft Division that would identify the specifics of the visit or technologies and technical information that were released or transferred to the Russian foreign nationals.

Naval Air Warfare Center, Weapons Division. In FY 1998, the Naval Air Warfare Center, Weapons Division, had 1,642 approved foreign visitors; in FY 1999, there were 2,562 approved foreign visitors. The Weapons Division is a

[9] 6.1 (Basic Research) – Attempts are made to take a research idea and develop a technology.

[10] 6.4 (Demonstration and Validation) – The integrated research effort is tested to evaluated the capabilities of the new technology.

multi-site organization created in 1992 from the Navy Research, Development, Test, and Evaluation Center and test and evaluation activities at China Lake (Naval Weapons Center), Point Mugu (Pacific Missile Test Center) and White Sands (Naval Ordnance Missile Test Station). It provides core efforts from 6.1 (Basic Research) through 6.3 (Advanced Technology Development). Weapons Division programs include research and development for many of the technologies on the Militarily Critical Technologies List, including aeronautics systems, armaments and kinetic energetic materials technology, and sensor technology.

In October 1999, a group of Israeli foreign nationals visited the Weapons Division to discuss issues regarding armaments and sensors, as well as to receive a tour of the various research facilities. During their visit, they received oral and visual information pertaining to armaments and sensors. The visit was authorized under a DEA; however, a delegation of disclosure authority letter did not exist. No export license or other documents were provided from the Weapons Division that would identify the specifics of the visit or technologies and technical information that were released or transferred to the Israeli foreign nationals.

Air Force Research Facilities Visited. Air Force research facilities provided technical data to foreign nationals without determining whether an export license was required. The Defense Security Service study identified lasers and sensors as the most frequently sought after technology category by foreign nations. We visited the Air Force Research Laboratories at Kirtland Air Force Base and Wright-Patterson Air Force Base and found that foreign nationals had been to those facilities and reviewed laser and sensor technology.

Kirtland Research Laboratory. In FY 1998, the Kirtland Air Force Base research facility had 307 approved foreign visitors; in FY 1999, there were 235 approved foreign visitors. At the Kirtland research facility, the Directed Energy Directorate was responsible for developing, integrating, and transitioning science and technology for directed energy, to include adaptive optics, high-power microwaves, imaging, and lasers, to ensure the preeminence of the United States in air and space. The directorate worked on 6.2 (Applied Research) and 6.3 (Advanced Technology Development) research technology related to advanced optics and imaging, high-power microwave, and laser technology.

During a 90-day period in calendar year 1999, two Russian foreign nationals were granted approval for recurring visits to the Directed Energy Directorate to conduct laser experiments and discuss laser-related technology issues. The foreign nationals had an office at the University of New Mexico and only used the research facility to conduct laser experiments. The visit was not authorized under a DEA, and a delegation of disclosure authority letter did not exist. However, the foreign nationals were placed under a strict security plan to control and restrict access to the facility, other laboratory researchers, and technical data not related to their laser experiments. The host stated that the foreign nationals were escorted 100 percent of the time while in the research facility.

Wright-Patterson Research Laboratory. In FY 1998, the Wright-Patterson research facility had 456 approved foreign visitors; in FY 1999, there were 442 approved foreign visitors. The Sensors Directorate is responsible for developing technologies to collect, interpret, and measure important military information worldwide and deny the enemy the same. The directorate works on 6.2 (Applied Research) and 6.3 (Advanced Technology Development) research technology related to infrared sensors and countermeasures technology, multi-discriminant and multi-function sensing, microwave and related components, and electro-optic detectors.

During FY 1998, a foreign national from India visited the Sensors Directorate at Wright-Patterson Air Force Base to participate in discussions and to test and investigate power performance of radar systems. The foreign scientist worked for a U.S.-owned company on an unrelated Air Force Office of Scientific Research contract in another State. During his visit, he received oral and visual information pertaining to sensors. The foreign visitor's host stated that he did not maintain any notes or briefing charts concerning the visit agenda or discussions conducted.

Summary

Numerous foreign nationals visit DoD research facilities under various international agreements and programs. Access to a research facility can be for a 1-day visit or for a period of several years. During the visit, the foreign national may be exposed to various technical information and know-how. Although information released to foreign nationals is reviewed for accuracy and security implications, a review is not performed to determine whether that information is potentially an exportable item under EAR or ITAR provisions. In those instances in which the release of the technical information could have been exempted from EAR or ITAR export licensing requirements, documentation did not exist to support the exemption. DoD needed to establish procedures to ensure that technical information or know-how released to foreign nationals is in compliance with Federal export licensing requirements.

Recommendations, Management Comments, and Audit Response

A.1. We recommend that the Under Secretary of Defense for Policy:

a. Coordinate with the Departments of Commerce and State to develop guidance regarding when a visit or assignment of a foreign national to a DoD facility requires a deemed export license.

b. Revise DoD Directive 2040.2, "International Transfers of Technology, Goods, Services, and Munitions," to clearly state policies, procedures, and responsibilities of DoD and Military Department hosts for determining whether a deemed export license is required when a foreign national visits a DoD facility.

c. Revise DoD Directive 5230.20, "Visits, Assignments, and Exchanges of Foreign Nationals," to clearly state policies, procedures, and responsibilities of DoD and Military Department hosts for determining whether a deemed export license is required when a foreign national visits a DoD facility.

A.2. We recommend that the Director, Defense Research and Engineering:

a. Coordinate with the Departments of Commerce and State to develop guidance regarding when a visit or assignment of a foreign national to a DoD research facility requires a deemed export license.

b. Establish a focal point at each DoD research facility to determine whether a deemed export license is required when a foreign national visits the facility.

c. Develop an export control program document containing procedures for determining whether technology or commodities at DoD research facilities can be exported to foreign countries, with or without a license. Include circumstances that may exclude a DoD or Military Department host from the requirements of the Export Administration Regulations or the International Traffic in Arms Regulations.

d. Mandate training requirements for personnel at DoD research facilities on the deemed export licensing requirements of the Export Administration Regulations and the International Traffic in Arms Regulations.

