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BEYOND CONTROL: REFORMING EXPORT LICENSING AGENCIES FOR NATIONAL SECURITY AND ECONOMIC INTERESTS

HEARING

BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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THURSDAY APRIL 24, 2008

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA,
OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:33 p.m., in room 342, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Subcommittee, presiding.

Present: Senators Akaka and Voinovich.

OPENING STATEMENT OF SENATOR AKAKA

Senator AKAKA. This hearing will come to order. This is a hearing of the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. I want to welcome our witnesses to this Subcommittee hearing and thank you very much for being here today.

This is the first in a series of hearings that the Subcommittee is holding to explore the effectiveness and efficiency of government management in various aspects of national security. Today's hearing focuses on the management of export controls for licensing military as well as commercial and military use, or dual-use, technology for export.

Our export controls regime struggles against the challenges of a globalized world. Too often, dual-use technology falls into the wrong hands. We do stop some of it. For example, Commerce Department enforcement officers recently arrested two men boarding a plane bound for China. These men had in their possession sensitive thermal imaging equipment that was not and would not have been licensed to them.

On the other hand, as you know, much gets through. At bazaars in the United Arab Emirates, sensitive dual-use technology is counted among the many items for sale. Three aircraft protected as dual-use technology were diverted illegally by a British company to Iran. At my request, Kenneth Katzman and Ian Fergusson of the Congressional Research Service produced an excellent background

report on issues relating to the UAE, which, without objection, I will introduce into the record.[1]

Today's hearing will examine key Federal Government agencies responsible for licensing exports, how their processes help or hinder the licensing process, and the role of the Federal workforce. My goal is to identify possible recommendations for improving the export controls process. If our export control systems are not supported by adequate bureaucratic structures, processes, and people, our national interests will be harmed. Export controls are critical to achieving the right balance in America's national and economic security.

In fiscal year 2006, dual-use technology licensing covered approximately $36 billion in exports, or 1.4 percent of total U.S. exports. Nearly 19,000 dual-use export license applications were reviewed in 2006. This was more than any other year in the past decade.

The Departments of State and Commerce have the lead in managing the export control system. The Department of Commerce's Bureau of Industry and Security manages dual-use export licensing. The State Department's Directorate of Defense and Trade Controls handles arms export licensing. Without objection, I would ask to insert into the record an excellent CRS analysis by Ian Fergusson and Richard Grimmett on export controls.[2]

In several reports, the Government Accountability Office has expressed its concern about export licensing delays, an absence of systematic analysis, unclear jurisdiction over controlled exports, and the lack of efficiency gained from automated licensing systems. We will also examine today some recommendations to address these and other export control system problems.

Some of the reforms I want to explore are revising the multilateral coordination and enforcement aspects of export controls; addressing weaknesses in the interagency process for coordinating and approving licenses; reviewing alternative bureaucratic structures or processes that may eliminate exploitable seams in our export control system; and ensuring that there are enough qualified licensing officers to review license applications in an efficient manner.

It is difficult for our national security, foreign policy, and economic interests to be met if they are weighed down by an inefficient export control system. Today's hearing will help us identify ways that the agencies responsible for this system can work together to provide the economic and national security we need.

I would like to now defer to our Ranking Member, Senator Voinovich, for his statement.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. Chairman Akaka, thanks for convening today's hearing to review the management of the Federal Government's export licensing process. Sadly, our export control system is

[1] The CRS report by Kenneth Katzman and Ian Fergusson appears in the Appendix on page 100.

[2] The CRS report by Ian Fergusson and Richard Grimmett appears in the Appendix on page 89.

a relic, unable to adapt to current threats to our national security while similarly impeding our economic competitiveness.

Each year, the Department of Defense and its industrial partners spend billions of dollars to maintain our national security and military technological advantage. Preserving this advantage requires a balance between allowing defense and dual-use items to be exported to our friends and allies while similarly doing all in our power to prohibit the transfer of such goods to those with malicious intent.

To avoid the transfer of security and dual-use technology to our enemies, watch lists must be comprehensive and regularly updated based on real-time data. Incomplete or differing watch lists have opened the door for malevolent end users to skirt the process designed to protect our national security.

Agency coordination must go beyond basic information sharing. The Departments of Commerce and State must reach agreement on uniform guidelines for all aspects of our export control system, ending the current practice of forum shopping for a preferred answer, which does nothing more than waste taxpayer dollars and open loopholes in our national security. The Department of Defense must undertake the same task, creating uniformity across all branches with respect to how they classify what is military technology.

One would have hoped this management challenge would have been resolved in light of our increased efforts to thwart terrorism. Instead, GAO has added this challenge to the high-risk list. Six years after September 11, 2001, it is critical that our allies in the War on Terror be given access to technology they need to save lives and protect their citizens. Similarly, American entrepreneurs must have the ability to more rapidly meet our allies' demands for needed goods. All of this must be conducted under strict scrutiny. Countries who are uncooperative simply must be regulated.

Congress shares part of this blame. Expired legislation has left our enforcement and oversight agencies ill prepared to deal with current problems in the export industry. Additionally, the number of employees needed to get the job done has not kept pace with the growing demand of license requests, as in many other cases throughout the government.

Senator Akaka, as a little editorial here, you know the greatest excuse that one can give not to perform their jobs is the fact that you don't give them the resources to get the job done. Over and over again, we seem to be having examples of cases where we are asking people to do things and we don't give them the people to get it done. And then they say, well, I can't get it done. That is the way it is.

Rapid globalization over the last few decades has left current export controls extremely outdated. Technology gaps with foreign nations are rapidly shrinking and the United States must adjust to this to not only better understand the capabilities of other nations, but to avoid denying private companies the ability to compete on the open market with their goods, which may be readily available from other nations. By regulating exports with outdated lists, we are effectively ignorant of what exists elsewhere in the world, thereby denying benefits to the U.S. economy.

