

**Testimony of William A. Reinsch, President, National Foreign Trade Council
Committee on Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District
of Columbia**

**Beyond Control: Reforming Export Licensing Agencies for National Security and Economic
Interests**

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Thank you for the opportunity to appear today. My name is William Reinsch, and I am the President of the National Foreign Trade Council. Along with our USA*Engage coalition, my organization supports economic, humanitarian and diplomatic engagement and multilateral cooperation as the most effective means of advancing U.S. foreign policy interests and American values. Prior to this position I was Under Secretary of Commerce for Export Administration in the Clinton Administration and, as such, ran the government's dual use export control system. Before that, I spent twenty years on Congressional staffs where my major responsibilities included export control policy and the Export Administration Act. In short, I have some familiarity with today's topic.

Consistent with the committee's jurisdiction, I have been asked to focus on management and organizational issues that have impacted export control administration. My fundamental conclusion from having observed the system from both inside and outside is that it does not function well, despite efforts over the years to clarify and simplify the process.

Time does not permit an extended discussion of the process problems, but from the perspective of users of the system, they are delay and uncertainty in decision making and, in the case of weapons, repetitive licensing requirements. Applicants can face these problems initially if there is uncertainty or interagency disagreement over whether their proposed export is a dual use item or a weapon, and then subsequently in the licensing process itself. In addition, failure to keep the control lists up to date by removing lower level items that have become widely available has led to a constantly increasing number of applications, which puts a growing burden on the bureaucracy to process them. In addition, expanded and uncertain efforts to deal with complexities like deemed exports impose new burdens on business simply to keep abreast of changing requirements.

The fundamental characteristic of export control administration, whether dual use or weapons, is that both policy and specific licensing decisions inherently involve multiple equities. Selling a controlled item is a foreign policy decision, a national security decision, a commercial decision, and often a nonproliferation and/or energy policy decision. Those equities are invested in different federal agencies, all of which deserve to be part of the process. My experience has been that the government makes the best decisions when all relevant agencies are involved in the process, and each plays the role assigned to it as part of its mission. That, however, creates a cumbersome bureaucracy because it means the Departments of State, Defense, Commerce, and sometimes Energy, as well as various parts of the intelligence community, need to work together.

The need to cooperate at both the technical and policy levels has been the weak point of this system for years. On the dual use side, the system is effective on paper, thanks to an Executive Order of December 1995 that set up a "default to decision" process that established rules for the referral of applications to

different agencies and then permitted decisions to be made at the senior career level by a single agency after extensive consultation but allowed them to be appealed to political levels where agencies vote.

In reality, things do not always work quite so smoothly. Making the wheels turn requires persistence and discipline. Decisions can be delayed when an agency games the system by deciding it is unprepared to discuss a matter, or when the relevant expert fails to attend the meeting. Deadlines become meaningless if they are not enforced. Deciding that an application – or more likely a number of similar applications – raises a policy issue can take the matter out of the system entirely and leave the license applications hanging while the agencies haggle over the underlying policy. For example, President Bush promised during the 2000 campaign to change the method of calculating computer power for licensing purposes. Thanks to interagency disagreement, it took more than five years to redeem that promise. While licenses were not blocked during that period, operating with an outdated metric meant many high performance computers were unnecessarily subjected to licensing delays.

On the weapons side, the State Department has been its own worst enemy, largely by resisting transparency and information sharing with other agencies and by insisting on a system that requires a separate license – and thus a separate decision for each piece of a transaction or each part of a technology collaboration instead of issuing project licenses that cover all transactions relevant to a specific program.

As a result, the number of license applications has been growing 8-10 percent annually and is now nearing 100,000 cases. A significant portion of this increase is attributable to U.S. government defense and security initiatives that call for close collaboration between the U.S. and its allies. Successful execution of these collaborative programs requires appropriate, timely sharing of technical data and technology over the entire lifecycle of a project. Requiring separate licenses for each transaction within a project – after the government has already made the policy decision to go forward – places an enormous bureaucratic burden on the State Department, frustrates our allies who have been told we want to work cooperatively with them only to find that basic decision second-guessed over and over again, and creates inevitable delays for the companies seeking to bring these projects in under budget and on time.

In such cases, which are very different from straightforward export transactions, a project licensing approach that authorizes an entire project within specified parameters, along with reliance on “trusted” or “validated” foreign parties whose technical and security credibility has been established would obviate the need for licensing for certain components of a collaborative program, or at least reduce the number of licenses required for activities that are predictable and repeatable. This would eliminate a major bottleneck, support effective program management, and strengthen cooperation with our allies.

When it has intervened, Congress has generally made the situation worse either by imposing additional administrative burdens, as in the case of high performance computers, or by arbitrarily defining items as weapons subject to State Department procedures, as in the case of commercial communications satellites.

Probably the most unsatisfactory aspect of the current system is the commodity jurisdiction process – the process by which the State Department determines whether an item is military subject to its licensing or dual use subject to Commerce licensing. This authority belongs to State, which over the years has not only refused to share it but has been reluctant to take advice from other agencies even though it has no technical expertise of its own, and has been particularly opaque in explaining the reasoning behind its decisions.

