

Interagency Review of the Commerce Control List and the U.S. Munitions List

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Abstract

In August 1998, the Chairman of the Senate Committee on Governmental Affairs requested that the Inspectors General from the Departments of Commerce, Defense, Energy, State, and the Treasury and the Central Intelligence Agency conduct an interagency review of the export licensing processes for dual-use commodities and munitions. The objective of the review was to determine whether current practices and procedures were consistent with national security and foreign policy objectives. An interagency Office of the Inspectors General (OIG) Report No. 99-187, "Interagency Review of the Export Licensing Processes for Dual-Use Commodities and Munitions," was issued in June 1999. Public Law 106-65, National Defense Authorization Act for Fiscal Year 2000, section 1402, "Annual Report on Transfer of Militarily Sensitive Technologies to Countries and Entities of Concern," October 5, 1999, required the President to submit an annual report to Congress, beginning in the year 2000 and ending in the year 2007, on the transfer of militarily sensitive technology to countries and entities of concern. The National Defense Authorization Act further required that the Inspectors General of the Departments of Commerce (Commerce), Defense (Defense), Energy (Energy), and State (State), in consultation with the Director, Central Intelligence Agency, and the Director, Federal Bureau of Investigation, conduct an annual review of policies and procedures of the U.S. Government with respect to their adequacy to prevent export of sensitive technologies and technical information to countries and entities of concern. An amendment to section 1402(b), found in section 1075 of the National Defense Authorization Act for FY 2001, further requires the Inspectors General to include in their annual report the status or disposition of recommendations that have been set forth in previous annual reports under section 1402.

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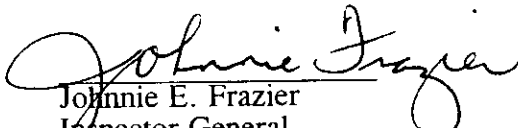
PREFACE

We are providing this report for information and use. This review was undertaken as a cooperative effort of the Inspector Generals of the Departments of Commerce, Defense, Energy, and State in response to specific provisions of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65). Our overall objective was to assess the policies and procedures for developing, maintaining, and revising the Commerce Control List and the U.S. Munitions List.

This report addresses issues that affect more than one agency and includes separate appendixes that contain the agency-specific reports addressing the issues related to each agency.

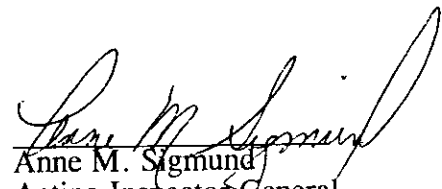
Agency comments were not obtained for this interagency report because of time constraints. However, agency comments on agency draft reports were requested and obtained from the appropriate officials of each agency and were considered in the preparation of this report. Agency comments on individual agency reports are included in those reports.

We hope that this joint report will be useful in shaping the future of the export licensing process for developing, maintaining, and revising the Commerce Control List and the U.S. Munitions List.


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Report No. D-2001-092

March 23, 2001

**Interagency Review of the Commerce Control List
and the U.S. Munitions List**

Executive Summary

Introduction. In August 1998, the Chairman of the Senate Committee on Governmental Affairs requested that the Inspectors General from the Departments of Commerce, Defense, Energy, State, and the Treasury and the Central Intelligence Agency conduct an interagency review of the export licensing processes for dual-use commodities and munitions. The objective of the review was to determine whether current practices and procedures were consistent with national security and foreign policy objectives. An interagency Offices of the Inspectors General (OIG) Report No. 99-187, "Interagency Review of the Export Licensing Processes for Dual-Use Commodities and Munitions," was issued in June 1999.

Public Law 106-65, National Defense Authorization Act for Fiscal Year 2000, section 1402, "Annual Report on Transfer of Militarily Sensitive Technologies to Countries and Entities of Concern," October 5, 1999, required the President to submit an annual report to Congress, beginning in the year 2000 and ending in the year 2007, on the transfer of militarily sensitive technology to countries and entities of concern. The National Defense Authorization Act further required that the Inspectors General of the Departments of Commerce (Commerce), Defense (Defense), Energy (Energy), and State (State), in consultation with the Director, Central Intelligence Agency, and the Director, Federal Bureau of Investigation, conduct an annual review of policies and procedures of the U.S. Government with respect to their adequacy to prevent export of sensitive technologies and technical information to countries and entities of concern. An amendment to section 1402(b), found in section 1075 of the National Defense Authorization Act for FY 2001, further requires the Inspectors General to include in their annual report the status or disposition of recommendations that have been set forth in previous annual reports under section 1402.

To comply with the first-year requirement of the National Defense Authorization Act, the OIGs conducted an interagency review of Federal agency compliance with the deemed export licensing requirements contained in the Export Administration Regulations and the International Traffic in Arms Regulations. To comply with the second-year requirement of the National Defense Authorization Act, the OIGs conducted an interagency review to assess policies and procedures for developing, maintaining, and revising the Commerce Control List (CCL) and the U.S. Munitions List (USML).

Background. The United States controls the export of certain goods and technologies for national security, foreign policy, or nonproliferation reasons under the authority of several different laws. The Export Administration Act of 1979, as amended, is the primary legislative authority for controlling the export of dual-use commodities,¹ whereas the export of goods and technologies that have only military use is controlled under the authority of the Arms Export Control Act. The Government publishes two lists, the CCL and USML, which identify the goods and technologies that are subject to export controls. Exporters use the CCL, which is managed by the Commerce Bureau of Export Administration, to determine what dual-use commodities are subject to control. For munitions, exporters refer to the USML, which is managed by State's Office of Defense Trade Controls.

Objectives. Our overall objective was to assess policies and procedures for developing, maintaining, and revising the CCL and USML. In addition, Commerce, Defense, and State OIGs assessed whether a need exists for more transparency in the commodity jurisdiction process. Commerce and Defense OIGs also assessed whether a need still exists for greater transparency in the commodity classification process.

Review Results.

Review of the Commerce Control List. The Commerce and Defense OIGs reported that improvements could be made in how the CCL is developed, maintained, and revised. Specifically, the Commerce OIG was concerned about the clarity and user-friendliness of the CCL. Because of those concerns, exporters may make errors in determining whether their item is controlled by the CCL and, as such, may either apply for a license when one is not required or not apply when a license is required. In maintaining the CCL, the Commerce OIG found that some items included in four Export Control Classification Numbers are controlled on the CCL for national security reasons, but are no longer controlled by the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. The Defense OIG reported that enhancements are needed to improve the review of unilaterally controlled items on the CCL and the review of countries listed on the Commerce Country Chart. Further, the Commerce OIG found that changes resulting from the multilateral plenary² sessions are not always reflected in the list in a timely manner. As a result of those problems, items may be subjected to tighter or more lenient controls than the Export Administration Act allows. The Energy OIG concluded that Energy, which has a minor role in developing, maintaining, and revising the CCL and USML, is providing appropriate support to the development and review of the Nuclear Referral List,³ a subset of the CCL. The process appears to be working appropriately and no concerns have been raised by other agencies regarding Energy's role.

¹Some controlled commodities are designated as "dual-use," that is, goods and technologies that have both civilian and military use.

²Plenary sessions are the annual and/or semiannual meetings of the various multilateral regimes fully attended by all qualified members.

³The Nuclear Nonproliferation Act of 1978, Section 309 (c) states that "The President shall publish procedures regarding control by the Department of Commerce over all export items, other than those licensed by the Commission [Nuclear Regulatory Commission], which could be, if used for purposes other than those for which the export is intended, of significance for nuclear explosive purposes." The Act also states that the Secretaries of Commerce and Energy are both responsible and must agree to changes in control procedures in consultation with other agencies. The Nuclear Referral List consists of those items on the CCL controlled for nuclear nonproliferation concerns.

Review of the U.S. Munitions List. The Defense and State OIGs found that the Office of Defense Trade Controls had not performed a comprehensive review of the USML since 1993. The Commerce OIG found that most users believed that the USML is not as easy to understand and use as the CCL. In an effort to improve export controls, in May 2000 a series of Defense Trade Security Initiatives was announced by the Secretary of State. One of those initiatives, number 17, “Periodic Reviews of the USML,” requires that the Defense Threat Reduction Agency and State’s Office Defense Trade Controls review the USML to ensure clarity and appropriateness. To comply with the initiative, the Defense Threat Reduction Agency has scheduled a review of 5 of the 19 active USML categories to be completed in May 2001. To help improve the user-friendliness of the USML, the Defense Threat Reduction Agency is supposed to help ensure that USML categories reflect the technologies considered significant in the list of militarily critical technologies and clarify USML language to ensure that users of the list can easily identify the items requiring export licenses. However, the Defense OIG found that critical parameters for the military technologies listed in the list of militarily critical technologies, a list developed to be a guide for export controls, may be outdated and that developing technologies with potential military applications may not have been identified on the list. The Defense and State OIGs jointly concluded that periodic reviews of the USML required by the Defense Trade Security Initiatives are needed and should continue into the future.

Commodity Jurisdiction Process. The Commerce, Defense and State OIGs found that their respective agencies did not comply with mandatory timeframes set forth in National Security Council guidance for processing commodity jurisdiction requests. Exporters unsure as to whether an item is on the USML can request a commodity jurisdiction determination from the Office of Defense Trade Controls to rule on the export licensing jurisdiction for the item. The commodity jurisdiction process can also be used to consider moving an item currently covered by the USML to the CCL. Specifically, the Bureau of Export Administration and the Defense Threat Reduction Agency did not comply with the timeframes to respond to the Office of Defense Trade Controls on commodity jurisdiction referrals because of competing priorities and limited resources and because the Office of Defense Trade Controls did not impose or enforce any deadlines. When the Office of Defense Trade Controls received the referrals from the Bureau of Export Administration and the Defense Threat Reduction Agency, it was also not timely in making its final commodity jurisdiction determinations because of resource constraints and competing priorities. As a result, all three agencies contributed to commodity jurisdiction determinations being made to exporters in an untimely manner—a situation that can cause delays or cancellations in shipments and uncertainty in the business community regarding the export control jurisdiction of certain items. The Commerce and State OIGs also identified problems associated with commodity jurisdiction cases being processed and tracked manually. Specifically, the manual system for processing commodity jurisdiction determination requests can be unreliable and does not lend itself to providing transparency and accountability for the commodity jurisdiction process. This situation increases the risk that documents can be lost, misplaced, or misdirected, resulting in unnecessary delays.

Unresolved Jurisdictional Issues. The Commerce and State OIGs noted a breakdown in the interagency process for resolving jurisdictional disputes for night vision equipment and space qualified items.⁴ With regard to night vision equipment, the

⁴According to the Export Administration Regulations, the term “space qualified” refers to products designed, manufactured, and tested to meet the special electrical, mechanical, or environmental requirements for use in the launch and deployment of satellites or high-altitude flight systems operating at altitudes of 100 km or higher.

Commerce and State OIGs noted ongoing disagreements about whether such equipment should be licensed by the Bureau of Export Administration or by the Office of Defense Trade Controls. Because of the inability of the licensing agencies to resolve the dispute, license applications are being delayed and exporters are confused about which agency they should apply to for a license for those goods. In addition, the U.S. Government has not been able to make a decision about which agency has jurisdiction for 16 categories of space qualified items currently controlled under the CCL. As a result, the National Security Council initiated a review to determine which Federal agency should have jurisdiction for the 16 space qualified items and was expected to rule in April 2000. However, as of March 2001, no decision has been made. Finally, the Commerce and State OIGs determined that the lack of formal policies and procedures in the Government jurisdiction process has led to confusion among both licensing agencies and exporters.

Commodity Classification Process. The Commerce and Defense OIGs reported that the commodity classification process was not transparent because the Bureau of Export Administration may not be referring munitions-related commodity classifications to the Defense Threat Reduction Agency and the Office of Defense Trade Controls. The failure of the Bureau of Export Administration to refer such commodity classifications to the other licensing agencies, as called for in guidance issued by the National Security Council in 1996, leaves the Bureau of Export Administration vulnerable to incorrect classifications. That finding was also reported as part of the 1999 interagency OIG export licensing review. While concurring with the 1999 Commerce OIG recommendation to work with the National Security Council to develop specific criteria and procedures for the referral of munitions-related commodity classifications to the Defense Threat Reduction Agency and the Office of Defense Trade Controls, the Bureau of Export Administration has taken no action to correct the problems because it maintains that it is currently in compliance with the National Security Council guidance. In addition, during the current review, the Commerce OIG found that the Bureau of Export Administration was not providing the Office of Defense Trade Controls with a copy of the final commodity classification determinations for any commodity classifications reviewed.

Followup to Prior Interagency Review. Appendix B contains the current status of the recommendations made by each agency as required by the amendment to section 1402 of the National Defense Authorization Act for FY 2001.

Recommendations, Agency Comments, and OIG Responses. The participating OIGs made specific recommendations relevant to their own agencies. Recommendations, agency comments, and OIG responses are included in the separate reports issued by each office, which are in Appendix C (Commerce), Appendix D (Defense), Appendix E (Energy), and Appendix F (State). Because of time constraints, agency managers were not asked to respond to this interagency report. Agency comments discussed in this report are those provided in response to the individual reports of the participating OIGs.

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Acronyms

BXA	Bureau of Export Administration, Department of Commerce
CCL	Commerce Control List
CJ	Commodity Jurisdiction
DTC	Office of Defense Trade Controls, Department of State
DTRA	Defense Threat Reduction Agency, Department of Defense
ECCN	Export Control Classification Number
OIGs	Offices of the Inspectors General
USML	United States Munitions List

Introduction

In August 1998, the Chairman of the Senate Committee on Governmental Affairs requested that the Inspectors General from the Departments of Commerce, Defense, Energy, State, and the Treasury and the Central Intelligence Agency conduct an interagency review of the export licensing processes for dual-use commodities and munitions. The objective of the review was to determine whether current practices and procedures were consistent with national security and foreign policy objectives. An interagency Offices of the Inspectors General (OIG) Report No. 99-187, "Interagency Review of the Export Licensing Processes for Dual-Use Commodities and Munitions," was issued in June 1999.

Public Law 106-65, National Defense Authorization Act for Fiscal Year 2000, section 1402, "Annual Report on Transfer of Militarily Sensitive Technologies to Countries and Entities of Concern," October 5, 1999, required the President to submit an annual report to Congress, beginning in the year 2000 and ending in the year 2007, on the transfer of militarily sensitive technology to countries and entities of concern. The National Defense Authorization Act further required that the Inspectors General of the Departments of Commerce (Commerce), Defense (Defense), Energy (Energy), and State (State), in consultation with the Director, Central Intelligence Agency, and the Director, Federal Bureau of Investigation, conduct an annual review of policies and procedures of the U.S. Government with respect to their adequacy to prevent export of sensitive technologies and technical information to countries and entities of concern. An amendment to section 1402(b), found in section 1075 of the National Defense Authorization Act for FY 2001, further requires the Inspectors General to include in their annual report the status or disposition of recommendations that have been set forth in previous annual reports under this section.