The United States would be naive, however, to think it is the only supplier for military critical technologies. Rapidly, industrializing nations in other parts of the world produce goods similar or identical to our own through ingenuity, hard work, and sometimes economic espionage.

While this hearing calls into question the efficiency of our own export control system, I have no doubt it is more accountable and more scrupulous than many other nations who might provide similar technologies to countries we would seek to deny access. The world has changed. This only compounds the need for the United States to be the preferred marketplace for such goods. As a favored supplier, we become not only aware of who is purchasing military and dual-use technologies, but our economy becomes the beneficiary.

I would like to thank the witnesses for being here today to share their perspectives on where we are and where we should be going. Thank you, Mr. Chairman.

Senator AKAKA. Thank you very much, Senator Voinovich.

I welcome the first panel of witnesses to this hearing: Ambassador Stephen Mull, Acting Assistant Secretary for Political-Military Affairs, Department of State; Beth McCormick, Acting Director, Defense Technology Security Administration, Department of Defense; Matthew Borman, Deputy Assistant Secretary, Bureau of Industry and Security, Department of Commerce; and Ann Calvaresi Barr, Director of Acquisition and Sourcing Management, U.S. Government Accountability Office.

It is the custom of this Subcommittee to swear in all witnesses and I would ask all of you to stand and raise your right hand.

Do you swear that the testimony you are about to give this Subcommittee is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. MULL. I do.

Ms. MCCORMICK. I do.

Mr. BORMAN. I do.

Ms. BARR. I do.

Senator AKAKA. Thank you. Let it be noted for the record that the witnesses answered in the affirmative.

Before we start, I want you to know that your full written statements will be part of the record. I would also like to remind you to keep your remarks brief given the number of people testifying this afternoon.

Ambassador Mull, will you please proceed with your statement.

TESTIMONY OF STEPHEN D. MULL,[1] ACTING ASSISTANT SECRETARY FOR POLITICAL-MILITARY AFFAIRS, U.S. DEPARTMENT OF STATE

Mr. MULL. Mr. Chairman and Ranking Member Voinovich, thank you very much for the invitation to appear with my colleagues here before you today. The invitation comes on a really timely occasion. There is a great deal of ferment and, I think, innovation going on in defense trade controls at the State Department right now.

[1] The prepared statement of Mr. Mull appears in the Appendix on page 37.

We view our mission as three-fold in the Directorate of Defense Trade Controls at the State Department. One, is to give our allies, especially in wartime, what they need to fight alongside with us.

Two, we have to protect our technology and our capabilities from falling into the hands of our enemies or of being used by recipients who might not have our best interests at heart or may be pursuing things that are inconsistent with our values.

And three, we have an important obligation to work with our customer base, the U.S. industrial base, to serve them and help make sure that they realize every opportunity they can in a very competitive global marketplace.

Now, these three missions are very often in conflict with one another, and frankly, there is a lot of tension that exists among them, and so we work very hard to carry out all of them as conscientiously and as effectively as we can. I won't hide that the work has become much more complicated and much more difficult since September 11, 2001, as both of you mentioned, Mr. Chairman and Ranking Member Voinovich, with the threats that our country faces in this decade. And the workload has become much heavier in the Directorate of Defense Trade Controls.

In fiscal year 1998, we had 44,000 applications for export of defense goods, and today, or rather at the end of fiscal year 2007, that number had grown to 79,000 applications, representing nearly $100 billion of defense trade in the last fiscal year. As I mentioned, many of these cases, they have not only grown in number, but they have grown seriously in complexity as our own technology becomes more complex.

In fiscal year 2007, the situation had reached crisis proportions, as was well documented in the GAO's report that came out a year ago. We had a standing case log of 10,000 cases. Many hundreds of them were unresolved for well over 60 days, some of them well over 100 days. Actually, my first week on the job as Acting Assistant Secretary, the GAO launched their investigation to look into the problems and causes that led to this situation. But we also had well-justified complaints about delays in commodity jurisdiction disputes, the processing time, and also many comments from our customers in industry that we had insufficient people and other resources devoted to the problem.

Fifteen months later, I am proud to say that I think we are in a much better place. Our case log is now at about 3,500 cases, which is about, given the hundreds of cases we receive every day, about the lowest it can possibly get, and we are in the midst of instituting some major new reforms that I think will enable us to exceed our past performance and to carry out all three of our missions more effectively and more quickly.

This results from several factors. Over the course of the past year, we have consulted very closely within the national security community, our colleagues in the Defense Department and the Commerce Department, as well as the business community, and of course here in the Congress, as well. We have filled significant gaps that existed in our organization with new and very experienced leadership that are already taking our organization into a much better direction.

In January, President Bush signed a series of Presidential Directives for our defense trade control operation that enable us to institute many new business process reforms. We now have a 60-day deadline for carrying out all of our licensing decisions with regular monitoring. If a case isn't resolved within a certain amount of time, it gets escalated higher and higher in the organization so that we can meet that 60-day deadline.

At the direction of the White House, we are developing a new plan so that we can become an at least 75 percent self-financed entity. That will enable us to increase our operating budget, our information technology, and most importantly, the number of people that we have doing this job.

We have put fewer licensing restrictions on third-country nationals from countries with whom we already have licensing arrangements to remove a lot of the red tape for getting our allies what they need. We are in the process of reforming the commodity jurisdiction process to make sure that these disputes are resolved much more quickly and much more transparently.

We have enhanced our enforcement cooperation with the Department of Justice and have seen gradually increasing successful prosecutions of those who violate our procedures. And we are moving to a fully electronic system to process defense trade controls that will substantially increase our efficiency, as well.

There are a number of other initiatives that we have implemented that I will just quickly review. We have established a fast track system to take care of those cases that affect our allies in war situations in Iraq and Afghanistan to make sure that every such license is adjudicated within 7 days. We have managed to succeed at that.