Army Comments. Although not required to comment, the Deputy Under Secretary of the Army (International Affairs) stated that a Process Action Team should be formed to include applicable Defense Components (at the Office of the Secretary of Defense, Army, Navy, and Air Force), Commerce, and State before the Office of the Secretary of Defense revises DoD Directive 2040.2, "International Transfers of Technology, Goods, Services, and Munitions," and 5230.20, "Visits, Assignments, and Exchanges of Foreign Nationals." The

Process Action Team should explore and lay to rest the underlying issues related to Federal deemed export licensing requirements at DoD research facilities, specifically regarding foreign national visits to DoD research facilities. An underlying assumption has been the data exchange agreements and Engineer and Scientist Exchange Program personnel exchanges were exempt because the work executed thereunder fell into the category of the "fundamental research" exemptions of the EAR. However, if those agreements and programs are not covered under the EAR "fundamental research" exemption, the work involved with them will grow considerably.

Air Force Comments. Although not required to comment, the Deputy Under Secretary of the Air Force (International Affairs) stated that DoD research facilities did not need procedures for determining whether an export license is required because all authorized DoD interaction with foreign nationals that involves classified or sensitive unclassified information is covered under paragraphs 124.4, 124.5, 126.5, and 126.6 of the ITAR.

Audit Response. The Army suggestion appears to have merit. Regarding the Air Force comment, it should be noted that, although some visits by foreign nationals to DoD research facilities may qualify for an ITAR exemption, not all do. A determination must be made on a case-by-case basis as to whether a license is required under the EAR or the ITAR, or if an applicable ITAR exemption applies.

Management Comments Required. As of March 17, 2000, the Under Secretary of Defense for Policy and the Director, Defense Research and Engineering, had not responded to a draft of this report. We request that the Under Secretary of Defense for Policy and the Director, Defense Research and Engineering, provide comments in response to the final report.

B. Data Exchange Agreement Annexes

DoD seldom provided proposed DEA annexes to Commerce for review. From calendar years 1994 through 1999, the Military Departments signed 316 DEA annexes; however, DoD provided only 48 to Commerce. DEA annexes were seldom provided because a 1994 policy memorandum, "Implementing Arrangements to Research and Development Umbrella Agreements," September 9, 1994, did not prescribe adequate procedures to ensure that Commerce was included in the DEA annex review process. In addition, the Military Departments' guidance for reviewing proposed DEA annexes did not include Commerce. As a result, DoD was not necessarily reflecting a U.S. Government consensus position when approving most DEA annexes.

Policy and Procedures

Mutual Weapons Development Data Exchange Program and Defense Development Exchange Program. DoD Instruction 2015.4, "Mutual Weapons Development Data Exchange Program and Defense Development Exchange Program," November 5, 1963, establishes procedures for exchanging scientific and technical military information of interest to the United States through correspondence or visits by technical personnel under the Defense Data Exchange Program (formerly the Defense Development Exchange Program). DoD Instruction 2015.4 states that a master DEA is an international agreement between DoD and a foreign country that establishes a framework for the exchange of research and development information. An annex to the master DEA is the mechanism for exchanging information. DEA annexes describe the scope of specific projects under the master DEA. DoD Instruction 2015.4 delegates authority to the Military Departments to initiate, sign, and terminate DEA annexes; however, the Director, Defense Research and Engineering, is required to sign all master DEAs.

International Agreements. DoD Directive 5530.3, "International Agreements," June 11, 1987, establishes policy, delegates authority, and prescribes procedures for implementing international agreements. DoD Directive 5530.3 defines international agreements as any agreement:

- that is concluded with one or more foreign governments, signed by personnel representing the U.S. Government;
- that signifies the intention of its parties to be bound to international law; and
- that is denominated by any name connoting a legal consequence.

DoD Directive 5530.3 authorizes the Under Secretary of Defense for Policy to delegate responsibility for negotiating and concluding international agreements within certain subject areas to DoD Components. However, DoD Components

with delegated authority must consult with organizations, including the Department of State, that have a vested interest in the subject area before negotiating and concluding international agreements. DoD Directive 5530.3 does not include Commerce in the required coordination process for international agreements.

Policy Memorandum. On September 9, 1994, the Principal Deputy Assistant Secretary of Defense for Dual-Use Technology Policy and International Programs (now the Deputy Under Secretary of Defense [International and Commercial Programs]) issued a policy memorandum, "Implementing Arrangements to Research and Development Umbrella Agreements" (1994 Policy Memorandum), to the Assistant Secretaries of the Army and Navy (Research, Development, and Acquisition); the Deputy Under Secretary of the Air Force (International Affairs); and the Deputy Director, Defense Research and Engineering. The purpose of the 1994 Policy Memorandum was to define the Military Departments' staffing requirements for DEA annexes. The 1994 Policy Memorandum states that all DEA annexes are to be forwarded to the Office of the Secretary of Defense prior to implementation and requires the Office of the Secretary of Defense to forward all DEA annexes to Commerce for review and comment. In addition, the 1994 Policy Memorandum states that the Military Departments are to consider and adopt, as appropriate, comments from Commerce on proposed DEA annexes.

DEA Annex Coordination With Commerce

DoD seldom provided proposed DEA annexes to Commerce for review. The Military Departments enter DEA annexes into the Tri-Service DEA Annex Database. The Tri-Service DEA Annex Database is an online database that provides information for all DEA annexes related to the country involved in the agreement, the subject of the agreement, and points of contact for the agreement. The database contains DEA annexes that were established,[11] expired,[12] proposed,[13] and terminated.[14] The database was developed in 1996 under a Navy International Programs Office and JIL Information Systems contract. Officials from the Navy International Programs Office stated that the database was initially developed to make information related to DEA annexes accessible to the entire Navy. However, prior to the database's completion, it was expanded to include the Army and the Air Force. As of January 2000, the Tri-Service DEA Annex Database contained 316 DEA annexes approved by the

[11]A DEA annex that has been signed and is currently being implemented.

[12]A DEA annex that was terminated because of a pre-arranged closing date, unless the DEA is extended by mutual agreement prior to its expiration.

[13]A DEA annex that is in the process of being signed.

[14]A DEA annex that has become unproductive and is pro-actively terminated either by mutual agreement or unilaterally per the terms of the master DEA or the DEA annex before its expiration date, if there was one.

Military Departments from calendar years 1994 through 1999. The following table shows the number of DEA annexes signed by each Military Department each year.

