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REVIEW OF THE DOD EXPORT LICENSING PROCESSES FOR
DUAL-USE COMMODITIES AND MUNITIONS

Report No. 99-186

June 18, 1999

Office of the Inspector General
Department of Defense

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Acronyms

ACEP	Advisory Committee on Export Policy
AECA	Arms Export Control Act
DIA	Defense Intelligence Agency
DTRA/ST	Technology Security Directorate, Defense Threat Reduction Agency
EAA	Export Administration Act
EO	Executive Order
FORDTIS	Foreign Disclosure and Technical Information System
GAO	General Accounting Office
OC	Operating Committee
NSA	National Security Agency



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884

June 18, 1999

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR POLICY
DEPUTY UNDER SECRETARY OF DEFENSE (POLICY
SUPPORT)
DIRECTOR, DEFENSE THREAT REDUCTION AGENCY

SUBJECT: Report of the Review of the DoD Export Licensing Processes for Dual-Use
Commodities and Munitions (Report No. 99-186)

We are providing this report for your review and comment. We conducted the review in response to a congressional request. An interagency report prepared by the Inspectors General of the Departments of Commerce, Defense, Energy, State, and Treasury and the Central Intelligence Agency addressing the U.S. Government export licensing process will be issued concurrently. This report addresses the DoD portion of the U.S. Government export licensing processes for dual-use commodities and munitions. We considered management comments on a draft of this report in preparing the final report.

DoD Directive 7650.3 requires that all recommendations be resolved promptly. The Under Secretary of Defense for Policy comments were generally responsive. We request additional comments on Recommendations Q.8.A. and Q.13.B. As a result of management comments, we revised Recommendation Q.7.B. Therefore, we request additional comments on that recommendation. We also request additional comments on material management control weaknesses as discussed in Appendix A. We request that comments on the final report be provided by July 30, 1999.

We appreciate the courtesies extended to the review staff. Questions on the review should be directed to Ms. Evelyn R. Klemstine at (703) 604-9172 (DSN 664-9172) (eklemstine@dodig.osd.mil) or Mr. Jerrold R. Savage at (703) 604-9612 (DSN 664-9612) (jsavage@dodig.osd.mil). See Appendix F for the report distribution. The review team members are listed inside the back cover.

A handwritten signature in black ink, reading "Robert J. Lieberman".

Robert J. Lieberman
Assistant Inspector General
for Auditing

Office of the Inspector General, DoD

Report No. 99-186
(Project No. 9LG-5025)

June 18, 1999

Review of the DoD Export Licensing Processes for Dual-Use Commodities and Munitions

Executive Summary

Introduction. On August 26, 1998, Chairman Fred Thompson, Senate Committee on Governmental Affairs, requested that the Inspectors General of the Departments of Commerce, Defense, Energy, State, and Treasury and the Central Intelligence Agency review the export licensing processes of dual-use commodities and munitions. Those processes were the subject of a 1993 interagency review conducted by the Inspectors General of the Departments of Commerce, Defense, Energy, and State. The Department of Commerce issues export licenses for dual-use commodities, and the Department of State issues export licenses for munitions. DoD reviews dual-use and munitions export license applications and recommends whether to approve or deny applications. The Defense Threat Reduction Agency is the primary DoD Component that advises the Departments of Commerce and State on export license applications; the Technology Security Directorate, Defense Threat Reduction Agency, performs that function. An interagency report addressing the U.S. Government export licensing process will be issued concurrently with this final report. This report addresses the DoD portion of the U.S. Government export licensing processes for dual-use commodities and munitions. To assist our efforts, we reviewed a sample of 60 dual-use license applications and a sample of 20 munitions license applications.

Objectives. The overall review objective was to evaluate the export licensing processes for dual-use commodities and munitions to determine whether current practices and procedures were consistent with established national security and foreign policy objectives. Specifically, the review was to answer the 14 questions posed by Senator Thompson in his August 26, 1998, letter. We also reviewed the management control program as it related to the overall objectives.

Results.

Question 1. Examine whether the current, relevant legislative authority contains inconsistencies or ambiguities regarding the licensing of dual-use and munitions commodities, and the effect of any such inconsistencies and ambiguities.

The general nature of the Export Administration Act and the Arms Export Control Act creates a broad framework, but we found no inconsistencies or ambiguities in either act. The acts give Federal departments and agencies flexibility to change details regarding the components of the dual-use commodities and munitions export licensing processes without requiring annual changes to legislation. The dual-use licensing process would be best served through reenactment of the Export Administration Act, which expired in 1994.

Question 2. Examine whether Executive Order 12981 (1995) as implemented is consistent with the objectives of the Export Administration Act and other relevant legislative authority.

Executive Order 12981, as implemented, is generally consistent with the relevant objectives of the Export Administration Act, the principal legislative authority that we considered under this question. However, Executive Order 12981 decreased from 40 to 30 days the time DoD had to review dual-use license applications. As a result of the shortened review period, the ability of DoD to locate the information necessary to inject into the license review process may have been diminished. However, it is difficult to quantify the effect the decreased review time has had on the DoD review of dual-use license applications.

Question 3. Determine whether there is a continued lack of interagency accord, as stated in the 1993 interagency report, regarding whether the Department of Commerce (Commerce) is properly referring export license applications (including supporting documentation) out for review by the other agencies.

DoD officials expressed general satisfaction with the dual-use export license applications that Commerce referred for review, although DoD officials disagreed with Commerce's decision not to refer 5 of 60 sampled dual-use license applications. They also expressed concern that Commerce referred too few commodity classification requests to DoD for review. As a result, in some cases, Commerce made decisions on license applications with national security implications without the benefit of DoD input.

Question 4. Determine whether the interagency dispute resolution (or "escalation") process for appealing disputed license applications allows officials from dissenting agencies a meaningful opportunity to seek review of such applications, and assess why this process is so seldom used.

With one possible exception, the interagency escalation process provided DoD a meaningful opportunity to appeal disputed dual-use license applications, although the outcome of the process often favored the Commerce position. The number of applications appealed to the Advisory Committee on Export Policy decreased as a result of Executive Order 12981, and DoD elected not to escalate disputed dual-use applications for a variety of reasons. Disputes over munitions applications were resolved between office chiefs at DoD and the Department of State (State).

Question 5. Review whether the current dual-use licensing process adequately takes account of the cumulative effect of technology transfers resulting from the export of dual-use items.

The licensing process at the Technology Security Directorate, Defense Threat Reduction Agency, occasionally takes into account the cumulative effect of technology transfers, but participants in the licensing process did not routinely analyze the cumulative effect of proposed exports or receive assessments to use during license reviews. In addition, DoD organizations did not conduct required annual assessments of the impact of technology transfers that could provide information on the cumulative effect of proposed exports. As a result, DoD cannot ensure that the licensing process takes into account the cumulative effect of technology transfers. As of March 1999, the Technology Security

Directorate, Defense Threat Reduction Agency, had initiated actions designed to increase the degree to which cumulative effect analysis was incorporated into the licensing process, but the matter is still under review.

Question 6. Review whether the current munitions licensing process adequately takes account of the cumulative effect of technology transfers resulting from the export of munitions and the decontrol of munitions commodities.

The results under Question 5 apply to the munitions licensing process also.

Question 7. Determine whether license applications are being properly referred for comment (with sufficient time for responsible review) to the military services, the intelligence community, and other relevant groups (the “recipient groups”) by DoD and other agencies. Consider in particular numerical trends in the frequency of such referrals, trends in the types of applications referred, trends in the nature of the taskings made in connection with the referrals, and the perceptions of officials at the recipient groups.

The DoD Components, except the Defense Intelligence Agency, have been referred about the same number of cases annually over the past 8 years. However, the Technology Security Directorate, Defense Threat Reduction Agency, did not always appropriately refer license applications to DoD Components for review. Of the applications we reviewed, DoD Components considered that 12 percent of the dual-use and 24 percent of the munitions license applications were not properly referred. If the Technology Security Directorate, Defense Threat Reduction Agency, does not properly refer a case to a DoD Component for review, the consolidated DoD position may be developed with incomplete information.

Question 8. Determine whether license review officials at each of the agencies are provided sufficient training and guidance relevant for reviewing license applications, and whether more formal training and guidance is warranted.

DoD Components and the Technology Security Directorate, Defense Threat Reduction Agency, received guidance from a wide range of sources, and nearly all licensing officers stated the guidance was adequate for performing their duties. DoD Component and Technology Security Directorate, Defense Threat Reduction Agency, licensing officers stated that they generally had sufficient training; however, some licensing officers stated that a classroom training program and training plan for personnel reviewing export license applications should be established. We were unable to determine if the lack of a classroom training program or a training plan materially affected licensing duties.

Question 9. Review the adequacy of the databases used in the licensing process, such as the DoD Foreign Disclosure and Technical Information System (FORDTIS), paying particular attention to whether such databases contain complete, accurate, consistent, and secure information about dual-use and munitions export applications.

FORDTIS provides a useful communication and coordination mechanism for DoD Components on export control matters, although limitations existed in the system that reduced the support provided to decisionmakers. In addition, as discussed in our response to Question 13, inadequacies existed in the use of

FORDTIS in providing an audit trail for export licensing decisions. As a result of the limitations, officials were using an automated information system that provided less than optimum support.

Question 10. In congressional testimony, a DoD licensing officer described instances where licensing recommendations he entered on FORDTIS were later changed without his consent or knowledge. Examine those charges, and assess whether such problems exist at your agencies.

Instances occurred in which recommended positions entered in FORDTIS by a licensing officer were changed without the consent or knowledge of that officer, although the number of such occurrences could not be determined. In addition, documentation related to the changes was not always complete. As a result, in some instances, the documentation for legitimate supervisory action was not complete and, in other instances, the official DoD record, which may serve as a precedent for future actions, was inaccurate.

Question 11. Determine whether license review officials are being pressured improperly by their superiors to issue or change specific recommendations on license applications.

With one exception, licensing officers did not report receiving any improper pressure to change specific recommendations on license applications. Other staff at the Technology Security Directorate, Defense Threat Reduction Agency, who did not formulate proposed recommendations on license applications, but who were at times involved with reviewing or processing license applications, also did not report any improper pressure directed at them to change positions on specific license applications. However, several of the Technology Security Directorate staff members stated that management applied indirect pressure to encourage certain viewpoints. Any individual that believes he or she has been the subject of a prohibited personnel practice should direct the matter to the offices with specific jurisdiction in those matters.

Question 12. Determine whether our Government still uses foreign nationals to conduct either pre-license or post-shipment licensing activities and whether such a practice is advisable.

In general, Commerce and State conduct pre-license and post-shipment licensing activities. DoD provides limited support to Commerce and State pre-license and post-shipment licensing activities through Defense Attaché Offices. In December 1991, DoD started to support State by monitoring certain foreign space launch activities under the provisions of munitions licenses. DoD has not used and does not plan to use foreign nationals to support Commerce or State pre-license and post-shipment licensing checks or to monitor space launches.

Question 13. Determine whether the agency licensing process leaves a reliable audit trail for assessing licensing performance.

FORDTIS provided a long-term audit trail for DoD positions on license reviews, but it did not always contain complete and accurate records of DoD and U.S. Government positions. The audit trail provided by FORDTIS for the sample reviewed generally agreed with the Commerce electronic records. However, in one instance the Commerce records showed a change to the conditional license approval from DoD that was not shown in FORDTIS, and in

another instance a conditional approval recommended by DoD for a license application was not included in the Commerce record. In addition, the audit trail provided by FORDTIS did not include new information presented at interagency decision meetings or detailed results of those meetings, records of all applications referred to the National Security Agency, and key correspondence or technical data. As a result, the audit trail provided by FORDTIS cannot be used as a reliable means of assessing the degree to which overall DoD positions are in agreement with positions taken by the U.S. Government. In addition, the audit trail provided by FORDTIS provides less assistance than possible for deriving DoD positions for similar cases in the future.

Question 14. Describe the procedures used by agencies to ensure compliance with conditions placed on export licenses (for example, no retransfers without U.S. consent, no replications, and peaceful use assurances) and assess the adequacy and effectiveness of such procedures.

In its support to State, the Technology Security Directorate, Defense Threat Reduction Agency, had adequate procedures for monitoring foreign space launch activities. Its informal process for reporting potential violations of license conditions and technology assessment control plans was also adequate. Expected increases in the number of monitors at the Technology Security Directorate and the number of launches to be monitored could result in a parallel increase in reports to State. If so, the informality of the reporting process could fail to ensure that State receives the highest standard of reporting from DoD.

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 revise DoD Directive 2040.2 to clearly state responsibilities and procedures regarding the performance of assessments designed to analyze the cumulative effect of technology transfers and the monitoring of compliance with any requirements established and to obtain FORDTIS access for its country desk officers reviewing export license applications.
- Director, Defense Threat Reduction Agency, develop an agency-wide training policy, training plan, and a classroom training program for Defense Threat Reduction Agency licensing officers, and provide DoD Components the classroom training program for licensing officers; and, in coordination with the Department of State, develop and implement a memorandum of understanding on reporting requirements for the Space Launch Safeguards and Monitoring Program.
- Director, Technology Security Directorate, Defense Threat Reduction Agency, work with the Assistant Secretary of Commerce for Export Administration to develop additional guidance and procedures on how to implement 1996 National Security Council guidance on commodity jurisdiction and commodity classification; develop an action plan with milestones for the integrated process team on the Militarily Critical Technologies Program that includes defining a process for identifying, prioritizing, and obtaining decisions on assessments related to the cumulative effect of technology transfers; reiterate his request that DoD Components identify the types of licenses they would like to review and

request that DoD Components review available dual-use and munitions license application summaries to determine what cases they would like to review; notify the Assistant Secretary of Defense (Strategy and Threat Reduction) of any DoD Component that does not identify the cases it wants to review; maintain a list of the types of export license applications that DoD Components have requested to review; establish procedures to ensure adequate documentation of changes to the position of a licensing officer with or without the consent or knowledge of the licensing officer; and establish procedures to ensure that FORDTIS records include the correct DoD position, additional information presented at the Operating Committee, an explanation of why DoD did not escalate disputed cases, the results of encryption cases referred to the National Security Agency, and key correspondence and technical data.

- Deputy Under Secretary of Defense (Policy Support) electronically provide guidance to DoD Components on how to query FORDTIS in order to generate dual-use and munitions reports; monitor modernization efforts of Commerce's export control information systems; and ensure that initiatives on electronic imaging in support of the export review process are successfully implemented within DoD.

Management Comments. The Under Secretary of Defense for Policy's comments included responses for recommendations made to the Deputy Under Secretary of Defense (Policy Support); the Director, Defense Threat Reduction Agency; and the Director, Technology Security Directorate, Defense Threat Reduction Agency. The Under Secretary of Defense for Policy concurred with most of the report's recommendations. However, the Under Secretary nonconcurred with the recommendation to electronically provide DoD Components a weekly summary of the munitions export license applications referred to DoD, stating that the DoD Components already have the ability to query FORDTIS on a daily basis for dual-use and munitions cases. In addition, the Under Secretary partially concurred with the recommendation to establish procedures to ensure that FORDTIS records included the correct DoD position, additional information presented at the Operating Committee, an explanation of why DoD did not escalate disputed cases, the results of encryption cases referred to the National Security Agency, and key correspondence and technical data stating resource implications. The Under Secretary stated that he will require the Director, Technology Security, Defense Threat Reduction Agency to consider those ideas as part of a broader review of the DoD licensing process, to determine ways and means of improving the utility of FORDTIS records and the process in general. Also, the Under Secretary disagreed that the lack of annual cumulative effect assessments, the lack of guidance on documenting licensing decisions, and the incompleteness of the FORDTIS audit trail were material management control weaknesses.

Although not required to comment, the National Security Agency nonconcurred with the recommendation to include encryption dual-use export license applications in FORDTIS.

A discussion of management comments is in the Questions section of the report and the complete text of the comments is in the Management Comments section.

Audit Response. The Under Secretary of Defense for Policy comments are generally responsive, but a few issues remain open. We revised the recommendation that the Deputy Under Secretary of Defense (Policy Support) electronically provide DoD Components a weekly summary of the munitions export license applications referred to DoD to recommending that the Deputy Under Secretary electronically provide guidance

to DoD Components on how to query FORDTIS in order to generate dual-use and munitions reports. Although the Under Secretary agreed to develop classroom training for licensing officers, the response did not address development of an agency-wide training policy or plan for licensing officers. In addition, we maintain our position that FORDTIS, as the only long-term audit trail in DoD for licensing positions, be accurate and complete. Therefore, we request that the Under Secretary reconsider his position on the importance of the missing information in FORDTIS. Although we consider the Under Secretary's comments to be responsive for ensuring that initiatives on electronic imaging are successfully implemented, we request additional comments be provided as to the scope of the work and expected milestones for completion. In addition, we request that the Under Secretary reconsider his position on the materiality of the management control weaknesses identified in this report, taking into consideration the definitions of materiality prescribed for the DoD Management Control Program. We request that the Under Secretary of Defense for Policy provide comments in response to the final report by July 30, 1999.

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Introduction

On August 26, 1998, Chairman Fred Thompson, Senate Committee on Governmental Affairs, requested that the Inspectors General of the Departments of Commerce, Defense, Energy, State, and Treasury and the Central Intelligence Agency review the export licensing processes of dual-use commodities and munitions. Specifically, he requested that the Inspectors General update and expand on a previous interagency report, “The Federal Government’s Export Licensing Processes for Munitions and Dual-Use Commodities,” (1993 Interagency Review) September 1993, and answer 14 questions. The 1993 Interagency Review was written by the Inspectors General of the Departments of Commerce, Defense, Energy, and State. Appendix B contains a summary of the interagency review and DoD sections of that report. This report addresses the DoD portion of export licensing processes for dual-use commodities and munitions. An interagency report is being issued concurrently.

Background

There are a considerable number of statutes, regulations, Executive Orders (EOs), and Presidential Documents affecting export controls. For the purposes of this review, we focused on those authorities impacting directly on the coordination of export license applications within the U.S. Government: the Export Administration Act (EAA) of 1979, as amended, and the Arms Export Control Act (AECA), as amended.

Dual-Use Commodities Licensing Process. The EAA, Title 50, United States Code, Appendix 2401 (50 U.S.C. 2401), is the primary legislative authority for controlling the export of goods and technology that have civilian and military applications, hereafter referred to as dual-use. The EAA expired in 1994. By EO 12924, “Continuation of Export Control Regulations,” August 1994, the President declared a national emergency and, under the authority of the International Emergency Economic Powers Act, 50 U.S.C. 1702, continued in effect the provisions of the EAA and the implementing Export Administration Regulations. Because the EAA has not yet been renewed by Congress, the President has in each subsequent year extended the national emergency. In EO 12981, “Administration of Export Controls,” December 1995, as amended, the President prescribed additional procedures for export license applications submitted under the EAA and the Export Administration Regulations. Among other things, those procedures required Commerce to refer all dual-use license applications to DoD and other Federal departments and agencies, and provide a mechanism for resolving interagency disputes over license applications.

The Export Administration Regulations, 15 Code of Federal Regulations, Part 730, implement EAA and EO requirements for executing the export licensing process for dual-use commodities. In addition, the Export Administration Regulations contain 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. The Bureau of Export Administration, Department of Commerce (Commerce) is responsible for processing export licenses for dual-use commodities and enforcing any conditions of those licenses. DoD advises the Bureau of Export Administration by reviewing and making recommendations on acceptance of dual-use export license applications and identifying militarily critical dual-use technologies to be included on the Commerce Control List. In FY 1998, Commerce referred 9,735 (91 percent) of the 10,696 dual-use license applications it received to DoD for review.

Munitions Licensing Process. The AECA, 22 U.S.C. 2751, is the primary legislation authorizing the President to control the export of Defense articles and services, hereafter referred to as munitions. The President delegated various aspects of his authority under the AECA to affected Federal departments and agencies through EO 11958, "Administration of Arms Export Controls," January 18, 1977, with the Secretary of State exercising the authority to regulate the issuance of licenses and designate the U.S. Munitions List.

The International Traffic in Arms Regulations, 22 Code of Federal Regulations, Part 120, implement the AECA. The International Traffic in Arms Regulations contain the U.S. Munitions List, which identifies Defense articles and services that may be exported as well as the conditions under which the munitions may be exported. The Office of Defense Trade Controls, Department of State (State), is responsible for processing munitions export licenses. DoD advises the Office of Defense Trade Controls by reviewing and making recommendations on acceptance of munitions export license applications and identifying munitions whose export should be controlled. In FY 1998, State referred 12,609 (29 percent) of the 44,212 munitions license applications it received to DoD for review.

DoD License Review Process. The Director, Defense Threat Reduction Agency, represents or supports the Under Secretary of Defense for Acquisition and Technology in matters relating to the Agency's mission, except that he is responsible to the Assistant Secretary of Defense (Strategy and Threat Reduction) for implementing DoD trade security policies. The Defense Threat Reduction Agency is the primary DoD Component that advises Commerce and State on export license applications, and the Technology Security Directorate, Defense Threat Reduction Agency (DTRA/ST), performs that function.¹ DTRA/ST also coordinates and implements the Space Launch Safeguards and Monitoring Program and provides support, as appropriate, to diplomatic, enforcement, intelligence, security, and technology activities of the United States. Five divisions compose DTRA/ST.

License Division. The License Division receives export license applications from Commerce and State, refers those applications to DoD Components and other DTRA/ST divisions, develops the final DoD position on

¹Prior to October 1, 1998, DTRA/ST was the Defense Technology Security Administration. For the purposes of this report, DTRA/ST is used for the current and former names.

the applications, and sends the DoD position back to Commerce and State. In October 1998, the division had two branches, Dual-Use and Munitions, with 17 civilians and 11 military personnel.

Policy Division. The Policy Division reviews selected dual-use and munitions license applications for compatibility with U.S. Government and DoD trade security policy. It is responsible for multilateral export control regime negotiations (such as the Missile Technology Control Regime), regulations, technology releasability guidelines for specific technology areas, science and technology exchanges, and other functions. In October 1998, the division had 22 civilians and 6 military personnel.

Space Launch Monitoring Division. The National Defense Authorization Act of FY 1999 established a requirement for the Secretary of Defense to monitor foreign country satellite launches involving exported U.S. satellites or related items. DTRA/ST established the Space Launch Monitoring Division on December 1, 1998, to fulfill that requirement. The division is in the process of organizing and hiring personnel.

Technology Division. The Technology Division provides technical input on all dual-use and munitions export license applications. It is the only DoD element, other than the DTRA/ST License Division, that reviews all dual-use and munitions applications. In October 1998, the division had 22 civilians and 5 military personnel.

Technology Security Operations. Technology Security Operations works with diplomatic, enforcement, and intelligence agencies to halt diversions of controlled exports and reviews a limited number of license applications. In October 1998, the division had three civilians and four military personnel.

DTRA/ST Resources. Since the 1993 Interagency Review, the number of license applications (cases) Commerce has referred to DoD has significantly increased; however, DTRA/ST resources have decreased. DTRA/ST reviews of dual-use and munitions license applications have increased 29 percent, from 15,359 in FY 1992 to 19,781 in FY 1998. Dual-use license applications submitted to DoD for review have increased 262 percent, from 2,693 in FY 1992 to 9,735 in FY 1998; however, munitions license applications have decreased .5 percent, from 12,666 to 12,609. Figure 1 shows the number of dual-use and munitions cases referred to DTRA/ST from FY 1990 through FY 1998.

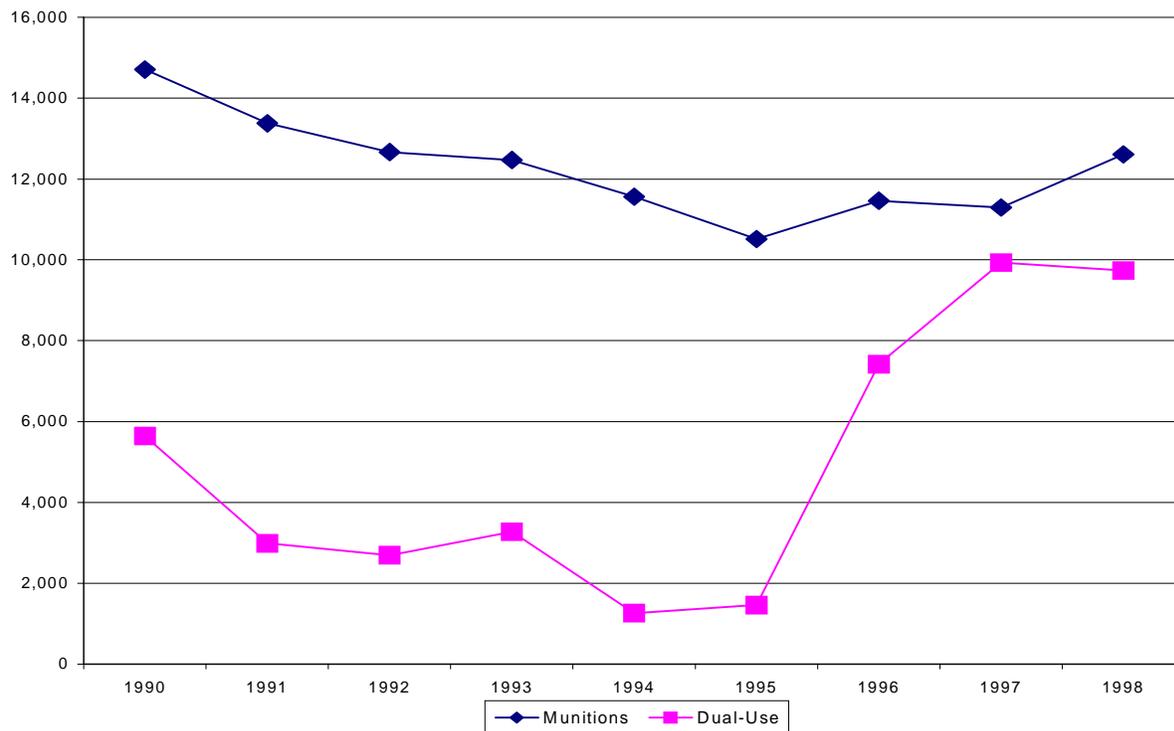


Figure 1. Dual-Use and Munitions Cases Referred to DTRA/ST From FY 1990 Through FY 1998

Although the number of dual-use export license applications referred to DoD increased from 1,463 cases in FY 1995 to 9,735 cases in FY 1998, the DTRA/ST operating budget remained at an average of about \$10.3 million over the same period. DTRA/ST personnel resources also decreased in that same period from 129 to 117, an average decrease of 4 individuals a year.

Automation Support. DTRA/ST uses the Foreign Disclosure and Technical Information System (FORDTIS) for the review, coordination, analysis, and decisionmaking on license applications involving the transfer of dual-use commodities and munitions to other nations and international organizations primarily through commercial exports. FORDTIS is also the DoD official record for licensing decisions. DTRA/ST assigns cases to DoD Components and DoD Components convey their positions on cases to DTRA/ST through FORDTIS. DTRA/ST records the DoD and U.S. Government positions in FORDTIS. The FORDTIS system administrator reports to the Deputy Under Secretary of Defense (Policy Support).

Objectives

The overall review objective was to evaluate the export licensing processes for dual-use commodities and munitions to determine whether current practices and procedures are consistent with established national security and foreign policy objectives. Specifically, the review was to answer 14 questions posed by Chairman Thompson in his August 26, 1998, letter. We also reviewed the management control program as it related to the overall objectives. See Appendix A for a discussion of the scope and methodology and our review of the management control program. See Appendix B for a summary of prior coverage related to the objectives. See Appendix C for a discussion of matters of interest that are not directly related to the objectives.

Question 1. Legislative Authority

Examine whether the current, relevant legislative authority contains inconsistencies or ambiguities regarding the licensing of dual-use and munitions commodities, and the effect of any such inconsistencies and ambiguities.

The general nature of the EAA and the AECA creates a broad framework, but we found no inconsistencies or ambiguities in either act. The acts give Federal departments and agencies flexibility to change details regarding the components of the dual-use commodities and munitions export licensing processes without requiring annual changes to legislation. The dual-use licensing process would be best served through reenactment of the EAA.