To comply with the first-year requirement of the Act, the OIGs conducted an interagency review of Federal agency compliance with the deemed export licensing requirements contained in the Export Administration Regulations and the International Traffic in Arms Regulations. Two interagency reports, "Interagency Review of the Export Licensing Process for Foreign National Visitors" and "Interagency Inspector General Assessment of Measures to Protect Against the Illicit Transfer of Sensitive Technology," were issued in March 2000. To comply with the second-year requirement of the National Defense Authorization Act, the OIGs conducted an interagency review to assess policies and procedures for developing, maintaining, and revising the Commerce Control List (CCL) and United States Munitions List (USML).

Background

The United States controls the export of certain goods and technologies for national security, foreign policy, or nonproliferation reasons under the authority of several different laws. The primary legislative authority for controlling the export of dual-use commodities¹ is the Export Administration Act of 1979, as amended (Title 50, United States Code, Appendix 2401). The export of goods and technologies that have military use is controlled under the authority of the Arms Export Control Act (Title 22, United States Code, section 2751). Finally, the export of nuclear dual-use commodities is controlled by the Nuclear Nonproliferation Act of 1978 (Title 22, United States Code, section 3201).

Commerce Control List. Commerce's Bureau of Export Administration (BXA) controls the export of dual-use commodities using the authority provided in the Export Administration Act. BXA develops export control policies, issues export licenses, and enforces the laws and regulations for dual-use exports, including the Export Administration Regulations. The CCL, contained within the Export Administration Regulations, lists items (commodities, software, and technology) subject to the export licensing authority of BXA.

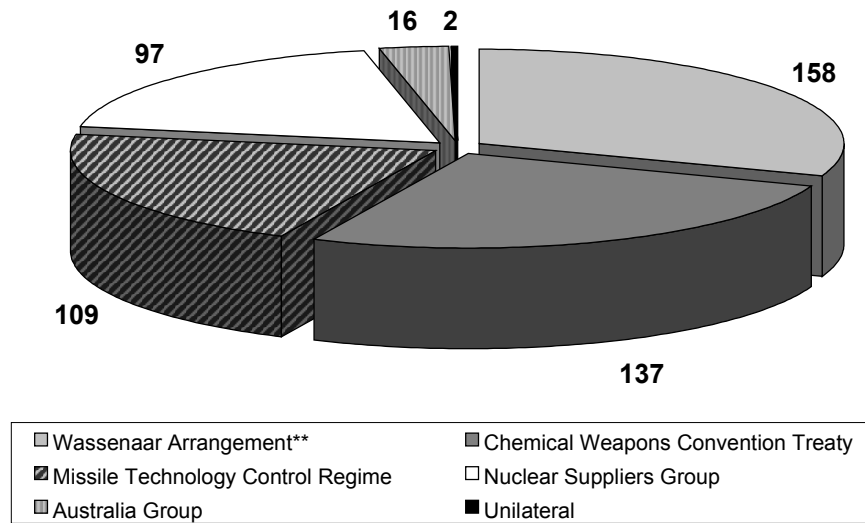
The CCL is organized by Export Control Classification Number (ECCN). Of the 472 ECCNs listed on the CCL, 137 are controlled unilaterally by the United States. The remaining 339 ECCNs² on the CCL are controlled in cooperation with other countries through various multilateral regimes (see Figure 1 for a breakdown of the source of ECCNs on the CCL). Items may be unilaterally controlled because they are in short supply,³ not readily available from any other country, or because the United States does not want to export the items for foreign policy reasons.

¹Some controlled commodities are designated as "dual-use," that is, goods and technologies that have both civilian and military uses. The U.S. Government designates some dual-use commodities as "nuclear dual-use" items, which are controlled for nuclear nonproliferation purposes.

²Of the 339 ECCNs, 4 are also controlled for unilateral reasons. Thus, 339 ECCNs controlled multilaterally, plus 137 ECCNs controlled unilaterally, will not total to 472.

³Short supply controls are detailed in Section 7 of the Export Administration Act. To protect the domestic economy from an excessive drain of scarce materials and reduce the impact of foreign demand, "the President may prohibit or curtail the export of any goods subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States."

Figure 1. Sources of ECCNs on the CCL*



*Totals more than 472 because some ECCNs may be controlled by more than one regime.

**Includes both the Wassenaar Arrangement Dual-Use and Munitions List

Sources: Commerce and Defense OIG Analysis of the October 2000 CCL

The United States is a member of several multilateral regimes concerned with the export of dual-use and munitions items to countries of concern. Those organizations include the Australia Group, the Chemical Weapons Convention, the Missile Technology Control Regime, the Nuclear Suppliers Group, and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (Wassenaar Arrangement).

The Australia Group is an informal forum of 32 industrialized nations that cooperate in curbing the proliferation of chemical and biological weapons through coordination of export controls, exchange of information, and other diplomatic actions. The Chemical Weapons Convention has 141 signatories to its treaty that bans the entire class of chemical weapons. Membership of the Missile Technology Control Regime totals 32 nations, with the objective to limit proliferation of missiles capable of delivering weapons of mass destruction. The Nuclear Suppliers Group, which has 39 member nations, sets controls on nuclear material, equipment, and technology unique to the nuclear industry and on dual-use items that have both nuclear and non-nuclear commercial and military applications. The Wassenaar Arrangement has 33 member nations and is designed to respond to the new security threats of the post-Cold War era. The purpose of Wassenaar Arrangement is to contribute to regional and international security and stability by promoting transparency and greater responsibility in the transfer of conventional arms and dual-use goods and technologies, such as computers, machine tools, and satellites.

U.S. Munitions List. The Arms Export Control Act authorizes the President to control the export of defense-related articles and services. In Executive Order 11958, “Administration of Arms Export Controls,” January 18, 1977, the President delegated responsibility for administering export functions associated with the Arms Export Control Act to the Secretary of State. Within State, that function is delegated to the Bureau of Political-Military Affairs, Office of Defense Trade Controls (DTC). That office carries out its responsibilities by registering persons or companies involved in defense trade, approving or denying export licenses, and ensuring compliance with the Arms Export Control Act and other applicable laws and regulations.

DTC is also responsible for creating and maintaining the USML, which is contained within the International Traffic in Arms Regulations, 22 Code of Federal Regulations, part 120. The USML identifies those items, technologies, and services inherently military in character and that could, if exported, jeopardize the national security or foreign policy interests of the United States. The USML specifies defense articles, services, and related technical data that may be exported as well as the conditions under which munitions may be exported. The USML consists of 21 categories. Two of those categories are, however, reserved for future use.

Defense Role in the CCL and USML. The Defense Threat Reduction Agency (DTRA), Technology Security Directorate, is the Defense component that BXA and DTC consult with when revising or updating the CCL or USML. DTRA also reviews commodity classification and commodity jurisdiction cases referred to it by BXA and DTC. DTRA serves as the Defense agent for implementation of Defense technology security policies established by the Under Secretary of Defense for Policy and the Deputy Under Secretary of Defense (Technology Security Policy) on international transfers of defense-related goods, services, technologies and munitions, consistent with DoD Directive 2040.2, “International Transfers of Technology, Goods, Services, and Munitions,” January 17, 1984.

Energy Role in the CCL and USML. Energy has a minor role in developing, maintaining, and revising the CCL and the USML. Within Energy, the Office of Nuclear Transfer and Supplier Policy plays a significant role in the formulation of U.S. nuclear proliferation and export control policies, and conducts export license review activities for dual-use and munitions commodities. The Office of Nuclear Transfer and Supplier Policy participates with BXA in the identification and review of nuclear dual-use commodities listed on the Nuclear Referral List.⁴ Officials within the Office of Nuclear Transfer and Supplier Policy said that they have not been involved in any changes to the USML.

⁴The Nuclear Nonproliferation Act of 1978, Section 309 (c) states, “The President shall publish procedures regarding control by the Department of Commerce over all export items, other than those licensed by the Commission [Nuclear Regulatory Commission], which could be, if used for purposes other than those for which the export is intended, of significance for nuclear explosive purposes.” The Act also states that the Secretaries of Commerce and Energy are both responsible and must agree to changes in control procedures in consultation with other agencies. The Nuclear Referral List consists of those items on the CCL controlled for nuclear nonproliferation concerns.

Objectives

Our overall objective was to assess the policies and procedures for developing, maintaining, and revising the CCL and USML. The Commerce, Defense, and State OIGs assessed whether there is a need for more transparency in the commodity jurisdiction process. In addition, Commerce and Defense OIGs also assessed whether a need still exists for greater transparency in the commodity classification process. See Appendix A for a discussion of scope and methodology of the reviews. See Appendix B for the status of recommendations from previous annual reports.

A. Review of the Commerce Control List

The Commerce and Defense OIGs reported that improvements could be made in how the CCL is developed, maintained, and revised. Specifically, the Commerce OIG identified improvements that are needed in the management of the CCL, including additional ways to make the list more user-friendly. Without improvements, exporters may make errors in determining whether their item is controlled by the CCL and as such, may either apply for a license when one is not required or not apply when a license is required. In maintaining the CCL, the Commerce OIG found that some items included in four ECCNs are controlled on the CCL for national security reasons, whereas foreign policy reasons would be more appropriate because the items are no longer controlled by the Wassenaar Arrangement. The Defense OIG reported that enhancements are needed to improve the review of unilaterally controlled items on the CCL and countries listed on the Commerce Country Chart.⁵ Further, in revising the CCL, the Commerce OIG found that changes resulting from the multilateral plenary sessions are not always reflected on the list in a timely manner. As a result of those problems, items may be subjected to tighter or more lenient controls than the Export Administration Act allows. The Energy OIG concluded that Energy is providing appropriate support to the development and review of the Nuclear Referral List, a subset of the CCL.

Development of the Commerce Control List

During its review, the Commerce OIG interviewed users of the CCL to determine how easy it was for them to use and apply the list to their potential exports. The Commerce OIG and the users noted that the CCL is easier to understand and use than the USML (as discussed in Finding B). However, the Commerce OIG and the users cited the following problems with the CCL.

- Approximately 45 items appear on both the CCL and the USML.
- Considerable confusion exists about the use of the ambiguous terms “specialized” and “specially designed” for military applications in the CCL.
- Some items controlled by multilateral regime dual-use lists are controlled by the USML rather than the CCL. Although those items are included in the CCL, the ECCNs direct the exporter to the USML to identify the proper controls. Those “pointers” from the CCL to the USML are sometimes unnecessarily confusing.
- Structure of the CCL could be modified to make it easier to navigate.

⁵The Commerce Country Chart, like the CCL, is maintained by BXA. The Commerce Country Chart helps the exporter, based on the reasons for control associated with their item, determine if a license is needed to export or reexport the item to a particular destination.

The Commerce and Defense OIGs believe that the clearer the CCL is, the more likely an exporter will be able to comply with the export regulations and the less time BXA will have to spend on answering questions and rerouting license applications.

The Commerce OIG recommended that BXA convene a working group of business and Government representatives to address problems with the CCL, as well as work with DTC and applicable congressional committees that are considering new legislation for dual-use exports to eliminate the overlap between the CCL and USML. The Commerce OIG also recommended that a user-friendly consolidated index of the items on the two lists be created. BXA generally agreed that the user-friendliness of the CCL should be improved. However, because BXA has found that past discussions with DTC on eliminating the overlap between the CCL and USML have consistently not been productive, BXA suggested revising the recommendation to request that the National Security Council chair the working group. The Commerce OIG disagreed and continues to believe that the working group should be managed at the agency level. BXA also stated that the agency would welcome the availability of a USML item-specific index or up-to-date which indices could be distributed with the CCL index.

Maintenance of the Commerce Control List

Commerce Maintenance of the CCL. Dual-use goods and technologies controlled by the Wassenaar Arrangement are controlled for national security reasons on the CCL.⁶ However, the Commerce OIG found 14 items included under four ECCNs (0A018, 0E018, 1C018, and 8A018) are being controlled on the CCL for national security reasons, but are not controlled by the Wassenaar Arrangement. (See Table 2 in the Commerce OIG report at Appendix C, page 19 for a full description of the national security controlled items on the CCL that Wassenaar Arrangement has decontrolled.) BXA generally does not have the authority, under the Export Administration Act of 1979, as amended, to unilaterally impose national security controls for those items. By doing so, BXA is requiring exporters to apply for a license when no national security controls were imposed on those items and a license may not have been required.

The Commerce OIG recommended that BXA work with DTRA and DTC to determine (a) whether the national security controls for those items should be removed and (b) whether those items should continue to be controlled for foreign policy reasons under the CCL. BXA concurred with the recommendation and stated that the agency has attempted to initiate discussions with DTC to undertake the review and revision but has been unsuccessful. BXA asked that the Commerce OIG encourage DTC to participate in the effort.

⁶Some dual-use goods controlled by the Wassenaar Arrangement are under the licensing jurisdiction of State and are contained on the USML.

Defense Maintenance of the CCL. The Defense OIG identified that a valid requirement for an export license may no longer exist for at least some of the 137 unilaterally controlled ECCNs on the CCL and some of the 196 countries for which unilateral controls are applicable. The United States unilaterally controls exports of 137 of the 472 ECCNs (29 percent) listed on the CCL to at least 196 countries. Because no review of those ECCNs or countries has been recently conducted by DTRA, a requirement for an export license may no longer exist.

Unilaterally Controlled Items. Unilaterally controlled ECCNs on the CCL were not reviewed by Defense. DTRA officials did not require reviews of export controls placed on ECCNs because of foreign policy and short supply concerns. The 137 ECCNs unilaterally controlled on the CCL were controlled because of foreign policy and short supply concerns as defined by the Export Administration Regulations. The majority of those ECCNs were controlled because of the potential terrorist threat that the items pose. The unilaterally imposed controls could benefit from DTRA expertise in a review of foreign policy controlled ECCNs on the CCL. BXA has not required or scheduled periodic DTRA reviews of unilaterally controlled ECCNs. Because the Export Administration Act requires DTRA concurrence for only the control of items based on national security concerns and because unilaterally controlled items are controlled based on foreign policy and short supply concerns, no Defense requirement existed for a review of unilaterally controlled ECCNs.

The Defense OIG recommended that DTRA establish a process for working with BXA to facilitate periodic interagency reviews of the CCL. The Defense OIG also recommended that DTRA work with BXA to determine if any of the ECCNs currently controlled by the United States should be removed from the CCL. DTRA concurred with the recommendations.

Commerce Country Chart. Countries for which unilateral controls are applicable were not reviewed because DTRA officials were not required to review export controls placed on ECCNs, due to foreign policy and short supply concerns. The 196 countries for which crime controls and nuclear nonproliferation controls were applicable were controlled because of foreign policy concerns. The countries affected by foreign policy controls, especially crime control and nuclear nonproliferation, could also benefit from a DTRA review of the Commerce Country Chart.