DEA Annexes Signed by the Military Departments

	1994	1995	1996	1997	1998	1999	Total
Army	9	14	21	24	6	7	81
Navy	35	47	55	25	15	14	191
Air Force	6	12	5	7	4	10	44
Total	**50**	**73**	**81**	**56**	**25**	**31**	**316**

From calendar years 1994 through 1999, the Military Departments signed 316 DEA annexes. Of the 316 DEA annexes, Commerce officials stated that DoD provided 48 (15 percent) for review during the same period as follows:

- 3 DEA annexes in 1994,
- 17 DEA annexes in 1995,
- 13 DEA annexes in 1996,
- 8 DEA annexes in 1997,
- 7 DEA annexes in 1998, and
- 0 DEA annexes in 1999.

Of the 48 DEA annexes provided to Commerce for review, Commerce did not concur with 6 (13 percent), because of concerns on the potential economic and competitive impact on the U.S. industrial base.

Compliance With Policy and Procedures

The Office of the Deputy Under Secretary of Defense (International and Commercial Programs) seldom provided DEA annexes to Commerce because the 1994 Policy Memorandum did not prescribe adequate procedures to ensure that Commerce was included in the DEA annex review process. In addition, the Military Department guidance for reviewing proposed DEA annexes did not include Commerce.

Procedures for Coordinating With Commerce. The 1994 Policy Memorandum did not prescribe adequate procedures to ensure that Commerce was included in the DEA annex review process. The 1994 Policy Memorandum required the Military Departments to forward, prior to implementation, a copy of DEA annexes to the Office of the Secretary of Defense. The Office of the Secretary of Defense was to forward all DEA annexes to Commerce for review. However, the 1994 Policy Memorandum did not recognize that DoD Instruction 2015.4 delegated the authority to initiate, sign, and terminate DEA annexes to the Military Departments.

Army Implementing Procedures. Army guidance did not require coordinating proposed DEA annexes with Commerce. The Army implementing regulation to DoD Instruction 2015.4 is Army Regulation 70-33, "Mutual Weapons Development Data Exchange Program (MWDDEP) and Defense Development Exchange Program (DDEP)," November 11, 1976. That Army regulation addresses procedures for coordinating proposed DEA annexes. However, because the regulation had not been updated since 1976, the requirement to coordinate with Commerce on proposed DEA annexes was not included in the regulation. As a result, the Army Materiel Command did not coordinate proposed DEA annexes with Commerce. In addition, because DoD Instruction 2015.4 delegates approval authority to the Army for its DEA annexes, the Army Materiel Command did not coordinate proposed DEA annexes with the Office of the Secretary of Defense.

Navy Implementing Procedures. Navy guidance did not require coordinating proposed DEA annexes with Commerce. Officials from the Navy International Programs Office stated that the Navy uses DoD Instruction 2015.4 as its primary guidance for preparing DEA annexes. In addition to DoD Instruction 2015.4, the Department of the Navy Handbook, "Data Exchange Program Guidelines for Technical Project Officers," November 1, 1997, was developed to address procedures for coordinating and reviewing proposed DEA annexes. The handbook was developed as a reference tool to assist technical project officers in identifying agreements that will benefit the Navy research and development community. However, the handbook does not address the requirement to coordinate proposed DEA annexes with Commerce or the Office of the Secretary of Defense. As a result, the Navy International Programs Office did not coordinate proposed DEA annexes with Commerce. Officials from the Navy International Programs Office stated they did coordinate proposed DEA annexes with the Office of the Deputy Under Secretary of Defense (International and Commercial Programs), as required by the 1994 Policy Memorandum. However, officials in the Office of the Deputy Under Secretary of Defense stated they had not received any DEA annexes from the Navy and, therefore, had not submitted the DEA annexes to Commerce for review.

Air Force Implementing Procedures. Air Force guidance did not require coordinating proposed DEA annexes with Commerce. The Air Force implementing instruction to DoD Instruction 2015.4 is Air Force Instruction 16-110, "U.S. Air Force Participation in International Armaments Cooperation (IAC)," March 19, 1999. Air Force Instruction 16-110 addresses procedures for coordinating proposed DEA annexes. However, the instruction does not address the requirement to coordinate proposed DEA annexes with

Commerce. As a result, the Office of the Deputy Under Secretary of the Air Force (International Affairs) did not coordinate proposed DEA annexes with Commerce. In addition, because DoD Instruction 2015.4 delegates the Air Force approval authority for its DEA annexes, the Office of the Deputy Under Secretary of the Air Force (International Affairs) did not coordinate proposed DEA annexes with the Office of the Secretary of Defense.

Streamlining the Process. Because approval authority for DEA annexes has been delegated to the Military Departments, it would be more efficient to delegate the Military Departments direct authority to coordinate with Commerce. Requiring the Military Departments to coordinate with the Office of the Secretary of Defense lengthens the review process for approving DEA annexes. To streamline the process, the Military Departments should include in implementing guidance of DoD Directive 2015.4 procedures requiring that proposed DEA annexes be coordinated with Commerce. In addition, the Deputy Under Secretary of Defense (International and Commercial Programs) should rescind the 1994 Policy Memorandum.

Industrial Base Impact

If DoD continues to exclude Commerce in the DEA annex review process, DoD may not reflect a U.S. Government consensus position when approving DEA annexes. The 1994 Policy Memorandum states that it is in the interest of DoD to allow Commerce to review proposed implementing arrangements to research and development umbrella agreements. A Commerce review would provide DoD an assessment of the economic and competitive impact of the transfer of technology to the U.S. industrial base. Since 1958, DoD has participated with allied and friendly nations in the exchange of basic scientific and technical information in areas of mutual interest. The Defense Data Exchange Program supports DoD efforts to improve the quality and interoperability of weapon systems, enhance the DoD technology base, identify areas for further research, and stay abreast of our allies' technological advances. Because of the high likelihood of transferring critical information and technology, DEA annexes should be reviewed by Commerce to ensure the greatest protection of the U.S. industrial base.

Recommendations, Management Comments, and Audit Response

Redirected Recommendation. As a result of the Deputy Under Secretary of the Army (International Affairs) comments, we redirected Recommendation B.2. from the Commander, Army Materiel Command, to the Deputy Under Secretary.

B.1. We recommend the Deputy Under Secretary of Defense (International and Commercial Programs):

a. Rescind the 1994 policy memorandum, "Implementing Arrangements to Research and Development Umbrella Agreements."

b. Revise DoD Instruction 2015.4, "Mutual Weapons Development Data Exchange Program and Defense Development Exchange Program," to delegate authority to the Military Departments for coordinating data exchange agreement annexes with the Department of Commerce.