The EAA and the AECA

The primary legislative authorities for the export licensing process that we considered are the EAA and the AECA. The EAA and the AECA establish general structures and contain broad policies that define the dual-use and munitions export licensing processes. No one interviewed stated the acts had inconsistencies or ambiguities that affected the licensing process, nor did we find any. The general nature of the EAA and the AECA allows Federal departments and agencies flexibility in changing export control standards to keep pace with changing U.S. national security relationships, U.S. military hardware, and improvements in technology without requiring continual legislative change. For the purposes of this report, we interpreted the question to be whether the EAA and the AECA contained the basic processes and necessary authorities to execute the program and whether the acts included a significant role for DoD.

The EAA. The EAA establishes a general framework and general policies for the dual-use export licensing process, to include a basic process, the necessary authority, and a significant role for DoD.

EAA Basic Process. The EAA mandates that the Secretary of Commerce determine which Federal departments or agencies will receive export license applications for review. Commerce is required to seek information and recommendations from Federal departments and agencies concerned with aspects of U.S. domestic and foreign policy and operations having an important bearing on exports.

EAA Authority. The EAA contains the necessary authority for executing the dual-use export licensing process. It authorizes the President to prohibit or curtail any goods or technology subject to the jurisdiction of the United States. It authorizes the Secretary of Commerce, in consultation with the Secretary of Defense, to curtail exports for national security reasons. The EAA does not contain an interagency escalation process; however, it authorizes the Secretary of Defense to recommend to the President that certain exports be denied for national security reasons.

EAA Role for DoD. Although general in nature, the EAA assigns DoD a role in the dual-use export licensing process. Specifically, the EAA:

- directs the Secretary of Commerce to exercise his authority for national security exports in consultation with the Secretary of Defense,
- directs the Secretary of Commerce to include on the Commerce Control List the dual-use commodities that he and the Secretary of Defense agree must be controlled for national security reasons,
- directs the Secretary of Defense to develop a list of the technologies that DoD assessed as critical to maintaining superior U.S. military capabilities,
- directs the Secretary of State, in consultation with the Secretary of Defense, to negotiate with other countries on multilateral export controls,
- grants DoD 20 days (or 40, if requested) to review dual-use export license applications for national security concerns, and
- authorizes the Secretary of Defense to recommend directly to the President that he deny the export of a dual-use commodity under certain circumstances.

The AECA. The AECA establishes a general framework and general policies for munitions export licensing, to include the necessary authority and a role for DoD.

AECA Basic Process. The AECA does not contain a basic process for munitions export licensing. Instead, the AECA focuses on a variety of subjects, to include the control of arms exports. In regard to arms exports, the AECA directs the President to control arms exports, list controlled items on the U.S. Munitions List, and require a license to export arms. The AECA also establishes fines. The International Traffic in Arms Regulations establish the munitions licensing process.

AECA Authority. The AECA contains the necessary authority for executing the munitions export licensing process. The AECA authorizes the President to control the import and export of Defense articles and services. In addition, it authorizes the Secretary of State to make decisions on whether license applications or other written requests for approval shall be granted, or whether exemptions may be used. Also, the AECA authorizes the Secretary of State to revoke, suspend, or amend licenses or other written approvals whenever the Secretary deems such action to be advisable. The AECA does not contain provisions for an escalation and appeals process.

AECA Role for DoD. The AECA provides that the Secretary of State, in consultation with the Secretary of Defense and other Federal departments and agencies, will establish and maintain, as part of the munitions list, an annex

related to the Missile Technology Control Regime. The AECA also provides for referral of license applications for export of munitions to the Secretary of Defense and the Director of the Arms Control and Disarmament Agency.

Reenactment of the EAA

The dual-use licensing process would be best served through reenactment of the EAA. The reenacted EAA should specifically provide adequate time for evaluation and comment of dual-use export license applications, and include provisions for additional time in exceptional or complex cases. In addition to providing a mechanism for resolving interagency disputes over license applications, the EAA should include an escalation authority for the Secretary of Defense, in the interest of national security, to escalate cases directly to the President.

Question 2. Executive Order 12981 and Legislation

Examine whether Executive Order 12981 (1995) as implemented is consistent with the objectives of the Export Administration Act and other relevant legislative authority.

EO 12981, as implemented, is generally consistent with the relevant objectives of the EAA, the principal legislative authority that we considered under this question. However, EO 12981 decreased from 40 to 30 days the time DoD had to review dual-use license applications. The decrease was the result of a compromise during 1994 Executive Branch deliberations over export control policy. As a result of the shortened review period, the ability of DoD to locate the information necessary to inject into the license review process may have been diminished. However, it is difficult to quantify the effect the decreased review time has had on the DoD review of dual-use license applications.

Executive Order 12981

EO 12981, as implemented, is generally consistent with the relevant objectives of the EAA, the principal legislative authority that we considered under this question.

Provisions of EO 12981. EO 12981 addresses the interagency process for reviewing dual-use license applications. It continued EAA provisions regarding the overall process for making license determinations, the initial screening of licenses by Commerce, case referrals to Federal departments and agencies, and the interagency dispute resolution process. Of particular interest to DoD were Commerce referrals, time available for DoD to review cases, and the interagency escalation process.

Commerce Referrals. EO 12981 directs Commerce to refer dual-use license applications to DoD, Energy, State, the Arms Control and Disarmament Agency, and other Federal departments and agencies as appropriate. Commerce does not have to refer a license application to DoD, Energy, State, or the Arms Control and Disarmament Agency if that department or agency delegated its review authority for that commodity to Commerce.

Time Available to Review Cases. EO 12981 sets timelines for participating Federal departments and agencies to make decisions regarding dual-use license applications, giving agencies other than Commerce 30 days to review cases and allotting a maximum of 90 days for the entire process. If, within the first 10 days of receipt of the license application, Federal departments and agencies require additional information, they may return it to Commerce, which will forward the request to the applicant.

Interagency Escalation Process. EO 12981 also establishes an interagency escalation process to the President through three committees: the Operating Committee (OC), the Advisory Committee on Export Policy (ACEP), and the Export Administration Review Board.² A flowchart depicting the interagency escalation process is in Appendix D.

- The OC reviews cases on which all participating agencies do not agree. Voting members of the OC are Commerce, DoD, Energy, Justice (for encryption cases),³ State, and the Arms Control and Disarmament Agency. Representatives of the Director of Central Intelligence and the Chairman, Joint Chiefs of Staff, are non-voting members of the OC. A DTRA/ST dual-use licensing officer represents the Director, DTRA/ST, at OC meetings. The OC Chair, a Commerce employee, decides the position of the OC on all license applications reviewed by the OC; however, the members vote on each application.⁴
- If DoD decides that it wants to appeal the decision of the OC Chair, it may escalate cases to the ACEP. The Assistant Secretary of Defense (Strategy and Threat Reduction) must sign escalation requests addressed to the ACEP. Voting members of the ACEP are from Commerce, DoD, Energy, Justice (for encryption cases), State, and the Arms Control and Disarmament Agency. Representatives of the Director of Central Intelligence and the Chairman, Joint Chiefs of Staff, are non-voting members of the ACEP. The Executive Order states that representatives to the ACEP are assistant secretaries or their deputies, but the Director, DTRA/ST, usually represents the Assistant Secretary of Defense (Strategy and Threat Reduction). The ACEP decides cases through a majority vote.
- If DoD decides that it wants to appeal an ACEP decision, the Secretary of Defense may escalate the decision to the Export Administration Review Board. The Export Administration Review Board also decides cases through a majority vote. The Secretaries of Commerce, Defense, Energy, and State; the Attorney General (for encryption cases); and the Director, Arms Control and Disarmament Agency, are voting members of the Executive Administration Review Board. The Director of Central Intelligence and the Chairman, Joint Chiefs of Staff, are non-voting members.

²There is no export control committee at the deputy secretary level, although EO 12981 provides that the deputy head of a department or agency may serve on the Export Administration Review Board in lieu of the head of the agency or department.

³EO 13026, "Administration of Export Controls on Encryption Products," November 15, 1996, designates the Department of Justice a member of the OC and other export control committees for the purpose of voting on encryption cases.

⁴EO 13020, "Amendment to Executive Order 12981," October 12, 1996, adds that cases related to commercial communications satellites and certain "hot-section" technologies for the development, production, and overhaul of commercial aircraft engines will be by majority vote.

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- Finally, the Secretary of Defense may escalate the Export Administration Review Board decisions to the President.

Relevant EAA Objectives

Overall, the EAA recognizes the importance of foreign policy and trade, national security, and protecting goods that are in short supply. For the purpose of this review, we considered the relevant EAA objective of balancing foreign trade against national security. Among other policy statements, Congress declared:

It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary –

To restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries, which would prove detrimental to the national security of the United States.

The EAA and EO 12981 Are Generally Consistent

EO 12981, as implemented, is generally consistent with the objectives of the EAA. It maintains the balance between foreign policy and national security by retaining Commerce and DoD roles in the licensing process. Commerce chairs the three interagency escalation committees, and the OC Chair decides cases for the OC. DoD reviews dual-use applications for the commodities that DoD has chosen and is authorized to escalate cases to the President, even though the escalation takes place through three committees. In written testimony to Congress in July 1998 the former Deputy Assistant Secretary of Defense for Counterproliferation Policy stated that DoD was generally satisfied with the provisions of EO 12981.

Time to Review Dual-Use License Applications

EO 12981 decreased from 40 days to 30 days the time DoD has to review dual-use license applications, which may degrade the DoD ability to screen them for national security concerns. The EAA allows Federal departments and agencies 20 days to review dual-use licenses plus an additional 20 days, if requested. EO 12981 provides for one 30-day period.

The decrease was the result of a compromise during 1994 Executive Branch deliberations over export control policy. According to the former Deputy Assistant Secretary of Defense for Counterproliferation Policy, part of the Executive Branch's 1994 EAA proposal was to allow all relevant agencies an

opportunity to review all dual-use license applications. In order to prevent delays in license reviews, agencies agreed to limit their review time to 30 days.

DoD Components' Ability to Locate Information. As a result of the shortened review period for dual-use license applications, the ability of DoD to locate the information necessary to inject into the license review process may have been diminished. The DoD Components indicated that DTRA/ST provides them an average of 10 days to review dual-use license applications. The Navy no longer routinely refers dual-use licenses to naval commands, such as the Naval Air Systems Command, but generally relies on the expertise of personnel in the International Programs Office. The Army standard for reviewing licenses is 12 days longer than the 10 days DTRA/ST normally provides DoD Components to review dual-use cases. The Army expedites its process to meet the DTRA/ST suspense.

Theoretically, shorter review time decreases the ability of DoD Components to find the experts who can best advise whether the export should be approved. Army, Navy, Air Force, and Joint Staff personnel stated that they could use additional time to review dual-use license applications, and Defense Intelligence Agency (DIA) personnel stated that they had to limit the effort they put into end-user checks.⁵ A DTRA/ST dual-use licensing officer testified before the Senate in writing that dual-use cases are very quickly reviewed, stating that “[a]pproximately 70 percent of the cases are approved outright based on the meager information contained in the license.”

Despite those comments, it is unclear whether DoD Components have too little time to adequately review dual-use license applications. We asked DoD Components how much time they had to review each of the 22 (out of our sample of 51)⁶ dual-use cases that DTRA/ST had referred to them and whether they had sufficient time to review them. The Components took between 1 and 18 days to review cases and, in each case, stated that generally they had sufficient time to review those cases. However, the Navy stated that out of the four cases it reviewed, it was unable to enter a Navy position on one of them before DTRA/ST developed the final DoD position. The Air Force reviewed five cases and was unable to enter a position on one of them. We were unable to determine why the Navy and the Air Force were unable to provide their input prior to the development of the final DoD position; however, the final DoD position included Navy license conditions and the Air Force closed out the case without input. In our sample of 51 dual-use cases, the DTRA/ST License

⁵DIA end-user checks involve checking available databases for derogatory information on parties associated with an export.

⁶We used an overall sample of 60 dual-use cases referred to DoD by Commerce; however, 9 of the 60 cases were sent directly to NSA under a June 1998 DTRA/ST delegation of authority to Commerce and NSA. In the report, we will refer to 51 dual-use cases when addressing issues regarding DTRA/ST processes alone and to 60 cases when addressing issues relevant to DTRA/ST and NSA processes.

Division, Dual-Use Branch, Tiger Team⁷ reviewed and responded back to Commerce about 47 percent of the referred cases within 1 day of their arrival at DTRA/ST. During 1994 Executive Branch deliberations on the EAA, the former Deputy Assistant Secretary of Defense for Counterproliferation Policy wrote that DoD considered 30 days sufficient time to review and comment on cases. The Director and Deputy Director, DTRA/ST, told us their staff had sufficient time to review applications, and four of the seven dual-use licensing officers said they believed DoD had sufficient time. National Security Agency (NSA) personnel also stated that they had sufficient time to review license applications.

⁷The Tiger Team comprises the Dual-Use Branch Chief, the seven Dual-Use Branch licensing officers, and representatives from the DTRA/ST Policy Division, Technology Division, and Technology Security Operations. The Tiger Team typically reviews cases the morning after Technology Division engineers and Technology Security Operations personnel have given cases an initial review.

Question 3. Interagency Accord for Export License Applications

Determine whether there is a continued lack of interagency accord, as stated in the 1993 interagency report, regarding whether the Department of Commerce is properly referring export license applications (including supporting documentation) out for review by the other agencies.

DoD officials expressed general satisfaction with the dual-use export license applications that Commerce referred for review, although DoD officials disagreed with Commerce's decision not to refer 5 of 60 dual-use license applications.⁸ They also expressed concern that Commerce referred too few commodity classification requests to DoD for review. Commerce and DoD differ in their interpretations of National Security Council guidance on Commerce's referral of commodity classification requests. As a result, in some cases, Commerce made decisions on license applications with national security implications without the benefit of DoD input.

1993 Interagency Review

The 1993 Interagency Review report stated that there was not complete accord between Commerce and most of the other Federal departments and agencies regarding which applications should be referred for comments. The report concluded that unclear and possibly conflicting guidance given by legislative mandates and Presidential directives was the primary cause. The report recommended that the Secretary of Commerce, in cooperation with the National Security Council and the Secretaries of Defense, Energy, and State, direct the appropriate officials to develop clearer guidance on Commerce's referral of applications to other Federal departments and agencies. The report also recommended that Congress clarify the roles of various Federal departments and agencies involved in the dual-use export licensing process.

License Referrals and Commodity Classification Requests

EO 12981 Referral Process. EO 12981 changed the method Commerce used to refer dual-use license applications to other Federal departments and agencies. Prior to December 1995, Commerce and DoD conferred on the types of applications that Commerce would refer to DoD. EO 12981 directed Commerce to refer all dual-use applications to DoD, Energy, State, the Arms Control and Disarmament Agency, and other Federal departments and agencies

⁸We used a sample of 60 dual-use cases not referred by Commerce to DoD. It is a different sample than the 60 dual-use cases referred by Commerce to DoD.

as appropriate. The EO allowed DoD, Energy, State, and the Arms Control and Disarmament Agency to identify the specific types of applications they did not wish to review.

DoD Delegations of Authority. In July 1996, DoD delegated to Commerce the authority to review a number of types of dual-use license applications. The delegations were for dual-use commodities that DoD did not wish to review, including:

- fingerprint analyzers;
- horses transported by sea;
- items controlled for reasons of short supply;
- polygraphs (except biomedical recorders designed for use in medical facilities for monitoring biological and neurophysical responses); and
- smoke bombs, grenades, and charges and other pyrotechnic articles having dual military and commercial use (the delegation did not include chemical agents, including tear gas).

Commodity Classification Process

Process. The commodity classification process, managed by Commerce, identifies an item's export control classification number. The Export Administration Regulations state that an exporter is responsible for classifying items or may request that Commerce provide them with the correct export control classification number. The outcome of that determination, which, if any, export control classification number an item falls under, indicates whether an export license is required for a particular item. Each export control classification number has guidance as to whether an export license is required for a given destination. Each commodity classification request may include up to six items.

In FY 1998, exporters submitted to Commerce 2,723 commodity classification requests, which comprised 6,161 line items. Commerce determined 2,306 (37 percent) of the 6,161 line items had an export control classification number; 976 (16 percent) were license exceptions;⁹ and 2,589 (42 percent) were EAR99.¹⁰ Three of the EAR99 line items required no license. Commerce was

⁹A license exception is an authorization that allows an exporter to export or re-export, under stated conditions, items subject to the Export Administration Regulations that otherwise would require an export license.

¹⁰EAR99 is a designation for items subject to the Export Administration Regulations but not specified on the Commerce Control List.

unable to classify 290 (5 percent) of the 6,161 line items presented by exporters. Commerce returns to the applicant commodity classification requests that it cannot classify and requests additional information from the applicant.

National Security Council Guidance. National Security Council guidance requires Commerce to refer a specific category of commodity classification requests to DoD. On March 12, 1996, the President approved interagency procedures on commodity jurisdiction and commodity classification, which the National Security Council issued as “Procedures On Commodity Jurisdiction and Commodity Classification,” April 15, 1996. The President directed Commerce to:

... share with State and Defense all commodity classification requests for items/technologies specifically designed, developed, configured, adapted and modified for a military application, or derived from items/technologies specifically designed, developed, configured, adapted or modified for a military application.

State, Commerce, and Defense may refer any of the commodity classification requests ... shared under this arrangement for a commodity jurisdiction determination within two working days of receipt.

Commerce has historically not referred many commodity classification requests to DoD. From April 1996 through March 1999, Commerce referred only 12 commodity classification requests to DoD for review. However, in FY 1998, Commerce made 6,161 commodity classification determinations. DoD referred 7 of the 12 commodity classification requests to State for a commodity jurisdiction determination.

DoD Satisfaction With Dual-Use Referrals

Referred Cases. DoD officials expressed satisfaction with the dual-use license applications that Commerce referred for review. EO 12981 resolved the problem identified in the 1993 Interagency Review report by allowing DoD, Energy, State, and the Arms Control and Disarmament Agency to decide which types of dual-use applications they wished Commerce to refer to them. DTRA/ST personnel stated that they were satisfied with the referral process under the EO.

Nonreferred Cases. DoD officials disagreed with Commerce’s decision not to refer 5 of 60 dual-use cases to DoD. We compared our sample of 60 cases with the export control classification numbers that DoD had delegated to Commerce and requested that DTRA/ST analyze 13 cases which were for commodities DoD had not delegated to Commerce. Of the 13 cases, DTRA/ST stated that:

- 8 had insufficient information in the Commerce computer case record for DoD to make a complete determination, although DoD had concerns about the end user for 3 of the 8 cases and the possibility that 1 of the 8 cases may have been a munitions item;

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- 3, which were denied by Commerce because the President imposed sanctions against India and Pakistan, should have been referred to DoD; and
 - 2, which were amendments to previously approved applications, should also have been referred to DoD because amendments to approved licenses should be treated as new cases.

DoD Concern on Commodity Classification Requests

DoD Concerns. DoD officials expressed concern that Commerce referred too few commodity classification requests to DoD for review. In July 1998, the former Deputy Assistant Secretary of Defense for Counterproliferation Policy responded to written questions submitted by Senator Bob Smith on commodity classification decisions. The former Deputy Assistant Secretary stated that one possible improvement to the EO 12981 process would be to require Commerce to circulate commodity classification requests for interagency review before taking any action on them. The Director, DTRA/ST, also stated that Commerce needed to refer more commodity classification requests to DoD for review.

Interpretation of Guidance. Commerce and DoD differ in their interpretations of National Security Council guidance on Commerce's referral of commodity classification requests. From April 1996 through March 1999, Commerce referred only 12 commodity classification requests to DoD. National Security Council guidance requires Commerce to refer to DoD commodity classification requests for items that may be munitions items under the International Traffic in Arms Regulations. The sections below highlight the difference in interpretations.

Joint Commerce/DoD Commodity Classification Review. To determine whether the problem was widespread, the Offices of the Inspectors General for Commerce and DoD facilitated a joint Commerce/DoD review of a sample of 103¹¹ items for which Commerce made commodity classification decisions in FY 1998. DTRA/ST was satisfied with 90 of 103 Commerce decisions. On March 30, 1999, Commerce and DTRA/ST personnel discussed 13 of the statistically selected items that DTRA/ST identified as misclassified or lacking sufficient information to make a commodity classification decision. During the joint review:

- Commerce and DTRA/ST personnel, after Commerce provided additional information, agreed that Commerce properly classified four items and misclassified one item on the Commerce Control List;
- Commerce personnel did not agree with DTRA/ST that they had misclassified two items;

¹¹100 items in statistically selected sample plus 3 additional line items that were "no license required." The three "no license required" line items were selected because DTRA/ST considered that category the most significant.

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- DTRA/ST stated that three case records had insufficient data to make a commodity classification decision;
 - Commerce and DTRA/ST agreed that one item belonged on the Commerce Control List. However, they disagreed on the relevant export control classification number; and
 - DTRA/ST stated that the data describing two other items suggested that the items might be munitions items subject to the International Traffic in Arms Regulations and should possibly be the subject of a commodity jurisdiction review.

The Deputy Assistant Secretary of Commerce for Export Administration stated that the joint review demonstrated that Commerce licensing officers made proper commodity classification decisions in the vast majority of cases. The Deputy Director, DTRA/ST, however, stated that the joint review demonstrated that Commerce licensing officers make commodity classification mistakes and therefore there was a need for Commerce to refer additional commodity classification requests to DoD for review.

Based on the joint review, there were commodity classification cases from which Commerce and DoD drew different conclusions about the nature of items that should be referred to DoD for review. For example, DoD and Commerce discussed two items that DoD stated could likely be munitions items. The first request was for a ruggedized, portable, encrypted radio. Commerce officials stated that the radio had not been built to military standards and therefore was not a munitions item under the jurisdiction of the International Traffic in Arms Regulations. DoD officials stated that literature described the radio as militarized and that other radios built by the manufacturer were subject to munitions export licenses. The second request was for an antenna. Commerce officials stated that the antenna was not a munitions item, despite company literature describing it as militarized. DoD officials stated that the literature satisfied International Traffic in Arms Regulations criteria for a “defense article” (munitions) and that the manufacturer had a history of exporting products under the munitions export licensing process.

Other Examples. Anecdotal evidence suggests that Commerce will make incorrect commodity classification decisions if it does not receive DoD advice on those decisions. In 1995 and 1997, Commerce decided that microchannel plates (used in night vision devices) fell under the Export Administration Regulations even though Commerce, DoD, and State decided in 1991 that that type of item fell under the jurisdiction of the International Traffic in Arms Regulations. In 1995, Commerce determined that a U.S. aerospace company’s accident report on a failed Chinese rocket launch that contained technical data fell under the Export Administration Regulations rather than the International Traffic in Arms Regulations. In 1996, Commerce determined that a protective suit fell under the Export Administration Regulations, while DTRA/ST and State determined that it was a chemical and biological defensive suit subject to the International Traffic in Arms Regulations.

Commerce Decisions. Commerce made licensing decisions on cases with national security implications without the benefit of DoD input. Incorrect commodity classification decisions can have long-term, adverse effects. One outcome of a commodity classification decision is that the item in question does not require an export license. In that case, the item may be exported without any further U.S. Government control – even if it should have been more appropriately exported under criteria established in the International Traffic in Arms Regulations.

Recommendation and Management Comments

Q.3. We recommend that the Director, Technology Security Directorate, Defense Threat Reduction Agency, work with the Assistant Secretary of Commerce for Export Administration to develop additional guidance and procedures on how to implement 1996 National Security Council guidance on commodity jurisdiction and commodity classification.

Management Comments. The Under Secretary of Defense for Policy concurred and stated that the Deputy Under Secretary of Defense (Technology Security Policy)¹² will develop a proposal and send it to the Assistant Secretary of Commerce.

¹²In May 1999, the Director, DTRA/ST, received the additional title of the Deputy Under Secretary of Defense (Technology Security Policy).

Question 4. Interagency Dispute Resolution Process

Determine whether the interagency dispute resolution (or “escalation”) process for appealing disputed license applications allows officials from dissenting agencies a meaningful opportunity to seek review of such applications, and assess why this process is so seldom used.

With one possible exception, the interagency escalation process provided DoD a meaningful opportunity to appeal disputed dual-use license applications, although the outcome of the process often favored the Commerce position. The number of cases appealed to the ACEP decreased as a result of EO 12981, and DoD elected not to escalate disputed dual-use cases for a variety of reasons. Disputes over munitions applications are resolved between office chiefs at DoD and State.

Interagency Dispute Resolution Process

Pre-EO 12981 Escalation Process. Before EO 12981, the Subcommittee on Nuclear Export Controls; the SHIELD, which deals with chemical and biological issues; and the Missile Technology Export Control Group (generally referred to as technical committees and chaired by State) reviewed export license applications under their purview, and the OC reviewed the balance of cases. If the technical committees or the OC did not reach consensus on a case, the appropriate technical committee or OC chair escalated the case to the ACEP.¹³

EO 12981 Escalation Process. EO 12981 establishes escalation procedures and timelines for disputed dual-use cases. There are four levels of escalation for dual-use cases: the OC, the ACEP, the Export Administration Review Board, and, if necessary, the President. The OC, ACEP, and Export Administration Review Board are required to consider all matters referred to it, giving consideration to domestic economy, foreign policy, national security, and concerns about the proliferation of armaments, weapons of mass destruction, missile delivery systems, and advanced conventional weapons. A flowchart depicting the interagency escalation process is in Appendix D.

¹³The technical committees continue to meet on a regular basis to share information and discuss whether a license should be granted for a particular dual-use commodity. However, now the technical committees are advisory and no longer vote on cases or have the right to appeal cases directly to the ACEP.

Escalation to the OC. The OC reviews all license applications on which the reviewing Federal departments and agencies are not in agreement. As discussed under Question 2, the OC Chair, a Commerce employee, decides the position of the OC on all license applications reviewed by the OC; however, the members vote on each application.¹⁴ The OC meets weekly.

Escalation to the ACEP. A Federal department or agency may appeal a decision made by the OC Chair within 5 days of the decision. The appeal must be to the ACEP Chair in writing and be signed by an official appointed by the President with the consent of the Senate, or an officer properly acting in such capacity. The Assistant Secretary of Defense (Strategy and Threat Reduction) currently has that role in DoD.

Escalation to the Export Administration Review Board. A Federal department or agency may appeal a majority decision of the ACEP within 5 days of the decision. The appeal must be a letter to the Export Administration Review Board, signed by the Secretary of the Federal department or agency disagreeing with the ACEP decision. The Export Administration Review Board had decided two cases since October 1992, with the last one being in 1997. It decided two cases in FY 1990 and 15 in FY 1991.

Escalation to the President. A Federal department or agency may appeal a majority decision of the Export Administration Review Board within 5 days of the decision. The appeal must be a letter to the President signed by the head of the department or agency disagreeing with the Export Administration Review Board decision. However, we found no evidence that any case had been appealed to the President since the implementation of EO 12981.

DoD Case Escalation Process. DTRA/ST has a process for escalating dual-use license applications to the ACEP. After each OC meeting, the License Division representative to the OC summarizes the meeting results and posts those results on the DTRA/ST computer network. The License Division representative to the OC meets with the Chief, Dual-Use Branch, to discuss OC results and any cases that should be escalated to the ACEP. In addition, all DTRA/ST staff members have access to the DTRA/ST computer network and have the opportunity to comment on cases they believe should be escalated to the ACEP. The Chief, Dual-Use Branch, recommends to the Director, DTRA/ST, which OC cases should be appealed to the ACEP. If the Director, DTRA/ST, determines that a case should be escalated, the responsible licensing officer prepares the appeal for signature by the Assistant Secretary of Defense (Strategy and Threat Reduction).

¹⁴EO 13020, "Amendment to Executive Order 12981," October 12, 1996, adds that cases related to commercial communications satellites and certain "hot-section" technologies for the development, production, and overhaul of commercial aircraft engines will be by majority vote.