The Defense OIG recommended that DTRA work with BXA to determine if any of the countries to which controls apply should be removed from the Commerce Country Chart. DTRA concurred with the recommendation.

Energy Maintenance of the CCL. The Energy OIG found that Energy's Office of Nuclear Transfer and Supplier Policy participates, along with BXA, in identification and review of nuclear dual-use commodities on the CCL. The nuclear dual-use commodities comprise the Nuclear Referral List. Officials from Energy's Office of Nuclear Transfer and Supplier Policy stated that they follow an informal process within Energy to review proposed changes to the Nuclear Referral List. BXA provides Energy a copy of the proposed changes by e-mail and follows up with a paper copy. Office of Nuclear Transfer and Supplier Policy export control analysts seek technical assistance as needed from Energy

laboratories to develop recommendations regarding proposed changes to the Nuclear Referral List. The Energy OIG found that the mix of participants in Energy's review process provides comprehensive coverage of all aspects of nuclear fuels cycle and nuclear weapons technologies, as well as coverage of nuclear export control and licensing issues. The process appears to be working appropriately and no concerns have been raised by other agencies regarding the Department of Energy's role.

Revision of the Commerce Control List

Commerce OIG found that improvements can be made in the timeliness of revisions to the CCL. Each year, the U.S. Government sends representatives from BXA, DTRA, Energy (as appropriate), and various offices from State to the plenary sessions⁷ of the various multilateral regimes to discuss a number of export control issues, including changes to the multilateral control lists. Upon returning from the plenary sessions, BXA is responsible for administering any changes to the CCL as a result of the changes made to the multilateral control lists at the plenary sessions. While there are no specified timeframes for how long this process should take, the Commerce OIG found that the process can take anywhere from 6 months to more than a year for the CCL to be updated with agreed-upon multilateral changes. For example, changes agreed to at both the May 1999 Nuclear Suppliers Group plenary session and the October 1999 Missile Technology Control Regime plenary session have still not been implemented by the United States. In the case of those two plenary sessions, the changes have not been made because of problems with BXA internal procedures for implementing agreed-upon multilateral controls. The Commerce OIG also found some timeliness problems associated with the DTRA review of proposed multilateral changes to the CCL. In several cases, including the changes agreed upon by participants at the December 1999 Wassenaar Arrangement plenary session, DTRA took 3 months to review the changes, whereas State took less than 1 month.

Delays in updating the CCL could cause problems for the U.S. Government and U.S. exporters. For example, if additional goods and technologies are added to one of the multilateral control lists, the United States will not be able to adequately monitor those items until added to the CCL. Conversely, U.S. exporters may face an undue burden of applying for license applications for items that the multilateral regimes have agreed to decontrol. The Commerce OIG believes that as a participating member in the multilateral control regimes, the U.S. Government has an obligation to implement the decisions made by the regimes in a "reasonable" time period. Not implementing agreed-upon multilateral changes in a timely manner could be perceived as a lack of commitment on the part of the United States to adhere to the policies of the multilateral control regimes.

⁷Plenary sessions are the annual and/or semiannual meetings of the various multilateral regimes fully attended by all qualified members.

The Commerce OIG recommended that BXA review its own clearance process and procedures and work with the other licensing agencies, including DTRA, Energy, and DTC to determine if the current process for updating the CCL could be adjusted to publish regulations more expeditiously. In addition, the Commerce OIG recommended that BXA immediately implement the regulatory changes that resulted from the May 1999 Nuclear Suppliers Group plenary session and the October 1999 Missile Technology Control Regime plenary session. BXA concurred with the recommendation to review its internal regulatory review process and supported efforts to expedite the interagency regulatory review process. BXA indicated that it has begun a weekly regulations priority meeting to discuss the status of all pending regulations and to work to make changes in a more timely manner. With regard to implementing the regulatory changes resulting from the May 1999 Nuclear Suppliers Group plenary session and the October 1999 Missile Technology Control Regime plenary session, BXA stated that the effort was in process.

B. Review of the U.S. Munitions List

The Defense and State OIGs reported that DTC had not performed a comprehensive review of the USML since 1993. The Commerce OIG reported that many users said that the USML is not as easy to understand and use as the CCL. In an effort to improve export controls, in May 2000 a series of Defense Trade Security Initiatives was announced by the Secretary of State. One of those initiatives, number 17, “Periodic Reviews of the USML,” requires that DTRA and DTC review the USML to ensure clarity and appropriateness. To comply with the initiative, DTRA has scheduled a review of 5 of the 19 active USML categories to be completed in May 2001. To help improve the user-friendliness of the USML, DTRA has indicated that it will ensure that USML categories reflect the technologies considered significant on the list of militarily critical technologies and clarify USML language to ensure that users of the list can easily identify the items requiring export licenses. However, the Defense OIG identified that critical parameters for the military technologies listed in the list of militarily critical technologies⁸ may be outdated and that developing technologies with potential military applications may not have been identified on the list. The Defense and State OIGs jointly concluded that periodic reviews of the USML required by the Defense Trade Security Initiatives are needed and should continue into the future.

U.S. Munitions List Review

Developing, Maintaining, and Revising the U.S. Munitions List. In its review, the Commerce OIG asked users of the USML and CCL how easy it was for them to use and apply the list to their potential exports. The Commerce OIG reported that most users that it contacted found that the USML was more difficult to use than the CCL, mainly because the USML tends to be a “negative” list, meaning that items do not have to be explicitly listed to be covered by the list. Conversely, the CCL is structured as a “positive” list, meaning that if an item is not explicitly listed, then it is not covered.

The State OIG found that since 1993, there were very few revisions to the USML. The State OIG reported that DTC does not have a mechanism for periodic reviews of the USML and for determining whether commodities that are controlled still merit inclusion on the USML. DTC officials last performed a comprehensive “scrub” of the USML at the end of 1993 at the direction of the President. DTC officials stated that changes to the USML occur infrequently because of the military nature of the commodities controlled by the USML. In addition, DTC cannot unilaterally recommend placing items on the USML because the office neither develops militarily sensitive technology nor has the technical capability to make such decisions. Although the Defense research labs could recommend that a new technology the lab developed be added to the

⁸A list developed and maintained by DTRA to be a guide for export controls. The list is a significant tool for updating and identifying militarily critical technologies.

USML, that is rare and usually accomplished through the militarily critical technologies program. Substantive changes to the USML are usually made through Congress and executive orders. For example, the most recent addition to the USML was made when Congress gave export-licensing authority for the satellite category to DTC (from BXA) in March 1999. All changes to the USML are reported in the Federal Register, and DTC must submit a report to Congress at least 30 days before any item is removed from the USML.

Defense Trade Security Initiative Number 17. In May 2000, a series of Defense Trade Security Initiatives was announced by the Secretary of State. The objectives of the initiatives are to improve export controls. Defense Trade Security Initiative number 17, "Periodic Review of the USML," requires DTC and DTRA to establish a schedule for reviewing portions of the USML with a view toward refining USML categories to ensure appropriateness and clarity. The 19 actively used categories of the USML are to be divided into four groups so that all of the categories would be reviewed every 4 years.

In response to Defense Trade Security Initiative number 17, DTRA drafted a plan to review approximately one-quarter of the USML per year. The plan listed four outcomes or goals of the reviews.

1. Identification of USML items that are more appropriately controlled by the CCL.
2. Identification of items for which export controls are no longer appropriate.⁹
3. Identification of additions to the USML, primarily because of new technological developments.
4. Clarification of USML language to ensure that users of the list can easily identify the items requiring export licenses.

According to DTRA officials, the plan was discussed with senior Commerce, Defense, National Security Council, and State officials on November 27, 2000. DTRA officials also stated that the overall objectives of the effort would be to make the USML easier for users to identify specific items for which export licenses would be required and to ensure that the USML reflected the relevant critical technologies identified in the list of militarily critical technologies.

The first review of five USML categories has begun and is scheduled to be completed by May 2001. The USML categories under review by the DTRA are:

- Category I - Firearms;
- Category V - Explosives, Propellants, Incendiary Agents and their Constituents;

⁹Continued controls under Treasury Office of Foreign Asset Control regulations to terrorist and embargoed destinations may be required for any items removed.

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- Category VIII - Aircraft and Associated Equipment;
 - Category XIV - Toxicological Agents and Equipment and Radiological Equipment; and
 - Category XVI – Nuclear Weapons, Design and Test Equipment.

After developing its specific recommendations pertaining to the USML, DTRA will consult with DTC about the findings. DTC will consider the DTRA recommendations and make a final determination as to whether changes to the USML are justified. The criteria for adding, deleting, or continuing to control items under the USML will be foreign policy considerations and national security interests. Items that DTC and DTRA agree to remove from the USML must be approved by the State Under Secretary for Arms Control and International Security, and Congress must be notified 30 days before a USML change. Industry will participate through the Defense Trade Advisory Group and the Federal Register rule-making process. BXA will be involved when DTC and DTRA agree that export controls of certain items should be moved from the USML to the CCL.

Reviews of USML categories are being performed by Defense working groups being established for each category. An oversight group is being staffed by DTRA licensing and technology officials. A coordinating group is being staffed by principals from the Military Departments, as well as the Offices of the Under Secretary of Defense for Acquisition, Technology, and Logistics, and the Under Secretary of Defense for Policy. As of March 2001, the working groups had completed a draft revision of USML Category V, which was renamed “Energetic Materials and Related Substances.” Information pertaining to items in Category V has been reorganized under homogeneous subcategory headings and the names of new technology substances have been added. References to related export control regulations have also been added.

The Defense and State OIGs jointly concluded that periodic reviews of USML should continue into the future. Since the last comprehensive review of USML in 1993, rapid changes have taken place in international relations and the way business is conducted as well as technological advances that could result in the need for updates or revisions to the USML.

Review of the List of Militarily Critical Technologies

The Defense OIG identified that critical parameters for military technologies listed in the list of militarily critical technologies, a list developed to be a guide for export controls, may be outdated and that developing technologies with potential military applications may not have been included on the list.

The Militarily Critical Technologies Program. The Export Administration Act assigns Defense responsibility for providing assessments of militarily critical technologies and equipment. The Militarily Critical Technologies Program produces the list. Use of technical working groups is essential to the ongoing analyses of militarily critical parameters¹⁰ provided by the Militarily Critical Technologies Program. Technical working groups include members from academia, other Federal agencies, industry, and Defense, including the Military Services. DTRA uses the technical working groups to update militarily critical parameters for technologies that have already been identified as militarily critical and to determine if military applications can be applied to technologies that will be developed in the future. However, management officials told the Defense OIG that they did not have the resources to hold meetings of all the technical working groups on a regular basis.

Identification of New Militarily Critical Technologies. The list of militarily critical technologies was designed to be a technical reference for licensing and export control by Commerce, Defense, Energy, State, and U.S. Customs Service. The list of militarily critical technologies supports U.S. export control policy and provides rationale for additions and deletions on various export control lists. The Defense OIG identified that developing technologies that are militarily critical may not have been added to export control lists because meetings with academia and industry to identify new militarily critical technologies were minimal.

The Defense OIG recommended that the Deputy Under Secretary of Defense (Technology Security Policy) establish goals and procedures for the Militarily Critical Technologies Program to include scheduled meetings of technical working groups to review the list of militarily critical technologies at regular intervals and that DTRA ensure that adequate funding and resources are available. The Deputy Under Secretary of Defense (Technology Security Policy) concurred with the recommendation.

¹⁰Militarily critical parameters represent capabilities of systems that result in military criticality. For example, a night vision device with a 10-foot range might not be militarily critical, but a night vision device with 1000 yards of range may be considered militarily critical.

C. Commodity Jurisdiction Process

Commerce, Defense, and State OIGs reported that their respective agencies did not comply with mandatory timeframes set forth in National Security Council guidance for processing commodity jurisdiction (CJ) requests. Specifically, BXA and DTRA did not comply with the timeframes to respond to DTC on CJ referrals because of competing priorities and limited resources and because DTC did not impose or enforce any deadlines. When DTC received the referrals from BXA and DTRA, DTC was not timely in making its final CJ determinations because of resource constraints and competing priorities. As a result, all three agencies contributed to untimely CJ determinations being made to exporters, which can cause delays or cancellations in shipments and uncertainty in the business community regarding the export control jurisdiction for certain items. The Commerce and State OIGs also identified problems associated with CJ cases being processed and tracked manually. Specifically, the manual system for processing CJ determination requests can be unreliable and does not lend itself to providing transparency and accountability for the CJ process. This situation increases the risk that documents can be lost, misplaced, or misdirected, resulting in unnecessary delays.

Commodity Jurisdiction Process and Guidance

Commodity Jurisdiction Process. Items subject to the International Traffic in Arms Regulations are on the USML, which is under the licensing jurisdiction of DTC. Exporters unsure as to whether an item is on the USML can request a CJ determination from DTC to rule on the export-licensing jurisdiction for the item. The DTC response to the exporter will indicate whether the item is on the USML. If not on the list, then DTC may state that it may be covered by the CCL. The CJ process can also be used to consider moving an item currently covered by the USML to the CCL. Important to note is that CJ determinations only rule on proper licensing authority for items contained on the list and do not represent an approval to export. An exporter must still apply for an export license if one is required.

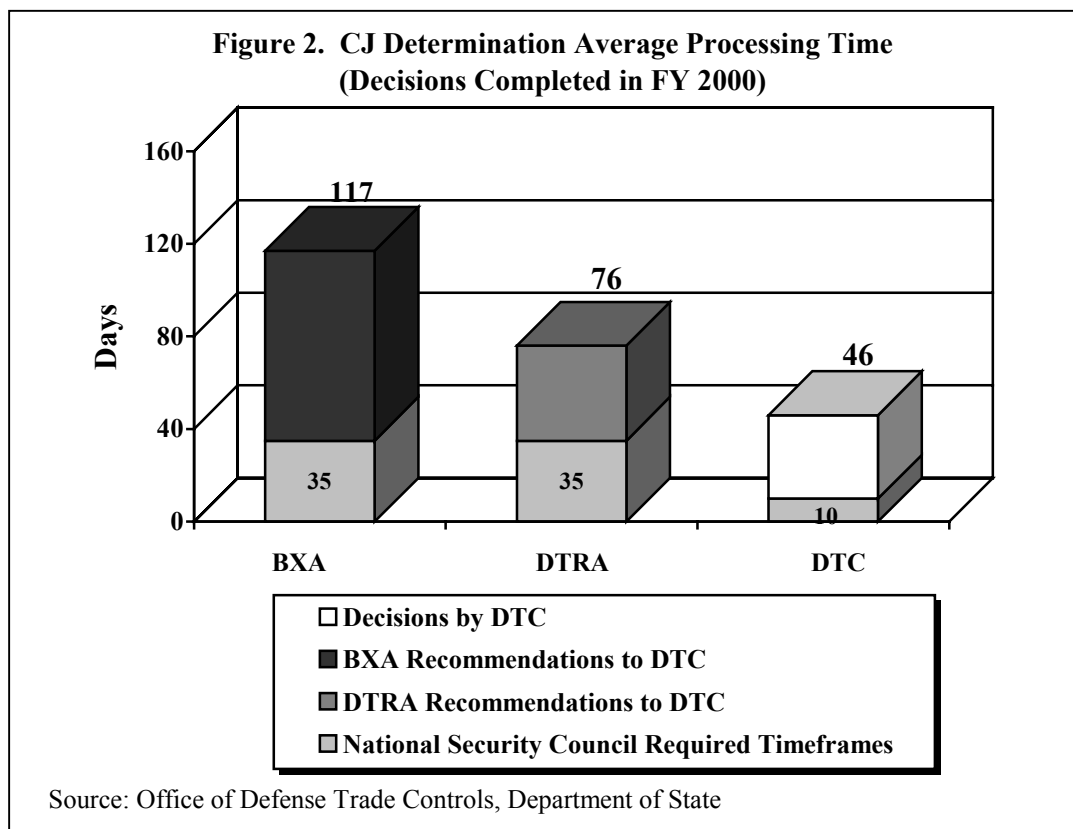
As part of the CJ process, DTC is required to refer CJ determination requests to BXA and DTRA to obtain their opinions about the licensing jurisdiction for a particular item. BXA and DTRA use their engineering expertise and experience with dual-use and munitions items to assist DTC in making CJ determinations. Occasionally, CJ determination requests are also referred to Energy or other Federal agencies, such as the Federal Aviation Administration or the National Aeronautics and Space Administration.