Management Comments. The Deputy Under Secretary of Defense (International and Commercial Programs) stated that his office regularly consults with the Departments of Commerce and State on all international agreements under its staffing authority. He also stated that DoD is conducting a systematic review of its internal processes for international cooperation and trade. The review, which includes representatives from the Departments of Commerce and State, will help identify process improvements in the review and approval processes for international agreements. This audit report will be considered in the development of further policy and process enhancements.

Audit Response. The Deputy Under Secretary of Defense (International and Commercial Programs) comments were partially responsive. Although we commend DoD for conducting a review of its internal processes for international cooperation and trade, management's position on the recommendation to rescind the 1994 policy memorandum and revise DoD Instruction 2015.4 needs clarification. We request that the Deputy Under Secretary of Defense (International and Commercial Programs) provide comments addressing the recommendations in response to the final report.

B.2. We recommend the Deputy Under Secretary of the Army (International Affairs) update Army Regulation 70-33, "Mutual Weapons Development Data Exchange Program (MWDDEP) and Defense Development Exchange Program (DDEP)," to delineate clear procedures for coordinating data exchange agreement annexes with the Department of Commerce.

Management Comments. The Deputy Under Secretary of the Army (International Affairs) concurred, in principle, provided concerns in regard to finding A are addressed by a process action team before implementing this recommendation. If the Office of the Secretary of Defense promulgates the recommended revision to DoD Directive 2015.4 before Army Regulation 70-33 has been revised, the Army Materiel Command will write a provision into the update of the "Army/AMC [Army Materiel Command] Data Exchange

Agreement Letter of Instruction (LOI)," to state that the Army Materiel Command as the Army Defense Development Exchange Program executive agent will staff all proposed data exchange agreements with Commerce.

B.3. We recommend the Navy International Programs Office update the Department of the Navy Handbook, "Data Exchange Program Guidelines for Technical Project Officers," to delineate clear procedures for coordinating data exchange agreement annexes with the Department of Commerce.

Management Comments. The Principal Deputy Assistant Secretary of the Navy (Research, Development and Acquisition) concurred, stating that after the Office of the Secretary of Defense revises DoD Directive 2015.4 delegating authority to the Military Departments for coordinating data exchange agreements with Commerce, the Navy International Programs Office will immediately revise and distribute the updated Handbook.

B.4. We recommend the Deputy Under Secretary of the Air Force (International Affairs) update Air Force Instruction 16-110, "U.S. Air Force Participation in International Armaments Cooperation (IAC)," to delineate clear procedures for coordinating data exchange agreement annexes with the Department of Commerce.

Management Comments. The Deputy Under Secretary of the Air Force (International Affairs) concurred, stating that Air Force Instruction 16-110 will be updated once DoD Instruction 2015.4 is revised.

Appendix A. Audit Process

Scope

Work Performed. We reviewed the Export Administration Act and the Arms Export Control Act and associated regulations. In addition, we reviewed the Department of State May 1999 list of countries that do not cooperate fully with U.S. antiterrorism efforts and the Department of Energy July 1999 Sensitive Countries List to identify current countries and entities of concern. Also, we reviewed the Defense Security Service study, "1999 Technology Collection Trends in the U.S. Defense Industry," that identified technology interest trends and ranked technologies, DoD programs, and weapon systems that were most frequently the target of illicit foreign collection efforts. Further, we reviewed and evaluated the adequacy of DoD and Military Department directives, policies, regulations, and memorandums, implemented during the period 1963 through 1999, related to disclosure and transfer of militarily sensitive and critical technologies and technical information to foreign countries and representatives.

We conducted interviews with Commerce and Department of State licensing officials. In addition, we conducted interviews with officials at the Offices of the Under Secretary of Defense for Policy; the Deputy Under Secretary of Defense (Science and Technology); the Director, Defense Research and Engineering; the Deputy Under Secretary of Defense (International and Commercial Programs); the Director, Defense Threat Reduction Agency; and at the Military Departments and the DoD program offices. In addition, we visited research facilities at the Army Armament Research, Development and Engineering Center; the Army Communications-Electronics Command; the Naval Air Warfare Center, Aircraft Division; the Naval Air Warfare Center, Weapons Division; and the Air Force Research Laboratories at Kirtland Air Force Base and Wright-Patterson Air Force Base. We conducted interviews with DoD managers at the sites visited who were responsible for managing the technology security programs and for managing and controlling foreign national visitors.

Limitations to Scope. In general, we did not include for review visits by foreign nationals approved under a DoD contract authority.

DoD-Wide Corporate Level Government Performance and Results Act Coverage. In response to the Government Performance and Results Act, the Secretary of Defense annually establishes DoD-wide corporate level goals, subordinate performance goals, and performance measures. This report pertains to achievement of the following goal, subordinate goal, and performance measure:

> **FY 2000 Corporate Level Goal 2:** Prepare now for an uncertain future by pursuing a focused modernization effort that maintains U.S. qualitative superiority in key warfighting capabilities. Transform the force by exploiting the Revolution in Military Affairs, and reengineer the Department to achieve the 21st century infrastructure. **(00-DoD-2)**
> **FY 2000 Subordinate Performance Goal 2.2:** Transform the U.S. military forces for the future. **(00-DoD-2.2) FY 2000 Performance**

Measure 2.2.2: Status of Defense Technology Objectives as Judged by Technology Area Review Assessments. **(00-DoD-2.2.2)**

Methodology

To determine the adequacy of DoD policies and procedures to prevent the transfer of technologies and technical information with potential military application to countries and entities of concern, we reviewed foreign visitor authorization listings at the six visited sites. The foreign visitor authorization listings identified visit requests received and approved in FY 1998 and FY 1999. During FY 1998 and FY 1999, the six visit sites had 11,544 approved foreign visitors. We judgmentally selected approved requests for visits conducted during FY 1998 and FY 1999. We reviewed the appropriate case files and related international agreements, delegation of disclosure authority letters, and security classification guides to identify established controlling authorities for disclosure of technologies and technical information to foreign national visitors at the research facilities and program offices visited. We interviewed DoD managers responsible for approving visits and for overseeing the foreign national's visit. In addition, we reviewed any available documentation for the technologies and technical information that was identified and provided to the foreign national during the visit. We evaluated the controlling authorizations, and the policies and procedures established to prevent the inappropriate transfer of militarily sensitive and critical technologies and technical information to foreign nationals or countries, against the visit controls and technical information provided to the foreign national during the course of the visit. Also, we compared the DoD programs, weapon systems, and technical information disclosed during a foreign national visit with the DoD programs, weapon systems, and technologies identified as targets in the Defense Security Service study to determine the need for executing export license applications prior to the disclosure of information on those DoD programs, weapon systems, and technologies.