Sample of OC and ACEP Cases

We reviewed a sample of 26 of 266 cases reviewed by the OC and all 8 cases reviewed by the ACEP from January through June 1998.

OC Cases. Of the 26 cases, 3 were resolved before the OC could consider them. Of the other 23 cases, the OC Chair approved 20 with conditions¹⁵ and denied 3. DoD voted to approve 6 with conditions and deny 17. The OC Chair approved 14 cases with conditions over DoD objections. DoD appealed (escalated) 1 of the 14 cases to the ACEP. Examples of license conditions included that the item could not be re-exported, transferred, or sold without prior U.S. Government permission, and foreign nationals' access to the item was restricted.

Of the 14 cases, 1 case was for export to Canada, 2 for China, 4 for India, 3 for Israel, 3 for Russia, and 1 for Sweden. DoD voted to deny 10 because of the risk of diversion; 6 because of concerns about the end user; and 2 because of the possibility of the item making a material contribution to an anti-satellite program, or a nuclear weapons/propulsion program.¹⁶ DoD voted to deny one case because the precedent for encryption products to foreign governments could jeopardize national security interests. DoD voted to deny another case because of concerns raised about a foreign national being considered for a job in the United States. DoD appealed to the ACEP one case regarding an encryption product bound for Sweden because it set a precedent for encryption products to foreign governments that could jeopardize national security interests.

ACEP Cases. The ACEP approved with conditions all eight cases in our sample. Four of the cases were to grant foreign nationals' access to high-speed computer technical data and the manufacturer's authority to sell computers (computer production facilities), one was to provide a precision timekeeping unit to India that could materially contribute to a missile/space launch program or research and development of such a program, one was for a semiconductor wafer to produce advanced microprocessors, and two were for encryption software. Of the eight cases, DoD changed its "deny" to "approve with conditions" for six cases, DoD maintained "approve with conditions" for one case, and DoD maintained "deny" for one case. The one case that DoD continued to deny at the ACEP was for the precision timekeeping unit. DoD did not attempt to escalate the case to the Export Administration Review Board because State changed its position from deny to approve with conditions at the ACEP meeting, which significantly decreased the likelihood that DoD would be able to persuade the Board to deny the case.

¹⁵Each of those licenses included one or more conditions that the exporter or user must abide by to obtain approval acceptable to all Federal departments and agencies reviewing the license.

¹⁶A license may be denied for more than one reason.

DoD Escalation of Dual-Use Cases

In general, DoD had a meaningful opportunity to appeal disputed dual-use license applications, but the outcome of the process often favored Commerce. We assigned seven criteria for determining whether the escalation process provided DoD a meaningful opportunity to appeal dual-use cases. The criteria are process oriented. Each of the following criterion was met.

- All disputed cases are identified.
- DoD brings qualified personnel to OC meetings.
- DoD is able to bring meaningful information to OC meetings.
- DoD is able to present its position at OC meetings.
- The OC Chair considers the input of all participating departments and agencies.
- Evidence that the OC and the ACEP act on DoD arguments.
- DoD is able to escalate cases.

All Disputed Cases Are Identified. Any time DoD entered a position on a dual-use case that differed from a position entered by any other Federal department or agency, the case automatically was referred to the OC. In some instances, the organizations may resolve differences before the case is discussed by the OC. Some cases remain on the OC meeting agenda for more than one meeting.

DoD Brings Qualified Personnel to OC Meetings. The OC Chair stated that DoD personnel attending the meetings were qualified and the collective expertise generally exceeded other agencies. DTRA/ST staff who attended OC meetings generally included engineering, licensing, and policy specialists, and all presented viewpoints at meetings observed. DoD was the only OC member that brought this range of experience to each OC meeting on a regular basis.

DoD Is Able to Bring Meaningful Information to OC Meetings. The OC agenda was reported to the DTRA/ST staff in advance of the meetings so DTRA/ST staff could prepare in advance for the meetings. The OC Chair characterized DoD as consistently the best prepared member of the OC.

DoD Is Able to Present Its Position at OC Meetings. DTRA/ST personnel who attended weekly OC meetings stated that the OC Chair consistently provided DoD an opportunity to present its position. The OC Chair has voted against the consensus of the OC, to include Commerce licensing officers. The OC Chair stated that one factor limiting the ability of all parties was that cases came to the OC before sufficient information was obtained or before sufficient efforts were made to reconcile differences among organizations. As a result,

the OC deliberations were impeded because too many cases were placed on the OC agenda. The OC Chair, however, had the option of placing a case on the agenda of the next meeting.

The OC Chair Considers the Input of All Participating Departments and Agencies. EO 12981 requires that the OC Chair consider the recommendations of the reviewing Federal departments and agencies. DTRA/ST personnel who attended OC meetings stated that the OC Chair carefully considered the information each member brought before the OC.

Evidence That the OC and the ACEP Act on DoD Arguments. In 11 of the 14 OC cases that were approved over DoD objections and in 7 of the 8 ACEP cases we reviewed, DoD reservations about the exports were addressed by tightening existing or adding new license conditions.

OC Cases. Of the 11 OC cases that had conditions added or tightened, 9 cases had added or increased restrictions on the end use of the export, 4 cases had added or increased restrictions on the future disposition of the items exported, 1 case had added restrictions on access to controlled technology and technical data, 1 case had the quantity limited, and 1 case had added safeguards for emergency decryption.¹⁷

ACEP Cases. Of the eight ACEP cases reviewed, the four cases for computer production facilities had conditions added and tightened by the ACEP to restrict the access of foreign nationals to controlled manufacturing technology. The case for semiconductor wafer manufacturing equipment had conditions tightened by the ACEP to increase restrictions on the end use and technical data transferred. The ACEP added conditions on modifications of equipment, training of personnel, and notification requirements over shipment of the equipment and changes in management personnel. The two cases for encryption software had conditions tightened by the ACEP to increase restrictions on the end user and end use.¹⁸ The ACEP did not tighten the OC conditions on the export of the precision timekeeping unit.

DoD Is Able to Escalate Cases. DoD escalated 1 of the 14 cases that the OC Chair approved over DoD objections. Of the eight ACEP cases reviewed, DoD had escalated two of the cases.

Exceptions Cited by the OC Chair. One exception to the general conclusion that the escalation process worked well is that the OC Chair stated that Commerce management directed her to consider only Commerce's position on certain encryption and other commodity cases. If true, that counters the provision of EO 12981 that the OC Chair consider the recommendations of the reviewing Federal departments and agencies. The Office of the Inspector General, Commerce, reviewed the matter and verified that Commerce

¹⁷Some cases had more than one condition added or tightened.

¹⁸At the ACEP, DoD changed its position from "deny" to "approve with conditions" for those two cases. NSA personnel familiar with the cases explained that the argument to deny and then escalate the cases would be hard to sustain because the items were bound for a U.S. ally.

management had provided the OC Chair guidance on certain OC cases. The Assistant Secretary for Export Administration and his deputy might have instructed the OC Chair or provided her guidance as to the applicable policy for a particular export transaction. They did so in order to expedite the licensing decision or to have a case escalated to the ACEP for a policy decision. The Office of the Inspector General, Commerce, recommended that the Under Secretary for Export Administration avoid any action that would interfere with the OC Chair's ability to render an independent licensing decision and to use Commerce's right to escalate case to the ACEP when Commerce management disagrees with the OC Chair's decision on a case.

Commerce Favored in Process

Although the escalation process generally provided DoD with a meaningful opportunity for seeking review of disputed license applications, the outcome of the process often favored the Commerce position. In general, the OC Chair voted more often with Commerce than with DoD. Of 23 cases reviewed, the OC Chair voted with Commerce 21 times and with DoD 9 times. In addition, the ACEP escalation process is predicated on the idea that an export will be allowed (typically a Commerce position) unless a Federal department or agency has concrete evidence that an end user is a high diversion risk. By more often favoring the Commerce position, the escalation process places a greater burden on DoD to substantiate concerns about exports such as potential diversions and possible links between known diversion risks and intermediary or end users. DTRA/ST staff stated that each escalation to the ACEP required additional work beyond that done to perform the initial review of the case.

Dual-Use Escalation Trends

Since the 1993 Interagency Review, using FY 1992 through FY 1998, the number of dual-use cases escalated to the OC increased by 130 percent, but the number escalated to the ACEP decreased by 68 percent. The following table shows the trends in Commerce referrals of dual-use cases to other Federal departments and agencies and cases referred to the OC, the ACEP, and the Export Administration Review Board from FY 1991 through FY 1998.

Referrals of Dual-Use Cases

<u>FY</u>	<u>Cases Referred to Agencies¹</u>	<u>Cases Referred to and Reviewed by the OC</u>	<u>Cases Referred to and Reviewed by the ACEP</u>	<u>Cases Referred to and Reviewed by the EARB²</u>
1991	7,000	169	89	20
1992	11,100	333	105	0
1993	13,900	493	142	0
1994	6,800	281	97	0
1995	5,100	161	68	0
1996	6,800	435	71	0
1997	10,400	784	38	1 ³
1998	9,100	766	34	0

¹Data based on date actual referral occurred.

²Export Administration Review Board.

³One case was referred to the EARB in FY 1997; however, the EARB did not review it.

Less Frequent Escalations

Fewer ACEP Cases. The number of cases appealed to the ACEP declined as a result of EO 12981. The ACEP reviewed an average of 103 cases per year from FY 1992 through FY 1995 and an average of 48 cases per year from FY 1996 through FY 1998. The primary reason for the decrease is the means by which cases are escalated to the ACEP. Prior to the signing of EO 12981, the ACEP reviewed any case on which the OC or the technical committees could not agree. Under EO 12981, the ACEP reviews only cases escalated to it through officials at the assistant secretary level. The change in escalation procedures appears to have no adverse impact. As discussed earlier, most cases were resolved at the OC level through tightening existing or adding new license conditions. Further, the Deputy Director, DTRA/ST, stated that the EO 12981 escalation procedures gave him the opportunity to escalate necessary OC cases to the ACEP.

DoD Escalation Decisions. DoD did not escalate cases to the ACEP or the Export Administration Review Board for a variety of reasons. The Director, DTRA/ST, stated that in general, decisions about escalating cases were made on the basis of the substance of the case, the viewpoints expressed by DoD principals, and the likelihood of prevailing at the ACEP. A DTRA/ST official also stated that DoD would generally maintain an objection at the OC meeting, even if it subsequently decided not to escalate, in order to preserve the option of escalating the case within the 5-day period. DTRA/ST officials did not maintain documentation on why specific cases were or were not escalated to the ACEP, but officials provided explanations after the fact based on their reexamination of the case records.

Not Escalating Cases to the ACEP. For the 13 cases that the OC Chair approved over DoD objections, and that DoD did not escalate to the ACEP, officials provided the following explanations. In one case, officials stated that they realized at the time that DoD should have voted “approved with conditions” at the OC. In three cases, officials stated that the cases were not escalated because the items were in support of international programs. In eight cases, officials stated that the cases were not escalated because there was not a strong enough policy argument to make in support of the objection. In the remaining case, officials said that the technical assessment was not sufficient to escalate the case.

Munitions Process

DTRA/ST personnel who worked munitions cases stated that DTRA/ST and State rarely disagree over licenses. In the case of a disagreement, however, the Director, DTRA/ST, and the Director, Office of Defense Trade Controls, State, resolve the issue informally.

Conclusion

Based on process-oriented criteria, the interagency dispute resolution process provides a meaningful opportunity for DoD officials to seek review of disputed license applications. A process exists for providing disputed cases to the OC, the first interagency level, and DoD has elected, at times, to elevate cases to the next interagency level, the ACEP. With the exception of certain areas in which Commerce management may be directing specific decisions, the OC Chair appears to impartially consider each case and listen to differing viewpoints. Typically an export will be allowed unless DoD or another Federal department or agency has concrete evidence that the end user is a high diversion risk. That characteristic places a greater burden on DoD to substantiate and justify objections to export license applications for national security concerns.

Questions 5 and 6. Cumulative Effect

Review whether the current dual-use and munitions licensing processes adequately take account of the cumulative effect of technology transfers resulting from the export of dual-use items and munitions, and the decontrol of munitions commodities.

The licensing process at DTRA/ST occasionally takes into account the cumulative effect of technology transfers but participants in the licensing process did not routinely analyze the cumulative effect of proposed exports or receive assessments to use during license reviews. In addition, DoD organizations did not conduct required annual assessments of the impact of technology transfers that could provide information on the cumulative effect of proposed exports. The assessment of the cumulative effect of technology transfers was limited at DTRA/ST because senior managers determined that a comprehensive assessment program would be costly and too slow for the licensing process and specific proposals to conduct assessments lacked focus. DoD organizations did not routinely conduct annual assessments of the impact of technology transfers because DoD policy was not clearly stated or emphasized. As a result, DoD cannot ensure that the licensing process takes into account the cumulative effect of technology transfers. As of March 1999, DTRA/ST had initiated actions designed to increase the degree to which cumulative effect analysis was incorporated into the licensing process, but further actions are needed.

Cumulative Effect Policy and Procedures

DoD Policy. DoD Directive 2040.2, “International Transfers of Technology, Goods, Services, and Munitions,” January 17, 1984, assigns responsibilities and describes procedures for the international transfer of Defense-related goods, munitions, services, and technology. The Directive 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). The DoD policy does not specifically discuss accounting for the cumulative effect of technology transfers. However, the policy states that DoD Components shall annually assess the total effect of transfers of goods, munitions, services, and technology on U.S. security. DoD Directive 5105.62, “Defense Threat Reduction Agency,” September 30, 1998, makes reference to, but does not cancel, DoD Directive 2040.2 and discusses responsibilities and functions for the Defense Threat Reduction Agency relative to technology security.

DoD Agency-Level Policy and Practices. DTRA/ST had no specific policies discussing how the licensing process should take cumulative effects into account. However, DTRA/ST officials stated that several practices in place provided for some degree of cumulative effect assessment. DTRA/ST officials stated that the method for assigning cases at DTRA/ST helps ensure that licensing officers review cases similar to the ones they reviewed in the past and thus could apply past knowledge to cases. Officials also stated that periodic

reviews conducted by license review officials of possible changes in lists of controlled commodities, participation by staff in compiling lists of militarily critical technology, and attempts to establish policy in certain technology areas also were practices that involved assessing the cumulative effects of technology transfers. In addition, a stated function of the Technology Division is to assess the strategic risk to U.S. national security of proposals to transfer militarily critical commodities and technologies to foreign end users.

The requirement for DoD Components to annually assess the total effect of technology transfers was not discussed directly in Army, Navy, and Air Force policies that covered the export licensing process, but assessments related to technology transfer issues were discussed in regulations and mission statements for DIA. Defense Intelligence Regulation Number 55-1, "Technology Transfer," September 5, 1997, establishes responsibilities within DIA for technology transfer issues to include proliferation of weapons of mass destruction. The Regulation states that the Chief of the Technology Assessments Group will assess and coordinate intelligence assessments concerning the total effect on U.S. security of the legal and illegal transfers of goods, services, and technology. Functions listed for another part of DIA, the Arms Transfer Division, include producing assessments on current and projected trends of conventional arms proliferation and maintaining a database on conventional arms transfers.

Cumulative Effect in the Licensing Process

Cumulative Effect Analysis at DTRA/ST. The licensing process at DTRA/ST occasionally takes into account the cumulative effect of technology transfers but participants in the licensing process did not routinely analyze the cumulative effect of proposed exports or receive assessments to use during license reviews. Interviews with the licensing officers for dual-use commodities and munitions did not reveal routine performance of cumulative effect analyses. Also, the licensing officers had no readily available source of cumulative effect assessments produced within DTRA/ST or by other organizations to consider during case-by-case reviews. None of the records for the 60 dual-use cases reviewed in our sample cited a specific assessment of the cumulative effect of technology transfers as the basis for the decision. However, DTRA/ST officials stated that they would on occasion perform queries within FORDTIS to determine how many times an item or related items had been approved for export to an end user or country.

Informal Analysis. DTRA/ST officials pointed to examples of cumulative effect analyses, but they characterized the process for performing such analyses as informal or ad hoc. Examples of cumulative effect analyses presented by staff included a case in which staff reviewing dissimilar items going to the same end user concluded that the items, when combined, resulted in a nuclear application deserving of stronger controls than the individual parts. In another example, a licensing officer and an engineer worked together to demonstrate how three separate technologies that had been approved for export individually could in combination create a capability in excess of what the United States might wish for a certain country. In another example, the assessment looked at

the degree to which technology transfers improved the military command, control, communications, and intelligence structure in a specific country. However, those examples were neither solicited by management nor part of a plan of analysis, and one of the examples had occurred more than 4 years ago. A DTRA/ST manager who reviewed one of the older assessments commented that a capacity to perform such analytical assessments on a routine basis would be desirable. The Director, DTRA/ST, stated that the organization did not have adequate resources to conduct cumulative effect analyses as a regular organizational activity and that efforts were undertaken on an ad hoc basis.

Annual Assessments. DoD organizations did not conduct required annual assessments of the impact of technology transfers that could provide information on the cumulative effect of proposed exports. The offices with export control responsibilities within the Military Departments, the Joint Staff, and DIA could not provide any examples of the annual assessments of the total effect on U.S. security of the transfers of goods, munitions, services, and technology as described in DoD Directive 2040.2. Further, DoD staff with country-specific responsibilities in the Office of the Secretary of Defense did not produce and were not aware of assessments focused on the total impact of technology transfers relative to specific countries. DoD organizations did contribute to, or were aware of, assessments that the Central Intelligence Agency had performed that dealt with the acquisition by foreign countries of technology useful for the development of weapons of mass destruction, regional security issues, and specific technology-related issues concerning specific countries. However, no organization identified an annual assessment intended to assist in the license review process.

Management Emphasis on Assessments

Assessments at DTRA/ST. The assessment of the cumulative effect of technology transfers was limited at DTRA/ST because senior managers determined that a comprehensive assessment program would be costly and too slow for the licensing process and specific proposals to conduct assessments lacked focus. The Director, DTRA/ST, stated that he was not opposed to the concept of conducting cumulative effect assessments, but that he had turned down a proposal in 1998 to perform such an analysis on a certain country because he viewed the proposal as too broadly focused, and thus not likely to produce usable results. The Director did not recall the specific reasons for turning down another proposal in 1995 that involved requesting an assessment from the Joint Staff, but he generally doubted that the Joint Staff had sufficient resources to devote to such efforts. An example of a more limited review approved by the Director was a request to an engineer to review an assessment done by an outside agency on semiconductor capabilities across several countries to determine the effect on export controls.

The Director, DTRA/ST, and senior managers expressed skepticism concerning the feasibility of a comprehensive assessment program. The skepticism was based on their belief that such analyses would require the collection of data from multiple sources, in addition to the data already collected by DoD in the

licensing process. Further, DTRA/ST officials stated they doubted that results of such analyses would be timely enough to support the tight deadlines of the dual-use review process. Examples of additional data that would have to be pulled together to conduct cumulative effect analyses included munitions transactions not referred by State to DoD, commercial sales that occurred without individual licenses, third party sales, and graduate school enrollments. DTRA/ST officials also stated they did not believe that the time constraints imposed by the 30-day review requirements for dual-use commodities would accommodate the time frames associated with the production of reports from the intelligence community.

Other DoD Organizations. Other DoD organizations did not routinely conduct annual assessments of the impact of technology transfers because DoD policy was not clearly stated or emphasized. DoD Directive 2040.2 includes a statement in the procedures section stating all Components are to perform an annual assessment, but in the responsibilities section of the policy the task is only assigned to the Under Secretary of Defense for Policy. The policy assigns responsibility for monitoring compliance to a subordinate office of the Assistant Secretary of Defense (International Security Policy) that is no longer in existence.¹⁹ A more current statement on responsibilities is found in DoD Directive 5105.62, which states that the Defense Threat Reduction Agency serves as the DoD agent for implementation of technology security policies established by the Under Secretary of Defense for Policy consistent with DoD Directive 2040.2. As of March 1999, DTRA/ST officials were not involved with revising the policy or monitoring compliance with the requirement for annual assessments.

Defense Intelligence Agency officials expressed concerns about the feasibility of the annual assessments. Officials stated that the annual assessments required by DoD Directive 2040.2 would require collection from extensive data sources plus knowledge of domestic and foreign military capabilities. Such annual assessments were considered unrealistic in analytical and budgetary terms. A DTRA/ST official with responsibility for work with the intelligence community emphasized the need to conduct assessments but stated that the assessments should use resources from intelligence sources, the Joint Staff, and the export control community.

Recent Actions Initiated

As of March 1999, DTRA/ST had initiated actions designed to increase the degree to which cumulative effect analysis was incorporated into the licensing process, but further actions are needed. An integrated process team was formed within DTRA/ST to better focus the activities of the Militarily Critical Technologies Program toward the mission of the Defense Threat Reduction Agency. In addition, a concept for a Technology Assessment System was under consideration. According to a DTRA/ST official, the general idea of the

¹⁹The Deputy Assistant Secretary of Defense (International Economic, Trade, and Security Policy).

Technology Assessment System was to develop the capability to interact electronically with disparate databases throughout the DoD community in order to answer complex questions related to the mission of the Defense Threat Reduction Agency. The Director, DTRA/ST, who assumed the position in August 1994, stated that he recently initiated the actions because the reorganization instituted in October 1998 brought DTRA/ST and the Militarily Critical Technologies Program under the same agency and made additional resources available. The actions initiated have the potential to yield positive results, but they are preliminary steps and limited to DTRA/ST.

Further Actions Needed

Without further action, DoD cannot ensure that the license review process takes into account the cumulative effect of technology transfers. Increased management emphasis and guidance that is more realistic and clearer regarding the roles of different participants would increase the likelihood of accomplishing assessments that could provide meaningful support to the license review process. The need to assess the cumulative effect of technology transfers may become increasingly important and ways to minimize budgetary demands may be available.

Need for Cumulative Assessments. Outside experts have commented on the need for assessments of technology transfers that account for cumulative effects. An academic commentator on one of the informal cumulative effect assessments obtained from DTRA/ST stated the increasing need to consider the synergistic effects of items applicable to a system. A Defense Science Task Force draft report on globalization and security, issued in December 1998, discusses how globalization of technology increases the need for those concerned with technology security to focus on the capabilities created by the integration and military application of uncontrolled technologies. The report also points out that the U.S. Government already collects a substantial amount of information on foreign technology but it is not easily used by the export licensing community. A study released in early 1999 by the Department of Commerce discussed how the cumulative effects of technology transfers to China may pose long-term economic risks to U.S. competitiveness and suggested that the topic warranted further study.

Minimizing Budget Impacts. Although the ability to completely analyze the cumulative effect of technology transfers is constrained by the availability of resources, ways to minimize the resources required may be available. Officials involved with conducting the informal assessments at DTRA/ST suggested that outside resources, such as Reserve units, Defense colleges and universities, Service academies, Defense contractors, and the academic community, could be used to assist in assessments related to the cumulative effect of technology transfers. In addition, resources allocated to cumulative effect assessments could be minimized by shifting the current requirement for annual assessments of all countries to more focused assessments that deal with specific countries, capabilities, or technology areas. The shift to more focused assessments would address concerns expressed by DIA officials about the feasibility of conducting

broad assessments of the total impact of technology transfers. The DTRA/ST integrated process team on the Militarily Critical Technologies Program could be used to define a process for identifying, prioritizing, and obtaining decisions on assessment topics that would be undertaken. That role for the Militarily Critical Technologies Program is consistent with the current support provided by the program to developing U.S. Government control lists and performing technical assessments.

Conclusion

Although the assessment of the cumulative effect of technology transfers requires resources, the impact on national security from issuing an export license or modifying a U.S. Government control list cannot be fully gauged without such assessments. By taking steps to develop a meaningful policy and a coordinated process, DoD can ensure that, to the degree consistent with resource constraints, the licensing process adequately takes into account the cumulative effect of technology transfers resulting from the export of dual-use commodities and munitions, and the decontrol of munitions commodities.

Recommendations, Management Comments, and Audit Response

Q.5./Q.6.A. We recommend that the Under Secretary of Defense for Policy revise DoD Directive 2040.2, “International Transfer of Technology, Goods, Services, and Munitions,” January 17, 1984, to clearly state responsibilities and procedures regarding the performance of assessments designed to analyze the cumulative effect of technology transfers and the monitoring of compliance with any requirements established.

Management Comments. The Under Secretary of Defense for Policy concurred, stating that a review will be conducted to determine whether DoD Directive 2040.2 should be revised. The Under Secretary stated that license decisions are case-by-case determinations reflecting an assessment of relevant factors, including licensing history, the level of technology, the end use, and the end user. Thus, he agreed that the need existed for better data and analytical tools to conduct assessments to assist in making significant export decisions. The Under Secretary stated that by September 30, 1999, he will issue guidance on general procedures and responsibilities for technology transfer assessments. However, the Under Secretary disagreed that the lack of annual assessments should be considered a material control weakness.

Audit Response. We consider the Under Secretary’s comments to be generally responsive. The materiality of the control weaknesses is discussed further in Appendix A.

Q.5./Q.6.B. We recommend that the Director, Technology Security Directorate, Defense Threat Reduction Agency, develop an action plan with milestones for the integrated process team on the Militarily Critical

Technologies Program that includes defining a process for identifying, prioritizing, and obtaining decisions on assessments related to the cumulative effect of technology transfers. The team should identify alternative resources that could be used to carry out such assessments and ways to include input from the Joint Staff and the Defense Intelligence Agency in the process.

Management Comments. The Under Secretary of Defense for Policy concurred, stating that the Deputy Under Secretary of Defense (Technology Security Policy) will lead the effort to implement the Under Secretary's guidance under Recommendation Q.5./Q.6.A. The integrated process team on the Militarily Critical Technologies Program will help formulate recommendations for the technology transfer assessment process by September 30, 1999.

Audit Response. The Under Secretary's response is generally responsive. The relatively near-term milestone for completing the team's effort obviates the need for interim milestones.

Question 7. License Application Referrals to Military Departments, the Intelligence Community, and Other Interested Organizations

Determine whether license applications are being properly referred for comment (with sufficient time for responsible review) to the military services, the intelligence community, and other relevant groups (the “recipient groups”) by DoD and other agencies. Consider in particular numerical trends in the frequency of such referrals, trends in the types of applications referred, trends in the nature of the taskings made in connection with the referrals, and the perceptions of officials at the recipient groups.

The DoD Components, except DIA, have been referred about the same number of cases annually over the past 8 years. However, DTRA/ST did not always appropriately refer license applications to DoD Components for review. Of the applications we reviewed, DoD Components considered that 12 percent of the dual-use and 24 percent of the munitions license applications were not properly referred. DTRA/ST personnel stated that it is impossible for them to develop a formula or policy that would identify more specifically which cases need to be referred to each DoD Component. If DTRA/ST does not properly refer a case to a DoD Component for review, the consolidated DoD position may be developed with incomplete information.

1993 Interagency Review – Providing a Sample of Cases to DoD Components

The 1993 Interagency Review recommended that DTRA/ST and DoD Components develop a mechanism to review a representative sample of dual-use and munitions cases referred to DTRA/ST. With the sample of cases, representatives from DTRA/ST and the DoD Components could review the referral decisions made by DTRA/ST and determine the appropriateness of those decisions. Licensing officers could use that information to improve future referral decisions. After the 1993 Interagency Review was issued, DTRA/ST took steps to provide DoD Components with a sample of the cases it received from Commerce and State.

On October 25, 1993, DTRA/ST invited DoD Components to participate in its review of munitions cases to determine appropriate referral requirements. As a result, the Army, the Navy, the Air Force, the Office of the Principle Deputy of the Under Secretary of Defense (International Programs) Planning and Analysis, DIA, NSA, and the Joint Staff met and concurred with the DTRA/ST referral methodology. DoD Component officials who attended the meeting dealt with dual-use and munitions cases, so they determined that a separate meeting for the dual-use referral process would be redundant. For a limited time, the Air Force

and the Joint Staff participated in the DTRA/ST referral of munitions cases. DTRA/ST officials stated that DoD Components have an open invitation to participate in the referral of dual-use and munitions cases.

