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BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
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Mr. Chairman and Members of the Committee, I am pleased to appear before you today to discuss the Commerce Office of Inspector General's (OIG) review of the Department of Commerce's export licensing process for dual-use commodities. In August 1998, you requested that the Inspectors General from the Departments of Commerce, Defense, Energy, State, the Treasury, and the Central Intelligence Agency conduct an interagency review of the export licensing process for dual-use commodities and munitions. Specifically, you asked the six Inspectors General to update a 1993 special interagency OIG review of the export licensing process and to answer 14 questions. In response to your request, we conducted a program evaluation of the Department's export licensing process, focusing on the effectiveness of the current policies, procedures, and practices in its licensing of dual-use goods and technologies.

The Department of Commerce's Bureau of Export Administration (BXA) administers the U.S. government's export control licensing and enforcement system for dual-use commodities for national security, foreign policy, and nonproliferation reasons. Dual-use commodities are goods and technology determined to have both civilian and military uses. BXA controls dual-use exports under the authority of several laws, including the Export Administration Act of 1979, as amended. Since that statute expired in September 1990,^[1] Presidents Bush and Clinton have extended existing export controls by executive order, invoking emergency authority contained in the International Emergency Economic Powers Act of 1977, as amended. These controls continue in effect today through Executive Orders 12924 and 12981.

Our review found that the multi-agency process for licensing U.S. dual-use exports is generally effective in bringing divergent policy views and information to bear on decision-making for export licenses (see Exhibit 1). That process includes not just the Commerce Department, but also the Departments of Defense, Energy, State, Justice (for encryption exports), the U.S. Arms Control and Disarmament Agency (ACDA),^[2] and the Central Intelligence Agency's Nonproliferation Center. Under Executive Order 12981, these agencies have the authority to review all dual-use export license applications submitted to Commerce. The executive order also established mandatory escalation procedures to be followed when Commerce and the referral agencies disagree about dual-use export license applications and refined the time lines for this process.

Exhibit 1

We determined that the interagency export license referral and escalation processes are working reasonably well. There are four levels of escalation for dual-use cases: the Operating Committee (OC) at the senior civil service level, the Advisory Committee on Export Policy (ACEP) at the assistant secretary level, the Export Administration Review Board (EARB) at the Cabinet level, and the President. Each level of the escalation process is required to consider all matters referred to it, giving consideration to national security, foreign policy, and proliferation of weapons of mass destruction. With an orderly procedure to resolve interagency disputes in place since 1995, the export licensing process has been greatly improved since the 1993 special interagency OIG review.

While we noted significant areas of improvement since our 1993 review, we also identified a number of problems that warrant the attention of the Department, the Administration, and the Congress.

I. EXPORT CONTROL LEGISLATION AND REGULATIONS

The 1990s have brought dramatic changes in worldwide economic and political conditions, as well as in the environment for controlling the export of U.S. commodities and technology. As we examined the legislation, executive orders, and regulations used to control U.S. exports, we found several legislative and regulatory weaknesses that need to be addressed in order to strengthen the export control process.

Export Administration Act of 1979. First and foremost, new legislation is needed to replace the expired Export Administration Act and accurately reflect current export control policies. Since early 1990, both the Congress and the Administration have tried to rewrite the basic law that authorizes the President to regulate exports from the United States. It is time to push even harder for new legislation, since the current emergency powers authority does not provide for strong penalties for those who violate U.S. export controls. In addition, as the United States encourages other countries, such as those in Eastern Europe and Southeast Asia, to implement export controls, we must set the example by sending a clear signal that we are committed to such controls. The fact that it has been so long since the expiration of the Act potentially sends a message to other countries, including our allies, that the United States is not truly committed to export controls. Thus, I strongly urge the Congress and this Committee to push for passage of new legislative authority for dual-use export controls. In the new legislation, we recommend that the Congress maintain the transparency provided for in the executive order and continue to give all licensing agencies the authority to review all export license applications. In addition, the Congress should maintain the dispute resolution process outlined by Executive Order 12981.

Deemed Exports. The export licensing policy and regulations regarding the release of certain technology or software to foreign nationals commonly referred to as deemed exports are ambiguous and need to be revised. Deemed export license applications made up approximately 10 percent of the 11,015 export license applications processed by BXA in fiscal year 1998. However, one BXA official estimated that 25 U.S. companies submit most of the deemed export applications that BXA processes. In addition, BXA received only two export license applications from Energy's research laboratories in fiscal year 1998. While BXA has done some outreach, it appears that there is a general lack of knowledge and understanding on the part of U.S. industry and the federal laboratories about the deemed export regulations and when an export license is

required. Thus, our report urges BXA to move expeditiously to clarify this requirement with the National Security Council and provide clearer guidance to U.S. research laboratories and industry to preclude the release of sensitive technology to inappropriate end users.