We performed tests to determine whether DEA annexes were coordinated with Commerce. We reviewed the DoD Tri-Service DEA Annex Database to identify the universe of DEAs that were signed by the Military Departments from calendar years 1994 through 1999. We compared the number of DEA annexes in the database with the number of DEA annexes reviewed by Commerce during the same period.

Use of Computer-Processed Data. We relied on computer-processed data from the Foreign Disclosure and Technical Information System database and the Tri-Service DEA Annex Database. We did not test general and application controls to confirm the reliability of the systems because we only relied on the information to determine the magnitude of approved foreign visit requests

received and DEAs received and coordinated with Commerce. We tested the computations and information for accuracy, and determined that they were validated for use in meeting the audit objectives.

Audit Type, Dates, and Standards. This economy and efficiency audit was conducted from September 1999 through January 2000 in accordance with auditing standards issued by the Comptroller General of the United States, as implemented by the Inspector General, DoD. Accordingly, we included tests of management controls considered necessary.

Contacts During the Audit. We visited or contacted individuals and organizations within DoD, Commerce, and the Department of State. Further details are available upon request.

Management Control Program

DoD Directive 5010.38, "Management Control Program," August 26, 1996, requires DoD organizations to implement a comprehensive system of management controls that provides reasonable assurance that programs are operating as intended and to evaluate the adequacy of the controls.

Scope of Review of the Management Control Program. We reviewed the adequacy of management controls at DoD research facilities and the Office of the Secretary of Defense with respect to controls over the export and export licensing of technologies and technical information. Specifically, we reviewed the adequacy of the Military Departments' management controls for determining whether a deemed export license was required in conjunction with a foreign visit. We also reviewed controls related to coordination of DEA annexes. In addition, we reviewed management's self-evaluation applicable to export controls.

Adequacy of Management Controls. We identified material management control weaknesses at the Military Departments and the Office of the Secretary of Defense with respect to export and export licensing of technologies and technical information, as defined by DoD Instruction 5010.40, "Management Control Program Procedures," August 28, 1996. The Military Departments' management control procedures over research facilities were not adequate to ensure that a determination was made whether a deemed export license was required in conjunction with a foreign visit. Recommendations A.1. and A.2., if implemented, will ensure that export licenses are obtained for controlled technologies and technical information prior to release or disclosure to a foreign national visitor. A copy of this report will be sent to the senior official in charge of management controls in the Office of the Secretary of Defense and the Military Departments. Although we identified management control weaknesses with respect to DEA annex coordination, they were not material weaknesses.

Adequacy of Management's Self Evaluation. The Office of the Secretary of Defense and the Military Departments' research facility officials did not identify export licensing as an assessable unit, related to release or disclosure of non-Foreign Military Sales program technologies and technical information. Therefore, they did not identify or report the material management control weaknesses identified by the audit. The Military Departments' research facility policies and procedures did not require consideration of deemed export licensing requirements prior to the release or disclosure of non-Foreign Military Sales

program technologies and technical information to foreign nationals and, therefore, did not include deemed export licensing requirements as a vulnerability in the risk assessment.

Appendix B. Prior Coverage

During the last 5 years, the General Accounting Office and the Inspector General, DoD, have conducted reviews and the General Accounting Office has also provided testimony to Congress on the subject matter of this report. General Accounting Office reports can be accessed over the Internet at http://www.gao.gov. Inspector General, DoD, reports can be accessed over the Internet at http://www.dodig.osd.mil. The following reports are of particular relevance to the subject matter in this report.

General Accounting Office

General Accounting Office Report No. NSIAD-00-14, "Export Controls: International Space Station Technology Transfer," November 1999.

General Accounting Office Report No. T-NSIAD-95-158, "Export Controls: Issues Concerning Sensitive Stealth-Related Items and Technologies," May 11, 1995.

Inspector General, DoD

Inspector General, DoD, Report No. 99-186, "Review of the DoD Export Licensing Processes for Dual-Use Commodities and Munitions," June 18, 1999.

Inspector General, DoD, Report No. 98-214, "Implementation of the DoD Technology Transfer Program," September 28, 1998.

Inspector General, DoD, Report No. 98-157, "Updating the Foreign Disclosure and Technical Information System," June 17, 1998.

Interagency Reviews

Inspectors General of the Departments of Commerce, Defense, Energy, State, and the Treasury and the Central Intelligence Agency, Report No. 99-187, "Interagency Review of the Export Licensing Processes for Dual-Use Commodities and Munitions," June 18, 1999.

Appendix C. Research and Development Programs Available to Foreign Nationals

During the audit, we identified DoD and Military Department research and development programs used to provide foreign nationals access to DoD research facilities. The programs, and in some cases the corresponding international agreements, provide foreign nationals access to technical data and know-how at the research facility. The following programs are those that were brought to our attention during the audit, not an all-inclusive list of such programs.

Department of Defense Programs

Engineer and Scientist Exchange Program. The Engineer and Scientist Exchange Program is a DoD effort to promote international cooperation in military research, development, and acquisition through the exchange of Defense scientists and engineers. A prerequisite for establishing exchanges under the program is a formal international agreement with each participant nation. As of January 2000, DoD had signed Engineer and Scientist Exchange Program agreements with Australia, Canada, Egypt, France, Germany, Greece, Israel, Norway, Portugal, the Republic of Korea, Sweden, Spain, the Netherlands, and the United Kingdom.

Foreign Visits System. Foreign national visits to DoD and Military Department research facilities are frequently initiated through the Foreign Visits System. Using the Foreign Disclosure and Technical Information System, the Embassy of the requesting government submits a formal visit request electronically. The visit may be self-initiated or by invitation, and the request may be for one-time, recurring, or extended visits. The appropriate foreign disclosure officer is authorized to approve or disapprove all foreign national visits to DoD installations when the visit involves the disclosure of unclassified or classified information.