On February 28, 1994, DTRA/ST issued to the DoD Components a memorandum that identified the general elements DTRA/ST considers important during the review of dual-use and munitions cases. The memorandum explained that because no two cases were identical, it was impossible to create a formula for referrals to DoD Components that could be applied to every situation.

DoD Position Input from DoD Components

DTRA/ST receives export license applications from Commerce and State and frequently refers those applications to DoD Components for review. The DTRA/ST licensing officers develop the consolidated DoD position with input from various organizations within the Office of the Secretary of Defense, the Military Departments, the Joint Staff, and DoD agencies. As discussed in Question 2, DTRA/ST allows DoD Components an average of 10 days to review dual-use cases and in general the Components stated they had sufficient time to review the cases. See Appendix E for a flowchart of the DoD review process for dual-use and munitions export license applications.

Office of the Secretary of Defense. The Office of the Secretary of Defense did not have a centralized point of contact for receiving export license applications. DTRA/ST licensing officers referred those cases directly to various organizations within the Office of the Secretary of Defense. A majority of the cases were referred to the Office of the Under Secretary of Defense for Policy for policy reviews, specifically, to the Office of the Assistant Secretary of Defense (International Security Affairs), the Office of the Assistant Secretary of Defense (Special Operations/Low-Intensity Conflict), and the Office of the Assistant Secretary of Defense (Strategy and Threat Reduction). Also, DTRA/ST referred cases to the Office of the Under Secretary of Defense for Acquisition and Technology for technical reviews.

Military Departments and the Joint Staff. The Military Departments and the Joint Staff primarily perform technical assessments on dual-use and munitions license applications. The Office of International Industrial Cooperation within the U.S. Army Security Assistance Command, a Component command of the Army Materiel Command, is the Army point of contact for export licenses. The International Programs Office is the Navy point of contact for export licenses. The Export Control Section of the Disclosure Implementation Division, Office of the Deputy Under Secretary of the Air Force, is the Air Force point of contact for export licenses. The Weapons Technology Control Division within the Office of the Deputy Director for International Negotiations is the Joint Staff point of contact for export licenses.

DoD Agencies. DIA primarily performs end-user checks on dual-use cases and technical assessments on munitions cases. Dual-use cases require more end-user checks because, unlike State, which handles munitions cases, Commerce does

not require applicants for dual-use licenses to register and they are therefore less likely to be known to the U.S. Government. On rare occasions, DTRA/ST requests that DIA perform a technical assessment on a dual-use case or an end-user check on a munitions case. The Technology Assessment Division within the Directorate for Intelligence is the DIA point of contact for export licenses. NSA has two offices that process license applications. One processes dual-use and munitions cases referred by DTRA/ST, and the other processes dual-use encryption cases referred directly to NSA by Commerce.

Trends in Referring Applications

DoD Components, except DIA, have been referred about the same number of cases annually over the past 8 years. The number of dual-use cases referred to DIA varied significantly. From 1990 through 1998, the Military Departments, NSA, and the Joint Staff received more munitions cases than dual-use cases. During the same period of time, DIA received more dual-use cases than munitions cases.

Dual-Use License Applications. From 1990 through 1994, the number of dual-use cases that Commerce referred to DTRA/ST decreased from 5,643 to 1,261. In December 1995, EO 12981 allowed DTRA/ST the opportunity to review all dual-use export license applications, significantly increasing the number of dual-use cases sent to DTRA/ST. From 1992 through 1998, the number of cases referred to DIA correlated with the increases and decreases in the number of dual-use cases Commerce referred to DTRA/ST. In 1994, the U.S. Government saw a decrease in the number of dual-use export license applications as a result of the 1993 decontrol of telecommunication technologies and the termination of the Coordinating Committee for Multilateral Export Controls. During 1998 of 9,735 dual-use cases received, DTRA/ST referred 517 (5 percent) dual-use cases to the Army, 777 (8 percent) dual-use cases to the Navy, 581 (6 percent) dual-use cases to the Air Force, 2,707 (28 percent) dual-use cases to DIA, 1,204 (12 percent) dual-use cases to NSA, and 1 (0.0001 percent) dual-use case to the Joint Staff. Figure 2 shows the number of dual-use cases DTRA/ST referred to the Military Departments, DIA, NSA, and the Joint Staff.²⁰

²⁰DTRA/ST may refer a dual-use or munitions case to several DoD Components.

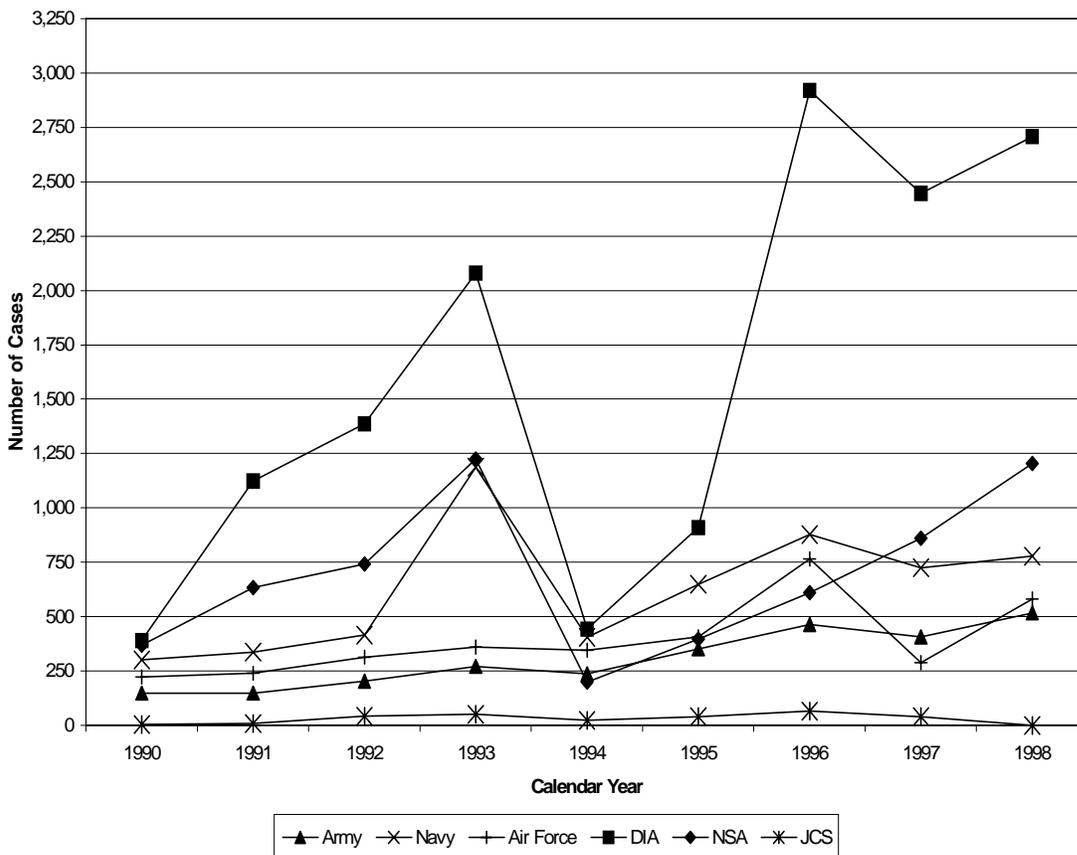


Figure 2. Number of Dual-Use Cases Referred to DoD Components by DTRA/ST

Munitions License Applications. From 1990 through 1998, the number of munitions cases that State referred to DTRA/ST decreased from 14,704 to 12,609. The Military Departments and NSA received approximately the same number of cases in 1998 as they did in 1990. From 1990 through 1998, DIA and the Joint Staff consistently received less than 5 percent of the munitions cases received by DTRA/ST. However, DIA and the Joint Staff have received close to a 400 percent increase in munitions cases during the same period. During 1998 of the 12,609 munitions cases received, DTRA/ST referred 5,564 (44 percent) munitions cases to the Army, 6,328 (50 percent) munitions cases to the Navy, 6,437 (51 percent) munitions cases to the Air Force, 356 (3 percent) munitions cases to DIA, 4,669 (37 percent) munitions cases to NSA, and 506 (4 percent) munitions cases to the Joint Staff. Figure 3 shows the number of munitions cases DTRA/ST referred to the Military Departments, DIA, NSA, and the Joint Staff.

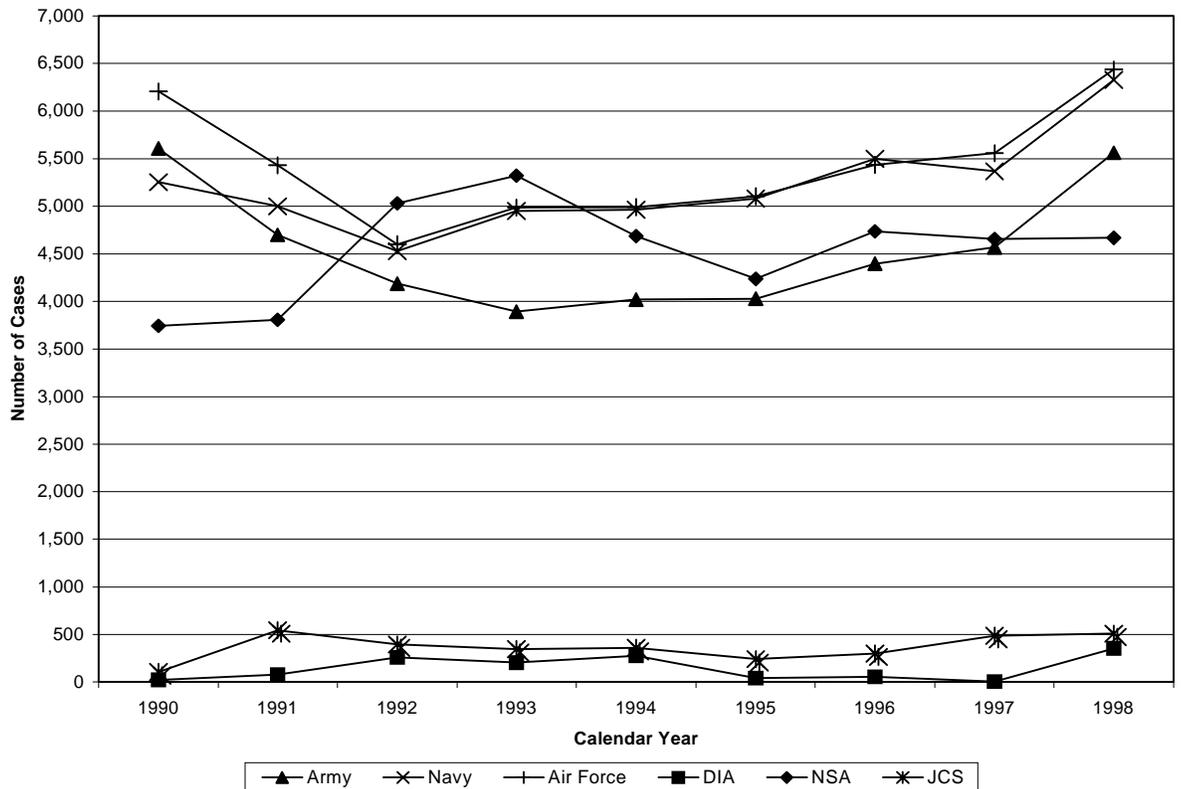


Figure 3. Number of Munitions Cases Referred to DoD Components by DTRA/ST

Methodology for Referrals to DoD Components

The Dual-Use and Munitions Branches of the DTRA/ST License Division use different methods to refer export license applications to DoD Components. Although DoD directives contain general guidelines on the international transfer of specific technologies, DTRA/ST has no guidelines for which DoD Components should be referred which cases. Instead, DTRA/ST licensing officials used their knowledge of which DoD Component is the office of primary responsibility for each item and their experience to make referrals.

Dual-Use Branch Referral Process. On a daily basis, DTRA/ST receives dual-use applications electronically through FORDTIS from Commerce. The Technology Division and Technology Security Operations review new dual-use cases and enter their comments in FORDTIS. The next day, the DTRA/ST Tiger Team reviews each new case. The Tiger Team consists of the Dual-Use Branch Chief, the Dual-Use Branch licensing officers, and one representative from the Policy and Technology Divisions, and Technology Security Operations. During the review, the Tiger Team members make recommendations for DoD Component and internal DTRA/ST referrals. If the Tiger Team determines that no referrals are necessary, it will complete the review internally and return the case to Commerce without referring it to DoD Components. Dual-Use Branch licensing officers may also review cases without

referring them to DoD Components. Our sample of 51 dual-use cases showed that DTRA/ST reviewed and returned to Commerce 29 of the dual-use applications without referral to DoD Components.

If the Tiger Team determines that a referral is necessary, the Tiger Team refers the license application to one or more DoD Components for review. Once the referral decision has been made, the Dual-Use Branch export control specialists forward the case electronically to the appropriate DoD Components. Available hard-copy information is also sent at that time. In our sample of 51 dual-use export license applications, DTRA/ST referred 1 to the Army, 4 to the Navy, 5 to the Air Force, 14 to DIA, 10 to NSA, and none to the Joint Staff.

Munitions Branch Referral Process. On a daily basis, Munitions Branch supervisors receive and separate munitions cases into categories: voluntary disclosure and munitions policy; Navy and Marine aircraft; electronic information warfare; Air Force platforms; land warfare and night vision flares; Army aviation; commodity jurisdiction and special foreign aircraft programs; space launches and missile counterproliferation; night vision tubes and goggles, aircraft engines, and commercial satellites; and naval warfare and ammunition. On rare occasions, the Munitions Branch receives an application that is not complex, in which instance the supervisors develop a DoD position and send the case back to State. If the application is not complete, the supervisors returns the case to State without a position. Other applications are distributed to the licensing officers. The Munitions Branch licensing officers are assigned categories based on their expertise, with each licensing officer responsible for one category. Multiple licensing officers review cases that contain information related to one or more categories. The licensing officers briefly review the application and technical data and complete an internal and external referral sheet, then pass the case back to their supervisor. Our sample of 20 munitions export license applications were all referred to DoD Components for review. The supervisor reviewed the application and technical data, determined if additional referral was required, and sent the case to an export control specialist to enter in FORDTIS. After the export control specialist had entered the data in FORDTIS, a hard copy of the case was printed for the record, and the case file was given to the supervisor. After the supervisor signed off on the hard copy, the case was sent to the appropriate DoD Components for review. In our sample of 20 munitions export license applications, DTRA/ST referred 8 to the Army, 8 to the Navy, 12 to the Air Force, none to DIA, 7 to NSA, and none to the Joint Staff.

Referrals to DoD Components

DTRA/ST did not always appropriately refer dual-use and munitions license applications to DoD Components for review. We discussed our sample of 60 dual-use cases (the 51 cases staffed by DTRA/ST and the 9 NSA cases) and 54²¹ munitions cases with DTRA/ST licensing officers and supervisors and

²¹We added 34 munitions cases to our original sample of 20 cases to increase our confidence in our results. See Appendix A for a fuller explanation of the munitions sample.

licensing officials from the Military Departments, DIA, NSA, and the Joint Staff. We considered a case “properly referred” if the appropriate DoD Component agreed with the referral decision. We considered a case “improperly referred” if it was not referred to the DoD Components and they felt it should have been. We provided DTRA/ST the opportunity to agree or disagree with the DoD Component responses. DTRA/ST and DoD Components disagreed on the referral of some of the cases in our sample; however, DTRA/ST also agreed that it had made referral mistakes. All nine dual-use cases Commerce referred directly to NSA were properly referred.

Results of Our Sample. DoD Components identified 6 (12 percent) improperly referred cases in our sample of 51 dual-use cases. DTRA/ST disagreed with the DoD Components on all six of the improperly referred dual-use cases. DoD Components identified 13 (24 percent) improperly referred cases in our sample of 54 munitions cases. DTRA/ST agreed with the DoD Components on 7 and disagreed on 6 of the 13 improperly referred munitions cases. Night vision devices accounted for 2 of the 13 munitions cases that the DoD Components felt had been improperly referred.

DTRA/ST and the Navy disagreed on the appropriate referral of applications for night vision devices. The disagreement was due to different interpretations of policy. Based on the DoD policy, “International Transfer and Export Control of Night Vision and Electro-Optic Technology Part I Image Intensifier Night Vision Systems and Technology,” January 4, 1990, the Navy thought DTRA/ST should refer all night vision cases to all DoD Components. DTRA/ST disagreed, stating that, based on the same policy, DTRA/ST reserved the right to refer night vision cases to the DoD Components that it deemed appropriate. However, after a close review of the 1990 policy, DTRA/ST and the Navy determined that the policy did not clearly state whether all DoD Components should receive all night vision cases. In February 1999, DTRA/ST decided to refer all of the export license applications for Generation III/OMNI IV night vision devices to all of the DoD Components, which satisfied the Navy.

DTRA/ST View on Referral of Cases to DoD Components. DTRA/ST stated that it was impossible to develop a formula or policy that would identify more specifically which cases need to be referred to each DoD Component. However, DTRA/ST and the Policy Automation Directorate in the Office of the Deputy Under Secretary of Defense (Policy Support) have taken initiatives to ensure that the DoD Components are reviewing the appropriate cases. DTRA/ST issued a memorandum requesting that DoD Components create a list of commodities they would like to review. The Office of the Deputy Under Secretary of Defense (Policy Support) provided a query capability of dual-use cases Commerce referred to DoD and issued a summary report of munitions cases State referred to DoD. The query capability and summary report gave DoD Components the opportunity to obtain from DTRA/ST the cases they were interested in reviewing.

DTRA/ST Requested Components to Identify Appropriate Referrals. In January 1996, DTRA/ST issued a memorandum requesting that DoD Components identify the types of dual-use cases they would like to review. Few DoD Components responded to the 1996 memorandum, so in February 1997, DTRA/ST issued another memorandum asking the DoD Components to reply to

the 1996 request. After the 1997 memorandum, the Navy, the Air Force, the Office of the Deputy Under Secretary of Defense (Space), the Ballistic Missile Defense Organization, the Defense Security Cooperation Agency, the National Imagery and Mapping Agency, the National Reconnaissance Office, and the Joint Staff responded. In December 1998, DTRA/ST sent a memorandum requesting that the DoD Components identify the types of dual-use and munitions export license applications they would like to review. The 1998 memorandum required the DoD Components to present their responses to DTRA/ST no later than January 13, 1999. As of April 2, 1999, the Office of the Under Secretary of Defense (Acquisition and Technology), the Office of the Deputy Assistant Secretary of Defense (Near Eastern and South Asian Affairs), the Army, the Navy, the Air Force, the Defense Advanced Research Projects Agency, the Defense Information Systems Agency, DIA, the Defense Security Cooperation Agency, the National Imagery and Mapping Agency, NSA, and the Joint Staff had responded to the 1998 memorandum. The 1998 memorandum stated that DTRA/ST licensing officers would use DoD Component responses to refer future cases for review.

Query Capability and Summary Report. The query capability allowed the DoD Components to use FORDTIS as a tool to briefly review and request referral of all of the export license applications provided to DTRA/ST. The DoD Components can review electronic files (shell cases) of all the dual-use cases DTRA/ST receives from Commerce. Those cases are electronically staffed to DTRA/ST through FORDTIS. The shell cases provide summary information on the application, but do not include hard-copy technical data. When DTRA/ST receives a dual-use case through FORDTIS, it is in “I” status until DTRA/ST adds information into the electronic file, which normally takes 1 day. Once DTRA/ST adds information to the electronic file, the case will change to “O” status. If the DoD Components queried the cases in “I” status on a daily basis, they would be able to review the summary information provided in FORDTIS of all the dual-use cases DTRA/ST received. The DoD Components could then provide the Tiger Team with a list of dual-use cases they would like to review, which the Tiger Team could use in making referral decisions. The Navy was the only DoD Component that reviewed shell cases, and it notified DTRA/ST of the dual-use license applications it wanted to review.

The summary report of munitions cases is called a “case create report.” DoD Components can query FORDTIS and obtain a case create report that identifies the case number and short title of all of the munitions license applications that DTRA/ST receives from State. The case create report is generated by querying FORDTIS for cases that are in “O” status between day 1 (Monday) and day 5 (Friday). Those instructions allow any DoD Component to generate a case create report on its own. All of the DoD Components have the query capability necessary to obtain the dual-use shell cases and the munitions case create report. The information could provide DoD Components an opportunity to identify cases that they would like to review but that DTRA/ST did not refer to them.

Consolidated DoD Position

If DTRA/ST does not properly refer a case to a DoD Component for review, the consolidated DoD position of the case may be developed with incomplete information. DTRA/ST relies on DoD Components to provide input for the consolidated DoD position. DTRA/ST reviews of export license applications that do not include all of the appropriate DoD Component input may negatively impact the effectiveness and completeness of the consolidated DoD position.

Management Comments on Question 7 and Audit Response

Management Comments. The Under Secretary of Defense for Policy disagreed with the statement that DTRA/ST agreed with DoD Components that 7 of 13 munitions cases were improperly referred. He stated that although for those examples it would have been nice to have the DoD Components' input, the input was not necessary to formulate the DoD position. The Under Secretary also disagreed with the methodology of characterizing license applications that DoD Components wanted to review but did not receive as "improperly referred," because the characterization was based solely on the opinion of a staff member at a DoD Component.

Audit Response. We agree that DTRA/ST did not need the DoD Components' input to form a DoD position. However, the best review of an export application would include input from all knowledgeable sources. The DoD Components believed that they could have added valuable technical information that would have benefited the DoD position on the cases in question. We also agree that our methodology for determining whether a case was "improperly referred" was solely based on the opinion of staff members at the DoD Components. However, the purpose of our analysis was to determine whether DTRA/ST and the DoD Components had differing opinions about proper referral of cases.

Recommendations, Management Comments, and Audit Response

Revised Recommendation. As a result of the Under Secretary of Defense for Policy comments, we revised Recommendation Q.7.B. and modified the applicable report text.

Q.7.A. We recommend that the Director, Technology Security Directorate, Defense Threat Reduction Agency:

1. Issue a memorandum to the heads of the applicable DoD Components requiring them to:

(a) Respond to the Director, Technology Security Directorate, Defense Threat Reduction Agency, 1998 request to identify the types of dual-use and munitions export license applications they would like to review, if they have not already done so.

(b) Notify the Director, Technology Security Directorate, Defense Threat Reduction Agency, of any changes in the types of dual-use and munitions cases they would like to review.

(c) Query the Foreign Disclosure and Technical Information System daily, review the shell cases, and notify the Director, Technology Security Directorate, Defense Threat Reduction Agency, of any additional dual-use cases they would like to review.

(d) Review the case create report weekly and notify the Director, Technology Security Directorate, Defense Threat Reduction Agency, of any additional munitions cases they would like to review.

Management Comments. The Under Secretary of Defense for Policy concurred, stating that by July 1, 1999, the Director, DTRA/ST, will send a memorandum to DoD Components that will reiterate the December 1998 memorandum, asking for refinements or other changes to the types of cases on their respective referral request lists. In addition, the memorandum to DoD Components will inform the Components that they may query FORDTIS daily to review cases and if there are additional dual-use or munitions cases they would like to review to notify DTRA/ST. Also, DTRA/ST will invite DoD Components to attend daily referral meetings at DTRA/ST; however, DTRA/ST would reserve the right not to refer routine cases for regular DoD Component review.

2. Notify the Assistant Secretary of Defense (Strategy and Threat Reduction) of any DoD Component that does not respond to the 1998 Technology Security Directorate, Defense Threat Reduction Agency, request.

Management Comments. The Under Secretary of Defense for Policy concurred, stating that by July 30, 1999, the Director, DTRA/ST, will notify the Assistant Secretary of Defense (Strategy and Threat Reduction) of DoD Components that have not responded to the request.

3. Maintain a list of the types of dual-use and munitions export license applications that DoD Components have requested to review.

Management Comments. The Under Secretary of Defense for Policy concurred, stating that DTRA/ST will continue its practice of maintaining a list of the types of cases that DoD Components have requested to review.

Q.7.B. We recommend that the Deputy Under Secretary of Defense (Policy Support) electronically provide guidance to DoD Components on how to query the Foreign Disclosure and Technical Information System in order to generate the dual-use and munitions reports.

Management Comments. The Under Secretary of Defense for Policy nonconcurred to the draft report recommendation, citing that it is unnecessary for the Deputy Under Secretary of Defense (Policy Support) to generate a weekly report because DoD Components already have the ability to query FORDTIS on a daily basis for dual-use and munitions cases.

Audit Response. We revised draft Recommendation Q.7.B. to reflect the Under Secretary's comments that DoD Components already have the capability to query FORDTIS on a daily bases for dual-use and munitions cases. Because some DoD Components were unaware that the capability existed, we revised, rather than deleted, the recommendation. We request that the Under Secretary of Defense for Policy provide comments on the revised recommendation in response to the final report.

Question 8. Guidance and Training

Determine whether license review officials at each of the agencies are provided sufficient training and guidance relevant for reviewing license applications, and whether more formal training and guidance is warranted.

DoD Components and DTRA/ST received guidance from a wide range of sources, and nearly all licensing officers stated the guidance was adequate for performing their duties. DoD Component and DTRA/ST licensing officers stated that they generally had sufficient training; however, some licensing officials stated that a classroom training program and training plan for personnel reviewing export license applications should be established. A classroom training program and training plan were not established because DoD supervisors relied on on-the-job training and mentoring as the primary methods of training new licensing officers. We were unable to determine if the lack of a classroom training program or a training plan materially affected licensing duties.

Legal and DoD Requirements

Statutory Training Requirements. Title 5, United States Code, Section 4103, “Establishment of Training Program,” requires that “[i]n order to assist in achieving an agency’s mission and performance goals by improving employee and organizational performance, the head of each agency shall establish, operate, maintain, and evaluate a program or programs, and a plan or plans for training agency employees by, in, and through Government and non-Government facilities.” Section 4103 states that “[e]ach program, and plan shall: conform to the principles, standards, and related requirements contained in the regulations; provide for adequate administrative control by appropriate authority; provide that information concerning the selection and assignment of employees for training and the applicable training limitations and restrictions be made available to employees of the agency; and, provide for the encouragement of self-training by employees by means of appropriate recognition of resultant increases in proficiency, skill, and capacity.”

DoD Civilian Training Policy. DoD Directive 1430.4, “Civilian Employee Training,” November 16, 1994, requires DoD Components to conduct internal reviews of training needs and establish and administer training programs. The DoD Directive requires that “DoD Components provide the training necessary to ensure maximum efficiency and effectiveness of civilian employees in performing their official duties, and to encourage employees in their efforts for self-improvement.” In addition, the Directive requires “heads of DoD Components to plan, program, and budget for training programs to meet employee development needs for a well-trained work force of employees and potential managers and executives, and integrate such programs with other personnel management and operating functions.”

DoD Military Training Policy. DoD Directive 1322.18, “Military Training,” January 9, 1987, requires that “[a]ll training of military members shall be based on requirements for knowledge and skills needed for specific military jobs or, as applicable, on requirements for broader military skills, such as leadership.” In addition, the Directive states that “[e]ach Military Service shall maintain military training programs, including institutional courses and OJT [on-the-job training], which, with job experience, provide for the continued development of NCOs [noncommissioned officers] as leaders and skilled technicians.”

Sufficient Guidance

DoD Components and DTRA/ST received guidance from a wide range of sources and nearly all licensing officers stated the guidance was adequate for performing their duties. Guidance included, but was not limited to, the EAA and the AECA, Presidential directives, the Export Administration Regulations, the International Traffic in Arms Regulations, the National Disclosure Policy, various DoD publications, and various DTRA/ST internal policies and procedures. We interviewed licensing officers to ascertain whether they were generally satisfied with current guidance available on performing their duties. Of the 16 licensing officers we interviewed, 14 stated that they felt they had the necessary guidance to perform their duties. Of the two licensing officers who said they had not received adequate guidance, one cited the EAA as containing insufficient detail and the other stated that management was unwilling to put important guidance in writing.