This has become much more important in the past decade because the line between military and dual use items is increasingly blurred, thanks in large part to civilian spin-offs of military technology, such as night vision equipment or radiation-hardened chips. These decisions can have significant effects on a company's business strategy since determining that an item is military subjects it to more restrictive licensing.

Another major issue is list reduction. The last time the dual use list was significantly updated was in 1994 when the Wassenaar Arrangement was established. Occasional changes have occurred since then, and periodic regular reviews have been frequently promised, occasionally begun, and never completed. The result is a control list that has not been reviewed in light of rapidly changing technology and increasingly widespread foreign availability and as a result has been growing when it should be shrinking. This, in turn, means more licenses are required in cases where our foreign competitors are not similarly constrained, resulting in loss of competitive advantage for American companies and no damage done to the end user, who simply buys a comparable European or Japanese product.

On the dual use side, the commercial nature of these products means that timing matters. U.S. high tech exporters compete intensely against Japanese and European companies. Delay in approving a license can mean a sale lost. In addition, uncertainty about U.S. policy leads buyers elsewhere. Overreach in our rules lead foreign manufacturers to "design out" American parts and components so they can avoid becoming entangled in our licensing system. Thus, the efficiency with which this system is administered has a significant impact on the ability of our most sophisticated industries to compete successfully overseas, which, in turn has an impact not only economic growth and jobs here but on our security, since we rely on these same companies for our most advanced defense equipment. Their health is essential to our security, and their health, in turn, depends increasingly on their ability to export.

Over the years there have been numerous proposals to reform both dual use and weapons systems, most of them less focused on improving administration than ensuring that the interests of one agency carry more weight than the others. Those efforts have generally been rejected; indeed, the Export Administration Act itself has not been amended substantively in more than twenty years, and the Arms Export Control Act has yet to undergo the periodically promised complete overhaul. The result is that both statutes are out of touch with current policy and the implications of global economic integration.

Proposals for Reform

There are essentially three approaches to export control reform. The first is tweaking the increasingly creaky current system – applying duct tape and wire to keep it operating. The Coalition for Security and Competitiveness, of which NFTC is a member, has proposed a set of administrative changes for both licensing systems that would be helpful in making them more efficient, but they are not fundamental reforms.

The second is to eliminate interagency squabbles by creating a unitary, independent agency to administer both dual use and weapons programs – called the Office of Strategic Trade in legislation proposed in the 1980s and 90s. This approach would abolish completely the current authorities in Defense, State, and Commerce and create a new independent office reporting directly to the President and the National Security Council.

Although well-intentioned, the basic problem with this approach is that it cannot be enacted as proposed. At some point during Congressional consideration of such a bill, the Secretaries of State, Defense, and Commerce would each approach their authorizing committee chairmen and argue that

while they could live with an independent agency, there is a small set of licensing decisions that require their direct involvement. The authorizing committees will accept those arguments; exceptions will be created; each department will set up an office to identify and handle the special cases; those offices – and the number of exceptions – will grow; and in five years the system will look very much like it does now but with an extra layer of bureaucracy.

The third approach is to create a unitary system that operates within an interagency framework. In it, the distinction between military and dual use items as far as licensing process is concerned would be abolished – all would be subject to the same procedure, thus eliminating the commodity jurisdiction issue that has plagued the current system and while still ensuring that all relevant parties are able to participate in the process. Since weapons and dual use items are subject to different multilateral obligations, the distinction between them cannot be abolished, but processing them the same way would be an enormous simplification without compromising our security.

Such a system would be modeled on the Executive Order I referred to. One agency would act as the “mailbox,” receiving applications and circulating them to other relevant agencies for comment and creating deadlines for submission of agency positions. In the event of consensus, licenses would be granted quickly. In the event of conflict, the default to decision process I described would be used. By including the innovations I mentioned like project licenses and the identification of trusted end users eligible for streamlined treatment, we could reduce the volume of applications that are routinely approved and thereby significantly increase efficiency.

Such a system, however, would still require active management by the National Security Council to ensure that the machinery remains well-oiled. Historically, the NSC has played an active role in pushing agencies to work out their differences. Recently, however, it has played a more passive role, which shows in the increasing amount of time it takes to resolve policy issues.

Mr. Chairman, I have not in my comments addressed the question of resources. That is not an oversight. A plea for more resources is the standard response of every federal agency to every problem, and more money would no doubt be helpful, particularly after significant BIS budget cuts this year, but I do not believe it is the most critical issue. Competent, dedicated civil servants labor in a system whose problems are self-imposed or imposed by Congress. Adding money will not clear away the obstacles to efficient export control administration; it will simply allow more people to be inefficient. I would encourage the Committee to address the fundamentals, however difficult that might be, rather than settle for with palliatives.

Finally, Mr. Chairman, let me congratulate you and the Committee on your examination of this issue, and let me urge you to continue with it. During my time working on export controls I’ve been involved one way or another in 13 or 14 efforts to rewrite the EAA. Only five of those succeeded, and the last was twenty years ago. This is admittedly a difficult area – it is complicated and controversial. I hope your oversight efforts will lead you to some useful conclusions and that you will work with the Banking Committee on legislation to implement them.