Intergovernmental Personnel Act Mobility Program. The Intergovernmental Personnel Act Mobility Program provides for temporary assignment of non-Federal employees among Federal, State, and local governments, colleges and universities, Indian tribal governments, federally funded research and development centers, and other eligible organizations. Foreign nationals employed under the Intergovernmental Personnel Act can also be employed in a DoD research facility.

Small Business Innovation Research Program. In 1982, the enactment of the Small Business Innovation Development Act created the Small Business Innovation Research Program. The program was designed to stimulate technological innovation among small private-sector businesses while providing the Government new cost-effective technical and scientific solutions to challenging problems. The program is used extensively within DoD and the

Military Departments. Foreign nationals may be hired to work Small Business Innovation Research contracts supporting 6.1 (basic research) and 6.2. (Applied Research) technologies associated with militarily sensitive or critical technologies.

Department of the Army Programs

Postdoctoral Programs. The Army Research Laboratory, through programs administered by the National Research Council and the American Society for Engineering Education, offers scientists and engineers research positions at several DoD research facilities and nearby universities. The objective of the program is to provide postdoctoral scientists and engineers with opportunities for research that contributes to the overall efforts of the Army Research Laboratory. Initial appointments are for 1 year, but are generally renewed for a second or third year based on the availability of funds.

Department of the Navy Programs

Postdoctoral Fellowship Program. The Postdoctoral Fellowship Program is sponsored by the Office of Naval Research and is designed to encourage the involvement of creative, capable, and highly trained scientists and engineers who have received a Ph.D. or equivalent in areas of great interest and relevance to the Navy. Those individuals may apply for appointments at a number of Navy research facilities.

Department of the Air Force Programs

High-Performance Computing Services Program. Air Force high-performance computing services are available to Air Force Office of Scientific Research grant or contract recipients. Research programs (meeting certain restrictions) are provided access to a range of state-of-the-art, high-performance computing assets within the DoD High-Performance Computing Modernization Program. There are policy provisions that provide control procedures for foreign nationals accessing the computers.

U.S. Air Force National Research Council – Resident Research Associateship. The associateship offers postdoctoral and senior engineers and scientists opportunities to perform research at sponsoring Air Force research facilities. Postdoctoral and senior research associateships are awarded to U.S.

citizens and permanent residents who have doctorates. U.S. citizenship is not a requirement and a small number of associateships are available for foreign nationals if funds are available.

Air Force Office of Scientific Research Grants. The Air Force Office of Scientific Research manages the entire Air Force basic research program. Grants enable technical experts to sponsor and direct research in Air Force research facilities, academic institutions, U.S. industry, and other Government agencies to produce world-class, militarily significant, and commercially valuable products.

Window on Science Program. The Air Force Window on Science Program is managed by the European Office of Aerospace Research and Development located in London, England, and the Asian Office of Aerospace Research and Development located in Tokyo, Japan. The program provides technical interchange opportunities to outstanding foreign scientists and engineers by funding visits to Air Force research facilities.

Appendix D. Report Distribution

Office of the Secretary of Defense

Under Secretary of Defense for Acquisition, Technology, and Logistics
    Director, Defense Research and Engineering
    Deputy Under Secretary of Defense (International and Commercial Programs)
    Director, Defense Logistics Studies Information Exchange
Under Secretary of Defense for Policy
    Assistant Secretary of Defense (International Security Affairs)
    Deputy Under Secretary of Defense (Policy Support)
Under Secretary of Defense (Comptroller)
    Deputy Chief Financial Officer
    Deputy Comptroller (Program/Budget)
Assistant Secretary of Defense (Command, Control, Communications and Intelligence)

Department of the Army

Deputy Under Secretary of the Army (International Affairs)
Commanding General, Army Materiel Command
Auditor General, Department of the Army

Department of the Navy

Director, Navy International Programs Office
Naval Inspector General
Auditor General, Department of the Navy

Department of the Air Force

Assistant Secretary of the Air Force (Financial Management and Comptroller)
Deputy Under Secretary of the Air Force (International Affairs)
Auditor General, Department of the Air Force

Other Defense Organizations

Director, Defense Contract Audit Agency
Director, Defense Logistics Agency
Director, Defense Security Cooperation Agency
Director, Defense Security Service
Director, Defense Systems Management College
Director, Defense Threat Reduction Agency
    Director, Technology Security Directorate
Director, National Security Agency
    Inspector General, National Security Agency
Inspector General, Defense Intelligence Agency

Non-Defense Federal Organizations and Individuals

Office of Management and Budget
General Accounting Office
    National Security and International Affairs Division
        Technical Information Center
Inspector General, Department of Commerce
Inspector General, Department of Energy
Inspector General, Department of State

Congressional Committees and Subcommittees, Chairman and Ranking Minority Member

Senate Committee on Appropriations
Senate Subcommittee on Defense, Committee on Appropriations
Senate Committee on Armed Services
Senate Committee on Banking
Senate Committee on Governmental Affairs
Senate Select Committee on Intelligence
House Committee on Appropriations
House Subcommittee on Defense, Committee on Appropriations
House Committee on Armed Services
House Committee on Government Reform
House Subcommittee on Government Management, Information, and Technology, Committee on Government Reform
House Subcommittee on National Security, Veterans Affairs, and International Relations, Committee on Government Reform
House Committee on International Relations
House Subcommittee on International Economic Policy and Trade, Committee on International Relations
House Permanent Select Committee on Intelligence

Deputy Under Secretary of Defense (International and Commercial Programs) Comments

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000

ACQUISITION AND TECHNOLOGY

06 MAR 2000

MEMORANDUM FOR DIRECTOR, READINESS AND LOGISTICS SUPPORT DIRECTORATE, OFFICE OF THE INSPECTOR GENERAL

SUBJECT: Comments on the Draft Audit Report on Export Licensing at DoD Research Facilities (Project No. 9LG-5030)

In response to your February 8, 2000 memorandum and report, this office has reviewed the conclusions and recommendations regarding Data Exchange Agreement Annexes. The following comments are limited to that portion of the report:

- This office regularly consults with the Departments of State and Commerce on all international agreements under its staffing authority.
- The Department of Defense is conducting a systematic review of its internal processes for international cooperation and trade. This review, which includes representatives from the Departments of State and Commerce, will help identify process improvements in the review and approval processes for international agreements.
- The IG report will be considered in the development of further policy and process enhancements.