Training

DoD Component and DTRA/ST licensing officers stated they generally felt they had sufficient training; however, some licensing officers stated that a classroom training program and training plan for reviewing export license applications should be established. A classroom training program was not established because DoD supervisors relied on on-the-job training and mentoring as the primary means of training new licensing officers. Although licensing officers generally considered their training sufficient, the law and DoD publications require each agency to have a training plan, and include, besides on-the-job training and mentoring, classroom training as a means to meet mission-related organizational and employee development needs.

Army. Although licensing officers stated they received sufficient training, the Army did not have a classroom training program or training plan for personnel reviewing export license applications. An Army supervisor stated that Army licensing officers primarily received on-the-job training and attended seminars on export controls, security, and program management. Army management officials stated that licensing officers needed classroom training.

Navy. Navy licensing officers stated they were sufficiently trained, but the Navy did not have a classroom training program or training plan for personnel reviewing license applications. A Navy supervisor stated that “on-the-job

training was the best way to keep up with the state of the art.” The supervisor also stated that the Navy had six active duty action officers assigned to review export license applications and that those officers were assigned based on their knowledge of a variety of commodities. The Navy supervisor stated that the only knowledge missing was expertise in submarines. Nevertheless, Navy licensing officers stated they thought a classroom training program would be beneficial.

Air Force. An Air Force licensing officer stated that licensing officers could benefit from additional training. The Air Force did not have a classroom training program or training plan for personnel reviewing export license applications. An Air Force supervisor stated that Air Force licensing officers received minimal instructions to perform their duties. As a result, the Air Force was in the process of developing a training program for licensing officers. The Air Force supervisor stated that DTRA/ST should provide some type of training program to all DoD Components.

Joint Staff. A Joint Staff licensing officer stated that he had good general training, but could benefit from additional export licensing training. The Joint Staff did not have a training program or plan for military personnel reviewing export license applications. The Joint Staff officer stated that he had not received any export control training since starting with the Joint Staff in October 1998. The officer stated that prior to the Joint Staff assignment he attended the Industrial College of the Armed Forces, where he wrote a munitions study. He stated that he had good general training, but that he could use some classroom training on the export licensing process.

DTRA/ST. DTRA/ST licensing officers generally stated they had received sufficient training; however, a classroom training program or plan for training personnel responsible for reviewing export license applications was not established. We interviewed all 16 licensing officers at DTRA/ST; 14 stated that they were satisfied with the training they had received. The remaining two licensing officers had not received any export license training. One said he did not need any, the other stated DTRA/ST supervisors stated that on-the-job training and mentoring were the primary means of training new licensing officers and that they encouraged licensing officers to take available courses. DTRA/ST officials stated they thought a classroom training program was not needed.

Lack of Training Impact

We were unable to determine if the lack of classroom training or a training plan materially affected the ability of licensing officers to perform their duties because, generally, licensing officers stated that they had received sufficient training. We reviewed annual performance ratings of 16 civilian and military licensing officers and found that 15 received outstanding performance ratings and awards. The ratings were based on established job performance standards. Based on the personnel documents that were provided, we concluded that some of the individuals may not have had the required breadth or depth of experience

when initially appointed as licensing officers. However, they appear to have gained the experience necessary to perform their duties. Also, DoD Components did not state that the licensing officers were unable to perform their assigned duties.

Recommendations, Management Comments, and Audit Response

Q.8. We recommend the Director, Defense Threat Reduction Agency:

A. Develop an agency-wide training policy, training plan, and a classroom training program for Defense Threat Reduction Agency licensing officers.

Management Comments. The Under Secretary of Defense for Policy concurred, stating that the Defense Threat Reduction Agency will develop a customized course of formal classroom training. In addition, the Defense Threat Reduction Agency will develop an action plan for such a course, including resources to support it, by September 30, 1999.

Audit Response. The Under Secretary's comments are partially responsive. Although we commend the Defense Threat Reduction Agency for developing a customized course of formal classroom training, the Under Secretary's comments did not address development of an agency-wide training policy and plan for licensing officers. Therefore, we request that the Under Secretary of Defense for Policy provide comments on developing a general agency-wide training policy and plan for the Defense Threat Reduction Agency in response to the final report.

B. Provide the classroom training program, developed in response to Q.8.A., to DoD Components to assist in developing their own training plans.

Management Comments. The Under Secretary of Defense for Policy concurred. The Under Secretary of Defense for Policy stated that the Defense Threat Reduction Agency would offer the customized course of formal classroom training to DoD Components to assist in developing their own training plans.

Question 9. Foreign Disclosure and Technical Information System

Review the adequacy of the databases used in the licensing process, such as the DoD FORDTIS, paying particular attention to whether such databases contain complete, accurate, consistent, and secure information about dual-use and munitions export applications.

FORDTIS provides a useful communication and coordination mechanism for DoD Components on export control matters, although limitations existed in the system that reduced the support provided to decision-makers. In addition, as discussed in Question 13, inadequacies existed in the use of FORDTIS in providing an audit trail for export licensing decisions. Limitations in the system existed because scheduled improvements and upgrades had not been implemented, although limitations were recognized. As a result of the limitations, officials were using an automated information system that provided less than optimum support.

FORDTIS Policy

FORDTIS. DoD Directive 2040.2 requires the Under Secretary of Defense for Policy to develop and maintain comprehensive reference databases on goods, munitions, services, and technology transfer matters that are accessible by all DoD Components. The Under Secretary of Defense for Policy or his designee manages and administers FORDTIS to ensure that it is responsive to user requirements, and develops, publishes, and maintains DoD Manual 5230.18-M, "The Foreign Disclosure and Technical Information System (FORDTIS)," July 1985. FORDTIS is one of four operational systems within the Security Policy Automation Network. In addition to FORDTIS, the other systems are the National Disclosure Policy System, the U.S. Visits System, and the Classified Military Information System.

Technology Protection System. The subsystem of FORDTIS used to support the export license review process is the Technology Protection System. The Technology Protection System is sponsored by the Under Secretary of Defense for Policy and was developed by the Policy Automation Directorate. It is the primary automated system used by DoD to carry out responsibilities assigned by the EAA and the AECA. The Technology Protection System began operations as a part of FORDTIS in 1982.

Extent of System. The Technology Protection System assists the U.S. Government in meeting its national security objectives by providing high-level decisionmakers and analysts a dedicated automated system to facilitate decisions on transfers of munitions and technology to foreign governments and international organizations. The system operates at the Secret level and supports

about 700 users at 150 remote sites in the Office of the Secretary of Defense, the DoD agencies, the Military Departments, the Joint Staff, and some non-DoD organizations.

Technology Protection System Databases. The Technology Protection System is composed of the Commodity Control List and the Munitions databases. The Commodity Control List database provides workflow management and decision support for exports controlled by the Export Administration Regulations. An unclassified automated link with Commerce supports the Commodity Control List database. The Commodity Control List database handles about 11,000 applications and 30,000 automated records per year. Since 1982, Technology Protection System records have been available on line through FORDTIS. The Munitions database provides workflow management and decision support for the review of applications for commercial munitions exports controlled by the International Traffic in Arms Regulations. The Technology Protection System has classified and unclassified automated links with State to support the Munitions database. The Munitions database handles about 12,000 applications and about 50,000 staffing records per year.

Communication and Coordination Through FORDTIS

FORDTIS provides a useful communication and coordination mechanism for DoD Components on export control matters. Officials who reviewed our samples of 51 dual-use and 54 munitions cases reported that the positions in FORDTIS were generally consistent with their records. Officials at DoD Components and DTRA/ST generally reported no significant problems with using FORDTIS as a means of documenting their decisions on license applications. However, as discussed in Question 10, one DoD Component expressed concerns about alterations made in FORDTIS records.

Limitations existed in the system that reduced the support provided to decisionmakers. The limitations included accommodating new information, accessing FORDTIS, completeness of comments fields, modernization efforts, query capability, security awareness, and transmitting electronic data.

Accommodating New Information. The system as configured required the user to retype or recopy previous positions when revised versions of dual-use cases were received from Commerce, and it did not alert users when new information was provided.

Accessing FORDTIS. DoD officials who reviewed export license applications in the Office of the Under Secretary of Defense for Policy did not have access to FORDTIS terminals. The nine country desk officers in the Office of the Assistant Secretary of Defense (International Security Affairs) did not have access and also did not know the purpose of FORDTIS.²² As a result, several

²²Country desk officers in the Office of the Assistant Secretary of Defense (Special Operations/Low-Intensity Conflict) and the Assistant Secretary of Defense (Strategy and Threat Reduction) also review export license applications, but we did not interview them.

stated that they had incomplete data because they lacked information, including historical data, from DTRA/ST. One stated that he would like information on all cases for his country. In most instances, because of the lack of information, the country desk officers did not review cases or performed only cursory reviews of cases referred to them by DTRA/ST.

Completeness of Comments Fields. The comments fields did not always contain an explanation of how DTRA/ST licensing officers developed the consolidated DoD position on cases, including comments on why the final DoD position was provided before receiving all DoD Component inputs. In our sample data, 16 of 51 dual-use cases and 2 of 20 munitions cases documented the DTRA/ST decisionmaking process in the comments fields in FORDTIS.

Modernization Efforts. DoD modernization efforts may further limit FORDTIS capabilities because of the need for better coordination with Commerce. FORDTIS is a useful tool for decisionmakers because it can obtain information from the Commerce export licensing computer system. However, that may not be possible in the future if modernization efforts are not coordinated. The dual-use licensing process is undergoing a modernization effort that includes significant modifications to FORDTIS. Commerce is considering modernizing its export licensing computer systems. On October 20, 1998, the Policy Automation Directorate attached a deliverable under the terms and conditions of an existent contract for the purpose of documenting and reengineering the Commodity Control List database for a Windows-based environment. The current database runs on a disk operating system that does not fully support user requirements. Access limitations were based on organization and personnel responsibilities and organization hierarchy. The Director, Policy Automation Directorate, stated that progress was being made on the new requirements for the Commodity Control List database and that DTRA/ST and DoD Components had completed the definition of the requirements. The goal of the modernization efforts is to provide a user-friendly tool to process, track, and forward positions on export license applications dealing with dual-use commodities.

Query Capability. FORDTIS queries led to different results and were described as cumbersome by users. Information may be retrieved from FORDTIS using criteria selected by the user. A query retrieves active and historical case data, which provide background and precedent information to assist in the decisionmaking process.

FORDTIS uses two query systems: one uses keywords and the other uses full text. Although the keyword system was faster, it was dependent upon the users' selection of keywords, which was not always consistent. As a result, keyword queries could give different results, which also differed from full text queries. Users also expressed concerns about the lack of consistency among repetitive queries and the inability to conduct sophisticated queries. Without those capabilities, querying FORDTIS was cumbersome. One licensing officer stated that queries to identify end users produced inconsistent results. For example, because an organization can be described several different ways, different keyword or full text queries would identify different end users.

Security Awareness. All licensing officers had passwords and user identifications. FORDTIS levels of access vary according to responsibility. A requirements report written for DTRA/ST and the Office of the Under Secretary of Defense for Policy states that user access approvals for the Security Policy Automation Network databases were not clearly understood at the different user and security office levels, and not understood at all at the system administrator level. The report states that the lack of understanding caused the access security to be less effective than it was designed to be.

Transmitting Electronic Data. The system did not have the capability to have documents scanned into it to facilitate information transfer. Engineers who worked with the technical data and DoD Components stated that scanning capabilities would improve the Components' ability to perform analyses in a more timely manner.

Limitations

Limitations in FORDTIS existed because scheduled improvements and upgrades had not been implemented, although limitations were recognized. The FORDTIS requirements document, "Combined Functional Data Requirements for the Commodity Control List Database," October 20, 1998, addresses the software limitations. However, other limitations may continue. In a memorandum dated March 9, 1998, the Director, DTRA/ST, offered users in the Office of the Assistant Secretary of Defense (International Security Policy), the Office of the Assistant Secretary of Defense (Special Operations/Low-Intensity Conflict), and the Office of the Assistant Secretary of Defense (Strategy and Threat Reduction) the opportunity to gain access to FORDTIS. All of these offices are within the Office of the Under Secretary of Defense for Policy, however, that office expressed little interest in taking advantage of DTRA/ST efforts to get them on line. As a result of that resistance, country desk officers did not have the benefit of accessing FORDTIS for historical data or information concerning commodities exported to their countries. Another possible limitation involved coordination with Commerce. DoD officials stated that Commerce modernization efforts may be limited because of uncertainty regarding funding.

Support for Users

FORDTIS limitations resulted in DoD officials using an automated information system that provided less than optimum support. Officials have taken steps to identify requirements, but successful implementation is critical. Of particular importance is coordinating modernization efforts with Commerce to ensure that DoD can continue to transfer license information from Commerce export licensing computers.

Recommendations and Management Comments

Q.9.A. We recommend that the Under Secretary of Defense for Policy take action to obtain Foreign Disclosure and Technical Information System access for its country desk officers who review export license applications.

Management Comments. The Under Secretary of Defense for Policy concurred, stating that a memorandum will be issued by June 30, 1999, directing those who review license applications in the Office of the Under Secretary of Defense for Policy and other DoD Components to obtain access to and use FORDTIS to review and communicate their recommendations on licenses.

Q.9.B. We recommend that the Deputy Under Secretary of Defense (Policy Support) monitor Commerce's system modernization efforts to ensure that DoD can transfer license information from Commerce export licensing computers.

Management Comments. The Under Secretary of Defense for Policy concurred, stating that the Deputy Under Secretary of Defense (Policy Support) will continue to work in close coordination with the Departments of Commerce and State on efforts to upgrade FORDTIS.

Question 10. Changing Licensing Recommendations

In congressional testimony, a DoD licensing officer described instances where licensing recommendations he entered on FORDTIS were later changed without his consent or knowledge. Examine those charges, and assess whether such problems exist at your agencies.

Instances occurred in which recommended positions entered in FORDTIS by a licensing officer were changed without the consent or knowledge of that officer, although the number of such occurrences could not be determined. In addition, documentation related to the changes was not always complete. Changes in the recommended positions occurred because, in some instances, the supervisor did not agree with the recommendations made by the licensing officer and the supervisor took authorized action to change the recommendations. In other instances, the administrative procedures established to record the final DoD positions on cases that were escalated through the interagency dispute process were not adequate. As a result, in some instances, the documentation for legitimate supervisory action was not complete and, in other instances, the official DoD record, which may serve as a precedent for future actions, was inaccurate.

Recording Export License Recommendations

Databases and Data Fields. After reviewing information from export license applications referred from Commerce or State, DoD staff enters recommended positions and supporting information within selected databases and data fields in FORDTIS. Information related to Commerce export license applications is recorded in the Commodity Control List database and information related to State export license applications is recorded in the Munitions database. Data fields used to record information included, but were not limited to, an action officer field, a recommendation field, a DoD position field, a comments field, and an approval field.

Action Officer Data Field. For dual-use cases, the action officer data field contains the name or in some cases a code designating the official assigned to the case. Licensing officers from the Dual-Use Branch or the Munitions Branch are responsible for referring cases to other offices within DTRA/ST and to other DoD Components, as appropriate. The licensing officer is also responsible for evaluating any recommendations received from other offices and formulating a proposed DoD position.

Recommendation Data Field. Licensing officers enter their recommended positions in FORDTIS and give a hard copy to their supervisor for approval. The FORDTIS recommendation data field contains a one-letter code showing the final DoD recommendation on a license application. Code "A" means that DoD recommends approval of the application. Code "B" means qualified approval and indicates that one or more conditions are

recommended to be placed on the license. Code “C” means that DoD objects to the export. Sixteen other codes are used to indicate other recommendations, such as to return without action or to hold the application for further information. Engineers and policy staff in DTRA/ST stated that they generally assume that the action officer listed in the action officer data field supports and is aware of the position stated in the recommendation data field.

DoD Position Data Field. The DoD position data field provides a brief narrative discussing the DoD recommendation. If the DoD recommendation was to approve with conditions, the DoD position field states or summarizes the conditions recommended for the export license. The DoD position field must contain information if a code was entered into the DoD recommendation field. The DoD position field can be read by anyone who has access to the FORTDIS record on a particular case, but editing the field is limited to the action officer, the immediate supervisor and higher level managers, and authorized administrative personnel.

Comments Data Field. The comments data field provides additional information on the case. A description of the DoD recommendation process issued in 1994 by DTRA/ST stated that the comments data field contains “any information needed to explain the current DoD recommendation and serve as background information for future requests.” Only authorized staff in the office originating the comments can read or edit the comments data field on a particular case. For example, information in the comments field entered by personnel in the Licensing Division at DTRA/ST cannot be read by personnel in the Technology Division at DTRA/ST or by personnel in the Army office that deals with export licenses.

Approval Data Field. The supervisor reviews the proposed DoD position and, upon approval, forwards the hard copy to administrative personnel who check for completeness and then close and save the FORDTIS record for transmission to Commerce. The approval data field indicates the supervisor that has reviewed and approved the proposed DoD recommendation prepared by the action officer. It may also indicate a non-supervisor who is acting for a supervisor. According to DTRA/ST officials, higher level approval of cases occurs on an exception basis if the first-level supervisor elects to elevate a case or if upper management has directed that certain types of cases or decisions be elevated to their attention.

Modifying Databases. FORDTIS permits multiple users to enter information in the databases, and information already entered in the database may be edited or supplemented by authorized users within a certain period of time. When a case is received by DoD from Commerce or State, the case is established in FORDTIS and referrals are directed by the Dual-Use and Munitions Branches at DTRA/ST. Once the Dual-Use or Munitions Branch refers the case to another office, properly authorized staff in those offices may type, save, and edit their position repeatedly until the positions are sent to the Dual-Use or Munitions Branch. Once positions are sent to the two branches, the system does not permit changes unless the case is released back to the originator of the position. The supervisors in the License Division are authorized to modify proposed DoD positions entered in FORDTIS by licensing officers but cannot modify the input

provided by other DTRA/ST offices or DoD Components. After supervisory approval, the final DoD position on the case is released to Commerce or State. A licensing officer may review the FORDTIS record after the case has been approved to determine whether the supervisor accepted or changed the recommendation.

Policy on Supervisory Changes. DTRA/ST written policy does not specify the procedures to follow when supervisors change recommended positions, and practices varied across DTRA/ST branches. In the Dual-Use Branch, the supervisor said his preference was to consult with the licensing officer prior to making a change in the recommended position, but that did not always occur because of time constraints. When changes were made to licensing officer recommendations without informing the licensing officer, the practice since 1996 has been to maintain the dissenting opinion in the database within the DoD position field or the comments field. A previous supervisor in the Dual-Use Branch wrote in an email that when the recommendation or position field was changed, the action officer field should be changed to reflect the name of the person making the change. However, the current supervisor did not carry forward that policy. The practice in the Munitions Branch was for the supervisor and the licensing officer to discuss differences and elevate disagreements to the next level supervisor. Outside the License Division at DTRA/ST, either supervisors did not review and thus did not change subordinate staff recommendations or the stated policy was for supervisors to put their name into the action officer field if they took a position that the subordinate staff did not agree with.

Changes Without Consent or Knowledge

Description of Changes. Instances occurred in which recommended positions entered in FORDTIS by a licensing officer were changed without the consent or knowledge of the licensing officer. One of 15 licensing officers reported 10 instances in which he found, after the DoD position was released, that changes had been made to his recommended positions without his consent or knowledge. The other licensing officers reported that either no changes were made or they knew about the changes, or they provided reasons why changes were acceptable. We reviewed eight cases, which are discussed below.

- In five cases, the DoD position field and DoD recommendation field were changed by the supervisor to reflect a different DoD position than the one recommended by the licensing officer. In each of the five cases, the DoD position field and corresponding DoD recommendation field were changed from recommending that the application be denied or returned without action, to recommending approval of the application with conditions. The licensing officer did not consent to the changes, but the supervisor stated that each decision was appropriate given the facts of each case. In one instance, the supervisor and the licensing officer agreed that they discussed the case prior to, or at the time of, the change. In the other four cases, no discussion occurred or the occurrence of a discussion is disputed.

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- In the remaining three cases, administrative procedures related to recording OC decisions produced a situation where the DoD recommendation field showed a code that was inconsistent with the narrative in the DoD position field. All three cases were ones that had been escalated to the OC. In two of those cases, the DoD recommendation field contained a “B,” signifying that the application was approved with conditions, but the DoD position field contained a narrative showing that the actual DoD position was to deny the application. In the other case, a narrative in the DoD position field showed that DoD had decided to reverse the original recommendation of the licensing officer and approve the case with conditions after a discussion at the OC. However, the DoD recommendation field contained a “C,” indicating that the DoD position was denial.

Quantifying Changes. The number of instances in which recommended positions were changed without the consent or knowledge of licensing officers could not be determined. Specific information related to the quantification of the two types of changes follow.

- For changes that occurred because the supervisor disagreed with the recommendation from the licensing officer, no query of the FORDTIS database could be done to identify changes in proposed positions. In addition, reviews of the hard copies of the recommendations submitted to supervisors for review, which would document supervisory changes, were limited because DTRA/ST officials reported that hard copies were periodically destroyed to preserve file space. The licensing officer stated that he did not know the frequency of such changes because he did not routinely review past cases to determine if the supervisor had modified positions or if the administrative procedures for recording OC decisions produced inaccurate records of the DoD position. The supervisor agreed that the frequency and number of changes could not be determined. Licensing officers who reviewed our samples of 51 dual-use and 20 munitions cases did not identify any with similar changes to the FORDTIS record, although in one case a licensing officer questioned the wording, but not the content, of a position. In another case in the samples, the supervisor made a change to the initial recommendation from the licensing officer but, in that case, the supervisor put his name in the action officer data field. The nine NSA cases were not in FORDTIS.
- Changes related to the administrative procedures for recording OC cases seemed to be more common. One case from among our sample of 51 dual-use cases showed a similar inaccuracy in recording the results from an OC case. A separate sample of 26 OC cases showed similar discrepancies related to administrative procedures in 8 records. The recording of OC decisions are discussed in relation to the reliability of the audit trail under Question 13.

Completeness of Documentation

Documentation related to the changes was not always complete. In the five cases where the supervisor changed the DoD recommendation and position fields from denial or return without action to approval with conditions, documentation in the FORDTIS records showed the dissenting opinion. However, the records did not consistently document who made the changes or why the changes were made. In the five cases, the action officer field, which is visible to all other offices, showed the name of the licensing officer who did not concur with the recommendation. In three of the five cases, the DoD position field did not show the supervisor's name and date when he entered a DoD position different from the one recommended by the licensing officer. Also, in one of the five cases, the comments field did not explain how the supervisor reconciled differing viewpoints from other DTRA/ST offices or DoD Component offices, although the supervisor had previously criticized a licensing officer for failing to provide such explanations in other cases. In that case, the licensing officer's original position incorporated an objection by an engineer within DTRA/ST to the sale of certain materials to an entity in Russia. The engineer's position was opposed by an outside agency that supported approving the sale with conditions. The record included no information on whether the engineer's concerns were mitigated or how the conflict with the outside agency was resolved, although discussions with the engineer revealed that certain additional information caused him to agree to approve the sale with conditions. In three cases, the positions in the record from other DTRA/ST offices were in agreement with each other and with the supervisor's position. In those cases, the supervisor included a narrative in the comments field that noted a lack of support among other offices for the licensing officer's position. In the other case, the supervisor included a brief explanation for the position on a case where another DTRA/ST office had objected.

Why Changes Occurred

Supervisory Changes. Changes in the recommended positions occurred because, in some instances, the supervisor did not agree with the recommendations made by the licensing officer and the supervisor took authorized action to change the recommendation. The positions taken by the supervisor on individual cases were supported by other offices but varying levels of support can be found in each case.

- For example, in one case, little support was found for the licensing officer's opposition to the sale of material needed for a program that was part of a U.S. Government agreement with the recipient country. The opposition was based on the belief that the program generally conflicted with the Missile Technology Control Regime, not on the specific appropriateness of the sale. The Chair of the Missile Technology Export Control Group²³ at State and the country desk officer

²³The technical committee that reviews license applications for compliance with the Missile Technology Control Regime.

at the Office of the Assistant Secretary of Defense (International Security Affairs) did not concur with the licensing officer's position and the supervisor had previously expressed opposition to positions of the licensing officer in similar cases. However, support existed for the technical assertions made by the licensing officer and the legitimacy of the policy issue.

- In another case, the sale was initially questioned by the engineer reviewing the case and the entity was among those on a list established by Commerce that are to receive increased scrutiny for sales. The supervisor changed the DoD position to approval based on receipt of a letter from the end user stating that the work was related to an Air Force contract. The engineer, although not consulted at the time of the decision, said the letter would have been sufficient to mitigate concerns. However, a policy analyst in DTRA/ST stated that accepting such end-user claims alone, without more complete documentation from the Air Force, posed a diversion risk.

Administrative Procedures for Recording OC Decisions. In other instances, the administrative procedures established by DTRA/ST management for recording the final DoD positions on cases that were escalated through the interagency dispute process were inadequate. The incorrect recording of the DoD position on cases escalated to the OC seemed more common. A recommendation for correcting the problem is included under Question 13.

Conclusion

In some instances, the documentation for legitimate supervisory action was not complete and, in other instances, the official DoD record, which may serve as a precedent for future actions, was inaccurate. Record changes were authorized or the changes occurred through inadequate administrative procedures. Still, in cases that involve substantive disagreements over the acceptable level of risk, procedures should ensure that adequate explanations are provided for differing positions. Also, given the practice for other licensing officials to assume that the licensing officer listed in the action officer data field concurs with the position and has detailed knowledge about the case, information in the DoD position field providing the name of the person making the change and the date of the revision would establish accountability for the changes.

Recommendation, Management Comments, and Audit Response

Q.10. We recommend the Director, Technology Security Directorate, Defense Threat Reduction Agency, establish procedures to ensure that instances are adequately documented in which supervisors change the position of a licensing officer with or without the consent or knowledge of

the licensing officer. Procedures should ensure that electronic records include the name of the person making the change and the reason for the change.

Management Comments. The Under Secretary of Defense for Policy partially concurred, stating that by July 31, 1999, the Director, DTRA/ST, will issue guidance clarifying the documentation requirements for the license review process. That guidance will include the opportunity for licensing officers to appeal in writing changes to their recommendations on export license applications. However, the Under Secretary disagreed that a lack of guidance on documenting licensing decisions was a material management control weakness.

Audit Response. The Under Secretary of Defense for Policy comments are responsive. We request that a copy of the guidance discussed above be provided in the management comments on this final report. The materiality of the control weaknesses is discussed further in Appendix A.

Question 11. Pressure on Licensing Officers

Determine whether license review officials are being pressured improperly by their superiors to issue or change specific recommendations on license applications.

With one exception, licensing officers did not report receiving any improper pressure to change specific recommendations on license applications. Other staff at DTRA/ST who did not formulate proposed recommendations on license applications, but who were at times involved with reviewing or processing license applications, also did not report any improper pressure directed at them to change positions on specific license applications. However, several of the DTRA/ST staff members stated that management applied indirect pressure to encourage certain viewpoints. Any individual that believes he or she has been the subject of a prohibited personnel practice should direct the matter to the offices with specific jurisdiction in those matters.

Policy

With respect to personnel decisions, civilian employees are protected from certain employment actions by 5 U.S.C. 2302. Prohibited personnel practices described in 5 U.S.C. 2302 include, but are not limited to, unlawful discrimination, coercion of political activity, unauthorized preferences, reprisal for whistleblowing, reprisal for cooperation with an agency Inspector General Office, and discrimination based on conduct not related to the job. Military personnel are protected under 10 U.S.C. 1034 from retaliatory personnel actions taken in response to lawful, protected communications with members of Congress, an agency Inspector General, or other designated agency officials.

Reported Actions

With one exception, licensing officers did not report receiving any improper pressure to change recommendations on license applications. Specifically, one of the 15 licensing officers on the job as of March 22, 1999, responsible for formulating the proposed DoD recommendation on license applications received what the licensing officer perceived as improper pressure to modify his general approach to reviewing applications. The pressure reported included, but was not limited to, critical comments in case records concerning the documentation provided, lowered performance evaluations, and restrictions on attendance at interagency meetings followed by a letter of reprimand when the licensing officer attended a meeting. According to the licensing officer, the negative actions began in the mid-1990s when he had refused to change his position on cases related to the export of machine tools to China. In those cases, the licensing officer's supervisor subsequently took over the cases, but included the

licensing officer's dissenting views in the official case records. The licensing officer also alleged that the supervisory pressure resulted from testimony provided by the licensing officer to Congress and information provided to the Inspector General, DoD.