National Security Council Guidance. National Security Council memorandum, “Procedures On Commodity Jurisdiction and Commodity Classification,” April 15, 1996, directed DTC to refer all CJ requests to BXA and DTRA. In addition, the memorandum provided DTC an overall cumulative timeframe of 95 calendar days to respond to exporters on CJ requests. Within the 95-day

timeframe, referral agencies, such as BXA and DTRA, were provided 35 days to respond to referrals. However, in extraordinary cases an additional 10 days may be requested in writing.

Timeliness of CJ Process

In FY 2000, 220 CJ determination requests were initiated by DTC. Of those, DTC issued jurisdictional rulings for 103 requests, while 117 requests remained open. For the 103 CJ determinations made, 56 were found to be CCL items; 29 were found to be USML items; 7 resulted in a split jurisdiction (both CCL and USML); 8 were returned without action to the exporter because the information provided was inadequate to make a determination; and 3 were withdrawn by the exporter. As shown in Figure 2, BXA, DTRA, and DTC were not timely in processing CJ determination requests during FY 2000.



Commerce Commodity Jurisdiction Review. Based on records provided by DTC, the Commerce OIG found that BXA responded to DTC in 101 of the 103 CJ determinations (the other 2 had not been referred to Commerce) completed during FY 2000. For those 101 CJ determinations, BXA took 117 calendar days on average to provide an opinion to DTC. According to BXA, the primary responsibility of its licensing officers is to process export license applications, which have mandated timeframes for completion under Executive Order 12981, "Administration of Export Controls," December 1995. As a result, processing CJ determination requests was given a lower priority and completed as time allowed.

The Commerce OIG found that delays in rendering prompt CJ determinations could have a negative impact on U.S. exporters. For example, when an exporter cannot get a timely response to a CJ request, shipments may be delayed or even cancelled, thus having an economic impact on the exporter. Another potential impact is that, while waiting for a CJ determination, an exporter may incorrectly file for a license with an agency that does not have licensing jurisdiction for the item.

The Commerce OIG recommended that BXA review its priorities and staffing levels and make adjustments to improve its timeliness on CJ requests. BXA agreed with the recommendation in principle but believes it to be unrealistic in practice. BXA contends that only if staffing levels and related funding for specific technical functions are increased can BXA improve its ability to meet the deadlines for the processing of CJ requests. As a result, BXA stated that it cannot consider implementing the recommendation unless it is coupled with a recommendation to the requisite budget authorities in the Congress to provide the necessary resources. The Commerce OIG believes that staffing levels are a contributing factor to the inability of BXA to process CJ determination requests in a timely manner. However, the Commerce OIG believes that if BXA needs additional staff to meet deadlines for processing CJ requests and does not have the resources to fund needed positions, it is incumbent upon the agency to justify that need in its budget submissions.

Defense Commodity Jurisdiction Review. Based on records provided by DTRA, the Defense OIG found that DTRA processed 215 CJ requests during FY 2000. According to the records, the processing time for the 215 CJ requests averaged 76 days. Of the 215 CJ requests, just 18 were processed within the permissible timeframe, with the processing time ranging from 13 to 356 days. The processing time was measured from the time that DTRA received the CJ request until the time a response was returned to DTC. If additional information was requested from the exporter or if there was an escalation above DTC for a final determination, that time did not count in the 76-day processing time.

The Defense OIG found that the DTRA licensing officer processing CJ requests also processed license requests when necessary. Export license applications were normally given a higher priority than CJ requests. DTRA is in the process of hiring 12 new licensing officers and 18 engineers to alleviate the existing

workload among licensing officers. The DTRA licensing officer who handles CJ requests was confident that the mandatory 35-day timeframe for CJ requests could be met if one individual was dedicated to the effort full time.

By contributing to delays in rendering CJ determinations to exporters, DTRA is causing uncertainty in the business community regarding export controls. Timely determinations provide certainty to the business community and increase the likelihood that the business community will correctly comply with export control regulations.

The Defense OIG recommended that DTRA provide resources to decrease processing times for review of CJ requests. DTRA concurred with the recommendation.

State Commodity Jurisdiction Review. The State OIG selected a judgmental sample of 20 CJ cases from the 103 final determinations completed during FY 2000. The State OIG found the average processing time for the 20 CJ cases in the sample was 196 days, or approximately 6.5 months. According to the DTC records, the processing time for the 103 CJ requests averaged 46 days.

The State OIG concluded that the timeliness problems occurred because BXA and DTRA had been extremely slow in responding to DTC referrals, and DTC did not impose or enforce deadlines on BXA or DTRA. In addition, the State OIG found that DTC also contributed to the timeliness problem because even in the cases where BXA and DTRA responded in a relatively timely fashion, DTC still took months to issue a determination. For example, in one case it took the exporter 10 months to get an answer from DTC, even though BXA and DTRA returned their recommendations to DTC within 3 months. In another case, it took an exporter almost 11 months to get a response from DTC, although DTC had received the BXA and DTRA recommendations in 3 months. The slow DTC processing time was not in compliance with the National Security Council guidance, which states that the process is supposed to take no more than 95 calendar days from start to finish.

Despite the problems jointly reported by the OIGs related to timeliness and transparency, the State OIG did not detect any instance where DTC did not give deference to the views of national security agencies in making a CJ determination. Similarly, the State OIG found no instance in which DTC overrode a recommendation from a Defense or intelligence agency.

The State OIG recommended that DTC develop procedures to regularly notify BXA and DTRA of deadlines for specific cases to conform with the National Security Council guidelines. DTC concurred with the recommendation. The State OIG also recommended that DTC develop and implement a plan to improve its CJ procedures to ensure that the agency is able to meet the deadlines set forth in the National Security Council guidance. DTC concurred with the recommendation.

An Automated Commodity Jurisdiction Process is Needed

The Commerce and State OIGs found that the CJ cases were processed manually. As a result, the process could be unreliable and in many cases was not transparent or timely. The process relied on faxing information back and forth between the agencies, which led to problems with faxes being lost, misplaced, or misdirected, resulting in unnecessary delays. When DTC receives a CJ request, it faxes a copy to BXA and DTRA for their review. When BXA and DTRA have completed their review, they fax their positions back to DTC. Then, when DTC makes its final determination, the decision is faxed to BXA and DTRA for their information. If either agency disagrees with the DTC decision, they have 5 days to either provide rebuttal information or escalate the case for resolution to higher-level officials.

The Commerce OIG found that under such a manual system, BXA and DTRA are unable to see the other's position on a CJ determination request unless specifically asked for. The position then has to be faxed or sent by courier. Depending on the workload of the staff at DTC, such requests are not always promptly fulfilled. Having the information would be helpful to the technical experts at both agencies so that they could view the opinions of other "experts" and perhaps see an issue or viewpoint they had not considered. In addition, the Commerce OIG found that because the information is not automated, BXA and DTRA did not have access to historical CJ information. According to BXA technical experts, such information would be helpful in reviewing future CJ requests from the same company or for "like" products. It would likely save time for the engineers because they would not have to conduct duplicative research on a company or commodity that was previously reviewed. Finally, because of the manual process, BXA managers told the Commerce OIG that sometimes the 5-day rebuttal period has already passed by the time the appropriate technical expert is given the fax from DTC. That situation can happen when someone is on vacation or is not diligent in removing incoming faxes from the fax machine. Thus, in those cases, BXA misses its opportunity to rebut or escalate a determination.

The State OIG reported that the CJ process also relies on agencies to manually retrieve information from DTC. Both BXA and DTRA send couriers to pick up each CJ package, which contains background information submitted by the exporter on the particular commodity. The State OIG found that the arrangement has resulted in problems because, according to the DTC CJ officer, BXA will occasionally claim that they never received a package months after it has been picked up. Those problems are exacerbated because DTC does not have a way to communicate via computer with the other Government agencies involved in the CJ process. The State OIG believed that this lack of transparency inhibited the CJ process.

The Commerce and State OIGs recommended that DTC, with assistance from BXA and DTRA, create, or include as part of the current systems redesign efforts, an automated system to process, refer, and store historical data on CJ cases. BXA nonconcurred with the recommendation, stating that the administration of the CJ process is the responsibility of DTC. BXA felt that it would be inappropriate to include such a process in its systems redesign efforts

and that the recommendation is better directed to DTC. The Commerce OIG recognizes that DTC has primary responsibility for the CJ process, but believes that all agencies need to participate in the design of a new system for the CJ process because each agency has unique needs and requirements that may impact how a new system is designed. Thus, in referring to current system redesign efforts, the Commerce OIG was primarily referring to the interagency U.S. Export Systems Automation Initiative, which is being managed by Defense. The Commerce OIG encourages BXA to work with DTRA and DTC, as part of the U.S. Export Systems Automation Initiative, to automate the CJ process. DTC requested that the consideration of the recommendation be deferred until the next joint OIG Congressionally mandated review, which will examine the information technology systems at each of the agencies involved in the export licensing process and their compatibility. The review is scheduled to begin in the spring of 2001. In light of the fact that the next joint OIG review will examine the information technology systems at each of the agencies involved in the export licensing process and their compatibility, the State OIG agreed to allow the issue to be put off until the next report, with the caveat that these recommendations be fully examined and potentially implemented then.

Consultation Problems

Formal Commodity Jurisdiction Requests. The Commerce and State OIGs reported that DTC did not always consult on CJ requests with BXA and DTRA as required by the 1996 National Security Council guidance. Specifically, during FY 2000, of the 220 CJ determination requests that were initiated in the same timeframe, there were cases that were not referred to BXA and DTRA. According to interviews conducted by the State OIG, DTC officials stated that they did not refer those cases because it was “obvious” that the commodities involved were USML items, or the exporter was submitting a second CJ on the same item for reconsideration and the National Security Council guidelines were unclear on how to handle cases submitted for reconsideration. The Commerce OIG believed that such justifications are not valid, particularly because the technical experts best able to decide on the licensing jurisdiction of an item reside in BXA and DTRA.

The State OIG recommended that DTC refer to the relevant agencies all of the CJ requests it receives and inform the agencies of its final determination on each CJ request. DTC nonconcurred with the recommendation, stating it believed that the premise of the State OIG recommendation is that the relevant agencies are not being informed of all CJ requests and all decisions taken on them. DTC stated that the crux of the OIG recommendation related to two cases where, in fact, the agencies were informed of both requests and both decisions, but after DTC made an initial ruling.

The State OIG disagreed with the DTC response on two counts. Of the 220 CJ cases DTC initiated in FY 2000, only 103 were completed during the year. Of that 103, the State OIG sampled 20 and found 2 cases (10 percent) that were not properly referred to the other agencies according to the International Traffic in Arms Regulations and the National Security Council guidelines. Second, despite the fact that DTC believed that these were “obviously” USML

items, it still should have followed the International Traffic in Arms Regulations and National Security Council guidelines, which clearly state that DTC shall notify Commerce and Defense of the initiation of each case.

Informal Commodity Jurisdiction Requests. During its review, the Commerce OIG identified at least two cases where U.S. Customs Service agents seized shipments at the border after DTC erroneously informed the agents that the shipments were USML items. In those cases, DTC effectively made a verbal CJ determination without first consulting with BXA and DTRA, as required. The Commerce OIG questioned whether DTC should make such CJ decisions without first consulting with the technical experts at BXA and DTRA, as DTC admittedly does not have the technical expertise to make such decisions on its own. In both cases, the items were actually CCL items and in one case, the exporter actually had a current export license from BXA for the items it was exporting. Because of the error by DTC, the exporters were highly inconvenienced, and in one case, the exporter was forced to hire legal counsel and expend funds to represent its interests with the U.S. Customs Service and DTC. In the opinion of the Commerce OIG, those situations should not have occurred and could have easily been avoided had DTC consulted with BXA and DTRA prior to making a verbal CJ determination.

When the State OIG asked DTC to comment on this situation, DTC refused to cooperate because they said it was beyond the scope of the joint OIG review. DTC claimed that for the matter to be properly examined, U.S. Customs Service processes and procedures would need to be reviewed. DTC also stated that thousands of telephone calls between the U.S. Customs Service and DTC were placed annually. Thus, DTC believes that the two cases the Commerce OIG reported are not necessarily indicative of a systemic problem.

The Commerce OIG recommended that BXA request that DTC cease its practice of making CJ determinations without first consulting with BXA and DTRA, as required by the 1996 National Security Council guidance. BXA concurred with the recommendation, but believed that the recommendation did not go far enough. BXA officials stated that it is their opinion that the entire process of determining the jurisdiction of commodities should be overhauled, as the process is neither timely nor effective. The Commerce OIG agrees that the CJ process has problems, but because the process is managed by DTC, it is not within the purview of the Commerce OIG to make recommendations that must be implemented by DTC. Therefore, the Commerce OIG reiterates its recommendation, directed to BXA, that the agency request that DTC cease its practice of making CJ determinations without first consulting with BXA and DTRA, as appropriate. The State OIG did make a similar request directly to DTC to refer all CJ cases to BXA and DTRA.

D. Export License Jurisdictional Issues

The Commerce and State OIGs noted a breakdown in the interagency process for resolving jurisdictional disputes for night vision equipment and space qualified items. With regard to night vision equipment, the Commerce and State OIGs raised the issue as to whether such equipment should be licensed by BXA or by DTC. Because of the inability of the licensing agencies to resolve the dispute, license applications are being delayed and exporters are confused about which agency they should apply to for a license for those goods. In addition, the U.S. Government has been unable to make a decision about which agency has jurisdiction for 16 categories of space qualified items¹¹ controlled under the CCL. As a result, the National Security Council initiated a review to determine which Federal agency has jurisdiction for the 16 space qualified items and was expected to rule in April 2000. However, as of March 2001, no decision has been made. Finally, the Commerce and State OIGs determined that the lack of formal policies and procedures in the Government jurisdiction process has led to confusion among both licensing agencies and exporters.