Thank you for the opportunity to review the draft audit report.

A. Volkman
Director, International Cooperation

Department of the Army Comments

DEPARTMENT OF THE ARMY
DEPUTY UNDER SECRETARY OF THE ARMY
INTERNATIONAL AFFAIRS
102 ARMY PENTAGON
WASHINGTON DC 20310-0102

REPLY TO
ATTENTION OF

15 March 2000

MEMORANDUM FOR INSPECTOR GENERAL, DEPARTMENT OF DEFENSE (AUDITING)

SUBJECT: Audit Report on Export Licensing at DoD Research Facilities (Project No. 9LG-5030)

The draft of the subject report was given to this organization for review and comment on behalf of the Department of the Army. In addition to this office, the report and the enclosed comments have been reviewed by the Offices of the General Counsel, Deputy Chief of Staff for Intelligence, and Headquarters, U.S. Army Materiel Command.

Recommendations applying to the first section are for the Office of the Secretary of Defense and concern policy changes to determine whether an export license is required for a foreign national visit or assignment to a DoD facility. These recommendations affect the policy and responsibilities of this service and therefore merit comment. The Army is concerned that these recommendations may have unintended consequences that slow and encumber an already overburdened review process while providing very little value. Therefore, we recommend an in-depth examination by a Process Action Team of the merits of these proposals prior to their implementation.

The subject report has only one recommendation (B2) directed specifically to the Army, that the Commander, U.S. Army Materiel Command, revise its regulation to delineate clear procedures for coordinating data exchange agreement annexes with the Department of Commerce. The Army concurs conditionally, subject to the finding that these visits are not exempt from Export Administration Regulation control, that the recommendations in the previous section are found to have merit after the proposed interagency review, and once the requiring DoD Directive has been changed.

A detailed rationale for these comments is provided in the enclosed information paper. My point of contact for this action is Mr. William D. Barr, SAUS-IA-DSZ, Tel: 703/558-8080.

Gayden E. Thompson

Enclosure

CF:
Army Audit Agency (SAAG-PMO-S)

AUDIT REPORT ON EXPORT LICENSING AT DOD RESEARCH FACILITIES
INFORMATION PAPER

- FINDING A: The report makes several recommendations for the Under Secretary of Defense for Policy and the Director, Defense Research and Engineering on the issue of determining whether a "deemed export license" is required for a foreign national visit or assignment to a DoD facility.

The Army recommends that a Process Action Team (PAT) be formed amongst DoD (OSD, Army, Navy & Air Force), Commerce and State before OSD(P) revises DoDD 2040.2 and 5230.20. This PAT would explore and lay to rest some underlying issues vis-a-vis data exchange agreements (DEAs) and personnel exchanges in regard to the export license issue. The underlying assumption has been that DEA and ESEP (Engineer and Scientist Exchange Program) personnel exchanges were exempted because the work executed thereunder fell into the category of the "fundamental research" exemption of the Export Administration Regulations (EAR). For example, the majority[1] of Army DEAs exchange information only through category 6.3 (Budget Activity 3 - Advanced Development). Category 6.3 is the last category that is fundamental "nonsystem specific" research exempted by the EAR.

As a result, and as noted in the DoDIG report, most DEA visits and transfers of technical information are executed without export or "deemed export" licenses. The Army's view is that DEA technical information exchanges and visits (and ESEP personnel exchanges) were sufficiently controlled by the DEAs and ESEPs Delegation of Disclosure Authority Letters (DDLs).

If DEAs and ESEPs are not covered under the EAR "fundamental research" exemption, the work involved with establishing them will grow considerably. It currently takes the Army an average of 12 months to establish a DEA.[2] The Army uses a federated Integrated Product Team (IPT) approach. This means that the IPT membership at the AMC Major Subordinate Command (MSC) and AMC levels must fully concur with the DEA and its accompanying SSOI and DDL (ESEP: resumé, position description, and DDL) before it can be staffed and signed at HQDA. The debate in IPTs regarding such issues as technical information releasability is rigorous, in-depth and time consuming, even for Controlled Unclassified Information (CUI). To require, in addition, that an export, or deemed export, license be obtained, could increase DEA and ESEP staffing time by an additional 4-5 months.

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[1] Sixty percent (147 of 249) of Army DEAs (as noted by their supporting DDLs) exchange technical information at the 6.3 category or less. Twenty percent (50) DEAs exchange technical information at 6.4 or above. Twenty percent (52) DEAs have no DDLs and therefore determination of the category is not available. These, for the most part, are old DEAs that were established prior to the Army requirement for either expiration dates or DDLs.

[2] Prior to the DEA LOI of 12 Dec 1995 and the implementation of IATS in January 1996, it used to take the Army an average of 24 months to establish a DEA.

Final Report Reference

Before adding another time-consuming requirement to the DEA process, the Army prefers to examine the pros and cons of this course of action by using the recommended PAT. This will insure that such an addition will add value to an already burdensome process. The Army feels strongly that the recommended PAT be established and executed before committing to staff DEAs with the Department of Commerce.

- FINDING B: Recommendation B2. of this section is that the Commander, AMC update AR 780-33 to include procedures for coordinating DEA annexes with the Department of Commerce.

Army concurs, in principal, provided our concerns in regard to FINDING A have been addressed by a PAT, and in conjunction with and prior to implementing the recommendation to coordinate DEA annexes with Department of Commerce. However, HQ AMC is no longer the proponent for this action. This recommendation should be addressed to the new proponent, the Deputy Under Secretary of the Army (International Affairs), ATTN: SAUS-IA-DSC, 102 Army Pentagon, Washington, DC 20310-0102. Redirected

Also, Army does not feel it is appropriate to require staffing proposed DEAs with the Department of Commerce until OSD revises and promulgates DoDD 2015.4. If OSD promulgates a revised DoDD 2015.4 prior to the publication of the Army's regulatory update (currently under revision), AMC will write a proviso into the update of the Army/AMC DEA Letter of Instruction (LOI) to state that AMC, as the Army DDEP executive agent, will staff all proposed DEAs with the Department of Commerce.