We have negotiated in record time treaties to approach our defense exports to the United Kingdom and Australia. Instead of requiring a license for every piece of technology that goes to these excellent allies, we have created a trusted community, an approved community of government entities and defense industries about which we have no concern about their misuse of our technology and they will be able to get this technology without a license. This will reduce our workload by as much as and even more than 20 percent, enabling us to devote even more resources to the problem cases. These treaties have been submitted to the Senate and we very much urge their rapid ratification by the Senate.

In the weeks ahead, we hope to work with your staffs, Senators, as well as other Congressional staff to make the Congressional notification process more transparent and more efficient.

I think we have accomplished much, but we have a long way to go and we look forward to consulting with this Subcommittee and hearing your thoughts during today, as well as the other expert witnesses, as well as our authorizing committees here in the Congress, and working with our interagency partners, our friends in the GAO and the business community, as well as our international partners to construct and manage the very best system to serve our customers in the business community while strictly protecting America's defense technology.

So thank you very much for this opportunity. I look forward to learning even more about how we can improve. Thank you.

Senator AKAKA. Thank you very much, Mr. Ambassador. Ms. McCormick.

TESTIMONY OF BETH M. McCORMICK,[1] ACTING DIRECTOR, DEFENSE TECHNOLOGY SECURITY ADMINISTRATION, U.S. DEPARTMENT OF DEFENSE

Ms. MCCORMICK. Thank you, Mr. Chairman, and Senator Voinovich. I appreciate the opportunity to be here today to discuss the Department of Defense's role in the export control process.

Simply stated, the Department of Defense's role is to provide the national security perspective to the Departments of State and Commerce in their responsibilities in the export control process. In our role, the Department of Defense possesses unique capabilities to provide technical expertise, develop and validate coalition and interoperability requirements, and provide program insight necessary to ensure exports and technology security controls protect U.S. national security.

Our mission involves two inherent tensions, maintaining the U.S. military technological advantage while supporting interoperable coalition forces, and protecting critical U.S. technology while ensuring the health of the U.S. industrial base. In this era of uncertainty and surprise, these two tensions will continue to intensify and require us to remain at the forefront of technological advancements and to build partnership capacity to meet the challenges of the ever-changing global security environment.

The strategic goals of my agency summarize it best. First, preserve critical U.S. military technological advantages. Defense-related technology is a valuable and limited national security resource that must be controlled as part of the U.S. military and defense strategy. DTSA ensures items and technologies important to U.S. national security interests are adequately controlled by reviewing export control lists and regulations and assisting the U.S. Government's efforts to enforce export controls through safeguards. We must ensure our fighting men and women not only have the best equipment, but have a significant technological edge that provides them an advantage over any potential adversary.

Second, we support legitimate defense cooperation with foreign friends and allies. The United States must engage in bilateral partnerships and multilateral regimes with allies and international partners to meet the challenges of today's dynamic security environment. My agency annually processes over 40,000 export licenses and roughly 75 percent of those export licenses reflect direct commercial sales to our closest foreign friends and allies.

The third goal of my agency is to assure the health of the defense industrial base. U.S. national security depends on a strong U.S. industrial base that can easily mobilize to support military capabilities and deter potential adversaries. The United States must maintain a technological superiority and highly competitive defense industrial base to thwart increased global competition. This will continue to balance national security interests while being receptive to the needs of the U.S. industrial base.

[1] The prepared statement of Ms. McCormick appears in the Appendix on page 44.

Our fourth goal is to prevent proliferation and diversion of technology that could prove detrimental to U.S. national security. DTSA's ability to support the United States in preventing hostile States and terrorist groups from acquiring and using weapons of mass destruction and defense-related technology is critical to ensuring U.S. national security. DTSA works with government agencies and with friendly nations to impede weapons of mass destruction-related trafficking and improve controls over existing weapons materiel and expertise.

DTSA coordinates the Department of Defense's review of Department of State license applications for the export of defense-related goods and services under the International Traffic in Arms Regulation and the Department of Commerce license application for the export of sensitive dual-use goods and technologies under the Export Administration Regulations. DTSA's critical role in reviewing these requests for export licensure and the conditions attached to those licenses is instrumental in ensuring U.S. national security is not jeopardized.

The export control initiatives announced by President Bush in January 2008 address the need to reform the defense trade and dual-use export control processes to ensure proper levels of control for continued U.S. economic competitiveness and innovation while protecting national security. We are committed to working with our colleagues at the Departments of Commerce and State to implement these initiatives.

Mr. Chairman, this concludes my opening statement. I look forward to your questions. Thank you.

Senator AKAKA. Thank you very much, Ms. McCormick. And now we will hear from Mr. Borman.

TESTIMONY OF MATTHEW S. BORMAN,[1] ACTING ASSISTANT SECRETARY OF COMMERCE, EXPORT ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Mr. BORMAN. Thank you, Mr. Chairman. It is a pleasure to be here to testify before you and Ranking Member Voinovich once again. I actually testified before a slightly earlier incarnation of this Subcommittee several years ago on export control systems of other countries, so it is a pleasure to be here again. As you have already heard from my colleagues, we all share the critical mission of protecting U.S. national security and economic interests.

Much of our export control system was built during the Cold War, when the world, while still dangerous, was in some ways a simpler place. The West confronted a clearly defined enemy and we also held a significant technological advantage over our adversary. We maintained our technological superiority over our enemies then largely through a strategy of denying exports of technology to specified countries. This system was based on the assumption that we and our allies had technology not available to our adversary from other sources.

Dramatic changes in the economic and security landscape, however, have challenged this assumption. As markets become increasingly integrated, production and supply chains for single goods now

[1] The prepared statement of Mr. Borman appears in the Appendix on page 48.

span the globe. Defenses we constructed in the past to preserve our technological superiority can no longer afford us the same level of protection. At the same time, we face more and varied national security risks from a range of nation states as well as non-state actors. Furthermore, our allies, in addition to being economic competitors, do not always share our security views.

To meet today's challenges, BIS's highest priority continues to be the effective and efficient operation of the U.S. dual-use export control system. This system covers products that have both civilian and military applications, including use in weapons of mass destruction and related delivery systems. We must ensure, however, that the system does not impose unreasonable burdens on innovation and commercial activity.