Night Vision Technology

Night vision technology and commodities are examples of where the CCL and USML need to be clarified. At issue is whether this equipment should continue to be licensed by BXA or whether it should be considered a munitions item and licensed by DTC. In 1994, DTC transferred to BXA export licensing jurisdiction for dual-use night vision equipment, including (1) nonmilitary focal plane arrays; (2) nonmilitary image intensification tubes; and (3) commercial imaging systems containing military second or third generation image intensification tubes or military focal plane arrays.¹² The transfer was prompted by the Memorandum of Disapproval on the Omnibus Export Amendments Act of 1990, in which former President Bush directed:

By June 1, 1991, the United States will remove from the U.S. Munitions List all items contained on the COCOM [Coordinating Committee on Multilateral Export Controls] dual use list unless significant U.S. national security interests would be jeopardized.

Although the transfer did not take place until 1994, BXA, DTRA, and DTC signed a classified memorandum of understanding in 1992 establishing how BXA would process license applications for night vision equipment, among other items. Until recently, the licensing agencies adhered to the terms of the agreement. However, beginning in 1998, due in part to rapid changes in night vision

¹¹According to the Export Administration Regulations, the term “space qualified” refers to products designed, manufactured, and tested to meet the special electrical, mechanical, or environmental requirements for use in the launch and deployment of satellites or high-altitude flight systems operating at altitudes of 100 km or higher.

¹²59 FR 46548 (September 9, 1994). The remaining night vision equipment is maintained on the USML.

technology, the agreement began to be ignored. As a result, the licensing process for at least 33 specific night vision products has been effected. Between FY 1999 and FY 2000, there was a 15-percent increase in the number of night vision cases escalated to the Operating Committee¹³ because of confusion over which Federal agency had licensing jurisdiction. Although most of the 259 licensing cases were eventually approved, the same types of applications are repeatedly escalated to the Operating Committee because the dispute concerning Federal agency jurisdiction continues unabated. BXA officials stated that each night vision case has to be reviewed from “the ground up,” regardless of whether a license may have previously been approved for the same exporter, item, and end user. As a result, exporters have complained that the long and unpredictable licensing process could discourage customers from buying night vision products from U.S. sources, especially because some of those items are available on the market from non-U.S. sources.

The unresolved dispute concerning which Federal agency has jurisdiction for night vision equipment and technology has left exporters confused and uncertain as to which agency to apply to for a license. In at least one case, an exporter submitted similar applications (same product, same end use, and same country of destination) to BXA and DTC to determine which Federal agency would license the item first. As a result of the stalemate, in December 2000, BXA formally requested that the National Security Council determine which Federal agency, or agencies if the jurisdiction should be split somehow, has jurisdiction for the night vision items in dispute.

The Commerce OIG recommended that BXA submit a formal written request to the new head of the National Security Council asking for early resolution of the jurisdictional issues regarding night vision equipment and technology. BXA, in responding to the Commerce OIG recommendation, indicated that it has already contacted the National Security Advisor and staff and that the National Security Council is well aware of the issue and taking steps to bring it to closure. BXA further stated that letters from BXA would not be conducive to resolving the matter more quickly. After receiving the BXA response to the recommendation, the Commerce OIG asked BXA to clarify whether or not its contact with the National Security Council was with the current Administration or the previous Administration. BXA responded that the Under Secretary for Export Administration verbally discussed the matter with the current National Security Council staff. While this partially meets the intent of the recommendation, the Commerce OIG believes that BXA should formally raise this matter, in writing, with the new National Security Advisor.

¹³If there is disagreement among agencies on whether to approve a license application after the initial interagency review period, the application is escalated to a higher-level interagency working group called the Operating Committee. The voting members of the committee include representatives from the Departments of Commerce, Defense, Energy, and State. The Chair of the Operating Committee is appointed by the Secretary of Commerce.

Space Qualified Items

Space qualified items are another example of where the CCL and USML need to be clarified. The dispute over space qualified items began with passage of the National Defense Authorization Act for Fiscal Year 1999, which transferred licensing jurisdiction for commercial communication satellites from BXA back to DTC.¹⁴ Specifically, Section 1513(a) of the Act states that the transfer applies to “all satellites and related items that are on the Commerce Control List.” Section 1516 of the Act further defines related items as, “satellite fuel, ground support equipment, test equipment, payload adapter or interface hardware, replacement parts, and non-embedded solid propellant orbit transfer engines.” However, because of a disagreement between BXA and DTC in interpreting the Act’s language, 16 categories of space qualified items did not transfer to DTC in March 1999 along with the other satellite systems and components.

To resolve the dispute, in January 2000 an interagency group chaired by the National Security Council that included BXA, DTRA, and DTC initiated a review of the 16 categories of items on the CCL that contain space qualified items. The purpose of the review was to determine whether any of the items should be transferred from the export-licensing jurisdiction of BXA to DTC. While a decision was expected in April 2000, no decision has been reached on any of the items as of March 2001.

In the meantime, the National Security Council ruled that the space qualified items in question are to remain under the jurisdiction of BXA until a final decision can be made on the jurisdiction of the items. However, BXA officials were concerned that DTC might be licensing space qualified items anyway. Although the Director of DTC stated that, “our licensing officers know about those items, and they would not intentionally license them,” a query of the DTC licensing database determined that DTC had licensed some space qualified items contrary to the National Security Council guidance.

The Commerce OIG recommended that BXA submit a formal written request to the new head of the National Security Council asking for early resolution of the jurisdictional issues regarding the 16 space qualified items. BXA responded that the agency has already contacted the National Security Advisor and staff, and the Council is taking steps to bring to closure the dispute over the 16 categories of space qualified items. As with the night vision equipment issue, BXA did not believe letters from the agency would be conducive to resolving the matter more quickly. After receiving the BXA response to this recommendation, the Commerce OIG asked BXA to clarify whether its contact with the National Security Council was with the current Administration or the previous

¹⁴In 1990, then President Bush ordered the removal of dual-use items from the USML unless significant U.S. national security interests would be jeopardized. As a part of this effort, State transferred jurisdiction of some commercial communications satellites to Commerce in 1992. Nonmilitary satellites containing certain militarily sensitive characteristics remained on the USML. However, in 1996 President Clinton ordered transfer of the remaining commercial communications satellites from State to Commerce.

Administration. BXA responded that the Under Secretary for Export Administration verbally discussed the matter with the current National Security Council staff. While this partially meets the intent of the recommendation, the Commerce OIG believes that BXA should formally raise this matter, in writing, with the new National Security Advisor.

Government Jurisdiction Process

In an attempt to resolve the jurisdictional dispute relating to night vision technology, State's Bureau of Nonproliferation requested that DTC initiate a Government jurisdiction determination for 33 specific night vision products in June 2000. The Government jurisdiction process is supposed to work in a manner similar to the CJ process, except that instead of an exporter initiating the request, a Federal agency does. During FY 2000, DTC initiated 14 Government jurisdiction requests—seven from the U.S. Customs Service; six from DTRA; and one from Energy. In the night vision technology case, however, the Government jurisdiction process failed to solve the dispute because a disagreement over how the process is supposed to operate occurred. Specifically, DTC claims that the Government jurisdiction process is designed to support law enforcement agencies such as the U.S. Customs Service. Therefore, after 6 months of holding up initiating Government jurisdiction reviews for 33 night vision products, DTC determined it was not going to initiate the reviews. Instead, DTC believed that the CJ process was the proper way to proceed (although as of March 2001 DTC had not notified the licensing agencies or industry of this decision). Despite the lack of action on the part of DTC regarding the night vision cases, the Commerce and State OIGs believe the same criteria applied to CJs can be used as a baseline for Government jurisdictions.

The Commerce OIG recommended that BXA request that the National Security Council provide formal guidance on how BXA, DTRA, and DTC should process Government jurisdictions, similar to the guidance the National Security Council issued for the CJ process. BXA nonconcurred with the recommendation. Specifically, BXA did not regard the Government jurisdiction process as legitimate, as it has not been validated by law, regulation, or executive order. Therefore, rather than providing guidance on Government jurisdiction processing, BXA would prefer to see the concept abandoned. Commerce OIG disagrees with the BXA position. The Government jurisdiction process has been useful in the past because it is the only vehicle by which agencies can deal with jurisdictional issues at the agency level rather than escalating the cases to a higher level, such as the National Security Council. Therefore, the Commerce OIG reiterates its recommendation that BXA request that the National Security Council provide guidance on how BXA, DTRA, and DTC should process Government jurisdictions, similar to the guidance the Council issued for the CJ process.

The State OIG recommended that DTC establish written policies and procedures for the Government jurisdiction process, in coordination with all of the Government agencies involved in the CJ process. DTC partially agreed with the intent of the recommendation, stating that they will remind other agencies and other State offices through a written notice that jurisdictional questions involving U.S. exporters must be resolved through the commodity jurisdiction procedures.

E. Commodity Classification Process

The Commerce and Defense OIGs reported that the commodity classification process was not transparent because BXA may not be referring munitions-related commodity classifications to DTRA and DTC. The failure of BXA to refer such commodity classifications to the other licensing agencies, as called for in guidance issued by the National Security Council in 1996, leaves BXA vulnerable to incorrect classifications. That finding was also reported as part of the 1999 interagency OIG export licensing review. While BXA concurred with the 1999 Commerce OIG recommendation to work with the National Security Council to develop specific criteria and procedures for the referral of munitions-related commodity classifications to DTRA and DTC, BXA has taken no action to correct those problems. In addition, during the current review, the Commerce OIG found that BXA was not providing DTC a copy of the final commodity classification determinations for any commodity classifications that it reviewed.

Commodity Classification Process and Guidance

Commodity Classification Process. Exporters are responsible for determining whether an item requires an export license, but BXA will advise an exporter whether an item is subject to the Export Administration Regulations and, if applicable, identify the appropriate ECCN. Exporters can verbally inquire about a commodity classification but only written inquiries result in a binding determination. When making written commodity classification requests,¹⁵ exporters must provide descriptive literature or brochures, precise technical specifications, or papers that describe the items in sufficient technical detail to enable BXA engineers to accurately classify the items. Important to note is that after exporters receive a commodity classification determination, they still must apply for a license if one is required.

National Security Council Guidance. The National Security Council set forth guidance for processing commodity classification and CJ requests in an effort “to improve interagency coordination and transparency” with regard to those processes. Essentially, the National Security Council guidance continues the process of allowing exporters to initiate commodity classification requests with BXA to determine whether items are subject to the Export Administration Regulations. However, the guidance also directs BXA 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 such items or technologies.”

¹⁵BXA also responds to many phone inquiries about commodity classifications, but advice provided over the phone is not considered to be a binding determination.

1999 Interagency OIG Export Licensing Report

As part of the 1999 interagency OIG export licensing review, the Commerce, Defense, and State OIGs determined that the commodity classification process was not transparent because BXA had not referred all munitions-related commodity classifications to DTRA and DTC as required by the 1996 National Security Council guidance. The 1999 interagency OIG export licensing report stated that because BXA rarely referred commodity classification requests to DTRA or DTC, BXA analysts did not benefit from the perspective of DTRA and DTC analysts. The interagency OIG report also identified opportunities to provide more transparency to the commodity classification process by BXA referring classification requests concerning agreed-upon commodities to referral agencies.

The Commerce OIG recommended that BXA, in conjunction with DTRA and DTC, work with the National Security Council to develop specific criteria and procedures on how to implement its 1996 guidance for referral of munitions-related commodity classifications to DTRA and DTC. The Defense OIG recommended that DTRA work with BXA to develop additional guidance and procedures on how to implement the 1996 National Security Council guidance. Although BXA and DTRA managers concurred with the Commerce and Defense OIG recommendations, no action has been taken on this important matter.

Transparency of the Commodity Classification Process

Referral Guidance. Since the 1999 interagency OIG export licensing review, DTRA and DTC have indicated to the OIG review team a need for more transparency in the commodity classification process. Specifically, they want the process to be completely open to interagency review similar to the export licensing process. To illustrate the need for greater transparency, the agencies routinely point to a 1995 case in which BXA mistakenly classified an investigative report on the crash of a Chinese rocket carrying a satellite and determined that no export license was needed. BXA allowed release of this report without consulting with DTRA or DTC. BXA later admitted that the report fell under DTC jurisdiction because the accident occurred in part of the rocket and not in the satellite. As such, the Commerce and Defense OIGs believe that with improper classification determinations, certain items of national security concern could be exported to problematic destinations without interagency review.

Of the 2,049 nonencryption commodity classification requests BXA processed during FY 2000, BXA referred only 13 to DTC (per DTRA delegation of authority to BXA, BXA did not refer any commodity classifications to DTRA in the same timeframe). Because there is no way DTRA or DTC can question commodity classifications that are not referred, the Commerce and Defense OIGs believe that those agencies may have a legitimate concern that BXA may be advising exporters that munitions-controlled items are licensable by BXA or require no license at all.

Recognizing that the small number of commodity classifications referred may not alone be indicative of whether BXA properly referred the munitions-related commodity classifications it processed during this time period, the Commerce OIG intended to conduct a sample that would help provide more insight into the matter. Unfortunately, because BXA did not provide the Commerce OIG with the necessary raw data in a timely manner, the Commerce OIG was not able to conduct a sample. The Commerce OIG did not propose that BXA refer all commodity classifications requests to DTC and DTRA at this time, however, the Commerce OIG believes that BXA needs to be proactive and work with DTC and DTRA to make the commodity classification process more transparent with regard to items or technologies specifically designed, developed, configured, adapted, and modified for a military application, or derived from such items as called for in the 1996 National Security Council guidance. After discussing its concerns with one National Security Council official responsible for export control policy, the Commerce and Defense OIGs believe that the Council would be willing to revisit the issues raised here if requested to do so by the participating agencies.

The Commerce and Defense OIGs believe that the overall disagreement in the commodity classification process stems from the fact that the 1996 National Security Council referral guidance relating to commodity classification is open to interpretation. BXA interprets that language very narrowly, such that it will only refer classifications that, in its opinion, are clearly “munitions related.” DTRA and DTC make a broader interpretation of the language that would require most commodity classifications to be referred.

The Defense OIG determined that the significant military expertise in DTRA could provide real value in ensuring that proper classifications are provided to exporters. Thus, the Defense OIG continued to strongly agree with the DTRA position that all commodity classification decisions must be subject to interagency reviews.