- OTHER

Army requests that below table to your report be corrected to include the Army DEAs signed into force in 1999. Revised

DEA Annexes Signed by the Military Departments

	1994	1995	1996	1997	1998	1999	Total
Army	9	14	21	24	6	7	81
Navy	35	47	55	25	15	14	191
Air Force	6	12	5	7	4	10	44
Total	**50**	**73**	**81**	**56**	**25**	**31**	**316**

2

Final Report
Reference

Revised

On page 5 of the draft report, in the section titled Army Procedures for Release of Technical Data, the report states that the contact officer conducts the review for release of technical information to foreign nationals in the foreign disclosure process. This is incorrect; it is the foreign disclosure officer that conducts this review.

Page 21

At the top of page 19, (and the bottom of page 20) in the subject report, under FINDING B, the following paragraph should be substituted. Note that the terms, as used by the subject audit, are inconsistent with Army usage (see comments in the footnotes).

DEA Annex Coordination With Commerce

DoD seldom provided proposed DEA annexes to Commerce for review. The Military Departments enter DEA annexes into the Tri-Service DEA Annex Database. The Tri-Service DEA Annex Database is an online database that provides information for all DEA annexes related to the country involved in the agreement, the subject of the agreement, and points of contact for the agreement. The database contains DEA annexes that were established[3], expired,[4] proposed,[5] and terminated.[6] The database was developed in 1996 under a Navy International Programs Office and JIL Information Systems contract. Officials from the Navy International Programs Office stated that the database was initially developed to make information related to DEA annexes accessible to the entire Navy. However, prior to the database's completion, it was expanded to include the Army and the Air Force. As of January 2000, 316 DEA annexes were approved by the services.

[3] A DEA annex that has been signed and is currently being implemented.

Revised

[4] A DEA annex that was established and is awaiting update because the implementation date has lapsed.(NOTE: This statement is not true as far as the Army is concerned. Expiration in the Army lexicon means "a coming to an end, the formal termination on a pre-arranged closing date" unless the DEA is extended by mutual agreement prior to its expiration.)

[5] A DEA annex that is in the process of being signed.

Revised

[6] A DEA annex that is no longer used. (NOTE: For the Army this means a DEA, that has become unproductive, that is pro-actively terminated either by mutual agreement or unilaterally per the terms of the "master DEA" and/or the DEA, and prior to its expiration date if there is one.)

3

Department of the Navy Comments

DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

MAR 1 4 2000

MEMORANDUM FOR THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

Subj: AUDIT REPORT ON EXPORT LICENSING AT DOD RESEARCH FACILITIES (PROJECT NO. 9LG-5030)

Ref: (a) DOD IG ltr of 8 Feb 00

Reference (a) requested the Department of the Navy comments on the findings and recommendations contained in the subject draft audit report. The Department of the Navy has no objections to the audit report.

There is no objection to the single IG recommendation for the Navy (recommendation B.3):

> "We recommend the Navy International Programs Office update the Department of the Navy Handbook, 'Data Exchange Program Guidelines for Technical Project Officers,' To delineate clear procedures for coordinating data exchange agreement annexes with the Department of Commerce."

After OSD revises instruction 2015.4 "Mutual Weapons Development Data Exchange Programs" delegating authority to the MILDEPs for coordinating DEA annexes with the Commerce Department, Navy IPO will immediately revise and distribute the Guideline Handbook.

Paul A. Schneider
Principal Deputy

Department of the Air Force Comments

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC

Office of the Under Secretary

MEMORANDUM FOR ASSISTANT INSPECTOR GENERAL FOR AUDITING
OFFICE OF THE INSPECTOR GENERAL
DEPARTMENT OF DEFENSE

FROM: SAF/IA

SUBJECT: Audit Report on Export Licensing at DoD Research Facilities (Project No. 9LG-5030)

This is in reply to your memorandum requesting the Assistant Secretary of the Air Force (Financial Management and Comptroller) to provide Air Force comments on subject report.

Finding A: DoD research facilities did not have procedures for determining whether a deemed export license was required in conjunction with the disclosure of release of technical data to foreign nationals. In addition, Military program officials were not knowledgeable of the term "deemed" or of the licensing requirements for deemed exports. DoD guidance does not clearly state policies, procedures and responsibilities of DoD and Military Department hosts for determining whether a deemed export license was required when a foreign national visited a DoD research facility, and guidance does not prescribe circumstances that would exclude DoD research facilities from the requirements of the EAR or the ITAR. As a result, DoD research facilities provided technical data to foreign nationals without determining whether an export license was required.

COMMENT: Concur with the first four sentences of the finding. Non-concur with the final sentence. DoD research facilities do not need procedures for determining whether an export license is required because all authorized DoD interaction with foreign nationals that involves classified or sensitive unclassified information is covered under paragraphs 124.4, 124.5, 126.4, 126.5 and 126.6 of the International Transfer in Arms Regulation. Since there are no authorized circumstances when a DoD research facility would be required to obtain an export license, there is no need for them to determine if an export license is required. Although none of the recommendations for finding A are directed at the Air Force, we nonconcur with all of the recommendations.

Finding B: DoD seldom provided proposed DEA annexes to Commerce for review. From calendar years 1994 through 1999, the Military Departments signed 309 annexes; however, DoD provided only 48 to Commerce. DEA annexes were seldom provided because a 1994 policy memorandum, "implementing Arrangements to Research and Development Umbrella Agreements," September 9, 1994 did not provide adequate procedures to ensure that Commerce was included in the DEA annex review process. In addition, the Military Departments' guidance

for reviewing proposed DEA annexes did not include Commerce. As a result, DoD may not adopt the U.S. Government position when approving a DEA annex.

COMMENT: Concur with the finding. Concur with recommendations B.1(a) and (b) of the report. Findings B.2 and B.3 are not applicable to the Air Force. Concur with finding B.4. SAF/IA will update Air Force Instruction 16-110, "U.S. Air Force Participation in International Armaments Cooperation (IAC)" when DoD revises DoD Instruction 2015.4, "Mutual Weapons Development Data Exchange Program and Defense Development Exchange Program."

Point of contact is Mr. Stubbs, SAF/IADX, 703-588-8865.

Willard Mitchell

WILLARD H. MITCHELL
Deputy Under Secretary of the Air Force
International Affairs

cc:
SAF/FMPF

Audit Team Members

The Readiness and Logistics Support Directorate, Office of the Assistant Inspector General for Auditing, DoD, prepared this report. Personnel of the Office of the Inspector General, DoD, who contributed to the report are listed below.

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