Interagency and international cooperation are critical to BIS's activities. Fulfilling the Bureau's mission depends heavily upon cooperation with a range of departments, including but not limited to the Departments of Defense and State, as well as engagement with our principal trading partners and other countries of strategic importance.

BIS carries out four major functions: Policy, licensing, outreach, and enforcement. BIS works closely with the Departments of State, Defense, and Energy in developing policies and implementing those policies through the Export Administration Regulations. BIS also works closely with those agencies and the intelligence community in licensing exports of controlled items.

Keeping U.S. industry informed of its obligations under the regulations is another critical part of ensuring that the dual-use export control system is effective and efficient. BIS conducts a wide range of outreach activities domestically and abroad on an annual basis. BIS also prioritizes its enforcement activities on cases involving the proliferation of weapons of mass destruction, terrorism, and military diversion.

In fiscal year 2007, BIS special agents made 23 arrests, resulting in 16 convictions and $25 million in criminal fines. In addition, BIS settled 65 cases administratively with final orders totaling $5.8 million in fines.

One of the most significant challenges for BIS is the longstanding lapse of the Export Administration Act of 1979. This lapse hinders the ability of BIS to employ up-to-date authorities to enforce the dual-use export control system, despite the ever-changing criminal landscape. The Export Enforcement Act, S. 2000, introduced by Senator Dodd, directly addresses this challenge and we support its prompt enactment.

BIS is continually reviewing, revising, and updating its policies to ensure the system remains effective. In this regard, there are three recent developments I would like to highlight. First, the President issued a Dual-Use Export Control Reform Directive on January 22 along with the Defense Trade Directive that Ambassador Mull has already mentioned to further adapt the dual-use export control system to today's challenges. The directive focuses on three objectives: First, moving to a more end-user-based system; second, ensuring continued U.S. global technological and economic competitiveness; and third, enhancing procedural transparency in the licensing process.

I would also like to point out that we are reviewing and implementing many of the recommendations contained in the December 2007 report of Secretary Gutierrez's Deemed Export Advisory Committee. Deemed exports, of course, are transfers of controlled technology to foreign nationals in the United States.

And finally but certainly not least, in addition to the numerous existing measures of effectiveness of the different parts of the dual-use export control system, we have established a program for systematically evaluating compliance with the Export Administration regulations based on actual export data that is now available to us. This measure will further address issues raised in the Government Accountability Office's January 2007 report.

In conclusion, the United States faces unprecedented challenges from a varied set of threats and increasing worldwide diffusion of high-technology in global markets. BIS, in conjunction with other agency partners, is continually evaluating and revising the dual-use export control system to effectively meet those challenges.

I thank you again for the opportunity to testify and I, of course, would be happy to answer questions you might have.

Senator AKAKA. Thank you very much, Mr. Borman. And now we will hear the testimony of Ms. Barr.

TESTIMONY OF ANN CALVARESI BARR,[1] DIRECTOR, ACQUISITION AND SOURCING MANAGEMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Ms. BARR. Mr. Chairman and Members of the Subcommittee, thank you for inviting me to discuss the U.S. export control system, a key component of the government's larger safety net of programs designed to protect critical technologies while allowing legitimate defense trade.

As you know, significant vulnerabilities in export controls as well as in other safety net mechanisms, such as Committee on Foreign Investment in the United States and the foreign military sales program, prompted GAO in 2007 to designate the effective protection of technologies critical to U.S. national security interests as a new high-risk area, an area that warrants strategic reexamination.

To start, let me briefly describe some longstanding vulnerabilities in the export control system. These vulnerabilities primarily relate to the licensing process and interagency coordination.

Specifically, procedural and technology weaknesses, along with human capital challenges, have contributed to backlogs in the processing of export license applications submitted to the State Department. In less than 4 years, the State Department's caseload increased almost 20 percent, median processing times nearly doubled, and the number of pending applications jumped to an all-time high of 10,000 in 2006. Yet the number of licensing officers remained unchanged.

At the same time, D-Trade, the State Department's IT system for processing cases, has not turned out to be the panacea it was promised to be. State's backlog created the risk that the government's export control focus will shift to expediting cases at the expense of

[1] The prepared statement of Ms. Barr appears in the Appendix on page 54.

national security interests, a concern the State Department officials raised.

And although the Commerce Department reviews comparatively fewer applications than the State Department, the Commerce Department also needs to ensure its processes are efficient.

Poor coordination among the State and Commerce Departments, and other Departments has created additional risks. Of particular concern are disagreements over the control of certain items. In one case, Commerce determined that an item was subject to less restrictive exporting requirements when, in fact, it was State Department controlled. In other cases, there were disputes over the jurisdiction of certain sensitive items, such as missile-related technologies. Left unresolved, these disputes increased the risk of sensitive items being exported without appropriate protections and create an unlevel playing field because some companies may gain access to markets that others will not.

Poor coordination and communication extends beyond the Commerce and State Departments. Specifically, there has been a lack of understanding between the State Department and DOD on whether contractors working in direct support of defense activities are exempt from certain licensing requirements. Further, the Departments did not until recently receive information from the Justice Department regarding export control-related indictments and violations, information that is needed to determine whether or not to approve a license in the first place.

Despite these known vulnerabilities, neither the State nor Commerce Departments has taken the basic steps needed to ensure their controls and processes are sufficient and appropriate for protecting U.S. interests. Notably, neither Department has assessed its controls over the past decade or seen the need for such an assessment, despite dramatic changes in the security and economic environment. Additionally, we have made numerous recommendations to address weaknesses in their controls, recommendations that have largely been ignored.

We are encouraged by the State Department's recent attention to some of the issues we have identified, including analyzing licensing data and determining the workforce structure needed. Similarly, the Commerce Department has updated its watch list on known export violators.