The other 14 licensing officers with similar responsibilities stated they had not experienced any inappropriate supervisory action. They identified instances where disagreements arose between supervisors and staff on license recommendations but stated that management actions in the resolution of those cases were not improper.

Other staff at DTRA/ST who did not formulate proposed recommendations on license applications but who were at times involved with reviewing or processing license applications did not report any improper pressure directed at them to change positions on specific license applications. However, several of the other staff stated that management applied indirect pressure to encourage certain viewpoints. An individual with administrative responsibilities stated that promotions and bonuses were based on cooperation with management. One official stated that travel for conferences was denied to personnel who did not go along with management's positions on license applications. Another individual stated that his participation in certain discussions and his awards were limited because he had provided information to outside investigators.

Information on Allegations

Regarding the specific allegations of the one licensing officer, a lower personnel appraisal did occur for the licensing officer after two rating periods during which the licensing officer expressed opposition related to sales of machine tools to China. Our sample of 51 dual-use cases had no instances of critical comments concerning the documentation provided, although cases with similar deficiencies existed. However, the sample also showed instances in which the documentation standards established by the supervisor were met by other licensing officers. The temporary restriction on interagency meeting attendance applied to all licensing officers and, according to the supervisor, was based on the need to perform the higher priority work of processing cases.

Any individual that believes he or she has been the subject of a prohibited personnel practice should direct the matter to the offices with special jurisdiction in those matter. The Directorate for Departmental Inquiries, within the Office of the Inspector General, DoD, investigates and performs oversight on allegations of reprisal against military members, Defense contractor employees, and nonappropriated fund employees. The U.S. Office of Special Counsel, an independent Federal agency, investigates allegations of prohibited personnel practices involving civilian Federal employees, especially reprisal for whistleblowing.

Question 12. Pre-License and Post-Shipment Activities

Determine whether our Government still uses foreign nationals to conduct either pre-license or post-shipment licensing activities and whether such a practice is advisable.

In general, Commerce and State conduct pre-license and post-shipment licensing activities. DoD provides limited support to Commerce and State pre-license and post-shipment licensing activities through Defense Attaché Offices. In December 1991, DoD started to support State by monitoring certain foreign space launch activities under the provisions of munitions licenses. DoD has not used and does not plan to use foreign nationals to support Commerce or State pre-license and post-shipment licensing checks or to monitor space launches.

DoD Support to Commerce and State

In general, Commerce and State conduct pre-license and post-shipment licensing activities. The Foreign Commercial Service conducts pre-license and post-shipment checks, and the Commerce Office of Export Enforcement conducts “Safeguard” assessments of foreign commercial entities, based on on-site visits, for dual-use items. Foreign Service officers perform “Blue Lantern” checks, which verify information on munitions license applications and determine whether the use of export commodities is consistent with the terms of the export license.

DoD provides limited support to Commerce and State pre-license and post-shipment licensing activities through Defense Attaché Offices. Each U.S. Embassy establishes its own program for conducting pre-license and post-shipment checks, and the Defense Attaché Office may be required to assist the program. Representatives from the Office of the Inspector General, Commerce, surveyed U.S. Foreign Commercial Service personnel at 27 U.S. Embassies and learned that Defense Attaché Offices helped to coordinate checks, provided background information, and helped to coordinate activities with the U.S. security assistance office, but rarely participated in on-site checks.

In December 1991, DoD started to support State by monitoring certain foreign space launch activities under the provisions of munitions licenses. In the “Arms Export Control Act Delegation of Authority,” December 6, 1991, the Secretary of State delegated to the Secretary of Defense responsibility for ensuring compliance with the “Memorandum of Agreement (MOA) on Satellite Technology Safeguards.” The memorandum of agreement was between the United States and the People’s Republic of China, and it pertained to AUSSAT-B satellite launches. The Air Force Space Command conducted space launch program support, monitoring activity, and reporting. DTRA/ST provided oversight and assistance with a staff of fewer than five individuals.

DoD Uses U.S. Personnel

DoD has not used and does not plan to use foreign nationals to support Commerce or State pre-license and post-shipment licensing checks or to monitor space launches. The Offices of the Inspectors General for Commerce and State visited U.S. Embassies and U.S. Consulates in Abu Dhabi, United Arab Emirates; Ankara, Turkey; Athens, Greece; Beijing, China; Hong Kong, China; Kuala Lumpur, Malaysia; Madrid, Spain; Sao Paulo, Brazil; and Tel Aviv, Israel.²⁴ The Defense Attaché Office, Tel Aviv, reported that it participated in Commerce and State pre-license and post-shipment licensing checks and used only U.S. personnel. The Defense Attaché Office, Abu Dhabi, supported State licensing checks, but that support did not include participation in on-site visits. Of the 27 Foreign Commercial Service posts contacted by the Office of the Inspector General for Commerce, none reported that Defense Attaché Offices participated in on-site checks. DoD uses U.S. Air Force personnel to monitor space launches and plans to use only U.S. personnel in future monitoring operations.

²⁴Representatives from the Office of the Inspector General for Commerce visited Beijing and Hong Kong, but those visits were conducted under a different project.

Question 13. Reliable Audit Trail

Determine whether the agency licensing process leaves a reliable audit trail for assessing licensing performance.

FORDTIS provided the only long-term audit trail for DoD positions on license reviews and it did not always contain complete and accurate records of DoD and U.S. Government positions. The audit trail provided by FORDTIS for the sample reviewed generally agreed with the Commerce electronic records. However, in one instance the Commerce records showed a change to the conditional license approval from DoD that was not shown in FORDTIS, and in another instance a conditional approval recommended by DoD for a license application was not included in the Commerce record. In addition, the audit trail provided by FORDTIS did not include new information presented at interagency decision meetings or detailed results of those meetings, records of all applications referred to NSA, and key correspondence or technical data. The inclusion of inaccurate DoD positions occurred because administrative controls were not in place to detect errors. The final U.S. Government position was not always included in FORDTIS because DTRA/ST did not consider it a priority to enter final U.S. Government positions in FORDTIS in a timely manner. FORDTIS records did not include new information presented at interagency decision meetings or all applications referred to NSA because procedures did not require the inclusion of that data. The audit trail provided by FORDTIS did not include key correspondence or technical data because optical scanning technology that would facilitate inclusion of that material had not been successfully implemented. As a result, the audit trail provided by FORDTIS cannot be used as a reliable means of assessing the degree to which overall DoD positions are in agreement with positions taken by the U.S. Government. In addition, the audit trail provided by FORDTIS provides less assistance than possible for deriving DoD positions for similar cases in the future.

Guidance Related to Documentation and Records

Federal and DoD Guidance. Office of Management and Budget and DoD guidance discuss the requirements related to documenting decisions and transactions. Office of Management and Budget Circular A-123 (Revised), “Management Accountability and Control,” June 21, 1995, lists recording and documentation as one of five specific management control standards. DoD Directive 5010.38, “Management Control Program,” August 26, 1996, states that the management control process shall be consistent with Office of Management and Budget Circular A-123 (Revised). DoD Directive 5015.2, “DoD Records Management Program,” April 11, 1997, on retention of records requires that heads of DoD Components ensure that records are created, maintained, and preserved to document the decisions, functions, organization, policies, procedures, and essential logistical, operational, and support transactions of DoD.

The time period for disposal of records varies depending on the disposition instructions for that type of record. Disposition instructions contain guidance on the time period for retention of records for administrative, audit, legal, and operational purposes. The Archivist of the United States provides guidance for the disposal of records common to all or several agencies of the U.S. Government through issuance of General Records Schedules. The National Archives and Records Administration provides guidance and reviews disposition instructions related to records not covered by General Records Schedules.

DTRA/ST Policy. In August 1996, Washington Headquarters Services provided DTRA/ST with the latest disposition instructions on dual-use and munitions case files. Those disposition instructions remained in effect as of March 1999. The disposition instructions provided that, after the case positions were documented in the FORDTIS database, certain hard-copy files could be destroyed when no longer needed for dual-use cases and after 90 days for munitions cases. The specific files eligible for destruction included reference materials that did not contribute to the preparation of the record, technical documents no longer needed for reference purposes, and non-substantive background papers. Officials stated that the FORDTIS electronic files are the official record for actions taken on a specific case reviewed by DoD. The Washington Headquarters Services disposition instructions did not address the length of time substantive records used to support the DoD position should be maintained before being purged.

Characteristics of the Audit Trail

FORDTIS provided the only long-term audit trail that existed for DoD positions on license reviews. FORDTIS was the only long-term audit trail because, although DTRA/ST maintained hard-copy files related to cases reviewed, those files were purged periodically after positions were entered in FORDTIS. FORDTIS was the official record for license applications that DoD reviewed. Key characteristics related to the audit trail maintained within FORDTIS are discussed below.

DoD and U.S. Government Positions. FORDTIS did not always contain complete and accurate records of DoD and U.S. Government positions. From among our sample of 51 dual-use and 20 munitions cases received from Commerce and State, respectively, 47 dual-use and 6 munitions cases did not contain a final U.S. Government position in FORDTIS. Another 9 dual-use cases referred to NSA were not recorded at all in FORDTIS. In addition, the final DoD position on cases that were escalated to the OC was not always accurately reflected in FORTDIS records. From among the 31 cases sampled that went to the OC for resolution, in 8 instances the DoD recommendation field did not reflect the final DoD position. The inclusion of inaccurate DoD positions for OC cases occurred because administrative controls were not in place to detect errors. The final U.S. Government position was not always included in FORDTIS because DTRA/ST did not consider it a priority to enter final U.S. Government positions into FORDTIS in a timely manner.

The audit trail provided by FORDTIS for the sample reviewed generally agreed with the Commerce electronic records. However, in one instance the Commerce records showed a change to the conditional license approval from DoD that was not shown in FORDTIS, and in another instance a condition recommended by DoD for a license was not included in the Commerce record. Comparing the electronic records from Commerce with the FORDTIS records showed additional discrepancies, although discrepancies usually involved relatively minor elements such as references to related cases that were included in one database and not the other. In the instance in which the Commerce record showed a change to the conditional license approval from DoD, a supervisor at DTRA/ST waived a license condition that was previously included. The conditional approval required a pre-license visit to a nuclear facility in India prior to the sale. Concerns about the facility reflected by that condition may have been well-placed, given that the facility was subsequently included on a list of entities published by Commerce that identifies organizations and companies that may be involved in proliferation activities. The DTRA/ST supervisor, who made the changes to the conditional license position during negotiations with Commerce officials prior to the OC meeting, questioned whether a pre-license check would provide new information of the well-known facility. The supervisor involved stated that he had begun to document phone calls regarding such negotiations with facsimile transmittals that were then passed to administrative personnel for use in updating the FORDTIS record. In the other instance, where a conditional approval by DoD was not included in the Commerce record, the condition not included dealt with restricting the export or retransfer of the item. The licensing officer stated that he was not concerned with proliferation from the end user but was concerned that Commerce did not use the language they had agreed upon.

Information Not Included. The audit trail provided by FORDTIS did not include new information presented at interagency decision meetings, records of all encryption applications referred to NSA, and key correspondence and technical data.

Interagency Meetings. Information in the FORDTIS record on the decisions made by the Chair of the OC included only a summary of the decision and the positions taken by each representative at the meeting. The FORDTIS record did not include information on why the Chair took a certain position, what new information may have been presented at the meeting, or an explanation of why DTRA/ST chose not to escalate cases on which DoD and the OC Chair held differing positions. Navy officials commented that such information would be useful for them during reviews of similar cases in the future. As of March 1999, DTRA/ST staff stated that they were beginning to enter in FORDTIS information from notes taken by DTRA/ST staff who attended OC meetings. Including data on new information raised at meetings and data on the basis for precedent-setting decisions would help meet the desire of the DoD Components for that data. The information must be extracted from notes taken at the OC meetings by DTRA/ST staff because detailed minutes of the meetings are not maintained by Commerce.

Encryption Cases. Records of NSA cases on selected encryption applications were not included in FORDTIS unless the cases were elevated to the OC. The direct referral of certain cases to NSA was consistent with the delegation of authority from DoD to Commerce. NSA maintained electronic files on the encryption cases reviewed and each of the sampled cases was on file. However, DTRA/ST officials who also reviewed selected encryption cases did not have access to the records on cases reviewed by NSA. Further, NSA officials reviewing encryption cases did not use FORDTIS, although other officials at NSA had access to the system. According to a DTRA/ST official, such cases were not put into FORDTIS in order to expedite case handling because, under current procedures, any case initially transferred to FORDTIS from Commerce would need to be reviewed by DTRA/ST staff. Because authority to review and decide certain encryption cases had been delegated to NSA, review of the cases by DTRA/ST staff would waste valuable staff time. In our opinion, that rationale may be valid from a case processing standpoint, but it does not provide an adequate audit trail. Inclusion of the results of all encryption cases in FORDTIS, either by inputting the information at FORDTIS terminals at NSA or through other means, would ensure a single source for records on DoD positions that is available to all FORDTIS users.

Key Correspondence and Technical Data. The audit trail provided by FORDTIS also did not include key correspondence and technical data. Key correspondence might include information from end users that responded to questions asked during the review process or messages among DoD reviewers. For example, in a case from April 1998 involving a sale to Russia, the hard-copy files, which were still available, included correspondence from the exporter to the Deputy at DTRA/ST that discussed concerns raised by DTRA/ST staff about the case. However, the information from the correspondence was not recorded in the FORDTIS file that would become the long-term audit trail after the hard copy was destroyed. Thus, DTRA/ST staff working a similar case in the future would not have the benefit of the information provided and would not be aware that the Deputy had been involved in making the decision. Technical data includes brochures and design drawings. Several engineers commented that having this information available would facilitate the review of future cases involving similar technology.

The audit trail provided by FORDTIS did not include key correspondence and technical data, as well as hard-copy substantive records used to support the DoD position, because optical scanning technology that would facilitate inclusion of that material had not been successfully implemented. DTRA/ST identified a requirement to implement electronic imaging to reduce selected case files and include scanned material in databases for ease of information transfer. Projects to achieve that began in 1995. In January 1997, officials from Los Alamos National Laboratory presented a concept demonstration of an Air Force pilot project to DTRA/ST and other DoD officials. Subsequently, in July 1997, the Air Force provided funding to the Office of the Deputy Under Secretary of Defense (Policy Support) to initiate further imaging activities. As of March 1999, the imaging system had not been implemented.

Conclusions

Because of the shortcomings of the audit trail provided by FORDTIS for the licensing process, it cannot be considered a reliable means of assessing the degree to which overall DoD positions are in agreement with positions taken by the U.S. Government. That does not mean that FORDTIS does not provide a useful mechanism for processing and adjudicating license applications. However, until steps are taken to ensure that the results of cases escalated to the OC are accurately entered in the system, broad conclusions about licensing performance are difficult to obtain. In addition, the audit trail provided by FORDTIS provides less assistance than possible for deriving DoD positions for similar cases in the future. By including resolution information, all organizations in DoD with access to FORDTIS can have complete information to use in reviewing cases.

Recommendations, Management Comments, and Audit Response

Q.13.A. We recommend the Director, Technology Security Directorate, Defense Threat Reduction Agency:

- 1. Establish procedures to ensure that Foreign Disclosure and Technical Information System records include the correct DoD position, particularly when cases are escalated.**
- 2. Establish procedures to ensure that Foreign Disclosure and Technical Information System records include details on new information presented at Operating Committee meetings, explanations of why DoD did not escalate cases on which DoD and the Operating Committee disagreed, records of encryption cases referred to the National Security Agency, and key correspondence and technical data.**

Under Secretary of Defense for Policy Comments. The Under Secretary of Defense for Policy partially concurred, stating that while the recommendations have some merit, they also have resource implications. The Director, DTRA/ST, will consider the recommendations as part of an overall review of the DoD licensing process, scheduled for completion by September 30, 1999. In addition, the Under Secretary stated that records with DoD position errors were being corrected, that the new database for Commerce cases that is currently under development will have additional fields to capture decisions and comments for cases that are escalated, and that DoD approached State about providing final U.S. Government decisions in an electronic format. Also, the Under Secretary stated that requiring NSA records on encryption cases be recorded into FORDTIS would impose a resource burden and may result in review delays. NSA has been delegated authority to receive and provide the DoD position on encryption cases directly to the Department of Commerce. The Under Secretary also recommended that Commerce resuscitate its summaries of OC meetings. The Under Secretary believes that the absence of

final U.S. Government decisions, information presented at the OC, explanations of why DoD did not escalate disputed cases, NSA information, and digitized key correspondence and technical data are not material management control weaknesses.

National Security Agency Comments. Although no comments were required, NSA responded to the draft report. NSA nonconcurred with the requirement in Recommendation Q.13.A.2. that information on encryption cases referred directly to NSA be entered in FORDTIS. NSA stated that the recommendation would increase the time it takes to review applications.

Audit Response. The Under Secretary of Defense for Policy comments are partially responsive. We consider the review of the DoD licensing process and actions to improve the quality of FORDTIS records as positive actions. However, the absence of the information identified in this report degrades the quality of FORDTIS, which continues to lack important historical information of value to future decisionmakers. NSA records on encryption cases must become part of the historical record of DoD licensing positions. As FORDTIS is the only long-term audit trail that exists for DoD positions on license reviews, it is imperative that all licensing positions be entered into FORDTIS. Therefore, we request the Under Secretary reconsider his position about the importance of the missing information in response to the final report. We also request that the Under Secretary provide the milestones for the new Commerce database in response to the final report. The materiality of the control weaknesses is discussed further in Appendix A.

Q.13.B. We recommend the Deputy Under Secretary of Defense (Policy Support) ensure that initiatives on electronic imaging in support of the export review process are successfully implemented within DoD.

Management Comments. The Under Secretary of Defense for Policy partially concurred, stating that the cost of scanning license information and technical data into an electronic database should be shared by licensing and reviewing agencies. DoD has work underway, including some in cooperation with State, to develop scanning processes and electronic formats.

Audit Response. The Under Secretary of Defense for Policy comments are responsive. However, we request that additional comments be provided in response to the final report as to the scope of the work initiated and expected milestones for completing the development of scanning processes and electronic formats.

Question 14. Monitoring Program

Describe the procedures used by agencies to ensure compliance with conditions placed on export licenses (for example, no retransfers without U.S. consent, any replications, and peaceful use assurances) and assess the adequacy and effectiveness of such procedures.

In its support to State, DTRA/ST had adequate procedures for monitoring foreign space launch activities. Its informal process for reporting potential violations of license conditions and technology assessment control plans was also adequate. Expected increases in the number of monitors at DTRA/ST and the number of launches to be monitored could result in a parallel increase in reports to State. If so, the informality of the reporting process could fail to ensure that State receives the highest standard of reporting from DoD.

DoD Monitors Foreign Space Launches

In its support to State, DTRA/ST had adequate procedures for monitoring foreign space launch activities and reporting potential violations of license conditions and Technology Transfer Control Plans.²⁵ As addressed in Question 12, DoD began monitoring foreign launches of U.S. commercial satellites in 1991 under a delegation of authority from the Secretary of State. The National Defense Authorization Act for FY 1999 made the Secretary of Defense responsible for monitoring certain foreign satellite launches. DTRA/ST is now establishing a Space Launch Safeguards and Monitoring Program to satisfy that requirement. The program outlines procedures for documenting, reporting, and verifying compliance of controls, conditions, and provisions specified in export licenses for satellites, related components, and associated Technology Transfer Control Plans used in conjunction with foreign space launches.

Pre-FY 1999 Monitoring. Under the 1991 Secretary of State Delegation of Authority, DoD developed a program that provided on-site monitoring and oversight required to verify compliance with controls and regulations specified in the export licenses of satellite and related components and associated Technology Transfer Control Plans.²⁶ Prior to December 1998, the Air Force Space Command conducted all DoD space launch program support, monitoring activity, and reporting for the Secretary of Defense. Air Force Instruction 10-1210, "Technology Safeguard Monitoring for Foreign Launches

²⁵We interviewed DTRA/ST Space Launch Monitoring Division personnel and reviewed policies and databases at DTRA/ST in Arlington, Virginia. Due to time constraints, we did not visit Air Force Space Command or launch sites, interview DoD monitors or U.S. contractor representatives, or review records prior to September 1998.

²⁶A Technology Transfer Control Plan is a legal agreement between the U.S. Government and the license holder. It requires controlled access to classified military information and to unclassified information by foreign nationals employed by U.S. contractors.

of U.S. Commercial Satellites,” July 21, 1993, established procedures, policy, and responsibilities for Air Force management of the program. DTRA/ST provided oversight without written procedures and provided assistance with a staff of less than five personnel. DoD monitored 3 space launch missions in FY 1996, 9 in FY 1997, and 11 in FY 1998. The approximate number of launches scheduled to be monitored during FY 1999 is more than 16.

FY 1999 Monitoring. Under provisions of the National Defense Authorization Act of FY 1999, the Secretary of Defense is responsible for monitoring certain foreign satellite launches. DTRA/ST is responsible for reviewing and monitoring all space related licenses and representing DoD in negotiations and enforcement actions. DTRA/ST Operating Instruction SOP-01, Revision 1, “Technology Safeguard Monitoring Program,” December 22, 1998, established the policy and responsibility of DTRA/ST for support to the field monitors attending technical interchange meetings and launch campaigns.²⁷ It also provides internal procedures for supporting monitors. DTRA/ST Space Launch Monitoring Division personnel oversee all monitoring team efforts. U.S. monitoring teams consist of Air Force Space Command personnel and at least one DTRA/ST employee. Overseas monitoring teams consist of Air Force Space Command personnel and specially selected augmentees. Documentation from field-level personnel and on-site team members includes reports of trips, followup action or responses to queries, and reports pertaining to technical interchange meetings and launch campaigns. Daily logs are prepared by on-site monitors at each location and sent to DTRA/ST.

Reporting Potential Violations. Space launch monitors report potential violations of Technology Transfer Control Plans and export licenses to the Chief, DTRA/ST Space Launch Monitoring Division. The Chief, in turn, reports violations of export licenses to the Director, DTRA/ST; the Assistant Secretary of Defense (Strategy and Threat Reduction); and the Director, Office of Defense Trade Controls, Department of State. The Chief, DTRA/ST Space Launch Monitoring Division, maintains an electronic monitoring log of space launch monitoring activities to include potential violations of Technology Transfer Control Plans and export licenses. The log we reviewed covered events from mid-September through December 31, 1998, and contained 7 minor technical violations resulting from 88 meetings, space launch campaigns, and support efforts conducted by monitors. The Chief, DTRA/ST Space Launch Monitoring Division, wrote a letter to the U.S. entity in three instances. DTRA/ST personnel addressed the remaining four instances by a visit or

²⁷A launch campaign is the period during which a launch site and a launch vehicle are prepared for a launch. It typically includes the delivery of the vehicle stages to the launch site, booster assembly, payload integration, and all other activities leading to a launch.

telephone call to the U.S. entity involved.²⁸ Between January 1, 1999, and February 28, 1999, 55 meetings, space launch campaigns, and support efforts took place, but no reportable violations were found.

Qualifications of Teams. Monitoring and oversight team members have backgrounds in engineering, spacecraft development and manufacturing, launch operations, and on-orbit space operations. The Air Force Space Command manages the monitors and provides training, scheduling, and administrative support. A pool of more than 200 qualified part-time volunteers is available to perform monitoring duties.

DTRA/ST Staffing. As part of its "Defense Reform Initiative Report," November 1997, DoD proposed the establishment of the Defense Threat Reduction Agency, which was subsequently funded by the Defense Appropriations Act of 1999. Under the new organizational alignment, the DTRA/ST Space Launch Monitoring Division goal is to hire 42 additional personnel to fulfill its expanded DoD Space Launch Safeguards and Monitoring Program mission. The increase in staffing can be attributed to the increased number of space launch monitoring missions for FY 1999 and future years.

Current Procedures Are Adequate

State has relied on DoD for data gathering, reporting, resources, and technical assistance to ensure that national security controls are enforced through monitoring and oversight of space launches. Prior to FY 1999, DTRA/ST reported findings or potential violations of laws and agreements with State personnel informally by telephone or in person, rather than in writing, and coordinated results through the respective chains of command. That method of reporting to State was adequate because so few people dealt with the information generated by monitors.

Although the informal mechanism for reporting to State is adequate for now, it will probably be inadequate after the DTRA/ST Space Launch Monitoring Division is fully staffed during the third quarter of FY 1999. The work load will continue to require that DTRA/ST provide detailed information to State; however, a more traditional and formal reporting approach should be undertaken. If the informal reporting process were to continue, it could fail to ensure that State receives the highest standard of reporting expected from DoD. As a result, a memorandum of understanding should be developed and implemented between DoD and State outlining reporting requirements.

²⁸DTRA/ST Operating Instruction SOP-01, Revision 1, December 22, 1998, considers minor technical violations as a security deviation resulting in no impact on the security of the satellite, related items, or technical data and stemming from a personnel error or security equipment malfunction or failure. No potential violation of a technology safeguard agreement results from the deviation.

Recommendation and Management Comments

Q.14. We recommend the Director, Defense Threat Reduction Agency, in coordination with the Department of State, develop and implement a memorandum of understanding outlining reporting requirements for the Space Launch Safeguards and Monitoring Program.

Management Comments. The Under Secretary of Defense for Policy concurred, stating that the memorandum of understanding should be completed by September 1, 1999.

Appendix A. Audit Process

Scope

Work Performed. We reviewed 1996, 1997, and 1998 congressional testimony. We reviewed Federal policies and regulations on export of dual-use commodities and munitions that were issued from 1980 through 1994. Specifically, we reviewed the EAA, the AECA, and the National Defense Authorization Act for 1999. We also reviewed EO 12924 and EO 12981. In addition, we reviewed DoD export policies and procedures issued from 1984 through 1991 related to the international transfer of goods, munitions, services, and technologies. We also reviewed prior reports on the export license review process. We obtained the number of dual-use and munitions license applications referred to DoD by Commerce and State from FY 1990 through FY 1998. We reviewed DTRA/ST policies and procedures for referring dual-use and munitions license applications to DoD Components for review and comment and also for escalating license applications to the OC and ACEP. We determined if the DoD export licensing process takes into account the cumulative effect of technology transfers. We reviewed DTRA/ST spending authority and civilian and military end strength from FY 1992 through FY 1998. We reviewed Federal policies and Office of Personnel Management training requirements, job descriptions, and qualifications for the licensing officers' positions. We also reviewed the official personnel records from 1973 through 1998 of the DTRA/ST licensing officers. We reviewed the FORDTIS database and its role in the export licensing process. Additionally, we reviewed the DoD role in pre-license and post-shipment licensing activities.

Limitations to Scope. In general, we did not determine the accuracy or appropriateness of the DoD position on dual-use and munitions applications. Instead, we reviewed case records to identify links between the final DoD position and inputs from DTRA/ST elements and DoD Components. In regard to authorized changes to recommended DoD positions on export license applications, we sought to determine whether information in the case records and participants in the cases supported the supervisor's decision.

DoD-Wide Corporate-Level Goals. In response to the Government Performance and Results Act, DoD established 6 DoD-wide corporate-level performance objectives and 14 goals for meeting the objectives. This report pertains to achievement of the following objectives and goals.

- **Objective:** Shape the international environment through DoD engagement programs and activities. **Goal:** Support friends and allies by sustaining and adapting security relationships. **(DoD-1.1)**
- **Objective:** Shape the international environment through DoD engagement programs and activities. **Goal:** Prevent or reduce threats and conflict. **(DoD-1.4)**

Methodology

To determine whether current practices for processing dual-use and munitions license applications were consistent with established national security and foreign policy objectives, we reviewed legislation and EOs that govern the export of dual-use commodities and munitions for inconsistencies. We also used statistical sampling and non-statistical sampling techniques to answer the 14 questions.