The Commerce OIG recommended that BXA request that the National Security Council form a working group (including BXA, DTRA, and DTC) to review the 1996 commodity classification guidance, revise it if necessary, and develop specific criteria and procedures to ensure that the referral of munitions-related commodity classifications to DTRA and DTC is handled in a timely, transparent, and appropriate manner by all agencies involved. In responding to the Commerce OIG recommendation, BXA stated that while it concurred with the same recommendation in its response to the 1999 interagency OIG export licensing report, BXA believes that the National Security Council should first form a working group to focus on the CJ process before recommending that the Council form a working group to review commodity classification guidance. The Commerce OIG encourages BXA to request that the National Security Council review the CJ process, if BXA believes that such a review is needed. However, the Commerce OIG reiterates the need for BXA to be proactive and request that the National Security Council form a working group (including BXA, DTRA, and DTC) to review the 1996 guidance, revise it if necessary, and develop specific criteria and procedures to ensure that the referral of munitions-related commodity classifications to DTRA and DTC is handled in a timely, transparent, and appropriate manner by all agencies involved.

DTRA Position on Commodity Classifications. Further complicating the issue of the DTRA position on commodity classifications is a May 13, 1996, letter sent by DTRA to the Deputy Assistant Secretary of Export Administration requesting that Commerce provide to DTRA, on a weekly basis, a copy of completed commodity classification requests and decisions. BXA officials interpreted the letter to mean that DTRA was interested in seeing only completed commodity classifications and not any proposed commodity classification requests. Thus, BXA officials would not send commodity classification requests to DTRA for review unless the letter was rescinded. In an attempt to resolve this matter, the Assistant Inspector General for Auditing, Department of Defense, sent a memorandum dated December 6, 2000, to the Deputy Under Secretary of Defense (Technology Security Policy) requesting clarification of the DTRA position on reviewing commodity classification requests. The Deputy Under Secretary of Defense sent this reply in writing to the Assistant Inspector General for Auditing.

Notwithstanding the National Security Council guidance issued in 1996, DoD has long maintained that all commodity classification decisions must be subject to prior interagency review. Over recent years, DoD has testified numerous times before Congress that greater transparency is needed as well as a timely process to ensure that disputed cases are escalated to appropriately senior officials . . . There are important national security interests involved with commodity classifications. For example, one possible outcome is a classification that no [export] license is required. If this determination is not proper, then certain items of national security concern could be exported to problematic destinations without prior government review. As such, we believe that the significant military expertise resident in DoD can provide real value in ensuring that proper classifications are provided to exporters.

The Deputy Under Secretary of Defense also stated that DTRA worked closely with several Congressional committees as part of deliberations on a new Export Administration Act and was supportive of language in a new Act requiring BXA to refer all commodity classification requests to DTRA and other departments or agencies, as appropriate. As of March 2001, the Deputy Under Secretary of Defense still has not rescinded its 1996 delegation of authority to BXA.

The Defense OIG recommended that the Deputy Under Secretary of Defense (Technology Security Policy) continue to work with BXA to establish a process whereby all commodity classification requests are reviewed by DTRA in a disciplined and transparent procedure with strict timeframes. The Deputy Under Secretary of Defense (Technology Security Policy) concurred with the recommendation.

Final Commodity Classification Determinations. The 1996 National Security Council guidance requires BXA to refer munitions-related commodity classification determinations to DTC for review and allows DTC 2 working days to provide BXA with a recommendation. Once DTC provides its commodity classification recommendation to BXA, DTC receives no indication from BXA as to whether the recommendation was accepted. However, DTC officials informed the Commerce and State OIGs that DTC would like to know the BXA final

commodity classification determination to “close out” their files. In addition, if the final commodity classification determination indicates that the item in question falls under the USML, DTC could then possibly conduct an outreach visit to the U.S. exporter who submitted the commodity classification request.

When the Commerce and State OIGs asked DTC officials if they had ever asked BXA to provide them with the final commodity classification determinations, DTC officials replied in the negative. When the Commerce OIG asked BXA officials why they did not notify DTC of the final commodity classification determination, BXA officials responded that DTC has never requested a copy of the final determination. However, BXA officials indicated that they would accommodate such a request from DTC.

The Commerce OIG recommended that BXA provide DTC with a copy of the final determination for any commodity classification that DTC reviews. BXA responded that it will provide copies of the closed commodity classifications to DTC only if it requests them. Commerce OIG agrees with BXA that DTC should have made this request to BXA directly. However, in the spirit of cooperation, the Commerce OIG believes that BXA should take the lead on this issue and provide DTC with a copy of the closed commodity classifications that it reviews.

Appendix A. Review Process

Scope

The review focused on the policies and procedures for developing, maintaining, and revising the CCL and USML. In addition, the review focused on other applicable laws, executive orders, regulations, and departmental guidance regarding the CCL and USML. The OIG review teams contacted responsible personnel in their respective agencies and in other Federal agencies and governmental organizations, as appropriate. The agencies involved in the CCL and USML processes, which include BXA, DTRA, the Office of Nuclear Transfer and Supplier Policy, and DTC, provided briefings to the OIG review teams on respective roles and responsibilities. The review teams also met with exporters and private sector members of Technical Advisory Committees who advise Government officials on export control matters. The participating review teams were from the Commerce, Defense, Energy, and State OIGs.

Methodology

To coordinate the review of interagency issues and determine the work to be performed by each OIG team, the four OIGs formed an interagency working group and held monthly meetings during the review. The reviews were conducted from August 2000 through January 2001.

Commerce Methodology. To assess the policies and procedures for developing, maintaining, and revising CCL and USML, the Commerce OIG reviewed BXA policies and procedures to determine whether the design, maintenance, and application of the CCL adequately controlled the export of militarily sensitive technologies. In particular, the Commerce OIG evaluated how the CCL is managed, including whether it is user-friendly and how commodities and technologies are added to and removed from the list. The Commerce OIG examined whether a need exists for greater transparency in the DTC CJ process. Finally, the Commerce OIG also examined whether there is still a greater need for transparency in the BXA commodity classification process.

The review methodology included interviews with various BXA officials, including attorneys, licensing officials, policy and regulation officials, programmers, and senior managers. The Commerce OIG spoke with officials at DTRA, Energy, DTC, and the National Security Council. The Commerce OIG attended several Technical Advisory Committee¹⁶ meetings and participated in two Regulation and Procedures Technical Advisory Committee meetings. In conjunction with the Defense OIG, the Commerce OIG compared the ECCNs on the CCL with items on the export control lists of the multilateral regimes of which the United States is a member. The Commerce OIG interviewed exporters

¹⁶The Technical Advisory Committees consist of technical experts from industry who are to advise the Secretary of Commerce on export control matters and to be consulted on revisions to the CCL.

to determine the ease with which they can use and apply the CCL to potential exports. Three organizations also provided written comments on the user-friendliness of the CCL.

Defense Methodology. To assess the policies and procedures for developing, maintaining, and revising the CCL and USML, the Defense OIG examined the DTRA process for ensuring that U.S. national security objectives are considered when revisions to the CCL and the USML are made. Specifically, the Defense OIG evaluated whether DTRA decisions regarding the CCL, the list of militarily critical technologies, and the USML are reached in an efficient, optimum manner using available information and resources.

The Defense OIG reviewed the applicable part of the Export Administration Act and Export Administration Regulations; the CCL, list of militarily critical technologies, and USML; the export control lists of international organizations; the Institute for Defense Analyses task order and technology working group documentation; the documentation concerning the timeliness of commodity classification and CJ requests; and the white paper concerning the Defense Trade Security Initiatives and plan for the annual review of the USML. In addition, the Defense OIG interviewed personnel within Commerce, Defense, Energy, State, the National Security Council, and the Institute for Defense Analyses.

Energy Methodology. To assess the policies and procedures for developing, maintaining, and revising the CCL and USML, the Energy OIG conducted fieldwork at Energy headquarters and three Energy laboratories—Lawrence Livermore National Laboratory, Los Alamos National Laboratory, and Oak Ridge National Laboratory. The Energy OIG interviewed officials from the headquarters Office of Nuclear Transfer and Supplier Policy, which is in the Office of Arms Control and Nonproliferation, Office of Defense Nuclear Nonproliferation. The Office of Nuclear Transfer and Supplier Policy is responsible for developing Energy’s export control guidance. The Energy OIG also interviewed contractor officials at the three Energy laboratories who provide technical assistance on export controls. In addition, the Energy OIG reviewed the applicable laws, Executive Orders, regulations, and Department of Energy guidance regarding Energy’s export licensing process for dual-use and munitions commodities.

State Methodology. To assess the policies and procedures for developing, maintaining, and revising the CCL and USML, the State OIG evaluated the process for placing items on the USML and the policies and procedures for considering amendments and revisions to it. The State OIG assessed the policies and procedures in place at DTC for processing CJ cases in a timely and transparent manner. The State OIG interviewed Department of State officials and reviewed documents at DTC, including the International Traffic in Arms Regulations and CJ files and records. In addition, the State OIG discussed the USML and the CJ process with exporters and the Center for Strategic and International Studies. The State OIG also spoke with officials from Commerce, Defense, and Energy.

Appendix B. Followup to Prior Interagency Review

As amended, Public Law 106-65, National Defense Authorization Act for FY 2000, requires the OIGs to include in their annual report the status or disposition of recommendations made in earlier reports submitted in accordance with the Act. In the first year of the Act, the OIGs each conducted an audit or review of compliance with the deemed export licensing requirements contained in the Export Administration Regulations and the International Traffic in Arms Regulations. The results of the reviews were consolidated and reported in Report No. D-2000-109, "The Interagency Review of the Export Licensing Process for Foreign National Visitors," March 2000. The March 2000 Interagency Review contains the complete text of each agency report, including recommendations in appendixes. The following is the current status of the recommendations made by each agency.

Status of the Commerce OIG Report No. IPE-12454, "Improvements Are Needed in Programs Designed to Protect Against the Transfer of Sensitive Technologies to Countries of Concern," March 2000

Recommendations for the Bureau of Export Administration

Recommendation: Aggressively pursue an outreach program to high technology companies and industry associations explaining and seeking compliance with the deemed export control requirements.

Status: Within BXA, the Office of Exporter Services has the lead responsibility for educating the business community and U.S. government agencies about the "deemed export" provisions of the Export Administration Regulations (EAR). BXA informed the Commerce OIG that the Office of Exporter Services includes the subject of deemed exports in its 2-day export control seminars, which are held monthly in cities across the United States. Plenary sessions were also conducted on deemed exports at the BXA annual Update Conference in July 2000, which BXA estimated included 800 industry representatives. In addition, BXA keeps industry informed of deemed exports through its various Technical Advisory Committee meetings. Furthermore, the Commerce OIG noted that BXA senior managers also periodically include information on deemed exports in speeches given at industry events.

In addition to the outreach activities, the Office of Export Enforcement (OEE), through its Project Outreach program, meets with employees of businesses, officials of other Federal agencies, and university officials to make them aware

of their export control compliance responsibilities under the EAR. According to OEE officials, the guidance includes making the individuals aware of the deemed export provisions of the EAR.

During FY 2000, the OEE reported that it conducted 1,033 Project Outreach visits and 60 public relations appearances (such as trade association meetings or OEE Business Executive's Enforcement Training meetings). OEE officials informed the Commerce OIG that because many of the dual-use technologies and commodities controlled under the EAR are high technology, a significant proportion of the OEE contacts with the business community are with high-technology firms. In addition, OEE special agents have visited numerous research institutes and universities that employ or sponsor foreign nationals. BXA actions meet the intent of the Commerce OIG recommendation.

Recommendation: Develop a link on the BXA main Internet web site specifically dedicated to deemed exports as was done for the Chemical Weapons program.

Status: On March 15, 2000, a deemed export web site link was established on the main BXA web site. The web site includes a comprehensive list of questions and answers covering what the deemed export rule is, who is considered a foreign national, what the licensing requirements for foreign nationals are, and what technologies are subject to control. BXA actions meet the intent of the Commerce OIG recommendation.

Recommendation: Expand outreach efforts with Federal agencies (including the Departments of Commerce, Defense, Energy, and Transportation, and the National Aeronautics and Space Administration) to ensure that these agencies fully understand the deemed export requirements and to help them determine whether foreign visitors at their facilities and/or laboratories require a deemed export license. At a minimum, BXA should

(a) Respond to the Energy's November 1999 request to review and concur with the informal deemed export guidance that BXA provided to Energy officials at a June 1999 meeting.

Status: Although BXA has still not formally responded to the Energy's November 1999 request to review and concur with the informal deemed export guidance that BXA provided to Energy officials at a June 1999 meeting, the Commerce OIG acknowledges that BXA is now engaged in a continuing dialogue with Energy on various export control issues, including deemed export controls. BXA actions meet the intent of the Commerce OIG recommendation.

(b) Follow up with the Director of the National Institute of Standards and Technology (NIST) on the three cases we identified to determine whether deemed export licenses should have been obtained and assist NIST in developing an export compliance program.

Status: According to BXA, licensing officials held consultations with NIST and determined that the three cases in question were instances of “fundamental research” and, as such, no deemed export license was required. BXA actions meet the intent of the Commerce OIG recommendation.

(c) Engage in discussions with the National Oceanic and Atmospheric Administration (NOAA) Administrator, as well as the Assistant Administrators of its line offices, and in particular the National Environmental Satellite, Data, and Information Service (NESDIS), to discuss deemed export regulations and their potential applicability to NOAA.

Status: According to BXA, in June 2000, the BXA Deemed Export Program Director contacted his counterpart at NOAA to extend the offer to conduct a briefing for appropriate NOAA officials regarding the deemed export license requirement, but no followup was sought by NOAA. As a followup measure, BXA stated that it will send a memo to NOAA extending the offer for a deemed export briefing when the new NOAA Administrator has been appointed. However, during FY 2000, OEE visited the NOAA facility in Boulder, Colorado, to meet with attorneys in its Office of Chief Counsel. According to OEE officials, the presentation was focused primarily on deemed exports. While the BXA action partially meets the intent of this recommendation, the Commerce OIG reaffirms its original recommendation for BXA to engage in discussions with senior NOAA officials across all of its line offices.

(d) Meet with Department of Transportation officials to ensure their understanding and compliance with deemed export license requirements.

Status: According to BXA, representatives from Export Administration and Office of Chief Counsel met with legal staff from the Department of Transportation Federal Aviation Administration in June 2000. BXA informed us that they provided an extensive briefing on the regulatory and procedural requirements of the deemed export program. In addition to the Federal Aviation Administration, BXA reported that it contacted officials at the Department of Transportation and provided them with copies of the regulation and web site material. BXA actions meet the intent of the Commerce OIG recommendation.

Despite a lack of action on some of the Commerce OIG recommendations, BXA appears to have made more concerted effort since issuance of our March 2000 report to ensure that other Federal agencies have a clear and uniform understanding of the licensing requirements for transfer of controlled technology to foreign nationals. For example, BXA reported that the OEE conducted 350 liaison meetings with other Federal agencies during FY 2000. BXA also informed the Commerce OIG that it includes its sister agencies as both guests and instructors in seminar programs in an effort to educate agency officials on BXA responsibilities in the export control arena, including deemed exports. Furthermore, BXA provided the Commerce OIG with the following information concerning some of its increased outreach activities to other Federal agencies regarding deemed exports.