National Defense Authorization Act for FY 1998. The National Defense Authorization Act for fiscal year 1998 requires exporters to notify BXA of their intent to export or reexport high performance computers, or HPCs, with a performance capability of between 2,000 and 7,000 Million Theoretical Operations Per Second (MTOPS) to Tier 3 countries, such as China, Israel, and Russia. We believe that this reporting requirement is reasonable and helps the U.S. government to monitor these shipments.

However, the Act's requirement that a post shipment verification be conducted for every HPC greater than 2000 MTOPS that is shipped to Tier 3 countries may not be the most effective use of government resources. Specifically, the Act requires that a U.S. government employee visit all high performance end users even if they have been visited in the recent past, to judge whether their U.S. computers are being used for weapons development. As a result, it has forced BXA to divert some of its enforcement resources to the conduct of Post Shipment Verifications on lower end HPCs or on multiple visits to the same end users that could have otherwise been used for targeting end use checks on the HPC shipments of greater concern or on other critical commodities and technologies. Thus, while we believe that exporter shipment reporting and end user checks on HPCs are important export controls, we recommend that some modification to the current Post Shipment Verification requirement be seriously considered.

II. COMMODITY CLASSIFICATION PROCESS

While BXA holds the exporter responsible for following export regulations and properly classifying an export item, it will advise an exporter on whether an item is subject to the Export Administration Regulations and, if applicable, identify the appropriate Export Control Classification Number. Exporters may verbally inquire about a commodity classification, or CCATS, but only written inquiries result in binding determinations by BXA. During our review, we were pleased to note that BXA had instituted a front-end review mechanism to pre-screen commodity classifications to ensure that the appropriate licensing engineer reviews the applicable CCATS.

While this initial step serves as an important quality control measure, our review identified two areas in the commodity classification process that still need improvement. First, BXA needs to improve the timeliness of its processing of exporters' commodity classification requests. Instead of meeting the required 14-day deadline for CCATS reviews, BXA took 37 days, on average, to process CCATS determinations in fiscal year 1998. This has resulted in delays for exporters.

Second, and more importantly, BXA needs to work with both Defense and State to ensure that the CCATS process is more transparent, or open and clear to all parties, 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. Specifically, while there were 2,723 CCATS requests in fiscal year 1998 alone, BXA

has only referred 27 CCATS to the State Department since 1996 and only 12 completed CCATS determinations were sent to the Defense Department. Both departments complained to us during this review about BXA not adequately coordinating the CCATS process with them.

As part of our review, we sought to determine whether past commodity classification determinations by BXA did, in fact, support the concerns of Defense and State about the accuracy of Commerce's CCATS decisions. We invited analysts from Defense and State to review a sample of commodity classification line items and second-guess the original determinations made by BXA.^[3] Based on our sample of 103 CCATS, we determined that 2 of these requests should have been referred to State for review. In addition, there was disagreement on three additional cases in which Defense agreed that the items fell under the Commerce Control List but disagreed on the export control classification number.

Thus, while our CCATS review showed interagency disagreement on very few cases, it did show clearly that the CCATS process was not transparent and that BXA was not complying with the National Security Council guidance to refer defense-related CCATS to Defense and State. Therefore, we recommended that BXA, in conjunction with Defense and State, work with the National Security Council to develop specific criteria and procedures for the referral of munitions-related commodity classifications to Defense and State to ensure that those agencies are involved in the CCATS process.

III. GUIDANCE, TRAINING, AND INDEPENDENCE ISSUES

Licensing Officer Guidance. Our review disclosed that the policy and procedures used by BXA licensing officers to process export license applications varied. Many licensing officers who responded to our survey questionnaire, as well as those we interviewed throughout the review, identified the lack of up-to-date guidelines as one of BXA's major weaknesses. We were pleased to see that near the end of our review, on March 31, 1999, BXA officials implemented new procedures to improve licensing officer guidance. The new guidelines emphasize the importance of a licensing officer obtaining sufficient information before making a recommendation on a case and documenting all relevant facts and details pertaining to it. We determined that the new guidance for licensing officer case analysis is more thorough. However, our report details some additional steps that we think BXA can take to further strengthen the support and guidance available to its licensing officers as they complete their reviews of license applications.