In the past, we have reported that export control initiatives not grounded in analyses have generally failed to achieve desired results. For example, in 2000, we determined that the Defense Trade Security Initiatives, an earlier effort to revise the U.S. export control system, were not grounded in analysis of the problems that the initiatives were intended to remedy. Ultimately, the initiatives proved to be solutions in search of problems and as such were generally unsuccessful.

To protect critical technologies while allowing legitimate defense trade, it is imperative that the export control system function both efficiently and effectively, and let me also say in conjunction with the other safety net programs. Yet our work has consistently revealed disconcerting gaps in this safety net. Only when the Departments work together to reach agreement on jurisdiction and control

and make meaningful and sustainable improvements can we be assured that we have a system that supports all U.S. interests.

Mr. Chairman, Members of the Subcommittee, I would like to thank you for holding today's hearing as it contributes to the reexamination that our high-risk designation calls for. This concludes my prepared statement and I am happy to answer any questions that you may have.

Senator AKAKA. Thank you very much, Ms. Barr.

Mr. Borman, I understand that currently there is a BIS official assigned to the United States Mission to the Organization for the Prohibition of Chemical Weapons, but that the Commerce Department has cut funding for that person and there is concern that if this technical advisor is removed, it will affect the United States' compliance obligations under OPCW. This, of course, is deeply disturbing and I wonder if you could comment on that.

Mr. BORMAN. I would be happy to comment on this issue. A little context, I think, would be helpful. Under the President's budget for fiscal year 2008, the Commerce Department, Bureau of Industry and Security, was due to be appropriated about $78 million and both the House and the Senate Appropriations Committees approved that amount. But in the omnibus appropriations bill, that amount was cut to $72 million. That is a very significant cut for us and we have had to do some very significant belt-tightening.

Our representative supports the State Department's representation of the U.S. Government at the OPCW. His term was due to expire in November. We looked at the potential cost savings of bringing that person back a few months earlier and we concluded, based on all of our other priorities, that was an appropriate use of our significantly limited funding. We still have the slot open, and pending funding becoming available, we would certainly look to consider to put someone back there. But certainly if we are operating under a continuing resolution in fiscal year 2009, still at the $72 million mark, that is going to have very severe budget circumstances for us.

I would also point out that in terms of U.S. obligations under the CWC, our person performs an important role representing industry interests because that treaty affects U.S. industry. But a lot of that work can be done from the United States, probably not as efficiently as having someone on the ground, but that work can still be carried out.

Senator AKAKA. Thank you. Ambassador, in your testimony, you stated that you will soon provide a plan to the Office of Management and Budget outlining the resources to carry out National Security Presidential Directive 56 without an increase in budgeted funds. When do you expect to present your plan to OMB?

Mr. MULL. Thank you, Mr. Chairman. I reviewed what I think is the final version of all of our internal coordination of this plan last week. It is now with our Under Secretary for Management, Mr. Kennedy. I expect he will approve that within the next few days and we hope still within this month to communicate that to OMB.

Senator AKAKA. Thank you. How do you intend to meet the requirements of NSPD–56 without an increase in budgeted funds?

Mr. MULL. It does sound like a feat of magic, I will allow you that. But, in fact, some of the procedures that we have been studying elsewhere in the government we think have been very instructive for us. For example, in the State Department, in our Consular Affairs Bureau for some years now, we have administered our consular and visa programs through a management of a fee-for-service system in which applicants for visas must pay an application fee and that in turn runs the program.

In Defense Trade Controls, for many years, we have had a registration fee for all defense companies, regardless of whether or not they export. And over time, this has resulted in a system where essentially smaller companies, and about 60 percent of all our registered firms export less than $100,000 worth of goods per year, they pay the same registration fee as those companies that export billions of dollars a year and require many licenses. So it is an inequity in which the smaller businesses of our country are, in effect, financing the work for the larger businesses in our country.

So we are looking at restructuring our registration fee structure to try and remove some of that inequity. I am afraid I can't go into detail yet because we will want to get OMB's approval, and I think we will want to consult very carefully with the Congress, as well, before we announce this. But that is the general philosophy that we have been taking and we think that this will increase produced revenue in keeping with the President's instruction for us to become at least 75 percent self-financed.

Senator AKAKA. Thank you for that.

Ms. Barr, in a November 2007 report and in your testimony, you identified a number of human capital problems at the DDTC. Could you please elaborate as to what those human capital problems are and if you have seen any corrective steps taken by this date?

Ms. BARR. Yes. I would be happy to, Mr. Chairman. Thank you. First and foremost, I would like to reiterate what Ambassador Mull just said, as we certainly have recognized the renewed and spirited leadership that has come into DDTC now, having aligned itself with some very capable leadership that is committed to responding to our recommendations and thinking through the process that has to be in place.

With that being said, I think the first issue that we recognized overall with regards to staffing as the inequities and overall staffing ratios of licensing officers to the number of cases processed. And I believe the numbers that we stated back then, if you look at the State Department, you had approximately 31 officers looking at 63,000 cases. Compare that to what Commerce had, 48 officers who are reviewing 22,000 cases. So clearly there is an inequity in the ratio of the number of people needed to handle the volume of cases coming in.

In addition, the State Department is to receive 10 military detailees to support DDTC operations and we found that those military detailees were not always at their full contingent. These are often individuals who have the requisite expertise to assist in the more complex types of cases and reviews and represent those individuals that are needed and have the ultimate signature authority for approving licenses. These detailees were not staffed and operating at the full contingent.

The third point that I would make is that many of the licensing officers—as you noted here—these are complex licensing applications oftentimes, and when they are, you need to have the right training and the skill set. What we found is that many of the licensing officers had less than 1 year experience to apply to complex licensing applications.

So I would say those are the main things that we were pointing to in terms of some of the critical human capital challenges.

Senator AKAKA. Thank you. Before I call on Senator Voinovich for his questions, let me ask the Ambassador, do you agree with GAO's human capital assessment?