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- **Department of Energy.** In April 2000, BXA provided speakers and training material on the subject of deemed exports at the Energy Department's Export Control Coordinators Organization (ECCO) conference. The ECCO is the coordinating body for those who deal with export controls at the various Energy laboratories. Furthermore, as a result of a recent administrative settlement with Energy's National Laboratories related to alleged violations of the EAR, BXA is currently hosting officials from Energy units short-term details. During their stay in BXA, Energy personnel gain comprehensive insight into BXA priorities regarding licensing and enforcement concerns. Furthermore, in March 2001, OEE hosted an Export Control Seminar for Energy personnel at the Los Alamos, New Mexico, and Lawrence Livermore, California, National Laboratories. In addition to traditional export control concerns, the Director of OEE delivered a presentation on compliance with deemed exports to Energy personnel. Since March 2000, OEE special agents have also participated in Project Outreach visits and BXA Export Seminars at Energy facilities, that include the National Renewable Energy Laboratory, the Thomas Jefferson National Accelerator Laboratory, and the Oak Ridge National Laboratory.
 - **Department of Defense.** In October 2000, the OEE made a presentation at the Defense Logistics Agency annual agent training in Battle Creek, Michigan, during which both deemed exports and "traditional" export control matters were discussed. OEE is also involved in interagency working groups in Milwaukee, Wisconsin, and Detroit, Michigan, that focus on topics such as deemed exports.
 - **National Aeronautics and Space Administration.** According to the OEE, several of the National Aeronautics and Space Administration's (NASA) operating units throughout the United States have been visited by OEE special agents in the last 3 years. Specifically, OEE reported that it has visited the NASA Dryden Flight Research Center, California, Johnson Space Center, Texas, Langley Research Center, Virginia, and Jet Propulsion Laboratory, California. According to the OEE, visits focused primarily on the deemed export of technology controlled under the EAR to visiting foreign scientists. The OEE special agents have also taken part in annual NASA training at its Ames Research Center.

Recommendation: Clarify the term "fundamental research" in the deemed export regulations to leave less room for interpretation and confusion on the part of the scientific community.

Status: While BXA generally concurred with this recommendation in its response to the Commerce OIG draft March 2000 report on this matter, in its June 2000 action plan, BXA stated that narrowing the definition of fundamental research would not only impair the relationship between industry and the academic community but also hinder new technology development. The BXA action plan also stated that any efforts to clarify the term in the regulations would involve a lengthy process so, as an interim measure, BXA tried to clarify

this term in its “Questions and Answers” page posted on its deemed exports web site that was established in March 2000. While the Commerce OIG believes the deemed export web site is a valuable tool for exporters, the explanation provided for fundamental research is essentially a restatement of how the EAR defines this term. As such, the Commerce OIG still maintains that U.S. entities could misuse this exemption by broadly defining fundamental research so as not to comply with deemed export controls. Therefore, the Commerce OIG does not believe that the BXA actions fully meet the intent of the recommendation.

Recommendation: Work with the National Security Council to determine what is the intent of the deemed export control policy and to ensure that the implementing regulations are clear in order to lessen the threat of foreign nationals obtaining proscribed sensitive U.S. technology inappropriately.

Status: BXA has taken no action on this recommendation since publication of the Commerce OIG report of March 2000. On March 14, 2000, in response to the Commerce OIG draft report and just prior to issuance of the final report, the Assistant Secretary for Export Administration sent a letter to the Special Assistant to the President and Senior Director for Nonproliferation and Export Controls at the National Security Council requesting that it convene a working group of representatives from the Departments of Commerce, Defense, Energy, Justice, State, and the Office of Management and Budget to review U.S. policy regarding deemed export technology transfers. However, BXA has not followed up with the National Security Council to determine the status of its request. The BXA limited action on this matter does not meet the intent of the Commerce OIG recommendation.

Recommendation: Track the number of visa application cables reviewed by the Director of the Office of Enforcement Analysis’s (OEA) Export License Review and Compliance Division, as well as those that are distributed to the analysts for an in-depth review.

Status: BXA estimates that the Director of the OEA Export License Review and Compliance Division reviews between 15,000 and 20,000 visa application cables annually. A count of the visa applications that the Director believes need further review by OEA analysts are recorded on an electronic log, which is updated on a daily or weekly basis, as needed. BXA actions meet the intent of the Commerce OIG recommendation.

Recommendation: For the Visa Application Review Program, assess whether OEA should continue to review the current level of visa application cables.

Status: According to BXA estimates, the Director of the OEA Export License Review and Compliance Division reviewed between 15,000 and 20,000 of the 47,000 visa application cables received from the Department of State Telecommunications Center in FY 1999. BXA managers reexamined the cable profile for visa application cables to determine whether they could reduce the number of cables reviewed. That review determined that both the number and type of cables being reviewed by the OEA is appropriate given current resource

levels. Therefore, BXA believes there is no need to decrease the number of visa application cables that it reviews annually. BXA actions meet the intent of the Commerce OIG recommendation.

Recommendation: Work with State to have a worldwide cable issued to reiterate the need for complete information in the visa application cables, including specific information for all stops on a visa applicant's proposed trip to the United States.

Status: The OEA sent a letter to State in July 2000, requesting that a worldwide cable be issued that reiterates the need for complete information in the visa application cables, including specific information for all stops on a visa applicant's proposed trip to the United States. While the Director of the OEA Export License Review and Compliance Division is not sure whether such a cable was ever issued, the Director has seen some improvement in the visa application cables. Specifically, all stops of the applicant in the United States are now generally being provided in the visa application cables. BXA actions partially meet the intent of the Commerce OIG recommendation. However, according to the OEA Export License Review and Compliance Division, there is still room for improvement in the information provided about each stop listed in the visa application cables, such as which individuals, companies, or institutions will be visited. Therefore, the Commerce OIG requests that BXA again contact State to publish better guidance on the information needed in the visa application cables.

Recommendation: Supplement the Visa Application Review Program training materials with additional reference information, to include checklists for the review process that are customized to the country of the visitor and type of place (company or Government facility) to be visited in the United States.

Status: The Director of the OEA Export License Review and Compliance Division created a checklist that identifies which resources are to be checked by the analysts, based on the country of the visitor and the type of place to be visited in the United States. This checklist was disseminated to the analysts of the OEA in July 2000. In addition, training and informational materials were subjected to a review to ensure continued applicability and usefulness. Finally, the Director of the Export License Review and Compliance Division meets regularly with staff members to ensure that all appropriate resources are being consulted during the review of visa application cables. BXA actions meet the intent of the Commerce OIG recommendation.

Recommendation: Change the OEA referral queue in Enforce to permit statistical queries and electronic notification to the responsible agent of a visa referral being made involving an existing case.

Status: Although BXA stated that it would implement this recommendation by September 2000, no action has been taken. According to BXA managers, all of the information technology efforts dedicated to developing the replacement program for the Export Control Automated Support

System. Improvements to the old program, including the Enforce module, are being given a low priority and are, in effect, not being done. BXA has not met the intent of the Commerce OIG recommendation.

Recommendation: Designate a point of contact in the OEE Intel for receipt and review of all visa referrals and have this point of contact interface on a regular basis with an OEA representative to ensure that visa cases are prepared, reviewed, and referred to the field offices in a timely manner. Assess the effectiveness of this new procedure as part of the periodic assessment of the overall Visa Application Review Program.

Status: On May 8, 2000, the Director of OEE Intel was designated as the point of contact in the OEE for receipt and review of all visa referrals. In addition, a change was made to the Enforce database so that incoming visa referrals from OEA now appear in the OEE Intel Director's "tickler" file, which enhances their visibility and enables the director to review and refer the referrals to field offices more quickly. Both the Director of the OEA Export License Review and Compliance Division and the Director of OEE Intel have seen a significant improvement in the timeliness of visa application referrals being made to OEE field offices. BXA has also pledged to review the new procedure as part of the periodic assessment of the overall Visa Application Review Program. BXA actions meet the intent of the Commerce OIG recommendation.

Recommendation: Institute a standard procedure for instances when OEE field offices uncover potential visa fraud that ensures that all such cases are referred to the appropriate office in the State Department in a timely manner.

Status: On May 12, 2000, OEE sent procedural guidance to its field offices regarding reporting instances of possible visa fraud to State. Under the new procedures, all instances of possible visa fraud identified by OEE field agents will be forwarded directly to the OEA, with an informational copy provided to OEE Intel at headquarters. Upon receipt of any referrals of possible visa fraud, OEA immediately sends the information to the appropriate office State for action. BXA actions meet the intent of the Commerce OIG recommendation.

Recommendation: Develop procedures within the OEA to ensure that visa fraud referrals are made to State within the appropriate 10- or 15-working day suspense period.

Status: On May 12, 2000, the OEA sent guidance to the analysts who review the visa application cables instructing them that if, during review of a visa application cable they discover apparent or possible visa fraud, analysts are to report the information to State immediately (via facsimile) and prior to further review or referral elsewhere. According to the Director of the OEA Export License Review and Compliance Division, no referrals for visa fraud have been made since we made this recommendation. BXA actions meet the intent of the Commerce OIG recommendation.

Recommendation: Stop making visa application referrals to State involving an entity on the Entity List.

Status: Effective April 1, 2000, OEA stopped making visa application referrals to State for entities listed on the BXA Entity List.¹ Such referrals are now only made to OEE for appropriate action. BXA actions meet the intent of the Commerce OIG recommendation.

Recommendation: Assess the Visa Application Review Program periodically, after the refinements we are recommending and others have been implemented, to determine whether the resources dedicated to the program justify the results. To that end, BXA should develop performance measures to help in determining the program's success.

Status: In its action plan, BXA agreed that it would assess the Visa Application Review Program once all of the Commerce OIG recommendations have been implemented and would continue to do so periodically thereafter. However, in recent discussions with OEA managers, it is clear that such an assessment has not been, and likely will not be, performed. BXA does not feel it necessary to develop external performance measures for the program because ongoing and regular feedback is obtained from the OEE on the disposition of investigative referrals stemming from the Visa Application Review Program. According to OEA and OEE managers, the feedback shows that the program has led to several fruitful investigations. However, because those investigations can take many years to reach a conclusion, such as an indictment made or monetary fine levied, the program's success is difficult to quantify. BXA believes for that reason, its internal measures are sufficient. However, the only internal performance measure that OEA tracks for the Visa Application Review Program is the number of investigative referrals made to the OEE, which totaled 274 in FY 2000. The Commerce OIG is not convinced that the number of referrals to the OEE is a good measure of whether resources dedicated to the program justify the results. In the Commerce OIG opinion, the outcome of the referrals is much more important. Thus, the BXA actions do not meet the intent of the Commerce OIG recommendation.

Recommendation: Work with the State Department and other interested agencies to formalize the review of visa applications under the Visas Mantis program in a memorandum of understanding. In addition, encourage the State Department to establish criteria for visa denials and develop a process for feedback so that the participating agencies are kept apprised of the results of their referrals.

Status: The State Department formalized the review of visa applications under the Visas Mantis program in an August 9, 2000, memorandum of understanding, which does contain criteria for visa denials. However, State has not developed a process for feedback to keep the participating agencies apprised of the results of the referrals. However, according to the Director of the OEA Export License Review and Compliance

¹The BXA Entity List is a published listing of foreign end users involved in proliferation activities.

Division, since the Commerce OIG report was issued, communication between State and BXA has improved significantly. In addition, meetings are being held more frequently among BXA, State, and other participating agencies. However, BXA would still like to obtain formal feedback on referrals that it makes to State, and it has made such a request to State. State has not responded to the BXA request, and it may be because BXA has made just a few visa application referrals to State during last year. Thus, creating a system to provide feedback on the disposition of those few referrals may not be a high priority for State at this time. The State OIG, which made a similar recommendation in its 2000 report, will followup to determine precisely why State has not implemented the feedback portion of the recommendation. BXA actions meet the intent of the Commerce OIG recommendation.

Recommendation: Ensure that all future Committee on Foreign Investment in the United States (CFIUS) filings, especially those involving countries of concern, are forwarded to both Export Enforcement and Export Administration's appropriate licensing office for review. In addition, make certain that any referral and recommendations are documented in the CFIUS case file.

Status: Of the 76 notifications filed with CFIUS since March 2000, only four of those notifications were from countries of concern. Although BXA reported to the Commerce OIG that both Export Enforcement and the appropriate Export Administration licensing division review CFIUS filings from countries of concern, BXA could only provide us with documentation supporting the fact for two of the four cases that it reviewed since March 2000. Thus, the Commerce OIG would again encourage BXA to ensure that all future filings, especially those involving countries of concern, are reviewed by both the Export Enforcement and the Export Administration's appropriate licensing office and that the referral notations and subsequent recommendations are recorded in the case file. BXA actions do not fully meet the intent of the Commerce OIG recommendation.

Recommendation for the National Institute of Standards and Technology

Recommendation: Ensure that the NIST Cooperative Research and Development Agreements (CRADA)² or any other agreements that the NIST may have with the private sector include a statement specifying its private sector partners' need to comply with export control laws, such as obtaining a deemed export license for their foreign national employees, if applicable, before working on NIST research projects.

²A cooperative research and development agreement, or CRADA, is one means that the U.S. Government uses for technology transfer to the private sector. CRADAs are used when research being conducted jointly by Federal laboratories and non-Federal parties is more likely to result in the development of an invention and would generally increase the possibility that deemed export licenses could be required.

Status: The terms and conditions of the standard NIST CRADA document were modified to include a clause on the export of technical data. According to the NIST, all new CRADAs executed by the NIST after April 7, 2000, include the new clause. Existing CRADAs that are extended or amended for any reason will also include the clause as part of the new amendment. In addition, the NIST is currently examining its other agreements with the private sector to determine on a case-by-case basis whether those agreements should also contain an export control clause. As a part of this exercise, the Commerce OIG would encourage the NIST to examine its existing CRADAs that may not come up for an extension or amendment to determine if they also need to be amended to include the export clause. NIST actions meet the intent of the Commerce OIG recommendation.

Recommendation for the National Institute of Standards and Technology, the National Oceanic and Atmospheric Administration, and the Bureau of Export Administration

Recommendation: Establish procedures to ensure that technical information or know-how released to foreign nationals is in compliance with Federal export licensing requirements. At a minimum:

- (a) Develop guidance regarding when a visit, assignment, or collaborative relationship of a foreign national to a NIST or NOAA facility requires a deemed export license.**
- (b) Clearly state policies, procedures, and responsibilities of NIST and NOAA hosts for determining whether a deemed export license is required.**
- (c) Establish a focal point at each appropriate NIST and NOAA research facility to determine whether a deemed export license is required when a foreign national visits the facility.**
- (d) Develop an export control program document containing procedures for determining whether technology or commodities at NIST and NOAA facilities can be exported to foreign countries, with or without a license.**
- (e) Mandate training requirements for personnel at NIST and NOAA facilities on the deemed export licensing requirements.**

NIST Status

Status: In response to the Commerce OIG recommendations, the NIST established an Export Control Working Group, which includes officials from the major NIST management groups and divisions. The primary mission of the group is to (1) review its current export control policies and procedures and propose improvements where needed, (2) draft written policy guidelines on export controls for NIST personnel, and (3) draft training materials on export controls for NIST personnel. On March 24, 2000, the Working Group had a kick-off meeting, which included a presentation by BXA officials.