We obtained a list of dual-use and munitions license applications referred to DoD by Commerce and State from FY 1990 through FY 1998. We analyzed the list to determine the trends in the number of license applications referred. We then analyzed the number of license applications referred by DTRA/ST to DoD Components during the same period to determine the trend in the number of cases referred to DoD Components. We reviewed selected DoD policies to determine if the dual-use and munitions licensing processes took into account the cumulative effect of technology transfers. Through interviews and analysis, we documented the adequacy of the FORDTIS database. Through multiple interviews with 16 licensing officers, we determined whether instances existed where licensing officers' recommendations entered into FORDTIS were later changed without their consent or knowledge. In cases that the DoD Components' positions did not agree with the overall DoD position on a license application, we ascertained from the DoD Components whether their positions were accurately reflected in FORDTIS. Through interviews and analysis, we determined whether DoD used foreign nationals to conduct either pre-license or post-shipment licensing activities. Also through interviews and analysis, we determined the procedures used by DoD to ensure compliance with conditions placed on export licenses, and assessed the adequacy and effectiveness of those procedures.

To determine whether DoD personnel processing license applications were qualified and trained to do their jobs, we reviewed Title 5, United States Code, Section 4103, to ascertain DTRA/ST responsibilities for training its employees. We interviewed 16 DTRA/ST civilian and military licensing officers responsible for processing dual-use and munitions license applications. We reviewed civilian job vacancy announcements for licensing officers' current positions, qualifications as licensing officers, training, and performance plans for their current positions, last annual performance appraisals, and performance awards received since joining DTRA/ST. We also reviewed billet requests and the latest available annual evaluations of military officers and enlisted personnel assigned to DTRA/ST during our review. We reviewed the available list of job-related training courses and seminars that each licensing officer had attended. In addition, we interviewed 15 licensing officers (one retired during the review) to ascertain whether they had been pressured improperly by their superiors to change their positions on license applications.

In addition to the licensing officers, we interviewed nine country desk officers at the Office of the Assistant Secretary of Defense (International Security Affairs) and senior management, engineers, and policy analysts at DTRA/ST. We also conducted interviews with export licensing personnel at DoD Components who were responsible for receiving and processing license applications referred from

DTRA/ST. We attended a DTRA/ST Tiger Team meeting, and we observed assignment of dual-use and munitions license applications to licensing officers. We also attended and observed an OC meeting and reviewed OC and ACEP files.

Universe and Sample. During our review we tested records for five different areas related to export licensing. For dual-use license applications, munitions license applications, and commodity classification requests, we used statistical sampling. For cases that were appealed to the OC, we used non-statistical sampling. For cases appealed to the ACEP, we reviewed all the cases. Details on sampling methodology for each of those five areas follow.

Dual-Use License Applications. We tested whether Commerce properly referred dual-use license applications to DoD for review and whether DoD Components properly distributed those referrals to other responsible DoD Components. The tests were based on the 5,411 dual-use license applications that Commerce received during the second and third quarters of FY 1998. Of those 5,411 cases, Commerce referred 4,830 to other Federal departments and agencies and reviewed 581 itself. Commerce referred 4,557 of the 4,830 cases to DoD – 4,355 to DTRA/ST and 202 to NSA. We tested whether Commerce adequately referred cases to DoD that should have been and whether DTRA/ST adequately referred those cases to DoD Components. Using a random sample, the Quantitative Methods Division, Office of the Assistant Inspector General for Auditing, DoD, selected 60 cases that Commerce reviewed itself and 60 cases that Commerce referred to DoD. Of the 60 cases referred to DoD, Commerce referred 51 to DTRA/ST and 9 to NSA.

Munitions License Applications. We tested whether State properly referred munitions license applications to DoD. In consultation with the Office of Defense Trade Controls, State, it was decided to limit the sample to the three most significant categories of munitions export license applications (unclassified exports, classified exports, and technical agreements). During the second and third quarters of FY 1998, State received 16,700 munitions license applications. Of those 16,700 cases, the Office of Defense Trade Controls referred 4,714 cases to other elements within State, DoD, or other Federal departments and agencies. State could not identify how many of the 4,714 cases were referred to DoD. We tested whether State referred to DoD cases that State should have under Office of Defense Trade Controls procedures and whether DTRA/ST referred to other DoD Components cases that DTRA/ST should have under DTRA/ST procedures. Using a random sample, the Quantitative Methods Division, Office of the Assistant Inspector General for Auditing, DoD, selected 100 cases comprising 75 cases reviewed by the Office of Defense Trade Controls and 25 cases referred to other Federal departments and agencies, including 20 cases to DoD. The Office of the Inspector General, State, tested and determined that the Office of Defense Trade Controls properly handled all 100 munitions cases (referred the 25 cases and did not refer the 75 cases) in the sample. We also reviewed the 20 munitions cases plus an additional 34 randomly selected munitions cases referred to DTRA/ST to test whether DTRA/ST referred them to other DoD Components according to DTRA/ST procedures. The additional cases were reviewed to help ensure the accuracy of our findings about DTRA/ST referrals of munitions cases.

Statistical Projections. On pages iii and 41, we state that DTRA/ST improperly referred 12 percent of dual-use cases and 24 percent of munitions cases. Those percentages are our best single estimates. Based on 6 of the 51 DTRA/ST dual-use cases being improperly referred, we project, with 90 percent confidence, that DTRA/ST improperly referred to DoD Components between 6 percent and 22 percent of all dual-use cases DTRA/ST received from Commerce. Our best single estimate is 12 percent. Based on 13 of the 54 munitions cases being improperly referred, we project, with 90 percent confidence, that DTRA/ST improperly referred to DoD Components between 15 percent and 36 percent of all munitions cases DTRA/ST received from State. Our best single estimate is 24 percent.

Commodity Classification Requests. We tested whether Commerce properly assigned export control classification numbers to items. The tests were based on the 6,161 line items on 2,723 commodity classification requests that Commerce processed during FY 1998. We divided the items into four groups as follows: items in export control classification number EAR99, items in other export control classification numbers, items that received a license exception, and items that Commerce was unable to classify. Using a random sample within each group and a 90 percent confidence level that sample results were representative of the population, we randomly selected 100 classification requests and selected all 3 items Commerce considered not to require a license. Of the 103 items sampled, DTSA/ST personnel questioned the classification assigned to 13 items and questioned authority of Commerce to classify 2 without submitting them for a commodity jurisdiction review.

OC Cases. We tested whether the OC properly handled dual-use cases that Federal agencies escalated to the OC. The tests were based on the 266 dual-use license applications reviewed by the OC during the second and third quarters of FY 1998. Using a systematic sample, we selected 26 cases. Because the sample selection started with the first application listed, the sample was not random. The results, however, should provide a useful indication of how the OC considered cases.

ACEP Cases. We reviewed the eight cases Federal agencies escalated to the ACEP during the second and third quarters of FY 1998 to determine if the ACEP properly considered the cases escalated to it. Because we reviewed all eight cases, no sampling methodology was used.

Use of Computer-Processed Data. We relied on computer-processed data from FORDTIS and the Export Control Automated Support System, maintained by Commerce, provided to us by DTRA/ST and the Office of the Inspector General, Commerce. We observed operating personnel performing FORDTIS queries at our request. We also asked DTRA/ST licensing officers and DoD Component personnel whether the FORDTIS records in the sample items we reviewed were accurate. During the review, we discovered problems concerning the accuracy and completeness of the data contained in FORDTIS. We believe that the opinions, conclusions, and recommendations in this report are valid and will help correct the problem with the accuracy and completeness of the data contained in the system.

Use of Technical Assistance. We obtained legal interpretation on the provisions of the EAA, the AECA, and the EOs we reviewed as they applied to the extensions of their related legislation from the Office of Deputy General Counsel, Inspector General, DoD. We also relied on the assistance of the Quantitative Methods Division, Office of the Assistant Inspector General for Auditing, DoD, in the design and size of the samples we reviewed. The Quantitative Methods Division also helped in the interpretation of the results on the sample data collected.

Review Type, Dates, and Standards. We performed this congressionally requested review from September 1998 through March 1999 in accordance with 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. This review was performed concurrently with the Inspectors General of the Departments of Commerce, Energy, State, and Treasury and the Central Intelligence Agency. We coordinated our review with them.

Contacts During the Review. We visited or contacted individuals and organizations within DoD, the Departments of Commerce, Energy, State, and Treasury, and the Central Intelligence Agency. Further details are available on 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 those controls.

Scope of Review of the Management Control Program. Our review of the DTRA/ST management control program was limited to the processing of export license applications. We reviewed the overall DTRA/ST management control plan and the DTRA/ST management control policy for the coordination of export license applications. We did not evaluate the adequacy of management's self-evaluation of those controls.

Adequacy of Management Controls. We identified material management control weaknesses for DTRA/ST as defined by DoD Directive 5010.38. DTRA/ST policies and management emphasis were insufficient to ensure that licensing officers analyzed and considered the cumulative effect of technology transfers in processing license applications as required by DoD Directive 2040.2. Additionally, DTRA/ST management control procedures over recording data on processed license applications were not effective to ensure that final DoD positions were accurately recorded in FORDTIS. Also, instances occurred in which recommended positions entered in FORDTIS by the licensing officer were changed without the consent or knowledge of that officer. As a result, FORDTIS did not provide a reliable official audit trail for export license reviews. A copy of the report will be provided to the senior official responsible

for management controls in the Office of the Under Secretary of Defense for Policy and DTRA/ST. Recommendations Q.5./Q.6.A., Q.10., and Q.13.A., if implemented, will correct the material weaknesses.

In commenting on the draft report, the Under Secretary of Defense for Policy disagreed that the conditions described above needed to be reported as material control weaknesses. We continue to believe that, in this extremely sensitive and controversial area, the lack of cumulative effect analysis and good audit trails for the development of the U.S. Government position on each case is material. DoD Instruction 5010.40 defines control weaknesses as material when the weakness bears on a matter of congressional interest. We request management to comment further on whether these weaknesses will be reported in the annual assurance letter for FY 1999, if they remain uncorrected.

Adequacy of Management's Self-Evaluation. DTRA/ST indicated in its Administrative Instruction No. 21, "Internal Management Control Program," September 25, 1992, that all assessable units including the "Export License Application Processing" unit were reviewed in FY 1988 and resulted in a finding of low vulnerability for all assessable units. On October 28, 1988, DTRA/ST conducted a risk assessment review of the Export License Application Processing unit and concluded that the overall risk assessment of the Export License Application Processing unit was low. However, DTRA/ST stated in the review that the general control environment of the Export License Application Processing unit was partially satisfactory. That occurred because the Export License Application Processing unit was now part of the new Defense Threat Reduction Agency organization and care was needed to make the new organization efficient and effective. In addition, the review stated that transfers, retirements, and the inability of DTRA/ST to hire new employees will affect the Export License Application Processing unit's ability to comply with the timely execution of its mission requirements. DTRA/ST also concluded that the inherent risk of the Export License Application Processing unit was medium because the time spent to meet congressional report requirements, Inspector General investigations, repeated records checks, and media attention distracts the Export License Application Processing unit from accomplishing its assigned mission. Because of the scope of our review, we did not also evaluate the adequacy of management's self-evaluation.

Appendix B. Summary of Prior Coverage

During the last 5 years, GAO and the Inspector General, DoD, have conducted reviews and GAO has also provided testimony to Congress on the subject matter of this report. GAO 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>. In 1993, the Inspector General, DoD, also issued an interagency report with the Inspectors General of Commerce, Energy, and State. The following reports are of particular relevance to the subject matter in this report.

General Accounting Office

GAO Report No. NSIAD-98-200 (OSD Case No. 1648-A), "Export Controls National Security Issues and Foreign Availability for High Performance Computer Exports," September 1998.

GAO Report No. NSAID-98-196 (OSD Case No. 1648), "Export Controls Information on the Decision to Reverse High Performance Computer Controls," September 1998.

GAO Report No. T-NSIAD-98-211, "Export Controls Issues Related to the Export of Communications Satellites," June 17, 1998.

GAO Report No. T-NSIAD-97-128, "Export Controls Sales of High Performance Computers to Russia's Nuclear Weapons Laboratories," April 15, 1997.

GAO Report No. NSIAD-97-24 (OSD Case No. 1242), "Export Controls Change in Export Licensing Jurisdiction for Two Sensitive Dual-Use Items," January 1997.

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

GAO Report No. T-NSIAD-94-163 (OSD Case No. 9691-A), "Nuclear Nonproliferation Licensing Procedures for Dual-Use Exports Need Strengthening," May 17, 1994.

Inspector General, DoD

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 Review

Inspectors General of Commerce, DoD, Energy, and State, “The Federal Government’s Export Licensing Processes for Munitions and Dual-Use Commodities,” September 1993.

Interagency Review Summary. Specifically, the report addressed the following.

- Changes are needed in the interagency referral procedures. For example, Commerce refers some – but not all – export license applications to DoD, Energy, State, or the intelligence community for review and recommendations. For most dual-use commodities controlled by Commerce, U.S. policy presumes approval of the application and any agency that opposes an export license application must bear the burden of overcoming that presumption. Until that issue is resolved, the agencies will not have adequate assurance that the license review process is working as efficiently and effectively as it should.
- Computer systems used to process license applications were secure but data inconsistencies existed. For example, databases at Commerce and Energy showed inconsistencies for 23 percent of the dual-use commodities sample items reviewed. Also, the final U.S. Government position was not always entered into the computer system by DTRA/ST.

The report recommended that the Secretary of Commerce, in cooperation with:

- the National Security Council and the Secretaries of Defense, Energy, and State, direct the appropriate officials to take action to complete the process initiated by National Security Directive 53 to resolve referral procedures and to provide a mechanism for resolving referral criteria disputes at progressively higher levels and periodically reviewing the referral criteria and process for resolving future disputes; and
- the Secretaries of Defense, Energy, and State, direct the appropriate officials to develop procedures to reconcile each agency’s database information with the information contained in the Export Control Automated Support System. Also, in cooperation with the National Security Council, establish an interagency working group with appropriate members from DoD, Energy, and State to determine the need for, the feasibility of, and the benefits to be derived from the expanded use of the Export Control Automated Support System for dual-use export license application data.

In response to a draft of the report, all four departments generally agreed with the interagency referral and the data inconsistency issues raised in the report. Commerce officials further agreed that the National Security Council should handle streamlining the referral issue. DoD officials agreed that the National Security Council would be an “honest broker” to resolve interagency differences. State officials preferred that the Executive Branch resolve interagency referral issues. All the departments agreed on the need for a single system as the sole license database and preferred the Export Control Automated Support System.

DoD Report Summary. The DoD portion of the report observed that DoD processes for reviewing dual-use and munitions export license applications were effective. In addition, DTRA/ST licensing officers properly referred license applications to DoD Components for review and comment. The review, however, identified four opportunities in the DTRA/ST process that needed improvement. DTRA/ST needed to:

- develop a mechanism to review with DoD Components a representative sample of applications referred to DTRA,
- enter the final U.S. Government positions on all referred applications into the DoD export licensing information management system,
- inform DoD Components of unilateral actions taken on applications, and
- publish a description of the export license applications.

The report recommended that DTRA/ST and DoD Components develop a mechanism to review a representative sample of dual-use and munitions license applications to identify the accuracy of the referral decisions made by DTRA/ST. Additionally, the report recommended to escalate the State FORDTIS terminal activation issue to a level that would complete the necessary security requirements. The report also recommended that the Office of the Deputy Under Secretary of Defense (Security Policy), Security Policy Automation Directorate, enter final U.S. Government positions in FORDTIS. In addition, the report recommended that the Office of the Deputy Under Secretary of Defense (Security Policy) develop the capability for FORDTIS to automatically inform users when there is action on an export license application after the application has been on hold or after a final DoD position has been sent to State.

The Principal Deputy Under Secretary of Defense for Policy and DTRA/ST managers concurred with the recommendations and stated that they had already taken steps to incorporate the report recommendations.

Appendix C. Other Matters of Interest

During our review the following three issues were brought to our attention.

Exporter Appeals Process

DoD has concerns about the limited DoD involvement in the exporter appeals process.

Appeals Process. The EAA states that the Secretary of Commerce shall establish procedures for applicants to appeal the denial of their export license applications. The Export Administration Regulations state that any person or company directly and adversely affected by an administrative action taken by the Bureau of Export Administration may appeal to the Under Secretary of Commerce for Export Administration within 45 days of the date appearing on the written notification for reconsideration of that administrative action. The Export Administration Regulations also authorize the Under Secretary of Commerce to consult with and receive information from any person or group in making an appeal determination. EO 12981 does not address the exporter appeals process.

DoD Participation in the Appeals Process. DoD expressed concern that the export appeals process is not “open.” The Director, DTRA/ST, stated that DoD would like the opportunity to review appeal cases in the same manner it reviews license applications. The Director, DTRA/ST, stated that the exporter appeals process does not take into account the escalation process outlined in EO 12981 and that it gives a Commerce official the opportunity to overturn decisions made by interagency committees, the OC, and the ACEP. The Director, DTRA/ST, recommended that each appeal be handled like a license application, with DoD having 30 days to review it. The Deputy Director, DTRA/ST, stated that Commerce considers DoD input on appeal cases as having less weight than DoD input on license applications.

Exporter Appeal Cases Decided in FY 1998. During FY 1998, the Under Secretary of Commerce for Export Administration resolved 19 exporter appeal cases. An applicant withdrew one appeal. In the 18 remaining cases, 15 were sustained by the Under Secretary of Commerce for Export Administration and the original denial decision upheld. For the first of the three remaining cases, the Under Secretary of Commerce for Export Administration did not act on the appeal because the case concerned a commodity classification request submitted to the Bureau of Export Administration. The commodity classification decision was subsequently overturned. For the second of the three remaining cases, the Under Secretary of Commerce for Export Administration closed the appeal case without action because the appeal was filed prematurely by the exporter. Only a licensing officer’s final action, not an interim action, may be appealed.

However, the appeal did prompt a second review of the license application by the OC, which subsequently approved the license application in question. For the third of the three remaining cases, the Under Secretary of Commerce for Export Administration overturned the denial decision. DoD was invited to participate in the case; however, it declined, stating that the authority of EO 12981 overruled the authority granted the Under Secretary of Commerce for Export Administration by the EAA and sustained through Presidential documents. The Under Secretary of Commerce's Bureau of Export Administration sent a memorandum to the Under Secretary of Defense for Policy, dated February 5, 1998, stating that he did not view Executive Order 12981 as abrogating exporters' appeal rights. Commerce and DoD remain divided on the issue of Commerce appeals, and we know of no initiatives to resolve the departments' differences.

DoD International Technology Transfer Coordinating Committee

There is not an effective functioning body to resolve issues among DTRA/ST and the DoD Components.

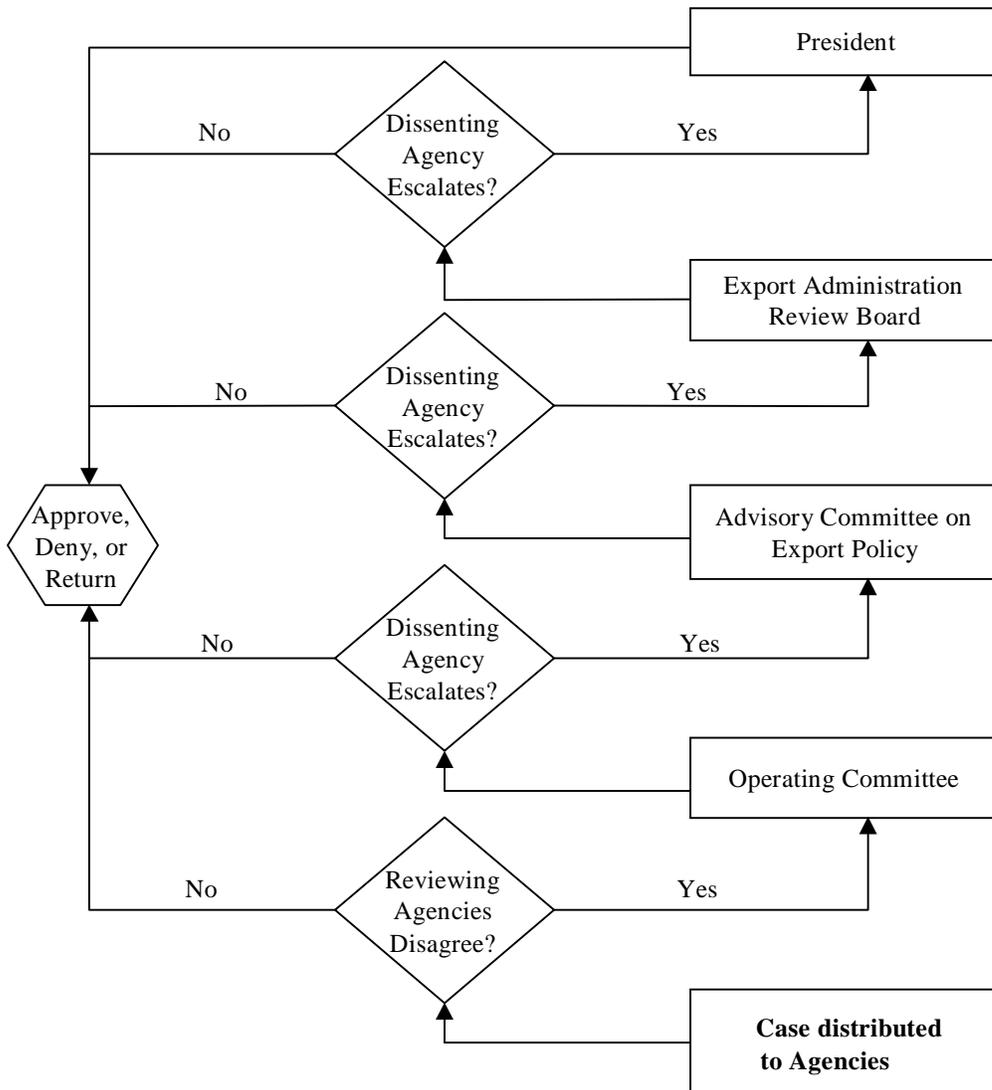
The DoD International Technology Transfer Coordinating Committee (Coordinating Committee) is not a functioning DoD body. DoD Directive 2040.2 established the DoD International Technology Transfer Panel (the Panel) and two subpanels. The Panel was to meet quarterly to identify and address technology transfer policy issues and resolve differences within DoD concerning program administration, interagency issues, and coordinated DoD recommendations on transfer cases referred by the subpanels. The subpanels were to have met monthly. The Panel consisted of representatives from the Office of the Under Secretary of Defense for Policy, the Office of the Assistant Secretary of Defense (International Security Policy) (the office no longer exists), the Office of the Under Secretary of Defense for Research and Engineering (now the Director, Defense Research and Engineering), the Office of the Joint Chiefs of Staff (the Joint Staff), the Defense Security Assistance Agency (now the Defense Security Cooperation Agency), DIA, NSA, the Defense Advanced Research Projects Agency, and the Military Departments. However, the applicable sections of DoD Directive 2040.2 were superseded by DoD Directive 5120.49, "DoD International Technology Transfer Coordinating Committee," March 14, 1990. The Coordinating Committee, composed of principal officials, not their representatives, replaced the Panel and its two subpanels.

The Coordinating Committee is not a functioning DoD body. The Deputy Director, DTRA/ST, stated that the Coordinating Committee and its predecessor, the Panel, only met two times during the last 10 years. As a result, any differences between DTRA/ST and DoD Components over license applications are resolved by escalating issues through respective chains of command, a practice with which two DoD Components were not satisfied. Officials from the two Components commented that there is no functioning DoD committee for discussing issues of interest to all DoD Components involved in

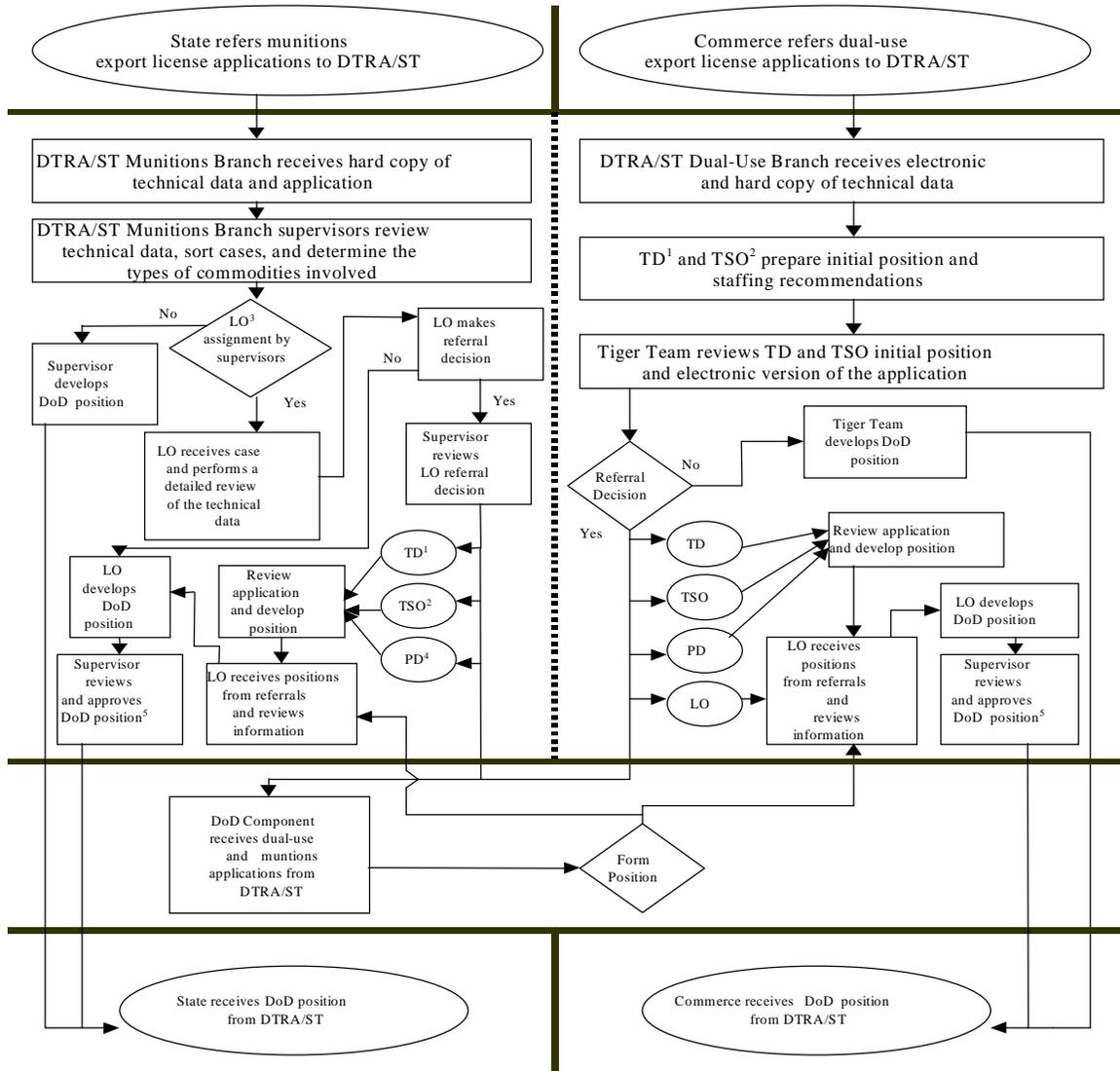
export licensing. However, representatives from those two Components stated that issues could be discussed and resolved by a committee composed of lower ranking officials rather than the members of the Coordinating Committee.

Appendix D. Escalation Process Flowchart

Executive Order 12981 (1995) establishes procedures for the interagency review of export license applications referred to all departments or agencies by the Department of Commerce. The flowchart below describes the four levels of escalation to be used to resolve dual-use cases under interagency dispute.



Appendix E. DoD Review Process Flowchart



¹Technology Division of DTRA/ST.

²Technology Security Operations of DTRA/ST.

³Licensing Officer.