Mr. MULL. I do in some measure. When I first took the job, it was clear to me, if by nothing else, that the intolerable level of caseload, standing caseload that we had at the 10,000 mark, that more people were clearly going to be an essential ingredient to chipping away and removing that backlog. But I also think that—I also don't want to fall into the trap of saying we need more people to fix everything. It was clear, also, that there were no business practices that we could implement immediately without another dime of taxpayer money that would substantially help. And so that has been an important part of our improvement over the past year, as well. We also need to invest more in some technological solutions. We are hoping our new budget plan will allow us to do that.

But yes, sir, people are an important part of the problem and I think when we get our new plan implemented, we will significantly increase the number of licensing officers that we have.

Senator AKAKA. To determine the problem, Mr. Ambassador, have you completed a management assessment to determine how many staff are adequate for the job, and if so, how many?

Mr. MULL. Yes. What we did—actually, my first week in the job, I brought in—again, it was from in-house, but I brought in some management consultants to spend a month as the GAO study was getting started to look at all of those things—budget levels, staffing levels, business processes—and I received a report on how we could begin to improve that situation within a month.

We have constant monitoring of the number of pending licensing cases that we have. We have constant monitoring of the average time it takes to adjudicate each of those cases. As I mentioned earlier, we have alarm bells in our system. When a license isn't acted on within a fixed period of time, it will automatically bump up to a higher level for engagement so we can meet that ultimate 60-day deadline. And a number of other constant evaluations that we are performing on our workload and how quickly we are getting through it, and recently we have begun posting this on our Website so that the business community and the public can see the progress that we are making.

Senator AKAKA. Thank you. Senator Voinovich.

Senator VOINOVICH. Do you have a strategic plan on how you intend to remedy this situation? Is it in writing and with deadlines, a pert chart, and all the things you need to do in order to get where you want to get?

Mr. MULL. The plan that we are going to be submitting to OMB, sir, I am satisfied will do that. It provides the strategic context of where we need to grow the organization, where we need more peo-

ple, how we need to allocate them among our different functions, which include developing policies, participating in the commodity jurisdiction dispute, of course processing licenses, and enforcement, which is an important part. And so we believe that we have targeted all of these in our plan, both on a strategic level as well as a solid business plan.

Senator VOINOVICH. When did you submit that?

Mr. MULL. Again, this is still within the State Department. I hope it will be submitted to OMB——

Senator VOINOVICH. The fact of the matter is, it is submitted—and you do that through the State Department, that is not going to be reflected in this budget that we have right now. The State Department has already put their budget in place, so we are now talking about hopefully being included in the 2010 budget.

Mr. MULL. Yes. Well, one of the features of our plan, sir, is that this will be a self-financing mechanism that will be independent of getting appropriations from the Congress. And so we will be able to grow the organization to the required levels without extra reliance on the budget that we have sought from the Congress this year.

Senator VOINOVICH. Have you sat down at all with GAO to get their input and whether or not they think that the plan you put together is going to get the job done?

Mr. MULL. I have not, sir, but once it is approved by OMB as the official administration position, I would be delighted to do that.

Senator VOINOVICH. Once you submit it, it is going to be pretty well done. I mean, how much change are you going to make in it after you have submitted it?

Mr. MULL. Well, what I want to do certainly is the very best possible job that we can do. I think this plan will be a good foundation to do precisely that. But it is not going to be the end of the line. I, and I expect my successors, will continue to welcome inputs not only from GAO but——

Senator VOINOVICH. Are you a regular State Department employee?

Mr. MULL. I am.

Senator VOINOVICH. How long have you been with the Department?

Mr. MULL. I have been a Foreign Service officer for 26 years.

Senator VOINOVICH. You have been acting in this capacity for how long?

Mr. MULL. For 15 months.

Senator VOINOVICH. Fifteen months, and your predecessor was an appointee?

Mr. MULL. It was a non-career appointee, yes, sir.

Senator VOINOVICH. How do we know that this plan you are putting in place is going to follow through in the next Administration and that we won't be back here a year and a half from now doing the same thing over again?

Mr. MULL. Well, we put together a plan that I think will be self-evidently good business sense in such a way that no one would disagree with it, not even my friends in the GAO. But again, we will welcome input from all of the stakeholders in the process. But I

trust that you will find it to be a solid plan that you will find much to like about.

Senator VOINOVICH. Ms. McCormick, do you have a plan to remedy some of the things that you are dealing with?

Ms. MCCORMICK. Well, sir, first off, I have a very comprehensive strategic plan for my organization and very detailed implementation plans and metrics. In fact, I just met yesterday with all my division chiefs and on a quarterly basis we review our performance metrics. I think we have also—we have implemented a variety of business processes that I think make us a relatively effective organization. We have some things like standing tiger teams that in the mornings we try to go through and try to do our best to determine what licenses we can turn, and I am pleased to report we do turn about 25 percent of the munitions licenses and about a third of the dual-use licenses, we are able to turn those around in about 1 to 2 days.

Senator VOINOVICH. Are you a political appointee?

Ms. MCCORMICK. No, I am not.

Senator VOINOVICH. So you are going to be around to continue to carry this out.

Ms. MCCORMICK. I am, sir. I have been serving soon 25 years and will continue to do it for a while longer.

Senator VOINOVICH. One of the things that has been laying around for a while is that in the January 2007 high-risk list update, GAO notes that the Commerce and State Departments have yet to reach an agreement on which agency has jurisdiction over certain missile technologies. Given the importance of the issue to our national security, why the delay and is there going to be an agreement in place prior to the transition?

Mr. BORMAN. Maybe I will start on that and Ambassador Mull may have something to add. We already had, in fact, some years ago actually published a regulation that dealt with this issue in part. Another piece of this that I think is important to keep in mind is that the missile technology control regime items that are on our list have technical parameters. The State Department list, of course, covers things that are specifically designed for military application and so there is a commodity jurisdiction process if exporters are unsure whether their item is subject to our jurisdiction or the State Department's. There is not really a possibility, though, that exporters could self-determine that their item is subject to our jurisdiction and just ship it without government oversight.