Training. We also found training provided to licensing officers to be inconsistent and often unresponsive to their needs. The export licensing function requires a continuous structured training program to ensure that the licensing officers' critical thinking and knowledge of export control issues and concerns are as strong as possible.

We were particularly concerned about the adequacy of training for new licensing officers. Such training is generally left up to the individual licensing divisions and mostly consists of reading the Export Administration Regulations and learning on-the-job primarily by directing questions to more experienced staff. By contrast, we found that BXA's Encryption Policy Division

provides a comprehensive training program for all of its new analysts. Specifically, new analysts (1) spend three weeks answering phones and sitting in on other calls in the Exporter Counseling Division, (2) observe the division director's telephone responses to exporter questions, (3) attend seminars on regulations and specific technologies sponsored by BXA for exporters, and (4) observe interagency working group and industry meetings.

While we recognize that training needs to be flexible to allow for different learning methods in a variety of disciplines, we recommended that BXA consider using this kind of training program for all new licensing officers. We also recommended that BXA identify and prioritize the current and future learning needs of its licensing officers and then establish a formal training program to meet those needs. Our report offers a number of suggestions for in-house and outside training, as well as for interagency exchanges of personnel, that we believe would further improve licensing officers' performance.

Pressure on Licensing Officials. Our survey results indicated that most BXA licensing officials are not pressured into changing their positions on specific license recommendations. While 2 of the 36 licensing officials who responded to this specific survey question indicated that they had received some pressure from management to change positions on recommendations,⁴ the remaining licensing officer responses to the survey, as well as our interviews with BXA personnel, did not indicate pressure had been exerted on licensing officials to unduly influence their licensing recommendations.

However, a third survey respondent, who is also the Chair of the Operating Committee, indicated that upper management sometimes conveys instructions about the decision she should make on a specific OC case. She indicated that this is a rare occurrence and that it generally involves a situation where she believes more information is needed about the transaction before a final decision can be made, and not necessarily a decision that she would ultimately disagree with if she had more time to consider the case. While we understand that the OC Chair is a BXA employee and that the Executive Order recognizes that an OC decision is a Commerce decision that can be escalated by a dissenting member agency, we also believe that one could interpret the role of the OC Chair, as being independent.⁵ The Executive Order procedures call for the Chair to preside over the OC meeting and listen to all of the reviewing agency arguments including BXA's before rendering a decision on a case.

As we outline in our report, we believe that the OC Chair should be free to independently decide a case, and we advised BXA management that it should definitely not give the impression that it is instructing the Chair on what licensing decisions to make. If the Chair makes a decision that BXA disagrees with, BXA should use the avenue afforded it under the executive order to escalate cases to the Advisory Committee for Export Policy in order to avoid any misconceptions or even the appearance that this part of the process is not transparent.

IV. EXPORT LICENSE APPLICATION REFERRAL PROCESS

As I stated earlier, the licensing review and referral process for dual-use commodities has improved since the last OIG review in 1993. In fiscal year 1998, BXA referred 85 percent of

export license applications to other agencies for review, up from 53 percent in fiscal year 1993, (see Exhibit 2). While we believe the overall referral process is generally more effective because of greater interagency involvement, we did identify some problems that need improvement and management attention. We are concerned about (1) licensing officers amending some existing licenses without interagency review; (2) inadequate review time being provided to the CIA's Nonproliferation Center for its end user checks; (3) BXA canceling some pre-license checks without notifying the referral agencies when they have approved a license conditioned on a favorable end use check; and (4) BXA's returning some export license applications without action after unfavorable pre-license checks are received. BXA management, in response to our report, has agreed to correct or address most of these problems. In addition, we identified two other problems that require interagency action and attention by the Congress.

Exhibit 2

Intelligence Agencies' Involvement in License Review. First, while the intelligence community plays a critical role in license review and threat analysis, we found that the CIA and its Nonproliferation Center, at their own request, review only 45 percent of all dual-use export applications. In addition, they do not always conduct a comprehensive analysis of the export license applications they do receive. Furthermore, the current dual-use licensing process does not take into account the cumulative effect of technology transfers. While individual technology sales may appear benign, the piecing together of these sales over a long period of time from many sources may allow U.S. adversaries to incrementally build weapons of mass destruction or other capabilities that could threaten our national security. We believe this cumulative effect analysis, while difficult to make, would be valuable to have during the export license application decision-making process.