⁴Policy Division of DTRA/ST.

⁵Normally, the Chief, Dual-Use or Munitions Branch, approves cases. In some cases, such as denials and special interest items, the Chief, DTRA/ST Licensing Division, or one of his supervisors will approve or change a DoD position.

Appendix F. Report Distribution

Office of the Secretary of Defense

Under Secretary of Defense for Acquisition and Technology
Deputy Under Secretary of Defense (International and Commercial Programs)
Director, Defense Logistics Studies Information Exchange
Under Secretary of Defense (Comptroller)
Deputy Chief Financial Officer
Deputy Comptroller (Program/Budget)
Under Secretary of Defense for Policy
Assistant Secretary of Defense (International Security Affairs)
Assistant Secretary of Defense (Special Operations/Low-Intensity Conflict)
Assistant Secretary of Defense (Strategy and Threat Reduction)
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Joint Staff

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Deputy Under Secretary of the Army (International Affairs)
Commander, Army Materiel Command
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Director, Defense Contract Audit Agency
Director, Defense Logistics Agency

Other Defense Organizations (cont'd)

Director, Defense Security Cooperation Agency
Director, Defense Threat Reduction Agency
 Director, Technology Security Directorate, Defense Threat Reduction Agency
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
Inspector General, Department of Treasury
Inspector General, Central Intelligence Agency

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
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

Under Secretary of Defense (Policy) Comments



POLICY

PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE
2000 DEFENSE PENTAGON
WASHINGTON, DC 20301-2000

JUN - 9 1999



MEMORANDUM FOR THE INSPECTOR GENERAL,
DEPARTMENT OF DEFENSE

SUBJECT: Response and Comments on April 23, 1999 Draft Report of
the Review of the DoD Export Licensing Processes for Dual-Use
Commodities and Munitions (Project No. 9LG-5025)

We appreciate the opportunity to review the above referenced draft report.
I am providing a consolidated response on behalf of the Department of Defense.

Our attached response is keyed to each of the recommendations of your
review team, and on those actions that will be taken by September 30, 1999.

In my view, the Department of Defense's export license review process has
been conducted in a highly professional manner. In this regard, I disagree with the
IG team's finding that these are material weaknesses in internal management
controls associated with this process. At the same time, we recognize that there is
room for improvement in any complex governmental process. The work of your
review team has provided useful insight that will assist us.

James M. Bodner

Attachment:
As Stated



**SUMMARY OF DOD IG DRAFT REPORT ON
THE DOD EXPORT LICENSING PROCESS AND
PROPOSED RESPONSES FOR
(USDP, DUSD(P), DIRECTOR, DTRA, AND
DIRECTOR, TECHNOLOGY SECURITY, DTRA)**

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q.1: Legislation. No inconsistencies or ambiguities in EAA and AECA; they provide adequate flexibility to USG; however, EAA should be re-enacted and provide additional time to review complex cases and specific SecDef authority to escalate cases to President</p>	None	None

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q.2: Executive Order 12981 (Dec. 1995) and EAA. The E.O. and EAA are generally consistent. Although the E.O. reduced DoD initial review times from 40 to 30 days, it is difficult to quantify impact on DoD review.</p>	<p>None</p>	<p>Comments: The IG's draft report notes that some concern was expressed about the impact of reduced review times for dual-use cases under E.O. 12981. To meet the requirements of the E.O., DTRA/ST uses a "Tiger Team" which meets daily to review cases referred by Commerce and, as a result, is able to dispose of about 50% of the cases, within 2 to 3 days. This team generally consists of 5 to 9 professional staff having about 50 years collective export license review experience. Tiger Team members take into account, among other things, the information in the license application, as well as case history data in FORDTIS, public source information on the technology and intelligence concerning the end-user. As part of this process, the team helps identify staffing requirements for the cases requiring more extensive review. We believe this review process enables DTRA/ST to provide sound and timely recommendations on dual-use cases.</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q.3: Referrals of Commerce Cases to DoD.</p> <p>DoD is generally satisfied with referrals of license applications, although 5 of 60 cases sampled were not, but should have been, sent to DoD. DoD and Commerce differ in interpretation of NSC guidance on referral of commodity classification cases, leading to unilateral and incorrect determinations of jurisdiction by Commerce.</p>	<p>That the Dir. of Technology Security, DTRA work with the Assistant Secretary of Commerce to develop additional guidance and procedures on how to implement 1996 NSC guidance.</p>	<p>Concur.</p> <p>The Deputy Under Secretary of Defense for Technology Security Policy will develop a proposal for resolving these issues and send it to the Assistant Secretary of Commerce. In this regard, DoD will reaffirm its recommendation that Commerce refer for DoD review proposed classifications that would result in no license being required for most destinations. The proposal will also seek clarification of issues raised in the IG's draft report about Commerce license application referral practices.</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q.4: Interagency Dispute Process. Disputes over State's munitions cases are resolved between office chiefs at DoD and State. Although fewer Commerce cases go to the ACEP under the E.O.'s changed escalation procedures, this appears to have no adverse impact; DoD has a meaningful opportunity to escalate cases. Commerce cases are typically approved unless DoD or other agency carry the burden to substantiate an objection.</p>	None	None

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q.5&6: Cumulative Effect. The Tech. Security Directorate of DTRA occasionally, but not routinely, takes into account the cumulative effect of technology transfers. Also, DoD organizations did not conduct annual assessments of the “total effect of transfers [of cases referred to DoD for review] of technology, goods, services, and munitions on U.S. security, as required by DOD Directive 2040.2 (1984).” By taking steps to develop a meaningful policy and a coordinated process, DoD can ensure that, to the degree consistent with resource constraints, the licensing process adequately takes into account the cumulative effect of technology transfers.</p>	<p>A. That the USDP revise DoD Directive 2040.2 to clearly state responsibilities and procedures regarding the performance of assessments designed to analyze the cumulative effect of technology transfers and the monitoring of compliance with any requirements established.</p>	<p>Concur, with comments.</p> <p>We do not believe that the less than full implementation of the DoD Directive 2040.2 annual assessment requirement has materially undercut DoD’s ability to provide sound recommendations on State and Commerce license applications. License decisions are case-by-case determinations reflecting a current assessment of relevant factors, including licensing history, the level of technology, the end-use and the end-user. Nevertheless, we recognize the need for better data and analytical tools to conduct assessments to assist in making significant export decisions and, therefore, concur with the IG’s recommendations as discussed below.</p> <p>A. The USDP will develop and issue guidance that will set forth the Responsibilities and general procedures for technology transfer assessments. As acknowledged in the IG’s draft report, resource constraints make it impractical to conduct all-encompassing, cumulative annual assessments as might be suggested by a literal interpretation of the requirement of DoD Directive 2040.2. As suggested by the IG, the guidance will clarify the requirement to focus on assessments that deal with specific countries and technology areas, as well as on developing the data, analytical tools, priorities and resources necessary to support production of such assessments. In this connection, a review will be conducted to determine whether DoD Directive 2040.2 should be revised. This action will be completed by September 30, 1999.</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q. 5&6: Cumulative Effect. continued</p> <p>While recognizing resource constraints, and acknowledging that DTRA/ST has begun to address the need for better assessment capabilities (through development of a Technology Transfer Assessment System and an integrated product team for the Military Critical Technologies Program), the U.S. export control process cannot be fully gauged without such assessments.</p>	<p>B. That the Director of Technology Security, DTRA, develop an action plan with milestones for the integrated process team (IPT) on the Military Critical Technologies Program (MCTP) that includes defining a process for identifying, prioritizing, and obtaining decisions on assessments related to the cumulative effect of technology transfers. The team should identify alternative resources that could be used to carry out such assessments and ways to include input from the Joint Staff and the DIA in the process.</p>	<p>B. The Deputy Under Secretary of Defense for Technology Security Policy will take the lead in implementing USDP's guidance. As part of this effort, the Directorate will draw on the IPT for the MCTP to help formulate recommendations for a process identifying and establishing priorities for assessments to support mission needs and on how to accomplish such assessments within the MCTP or other available resources, and with input from the Joint Staff and DIA. This action will be completed by September 30, 1999.</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q.7: Referrals of License Applications to MilIDeps, the IC and other Interested Organizations.</p> <p>The Tech. Security Directorate, DTRA, did not always appropriately refer license applications to DoD Components for review; failure to refer may lead to formulation of the DoD position without complete information.</p>	<p>A. That the Director, Tech. Security, DTRA,</p> <p>1. Issue a memo to the heads of the applicable DoD Components requiring them to:</p> <p>(a)&(b) Respond to his Dec. 1998 request to identify types of dual-use and munitions export license applications they would like to review if they have not already done so, and of any changes.</p> <p>(c) Query the FORDTIS daily, review shell cases, and notify DTRA/ST of any additional dual-use cases they would like to review.</p> <p>(d) Review the case create report weekly and notify DTRA/ST of any additional munitions cases they would like to review.</p>	<p>A. Concur, with comments.</p> <p>1. The Director, Tech. Security, DTRA, will send a memo to DoD Components reiterating the request made in his December 1998 memo and, where appropriate, ask for any refinements or other changes to types of cases on their respective referral request lists. The memo will also reiterate a longstanding invitation to DoD Components to attend daily meetings at DTRA/ST when referral decisions are made. The memo will also inform DoD Components that they may query FORDTIS daily to review cases and notify DTRA/ST of additional dual-use or munitions cases they would like to review. However, consistent with longstanding practice, DTRA/ST reserves the right not to refer routine cases (e.g., well-established precedent to an allied or friendly country) for regular DoD Component review. Action will be completed by July 1, 1999.</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q.7: Referrals of License Applications to MilDeps, the IC and other Interested Organizations. (Continued)</p>	<p>2. Notify the ASD(S&TR) of any DoD Component that does not respond to the 1998 DTR/ST request.</p> <p>3. Maintain a list of the types of dual-use and munitions export license applications that DoD Components have requested to review.</p> <p>B. That the DUSD(PS) electronically provide DoD Components, on a weekly basis, the case create report which identifies all of the munitions export license applications DTRA/ST received during the prior week.</p>	<p>2. The Director, Technology Security, DTRA will notify the ASD/S&TR by July 30, 1999, of DoD Components that have not responded to foregoing request.</p> <p>3. DTRA/ST will continue its practice of maintaining a list of types of cases that DoD Components have requested to review.</p> <p>While concurring with the recommendations, we disagree with the statement in the draft (page 38) suggesting that the management of "DTRA/ST agreed with DoD Components that 7 of 13 munitions cases were "improperly referred." The Chief of DTRA/ST's Munitions Branch advises that, while inputs from the DoD Components to which these applications were not referred would have been "nice to have," they were not necessary to formulate the DoD position. In this connection, we also take exception to the IG's methodology of characterizing license applications as "improperly referred" primarily on the basis of the opinion of a DoD Component staff member that an application should have been referred to such Component.</p> <p>B. Nonconcur.</p> <p>As indicated above, DoD Components already have the ability to query FORDTIS on a <u>daily</u> basis for any munitions, as well as dual-use cases, they wish to review. This query capability makes it unnecessary to generate a weekly report for munitions cases.</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q. 8: Guidance and Training. DTRA/ST and DoD Component licensing officers stated they generally had sufficient training. DoD supervisors relied on on-the-job training and mentoring as the primary methods of training new licensing officers. No determination could be made whether the lack of a DoD classroom training program or a training plan materially affected licensing duties.</p>	<p>That the Director, DTRA:</p> <p>A. Develop an agency-wide training policy, training plan, and a classroom training program for DTRA licensing officers.</p> <p>B. Provide the classroom training program, developed in response to Q.8.A., to DoD Components to assist in developing their own training plans.</p>	<p>Concur.</p> <p>As indicated in the draft report, DTRA/ST has relied primarily on on-the-job training for licensing officers, which has been supplemented by courses offered by government agencies, academia and other organizations. While this training has been sufficient, it would be desirable to have a DTRA-sponsored, customized course of formal classroom training. DTRA will develop an action plan for such a course, including resources to support it by September 30, 1999. The course will be offered to DoD Components to assist in developing their own training plans.</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q.9: Foreign Disclosure and Technical Information System (FORDTIS). FORDTIS provides a useful, but less than optimal, communication and coordination mechanism for DOD on export control matters. The utility of FORDTIS has been limited by failure of some DoD Components (primarily OUSDP country desk officers) to use this system, as well as delays in system upgrades (e.g., re-engineering the data base for a Windows-based environment, which will include better search capabilities, which could lead to some incompatibilities with Commerce's modernization of its own computer system), by lack of scanning capability, and inadequacies in license case audit trails (see Q. 13).</p>	<p>A. That the USDP take action to obtain FORDTIS access for its country desk officers who review export license applications.</p> <p>B. That the DUSD(PS) monitor Commerce's system modernization efforts to ensure that DoD will transfer license information from Commerce export licensing computers.</p>	<p>A. Concur.</p> <p>USDP will issue a memo directing export application reviewers in OUSD(Policy) and other DoD Components to obtain access to and to use FORDTIS to review and communicate their recommendations on license cases. This action will be completed by June 30, 1999. In this connection, it should be noted that following up the March 9, 1998 memo by the Director, Technology Security, DTRA, ODUSD(PS) wrote a memo on April 23, 1998, to ASD(ISA), ASD(SO/LIC), and ASD(ST&R) encouraging their staff to take better advantage of FORDTIS and explained the procedure to do so.</p> <p>B. Concur, with comments.</p> <p>In the course of efforts to upgrade FORDTIS, the DUSD(PS) will continue to work in close coordination with the Departments of Commerce and State.</p>

<p>Q.9: Foreign Disclosure and Technical Information System (FORDTIS). (Continued)</p> <p>FORDTIS levels of access vary according to responsibility. A requirements report written for DTRA/ST and OUSD Policy states that the lack of understanding of user access approvals for use of the policy automation network, of which FORTIS is part, caused the access security to be less effective than it was designed to be.</p>		<p>Each of the military departments and defense agencies have an office assigned with the responsibility for creating, editing and updating their recommendations on an export license case. The office manager in each office may assign different individuals with specific responsibilities in this licensing process. Occasionally, what an individual has permission to do is assigned in error. Normally, system administrators catch these errors and correct them by contacting the office manager.</p> <p>If you mis-assign a person to a task, that has no impact on access security, assuming access means the ability to look at a file. What an office can do is automatically restricted by their organizational location. For example, NAVAIR can only generate a position for NAVAIR, not for the whole Navy. Therefore, an individual can only do what his office has permission to do.</p>
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IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q. 10: Changing Licensing Recommendations. There were instances where recommended positions entered in FORDTIS by a licensing officer were not accepted by the supervisor who took authorized action to change such positions without the consent or knowledge of that licensing officer or without adequate documentation of such changes. As a result, in some instances, documentation for legitimate supervisory action was not complete and in other instances, the official DoD record, which may serve as a precedent, was inaccurate.</p>	<p>That the Director, Technology Security, DTRA, establish procedures to ensure that instances are adequately documented in which supervisors change the position of a licensing officer with or without the consent or knowledge of the licensing office. Procedures should ensure that electronic records include the name of the person making the change and reason for the change.</p>	<p>Concur in part.</p> <p>We do <u>not</u> agree that DTRA/ST record keeping practice with respect to draft or proposed positions by licensing officers constitutes a material management control weakness. However, we agree that clarifying guidance should be issued.</p> <p>The Director, Technology Security, DTRA will issue guidance by July 31, 1999, clarifying the documentation requirements within DTRA/ST in the license review process. This guidance will end past informal practice of allowing a licensing officer to record in the "Comments" field in FORDTIS his/her personal recommendation as distinguished from the official position of his/her unit – a branch of the Licensing Division. It appears that allowance of this practice has contributed to some confusion about what is to be recorded and maintained as part of the official electronic record of decision making in license cases. In this regard, a licensing officer's recommendation is akin to a draft or proposal which may be accepted or modified by the licensing officer's supervisor or other person empowered to make such a determination. There is no requirement for maintaining records of staff drafts or proposals.</p> <p>The issue that the IG's report hints at, but does not explicitly address, is what happens if the licensing officer's recommendation is not accepted? DTRA/ST has an informal procedure (which will be confirmed in forthcoming written guidance) whereby, if not satisfied, the licensing office may submit a written appeal (and supporting material) to or through his supervisor. However, such an appeal must be submitted in a timely manner and no change would be made to any FORDTIS record, unless a decision were made to change an official position.</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q. 11: Pressure on Licensing Officers. With one exception, licensing officers did not report receiving any improper pressure to change specific recommendations on license applications. Other non-license officer DTRA/ST staff involved in the license application review process also did not report any improper pressure directed at them to change positions on specific applications. However, several of the DTRA/ST staff stated management applied indirect pressure to encourage certain viewpoints. An individual who believes he/she has been the subject of a prohibited personnel practice should direct the matter to the offices with specific jurisdiction.</p>	<p>None.</p>	<p>Comment: The IG report draws no conclusion on this issue, and appropriately notes that individuals who feel they have been subject to a prohibited personnel practice may pursue any allegations in the appropriate channels for dealing with such matters. In this connection, the Director, Technology Security, DTRA wishes to point out that neither he nor other supervisors pressure staff to change their recommendations on license applications. The formulation of a DoD position is a dynamic and iterative process that often requires resolution of inconsistencies in technical information, intelligence, and recommendations. In the end, there is only one DoD position and that is determined at the appropriate supervisory level.</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q. 12. Pre-License and Pre-Shipment Activities. In general, Commerce and State conduct pre-license and post-shipment licensing activities. DoD provides limited support through Defense Attache Offices. In December 1991, DoD started to support State by monitoring certain foreign space launch activities under State munitions licenses. DoD has not used and does not plan to use foreign nations to support Commerce or State pre-license and post-shipment licensing checks or to monitor space launches.</p>	None	None

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q. 13: Reliable Audit Trail. The FORDTIS audit trail on license cases did not always contain complete and accurate records of DoD and USG positions. Final DoD positions were not input into the appropriate field, particularly in escalated Commerce cases. Also, escalated and final USG positions were often not recorded, mostly in State cases. While Commerce and DoD records of case dispositions were generally in accord, they differed in certain instances. FORDTIS did not include new information presented at or detailed results of interagency decision meetings, records of applications referred to NSA, and key correspondence or technical data. As a result, FORDTIS cannot be used as a reliable means of assessing the degree to which overall DoD positions are in agreement with positions taken by the USG and the audit trail provides less assistance than possible for deriving positions for similar cases in the future.</p>	<p>A. That the Director, Technology Security Directorate, DTRA:</p> <ol style="list-style-type: none"> 1. Establish procedures to ensure that FORDTIS records include the correct DoD position, particularly when cases are escalated. 2. Establish procedures to ensure that FORDTIS records include details on new information presented at Operating Committee meetings, explanations of why DoD did not escalate cases in which DoD and the OC disagreed, records of encryption cases referred to the NSA, and key correspondence and technical data. <p>B. That the DUSD(PS) ensure that initiatives on electronic imaging in support of the review process are successfully implemented within DoD.</p>	<p>Concur in part.</p> <p>DTRA/ST acknowledges that there were some errors in recording final DoD positions on certain escalated Commerce cases. The Licensing Division discovered that the final DoD position code in FORDTIS had been incorrectly overwritten by the administrative staff to conform to the Operating Committee's License Decision (OCLD) issued by the Commerce Chair, even in cases where DoD maintained a denial recommendation. However, the OCLD and DoD position were accurately recorded in FORDTIS in the Position Text Field. Thus, the correct DoD position is obvious to a licensing officer and the basic integrity of the FORDTIS records was not undercut. These records are being corrected in the current database for historical accuracy. That said, we recognized the need for a separate area in which to record the position code on escalated cases. The new database for Commerce cases which is currently under development has additional fields to capture decisions and comments for cases that are escalated. This will facilitate recording complete historical record of official decision making.</p> <p>We do not believe the aforementioned administrative mistakes reflected material weaknesses in management controls. Similarly, we do not believe that the absence from FORDTIS license case records of the information identified in Recommendation A.2. constitutes a weakness in such controls.</p> <p>We believe the FORDTIS system and NSA records, for certain encryption cases it handles under delegation of authority, do contain adequate records of the history of the DoD position and USG disposition. Regarding the latter, the State Department's practice is to dispose of munitions cases consistent with DoD's recommendation. Delays in recording/scanning the State licenses into FORDTIS reflect resource constraints and do not materially derogate from the FORDTIS record. On 12 May</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q. 13: Reliable Audit Trail (continued)</p>		<p>1999, ODUSD(PS) again approached State Department about providing final USG positions in an electronic format. State was unable to do so because of technical and resource constraints. Commerce's dispositions of dual-use cases are required by Executive Order to be in accord with DoD's position or resolution by appropriate interagency procedure. If the latter, the interagency disposition is manually entered into FORDTIS; otherwise, there is no cost-effective way at present of entering Commerce dispositions.</p> <p>Requiring that NSA record in FORDTIS its actions on encryption cases would impose a resource burden and may result in review delays. NSA has been delegated authority to receive and provide the DoD position on these directly to Commerce. This procedure was adopted to expedite the process. In 1998, NSA handled almost 2400 encryption related cases and maintains hard copy records.</p> <p>Inputting more information into FORDTIS relating to decisions not to escalate and on interagency discussions would also impose an additional tax on resources without adding value. In this connection for example, the preparation of interagency meeting conclusions is something that Commerce, as the Chair, used to do – but no longer does. We believe that Commerce should prepare short summaries of decisions and transmit them in digital form to agencies.</p> <p>Scanning license information and technical data into an electronic data base should be an activity that is shared by licensing and reviewing agencies. We believe a common approach should be developed that provides an equitable sharing of costs. For its part, DoD has work underway, including some in cooperation with State, to develop scanning processes and electronic formats.</p> <p>We are not saying that the IG's ideas are without merit, but only that they require careful consideration, including of their resource implications. The Director, Technology Security, DTRA will undertake to study these ideas as part of a broader review of the DoD license process, to include case documentation practices, to determine ways and means of improving the utility of FORDTIS records and the process generally. The study is expected to be completed by September 30, 1999.</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Q. 14. Monitoring Program In support to State, DTRA/ST has adequate procedures for monitoring space launch activities. Its informal process for reporting potential violations of license conditions and technology transfer control plans was also adequate. However, expected increases in the number of monitors at DTRA/ST and the number of launches to be monitored could result in a parallel increase in reports to State. The informal reporting process could fail to ensure that State receives the higher standard of reporting from DoD.</p>	<p>That the Director, Defense Threat Reduction Agency, in coordination with the Department of State, develop and implement a memorandum of understanding outlining reporting requirements for the Space Launch Safeguards and Monitoring Program.</p>	<p>Concur.</p> <p>As the IG's draft report notes, DTRA/ST has developed and issued DTRA/ST Operating Instruction SOP-01, Rev. on December 22, 1998. The Instruction sets forth details for documenting and reporting monitoring activities, including violations of Technology Safeguard Agreements, Technology Control Plans and export laws and regulations administered by the Department of State. A copy of the Instruction has been provided to State. As a first step in the implementation of this recommendation, the Director of DTRA will seek the State Department's guidance on what additional specific procedures it would advise to ensure that evidence of violations of such agreements, control plans, laws and regulations are reported to State. Action should be completed by September 1, 1999.</p>

IG Finding	IG Recommendation	Response to Recommendation and/or Comments
<p>Management Control Program.</p> <p>The draft report characterizes the practices described in findings in Q.5/6, Q.10 and Q. 13, as “material management control weaknesses.”</p> <p>DTRA/ST had not performed a self-evaluation of its export license application reviews since FY 1988.</p>	<p>Recommendations relating to Q.5, Q.6.A, Q. 10 and Q.13.A, if implemented, will correct the material weaknesses.</p>	<p>Nonconcur.</p> <p>We do not agree that there is evidence demonstrating a material weakness in internal management controls. However, we believe that the actions that have been undertaken in response to the IG’s recommendations will address the relevant concerns and lead to improvements in the DoD license process.</p> <p>DTRA/ST’s predecessor, DTSA, did conduct self-evaluations as required by its Internal Management Controls. The most recent such assessment was conducted in 1998 and a copy of it was provided to the IG’s office after issuance of its draft report. All such assessments resulted in a finding of “low vulnerability.”</p>

National Security Agency Comments



NATIONAL SECURITY AGENCY
FORT GEORGE G. MEADE, MARYLAND 20755-6000

14 May 1999

MEMORANDUM FOR THE DIRECTOR, READINESS AND LOGISTICS SUPPORT
DIRECTORATE, OIG DOD

SUBJECT: Draft Report of the Review of the DoD Export Licensing Processes for Dual-
Use Commodities and Munitions (Project No. 9LG-5025)

NSA has reviewed the draft DoD IG report, "Review of the DoD Export Licensing Processes for Dual-Use Commodities and Munitions," dated 23 April 1999. A classification review was also conducted for those portions of the report that include NSA. The following comments are provided.

Q.13.A.2.: The Director, Technology Security Directorate, Defense Threat Reduction Agency establish procedures to ensure that Foreign Disclosure and Technical Information System records include details on new information presented at Operating Committee meetings, explanations of why DoD did not escalate cases on which DoD and the Operating Committee disagreed, records of encryption cases referred to the National Security Agency, and key correspondence and technical data.

NSA nonconcurrs with the recommendation to input into the Foreign Disclosure and Technical Information System (FORDTIS) the NSA position on encryption cases. The recommendation negates the purpose of the delegation of authority (DOA) from the Defense Threat Reduction Agency (DTRA) to NSA. This DOA to vote encryption cases directly to the Department of Commerce (DOC) speeds up the licensing process for US vendors and was part of an Administration effort to improve encryption policy and licensing in response to vendor input.

Although the encryption audit trail is not the same as other cases because it does not include FORDTIS, nevertheless, the trail exists, from DOC to the operational element responsible for encryption licensing. And, per the DOA, DTRA can request the information at any time. It is the task of the operational element responsible for encryption licensing to keep the records. As a true measure of the additional workload involved to input encryption case voting into FORDTIS consider these statistics. In 1998, Commerce staffed 1939 encryption license applications to the operational element for voting and 377 requests for reviews for license exception. The Technology Security Policy Office already staffs 6000 license applications per year. The only feasible way

encryption voting data could be included in FORDTIS would be if the operational element responsible for encryption licensing input the relevant data.

The statement that NSA personnel stated they had time to review license applications can be more correctly stated in terms of NSA's on time response to dual use license applications (30-day window) and because there is no mandatory deadline for munitions cases. Seldom has DTRA not waited for NSA's vote. The NSA response time has been good compared to other DoD agencies. This would not be the situation if it was decided that 2000+ encryption cases had to be entered into the FORDTIS database. For reasons of efficiency and timely response, the Technology Security Policy Office could not manage an increased workload involving encryption license application reviewing, staffing, database entry and updating or the institution of mandatory deadlines on munitions cases.

Classification Review:

A classification review was conducted for those portions of the report that mention NSA. The review is based on NSA equities and not those of the other agencies and entities involved in the export licensing process. The other agencies involved should conduct a classification review for their portion of the report. The report is properly classified FOR OFFICIAL USE ONLY and should not be released as unclassified. Also, NSA and the DoD IG have agreed that reports containing information regarding the National Security Agency are released with a "Special Warning" caveat: "This report contains certain unclassified information relating to the organization and function of the National Security Agency that may be protected by Public Law 86-36, May 29, 1959. Reproduction or removal of pages is prohibited. Safeguards must be taken to prevent publication or improper disclosure of the information in this report." Please ensure that the caveat appears on the cover of the report.

Please contact Judy Jefferson, Audit Liaison, 301-688-8052, if you have any questions or need additional information.


ROBERT J. LIBERATORE
Comptroller

Through subsequent discussions with NSA, it was determined that the warning notice was not necessary for this report.

Review Team Members

The Readiness and Logistics Support Directorate, Office of the Assistant Inspector General for Auditing, DoD, produced this report.

Shelton R. Young
Evelyn R. Klemstine
Jerrold R. Savage
Henry Y. Adu
Raymond L. Hopkins
Jane T. Thomas
William H. Zeh
Andrew T. Nerreter
Sean J. Keaney
Henry D. Barton