Senator VOINOVICH. Was there an agreement? Ms. Barr, are you familiar with this issue?

Ms. BARR. I am familiar with this issue, and if Mr. Borman wants to continue, I would like to comment on this afterwards.

Mr. BORMAN. So, if exporters have an item and they think it is subject to our jurisdiction because of our controls on the export of missile technology items, they have to come into the Commerce Department for a license and under our Executive Order process we have to refer that to both the Defense and State Department for their review. And in that process, if either agency thinks that item is actually subject to State Department's jurisdiction, they stop that process and we put it in the commodity jurisdiction realm.

So I think part of the GAO concern was that an exporter could sort of self-classify and ship without government authorization. But under the system, they either have to go into the State Department or they have to come in to us for any missile technology item.

Senator VOINOVICH. Ms. Barr.

Ms. BARR. The comment that I would like to make with regards to that is lets put ourselves in the seat of the exporter. I think it needs to be very clear up front whether these items are either on the USML or on the CCL list. I would not want to be an exporter who comes through a system only to find out after months elapsed and after it has been staffed out for review that you don't fit under the Commerce Department anymore, but instead, you are under the State Department. Now you have to come back in under a different set of reviews with a different set of compliance requirements and costs. That is just not the way to do business. Items should appear on one list or the other and it should be clear from the get-go.

Senator VOINOVICH. When you were putting your plans in place, how much input did you get from your external customers? We have some people representing industry here. Did you sit down with them and say, what are your problems? Did you get their input so that you could at least find out how the customers feel and what you could do to satisfy them?

Mr. MULL. Yes, sir. At the State Department, we have a group called the Defense Trade Advisory Group in which the defense industry regularly participates and provides advice to the Secretary of State and all of us who work on these issues at the State Department.

In addition, and I should have paid tribute to this in my opening statement, the Coalition for Competitiveness and Security, a very high-level group, a consortium group of leading defense industrialists, made some very important recommendations to the Administration last year that had a really important impact on—they made a series of 10 to 12 recommendations about how we could improve and we have implemented almost every one of their recommendations. There are a few that we were not able to because of legal problems or philosophical differences, but the vast majority, we did implement.

Senator VOINOVICH. In other words, if I got them in a corner and said, what do you think about it, they would come back and say, I think they have done a pretty good job of putting it in place, or would they have some strong reservations yet?

Mr. MULL. Well, sir, we have gotten very positive feedback, but I do encourage you to ask them because if they have a different view that they haven't shared, I would love to hear it.

Senator VOINOVICH. Well, they have all got to deal with you. Senator Akaka.

Senator AKAKA. Thank you. We will have a second round.

Ms. Barr, in your testimony and in a 2006 report, GAO found that the Commerce Department did not have measures of effectiveness to assess its performance. Will you please elaborate on this and how this situation can cause problems?

Ms. BARR. What we found in the case of the Commerce Department, there were certain measures that looked at their system in

terms of how long it took for a license to actually be processed, and those measures focused on primarily the up-front part of the process, how long it took to staff a case out. But there weren't measures in place to actually come back and report to them on how long it took for the whole process if it was staffed out. We had indicated that it would be important to know at each stage of the process. For example, how long does it take to get outside of the Commerce Department, how long does it take with the other agencies, and what are the overall processing times.

Now, efficiency measures are just one part of effectiveness. I also think that it is absolutely critical for any agency with any goal, with any mission, particularly as important as this, to analyze data to look at what applications have come in, which have required licenses, which have gone out without licenses, what items have we shipped to where, and what intelligence information do we have regarding the cumulative impact of what we are shipping to certain countries under certain commodities. These are the kind of effectiveness measures and studies that we are calling for and some of the due diligence that we are asking for.

And I think, as Mr. Borman indicated, there are new initiatives in place now to expand the assessments that they are doing. We have not yet had an opportunity to look at that. But we are aware that there are some initiatives underway.

Senator AKAKA. Mr. Borman, do you agree with GAO's assessment about the status of your measure of effectiveness and have any comment on that?

Mr. BORMAN. Well, we certainly agree with GAO that it is very important to be able to measure as many pieces of your system and then measure it overall, as well, and as I mentioned in my statement, we have added additional effectiveness measures. Just to touch on two pieces that were just mentioned, under our Executive Order, we have 9 days to process internally a license application and then it goes to the agencies. They have 30 days to review. By our metrics, we know that the Commerce Department averages 2 days to review. The agencies generally do their reviews in 12 to 14 days, and our average overall processing time is 28 days. So we now have a system in place to track all those pieces.

We also have added a new way of measuring effectiveness compliance with our regulations now that we have access to actual export data. We can analyze the filings in the Automated Export System against the regulations, and this is something that GAO has not had a chance yet to look at and review, but this is another very useful new tool to measure whether our U.S. exporters are really complying with our regulations.

Senator AKAKA. Mr. Borman, in Mr. Poneman's testimony, he proposed the creation of an export control career path for Bureau of Industry and Security (BIS) staff. Could you comment on that? Is there such a career path now, in your view?

Mr. BORMAN. Well, in our Bureau, we are, of course, headed by political leadership at the Under Secretary and the Assistant Secretary levels, but at the Deputy Assistant Secretary and below, we are all career civil servants and certainly in our licensing ranks, we have a range of GS levels so that someone could certainly and have come in, say, at GS–12 level and by gaining experience and taking

different jobs, could move all the way up to the GS–15 level, which is the highest in the General Schedule. So I think we do have a good system in place to allow people to stay in, and we have quite a few licensing officers who have been at this a very long time and are really experts in their subject areas.

Senator AKAKA. Mr. Borman, in your testimony, you stated that since the Export Administration Act has not been updated, the enforcement authorities of BIS's special agents have not kept pace with the challenges of proliferation and globalization. Could you explain how BIS's special agents work with DHS's Immigration and Customs Enforcement and Customs and Border Patrol agents?