In addition, since cumulative effect results not only from the transfer of items under approved export licenses from the United States, but also from the provision of items not requiring a license and shipments from foreign suppliers as well as indigenous resources and capabilities, BXA suggested that any assessment of cumulative effect be made during the multilateral list review process (e.g., Wassenaar Arrangement) instead of on each individual license application. We agree that this type of assessment during the list review process could also be advantageous.

Screening BXA License Data Against Customs' TECS Database. Second, as we have reported several times in the past, another key element missing from the export licensing process is the screening of all parties to pending license applications against the Treasury Enforcement Communications System, or TECS, database maintained by the Treasury Department's U.S. Customs Service. TECS was created to provide multi-agency access to a common database of enforcement data developed through the sharing of sensitive information between federal law enforcement agencies. Screening every export license applicant and consignee against TECS during the initial phases of the licensing process would give licensing and enforcement authorities early warning of any potential concerns Customs may have and would ensure that BXA considers all potential U.S. export enforcement concerns before issuing a license. By not doing so, BXA is making licensing decisions based on incomplete information. As a result, we

again recommend that BXA reach an agreement with Customs to provide for TECS screening of pending license applications.

V. DISPUTE RESOLUTION PROCESS

We believe that the current four-level dispute resolution process has been effective. We found that the process gives officials from dissenting agencies a meaningful opportunity to seek additional review of disputed cases. From fiscal years 1991 to 1998, the number of cases escalated to the Operating Committee increased by 353 percent, while the number of cases escalated to the Advisory Committee on Export Policy decreased by 62 percent. In addition, only 21 license applications have been escalated to the Export Administration Review Board during this time period; of which only one of those has been escalated since 1991 (see Exhibit 3). Most of the cases in dispute have been resolved at the working level interagency Operating Committee. We attended a number of the OC and ACEP meetings and were impressed with the level of discussion and technical details that the members dealt with to resolve their questions about specific license applications and potential end users.

Exhibit 3: Number of Export License Applications Escalated Fiscal Years 1991 - 1998

Fiscal Year

Export License Applications

Received

OC

ACEP

EARB

1991

33,118

169

89

20

1992

24,071

333

105

0

1993

26,125

493

142

0

1994

12,609

281

97

0

1995

9,988

161

68

0

1996

8,710

435

71

0

1997

11,480

784

38

1*

1998

10,696

766

34

0

*** Although this case was escalated to the EARB, the EARB was never convened. Subsequently, the final vote on this case defaulted to the ACEP majority vote of approval with conditions.**

Source: Office of Administration, Bureau of Export Administration.

We found that the Chair of the Operating Committee affords each agency—including BXAB—the opportunity to present its recommendation on every application the Committee reviews. The OC Chair has the authority to decide all cases at this level without having to reflect the recommendations of the majority of the participating agencies. However, we found that the decisions of the Chair are usually based on interagency consensus, which is built through healthy exchanges and debate, often resulting in special conditions being added to a license before approval. In addition, if any agency does not agree with the Chair's decision to approve or deny, it can independently escalate the decision to the ACEP. While we concluded that the OC is working well, we did identify several areas that need management attention: (1) the OC Chair's

independence needs to be clarified, as I discussed earlier, and (2) the process of returning escalated cases to the licensing officers requires additional quality control.

VI. EXPORTER APPEALS PROCESS

Once an export license application has been formally denied, the exporter has the right to appeal to the Under Secretary of Commerce for Export Administration, whose decision is considered final. Although BXA confers informally with the referral agencies before deciding on appeals, there is no requirement that this decision be made in consultation with the other referral agencies involved in the export licensing process. While we found no evidence to suggest that exporters are using the appeals process to circumvent the interagency referral process, we believe that the referral agencies should be formally included in the appeals process. We made this recommendation to BXA, and it has agreed to work with the National Security Council to formalize the appeals process. We also would recommend that the Congress include a formal interagency appeals process in the new Export Administration Act.

VII. MONITORING LICENSE CONDITIONS

The ability to place conditions on a license is an important part of the license resolution process, as well as an additional means to monitor certain shipments. Frequently, the conditions are the result of lengthy negotiations among Commerce and the referral agencies. While 28 standard conditions can be placed on an export license, there are only 7 that actually require the exporter to provide documentation to BXA for shipments made against the license. We found that BXA is still not adequately monitoring license conditions as first reported in the 1993 special interagency OIG review.