In May 2000, pending the adoption of formal written procedures, the offices of the NIST Counsel and International and Academic Affairs instituted short-term procedures for processing foreign guest workers working at the NIST. Workers coming from organizations on the BXA Entity List or from embargoed countries, regardless of which project they will be participating in at the NIST, were to be first vetted through the Office of NIST Counsel and formal applications for deemed export licenses are to be made. According to the NIST, it has filed two deemed export license applications with BXA since March 2000. Both applications were returned without action because no license was required.

Subsequently, a June 2000 memorandum from the Director of the NIST Program Office was sent to all the division chiefs informing them of U.S. export control laws and regulations governing the sharing of information with foreign nationals. The memorandum also requested that each chief provide the name, country of origin, and detailed description of the research being conducted by each guest worker currently visiting the NIST (as well as in the future) who comes from one of the countries listed on the restricted countries list contained in the International Traffic in Arms Regulations (ITAR).³ According to the memorandum, this information is to be forwarded to the Office of International and Academic Affairs. Finally, the memorandum designates the Office of NIST Counsel as the focal point for export control guidance, including questions and clearances.

In August 2000, the Director of NIST sent a memorandum to all NIST employees on the “Do’s and Don’ts When Dealing With Intellectual Property, Proprietary Information and Companies.” The memorandum is essentially a list of 10 principles to help NIST employees ensure that all their dealings with outside parties are ethical and are in compliance with federal law, regulation, and policy. Item 6 on the list warns against the disclosure of technical information to non-U.S. citizens and briefly explains the concept of deemed exports.

Finally, since issuance of the Commerce OIG March 2000 report, NIST has held three training sessions, primarily geared to NIST personnel involved in the Advanced Technology Program’s intramural activities, that include a discussion of export control-related issues, including deemed exports. Furthermore, NIST is planning another series of training courses involving general scientific collaborations during the coming year that is also expected to incorporate a discussion of export control-related issues. NIST actions meet the intent of the Commerce OIG recommendations.

³The ITAR list includes BXA embargoed countries. When the Commerce OIG questioned the NIST as to why it used the ITAR list as a baseline for its division chiefs to follow, the NIST informed it that the original intent of the memorandum was for the NIST to identify research being conducted by foreign guest workers from countries of concern, such as those from China, India, and Pakistan. However, the NIST pointed out that it is aware of the BXA Entity List and Denied Persons List as indicated by the fact that it applied for two deemed export license applications for individuals coming from an entity that appears on the BXA Entity List. The NIST stated that any future instruction on this issue will include references to not only the ITAR-restricted list, but also the BXA Entity and Denied Persons Lists.

NOAA Status

Status: In its action plan, NOAA stated that its NESDIS is prepared to work with BXA to improve its policies and procedures concerning deemed export controls, as needed. It also noted that NOAA will canvass its other line offices to determine whether additional efforts need to be taken to ensure that technical information or know-how released to foreign nationals is in compliance with federal export licensing requirements. NOAA also pointed out that implementation of any export control policies and procedures would be predicated upon clarifications to the EAR by BXA, including whether a facility is an “appropriate research facility.” As indicated earlier, BXA reported to us that it tried to engage NOAA in a discussion on deemed export controls but NOAA did not pursue the opportunity. Therefore, we would strongly encourage NOAA to contact BXA to discuss deemed export regulations and their potential applicability to NOAA. NOAA actions have not fully met the intent of our recommendations.

Recommendation for the International Trade Administration and the Bureau of Export Administration

Recommendation: Determine whether the International Trade Association (ITA) or BXA is the appropriate Commerce organization to take the lead on CFIUS.

Status: BXA and the International Trade Administration agree that the Commerce responsibility for coordinating CFIUS matters should continue to reside in ITA, because neither party believes that a transfer of administrative responsibilities would enhance the effectiveness of Commerce’s CFIUS review process. However, neither agency could provide a justification as to why the ITA is the more appropriate Commerce organization to take the lead on CFIUS. Regardless, the two bureaus agreed to work closely together, as well as with other interested departmental units, to ensure that all of the CFIUS cases are reviewed thoroughly. BXA and ITA actions meet the intent of the Commerce OIG recommendation.

Status of the Defense OIG Report No. D-2000-110, “Export Licensing at DoD Research Facilities,” March 24, 2000

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

Status: The Director, Defense Research and Engineering, is working with the DTRA to coordinate with the Departments of Commerce and State to develop guidance regarding when a visit or assignment of a foreign national to a Defense research facility requires a deemed export license. Anticipated completion date is May 15, 2001.

Recommendation: Revise DoD Directive 2040.2, “International Transfers of Technology, Goods, Services, and Munitions,” and DoD Directive 5230.20, “Visits, Assignments, and Exchanges of Foreign Nationals,” to clearly state policies, procedures, and responsibilities of DoD and Military Department hosts for determining whether a deemed export license is required when a foreign national visits a Defense facility.

Status: A report from the Office of the Under Secretary of Defense (Policy) on the status of this corrective action was due February 12, 2001; however, as of March 23, 2001, that report has not been received.

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

Status: When export control program guidance has been fully developed, the Director, Defense Research and Engineering, will develop a memorandum directing each Defense research facility to appoint a focal point for deemed export license determinations and direct the use of the guidance document to be developed, as described below. Anticipated completion date is July 31, 2001.

Recommendation: Develop an export control program document containing procedures for determining if technology or commodities at Defense research facilities can be exported, with or without a license, including circumstances that may constitute exemptions from requirements of the Export Administration Regulations or the International Traffic in Arms.

Status: The Director, Defense Research and Engineering, is working with DTRA to develop an export control program document containing procedures for determining whether technology or commodities at Defense research facilities can be exported to foreign countries, with or without a license. Guidance developed jointly with the Departments of Commerce and State will be included. The document is to be coordinated with the Office of the Under Secretary of Defense (Policy) and Service representatives prior to submission for publication. Anticipated completion date is July 13, 2001.

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

Status: The Director, Defense Research and Engineering, has been working with the Office of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence to develop a process to improve counterintelligence support to DoD research facilities. The process includes development of Counterintelligence Support Plans at each facility. Each Counterintelligence Support Plans will include a requirement for threat awareness training for all personnel at these facilities. The Director, Defense Research and Engineering, will work with the Office of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence to ensure

that the training addressed in the Counterintelligence Support Plans includes deemed export licensing requirements and that deemed export licensing is addressed in the implementing regulation for DoD Directive 5230.39, “Research and Technology Protection Within the Defense Department,” currently in draft. No estimated date of completion was provided.

Recommendation: The Deputy Under Secretary of Defense (International and Commercial Programs) rescind the 1994 policy memorandum “Implementing Arrangements to Research and Development Umbrella Agreements,” and revise DoD Instruction 2015.4 “Mutual Weapons Development Data Exchange Program and Defense Development Exchange Program,” to delegate authority to the Military Departments for coordinating data exchange agreement annexes with the Department of Commerce.

Status: In November 2000, a Statement of Principles between the DoD and Commerce was signed. The Statement concerns the consultation of acquisition, technology and logistics-related international agreements, including Data Exchange Annexes and Information Exchange Annexes, between both Departments. A December 13, 2000, memorandum from the Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) requires the Military Departments to transmit all draft Data Exchange Annexes or Information Exchange Annexes to Commerce for review prior to signature. The Director, International Cooperation, from the Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), has said that his office was planning to update the processes in DoD Directive 2015.4. No estimated date of completion was provided.

Recommendation: Army, Navy, and Air Force update their guidance to delineate clear procedures for coordinating Data Exchange Annexes with Commerce.

Status: The three Services have agreed to update their respective guidance, upon the revision of DoD Directive 2015.4. Action is awaiting the above revision.

Status of the Energy OIG Report No. 0465, “Inspection of the Department of Energy’s Export License Process for Foreign National Visits and Assignments,” March 2000

Corrective actions for two of the eight recommendations in the March 2000 report were completed and the recommendations were closed. Six recommendations are currently open pending issuance of a Department of Energy order regarding foreign visits and assignments. When issued, the Energy OIG will assess the responsiveness of the order to the recommendations and determine whether the remaining recommendations should be closed.

Recommendation: The Department of Energy should ensure that senior Energy officials work with senior Commerce officials to assure clear, concise, and reliable guidance is obtained in a timely manner from Commerce regarding the circumstances under which a foreign national's visit or assignment to an Energy site would require an export license.

Status: The Department of Energy reported that on April 20, 2000, guidance on "Deemed Exports" was published and submitted to Department of Energy elements and that this guidance was reviewed by the Field Management Council and approved by the Deputy Secretary. The guidance explains what a "deemed export" is, when a "deemed export" requires an export license, and how a "deemed export" can occur. The guidance also provides directions for technical reviews to occur by facility individuals familiar with technology, equipment, or material involved and with applicable export control regulations. Based upon the Department of Energy's actions, the recommendation was closed.

Recommendation: The Department of Energy should ensure that a proposed revision of the Energy Notice concerning unclassified foreign visits and assignments include the principal roles and responsibilities for hosts of foreign national visitors and assignees.

Status: The Department of Energy reported that the recommendation is consistent with the current and ongoing Energy initiative to update and clarify foreign visit and assignment policy. The Department of Energy further reported that the new draft Department of Energy (DOE) Order 142.X, "UNCLASSIFIED VISITS AND ASSIGNMENTS BY FOREIGN NATIONALS," includes the principal roles and responsibilities for hosts of foreign national visitors and assignees. The recommendation remains open pending issuance of the DOE Order.

Recommendation: The Department of Energy include a requirement for Energy and Energy contractor officials to enter required foreign national visit and assignment information in the Foreign Access Records Management System, or a designated central data base, in a complete and timely manner.

Status: The Department of Energy reported that a new Energy-wide information system, the Foreign Access Centralized Tracking System, has been developed and implemented. The Department of Energy further advised that draft DOE Order 142.X includes a requirement for Energy sites to enter required foreign national visit and assignment information into Foreign Access Centralized Tracking System, in a complete and timely manner. The recommendation remains open pending issuance of the DOE Order.

Recommendation: The Manager of the Department of Energy's Oak Ridge Operations Office should ensure that requests for foreign national visits and assignments at the Oak Ridge site are reviewed by the Y-12 National Security Program Office to assist in identifying those foreign nationals who may require an export license in conjunction with the visit or assignment.

Status: The Department of Energy reported that to ensure that requests for foreign national visits and assignments at the Oak Ridge National Laboratory receive appropriate export license consideration, Oak Ridge National Laboratory has initiated a system of reviews. Under this system, requests are reviewed by five separate disciplines (Cyber Security, Export Control, Classification, Counterintelligence, and Security). In addition, requests associated with concerns are referred for resolution to the Non-citizen Access Review Committee. The Department of Energy further reported that while each of these reviews can involve National Security Program Office, the Oak Ridge National Laboratory Export Control Office is responsible for referring requests to National Security Program Office as necessary. Based on the actions taken by the Oak Ridge Manager, the recommendation was closed.

Recommendation: The Department of Energy should ensure that the requirements in the revised Energy Notice for unclassified foreign national visits and assignments are clearly identified and assigned to responsible officials or organizations.

Status: The Department of Energy reported that draft DOE Order 142.X includes clear identification of requirements and assignments to responsible officials or organizations. The recommendation remains open pending issuance of the DOE Order.

Recommendation: The Department of Energy should ensure that guidance issued by the Office of Nuclear Transfer and Supplier Policy to advise hosts of their responsibilities regarding foreign nationals includes the appropriate level of oversight to be provided by the host during the period of the visit or assignment.

Status: The Department of Energy reported that draft DOE Order 142.X includes the principal roles and responsibilities for hosts of foreign national visitors and assignees. The recommendation remains open pending the issuance of the DOE Order.

Recommendation: The Department of Energy should revise the Energy policy regarding foreign national visits and assignments to ensure that consistent information is being maintained by Energy sites regarding foreign nationals visiting or assigned to work at the site.

Status: The Department of Energy reported that draft DOE Order 142.X requires development of consistent information and input into the Foreign Access Centralized Tracking System. Actions are underway to implement standard templates to upload historical information from the Department of Energy sites' legacy systems into the Foreign Access Centralized Tracking System. The recommendation remains open pending the issuance of the DOE Order.

Recommendation: The Department of Energy should require that all Energy sites having foreign national visitors or assignees enter information regarding the visits or assignments into Foreign Access Records Management System, or a designated central Energy database.

Status: The Department of Energy reported that the Foreign Access Centralized Tracking System has been developed and implemented and that draft DOE Order 142.X includes the requirement for all sites to enter required foreign national visit and assignment information into the Foreign Access Centralized Tracking System, in a complete and timely manner. The recommendation remains open pending the issuance of the DOE Order.

Status of State OIG Report No. 00-CI-008, “Department of State Controls Over the Transfer of Militarily Sensitive Technologies to Foreign Nationals from Countries and Entities of Concern,” March 2000

Recommendation: The Office of Defense Trade Controls should improve its tracking capabilities for foreign nationals on export munitions licenses to prevent the transfer of sensitive data to countries of concern. DTC should use its existing database to track foreign nationals listed on export munitions licenses, including, at a minimum, the name and nationality of the individual.

Status: The Office of Defense Trade Controls reported that it has established a computer coding capability to track foreign nationals from countries of concern whose U.S. defense industry employment has been authorized by a munitions license. Based on the action, the recommendation was closed.

Recommendation: The Office of Defense Trade Controls should highlight in its outreach programs compliance with existing licensing requirements for the transfer of information to foreign nationals.

Status: The Office of Defense Trade Controls reported that it will continue to highlight in its outreach programs the existing requirements of the International Traffic in Arms Regulations with respect to the transfer of information to foreign nationals. However, the Office of Defense Trade Controls noted that its request for more staff and resources for outreach efforts were not granted last year. As of March 23, 2001, the recommendation remained open pending receipt of documentation on outreach programs highlighting compliance with existing licensing requirements for the transfer of information to foreign nationals.

Recommendation: The Office of Defense Trade Controls should develop a plan of action, based on an analysis of the effectiveness of the first year program, for the number and scope of future reviews including additional personnel and resources.

Status: The Office of Defense Trade Controls reported that it has agreed to develop such a plan of action. The implementation of the plan is dependent upon additional personnel and resources. As of March 23, 2001, the recommendation remained open pending receipt of the action plan.