Specifically, we determined that BXA's follow-up systems were out of date and that the two offices responsible for following up on licenses did not give sufficient priority to determining whether exporters had complied with the reporting conditions. In addition, most licensing officers (except for those responsible for deemed exports and encryption) are not involved in monitoring conditions they place on the licenses. Licensing officers also did not have access to exporters' compliance history in order to make the most informed decision about an export license application. By not having an adequate monitoring system in place, BXA cannot assure itself that the goods were not diverted to an unauthorized end user, and exporters may receive new licenses even if they did not comply with previous licenses. We recommended that BXA improve its follow-up with exporters to determine if shipments were made against licenses, including periodically performing a random spot-check on licenses to monitor exporter compliance with license conditions.

VIII. END USE CHECKS

End use checks are an important part of the license evaluation process because they verify the legitimacy of export transactions controlled by BXA. A pre-license check is used to validate information on export license applications by determining if an overseas person or firm is a suitable party to a transaction involving controlled U.S.-origin goods or technical data. Post shipment verifications strengthen assurances that exporters, shippers, consignees, and end users comply with the terms of export licenses and licensing conditions, by determining whether goods exported from the United States were actually received by the party named on the license and are being used in accordance with the license provisions. These checks, which help prevent and detect illegal technology transfer, are generally conducted by Commerce's U.S. and Foreign Commercial Service (US&FCS) officers stationed at overseas diplomatic posts and by BXA's export enforcement agents through its Safeguard Verification program.

During this review we found some of the same problems identified in our previous reviews with respect to end use checks conducted by US&FCS. Among these concerns are (1) untimely end use checks, (2) US&FCS's use of foreign service nationals and personal services contractors to conduct some checks (see Exhibit 4), (3) failure to always perform on-site checks, and (4) insufficient US&FCS coordination with other parts of the embassy and host governments in conducting checks.

Exhibit 4

US&FCS Checks Reviewed

US&FCS Personnel Conducting End Use Checks

Officer

FSN/PSC

Combination

Unclear

PLC

90

22

5

36

27

PSV

15

10

0

0

5

Total

105

32

5

Notes: PLC= pre-license check, PSV= post shipment verification, FSN= foreign service national, and PSC= personal services contractor

Source: Office of Enforcement Analysis, Bureau of Export Administration.

In addition, while we found that Export Enforcement=s Safeguard Verification program enhances the quality of end use checks because of the Aenforcement@ element it brings to the process, we made a number of suggestions to make this program more effective, including:

(1) better initial trip planning, (2) additional in-country consultations, (3) clearer guidance or a standard format for trip reports, and (4) faster and wider dissemination of Safeguard check results, especially negative findings. We also believe that BXA should use the Safeguard visits as an opportunity to provide additional training for US&FCS staff on conducting end use checks.

IX. BXA=S AUTOMATED EXPORT LICENSING SYSTEM

BXA=s automated export licensing system, called ECASS,[\[5\]](#) was developed in 1984. It is a large database system that provides license processing and historical license information to BXA and the referral agencies. We determined that the system=s internal controls are generally adequate and that its data are sufficiently reliable. In answer to one of your specific questions, we also determined that licensing recommendations or decisions entered into the database could not be changed without the knowledge of the licensing officer.

At the same time, it is readily apparent that BXA=s automated information system needs to be replaced. The system is still supporting the licensing process, but we believe that it is inefficient and outdated. ECASS lacks good query capabilities, expanded text capabilities, modern interfaces, and online access to exporters= technical specifications. We strongly agree with BXA that it needs a new system to process export license applications efficiently and effectively. We endorse BXA=s efforts to work with the Department, OMB, and the Congress to secure funding for the development of a new system as soon as possible. We have recommended that BXA consider the best available system replacement options, including a classified system. A classified system would enable BXA=s licensing officers to have online access to classified data needed to process applications more efficiently, as well as make it easier to interface with the referral agencies that use a classified system. We also have urged BXA to coordinate its system development efforts with the other export licensing agencies to ensure that all of their export control systems are compatible and, at a minimum, are able to interact with each other.

This concludes my statement Mr. Chairman. I would be pleased to answer any questions you or other Members of the Committee may have.

[\[1\]](#) Except for a brief time period in 1994, when the Act was temporarily extended by the Congress.

[\[2\]](#) ACDA was a separate agency until April 1999, when it became a part of the Department of State.

[\[3\]](#) Officials from the Department of State's Defense Trade Controls chose not to participate in the review.

[\[4\]](#) During our detailed follow-up interview with one of the licensing officials, he was unable to provide any details, or specifics about being pressured. While the second response was sent anonymously, we found no evidence to support this individual's statement.

[\[5\]](#) Export Control Automated Support System