Mr. BORMAN. Yes. Our agents have a very close working relationship with both those units of the Department of Homeland Security. On the Customs and Border Protection side, for example, on a daily basis, we send them updates of licensing decisions. So at the ports and borders, the inspectors have the most up-to-date information on what transactions are approved under the Commerce Department licenses so they can check shipments efficiently and effectively.

On the investigative side, we often do joint cases with our Customs colleagues and we have an MOU that we have had in place for many years to make sure that functions very smoothly, and quite a few of our cases, particularly on the criminal side, are joint cases with Immigration and Customs Enforcement, as well as the Department of Justice.

Senator AKAKA. Mr. Borman, in an April 2, 2008 article in the *New York Times* entitled, "U.S. Alarmed as Some Exports Veer Off Course," reporter Eric Lipton identified that U.S. exports to the United Arab Emirates were diverted to countries like Iran and Syria. I am concerned that there may not be enough staff monitoring exports to the UAE. What is the current number of export control officers assigned to the UAE?

Mr. BORMAN. We have one attachment stationed in Abu Dhabi who covers the UAE, and the way that we are getting at that issue—there are several ways, of course. One is close cooperation with the government of the UAE. They recently passed their own export control law and I was there with an interagency delegation 2 months ago and they are, in fact, enforcing that law, they have told us. They continue to need to do more to implement that system.

We also imposed specific additional controls on a whole range of foreign trading companies, including some in the UAE, over the last few years where we had strong reason to believe that they were importing low-level uncontrolled items that were showing up in Iraq and Afghanistan. So we have several ways to get at that issue.

Senator AKAKA. Let me ask, how do you determine if there is a sufficient number of staff to keep up with the potential violations and transshipment activity in the UAE?

Mr. BORMAN. Well, it is a constant process of monitoring what trade goes through there, looking at the relevant classified information, and having agents assigned. Now, some of the enforcement authorities that are in Senator Dodd's bill would also get at that because that goes to foreign investigative authority.

Senator AKAKA. Thank you. Ms. McCormick, the DDTC, Directorate of Defense and Trade Controls, faced an almost 20 percent increase in the number of licensing cases between 2003 and 2006. The Foreign Relations Authorization Act of Fiscal Year 2003 states that the Secretary of Defense should ensure 10 military officers are on detail to DDTC. In a 2007 report, GAO revealed that DOD provided only three to seven military officers to DDTC at any given time. Is DOD currently assigning the mandated number of military officers to DDTC?

Ms. MCCORMICK. Well, Mr. Chairman, it is obviously—you can imagine under the current circumstances we are, where our military is serving in so many operational assignments, we have a lot of shortfalls in our personnel, and to be perfectly frank, I actually have in my own organization, don't even have the number of military officers that were assigned to my organization. I have had some vacancies in my own organization upwards of 3 years where the military services have not assigned officers to me.

But I understand here recently there has been some movement to provide some additional military staff to the Defense Trade Controls, the State Department, I believe right now, and I can check this for the record then to make sure, but I think right now we are up to eight officers that are assigned over at the State Department.

Senator AKAKA. Thank you. Mr. Reinsch in his written testimony proposed the idea of a unitary—handling both arms and dual-use technology—export licensing system that operates in an interagency framework. How do you feel about Mr. Reinsch's idea for a single interagency coordinating body? Ambassador Mull.

Mr. MULL. Thank you, Mr. Chairman. The State Department does not have an official position on that idea. My personal view is that, as I mentioned in my opening statement, there are inherent tensions in this entire function of government in which we have to balance our national security interests against our economic and commercial interests, and some of the frustration that users of this system encounter results from the tensions bubbling up to higher and higher levels, where it takes longer than the consumer might like to resolve what particular factor is more important, the national security or the economic and commercial dimension.

I think those institutional tensions are going to exist regardless of how we organize ourselves as a government. If there were one agency doing all of this, you would find the same tensions and disputes that we have now, just given rise in a different kind of setting.

I think what is important is to make sure that we as a government have as efficient a way as possible of managing those natural differences and tensions in a way that is quick and transparent to the user of the system, and I hope certainly by the end of this year with the President's Directive we will be in a much better place than we have been.

Senator AKAKA. Thank you. Ms. McCormick.

Ms. MCCORMICK. Thank you, Mr. Chairman. It is probably a little easier for me to say this since my agency doesn't have a regulatory role here, so I sort of sit between the two agencies that have the regulatory responsibility. But I think one of the things I see is we actually are organized—and maybe the way we are organized

is an interesting comment on this—in my organizational structure, the technical workforce that I have, because I have got a very solid technical staff of engineers and scientists, we have chosen in that particular case to organize along technology lines, and so my engineers and scientists actually review both dual-use and munitions licenses because we believe what is important for us to understand is the technology, how that technology is evolving, and what are the implications for the Department of Defense for that technology.

But then my licensing officers, while I have one licensing shop, I have it divided between munitions and dual-use predominately because of the different regulatory regimes that we need to deal with and the fact that we need to interact with different people.

But I think some of the initiatives that we are pursuing right now collectively as part of the President's initiatives are really aimed at having the overall system be more transparent, and I can tell you the two gentlemen who are sitting on either side of me, the relationships, the professional relationships we have and the orientation we have to making change, I think it is very strong and I think that collaboration right now and the agencies working together in a more predictable and transparent manner is happening and can only get better.

Senator AKAKA. Thank you very much. Mr. Borman.

Mr. BORMAN. Mr. Chairman, I would like to answer this in two parts. One is, as with the State Department, the Department of Commerce does not have an official position on that proposition.

I can tell you, as a career civil servant in this area, we have spent a lot of effort doing our interagency coordination focusing on the functions and the principles. To the extent that there would be an effort to create a unitary entity, I think that would divert a lot of attention and focus from the functioning to the structure and the process and inevitably that would be a fairly long undertaking. So I would just add that note to anyone who is thinking of pursuing that line, that there would be a lot involved just on the functional part, which by definition I think would take away from the current work that is being done because there are only so many hours in the day that each of us has.

Senator AKAKA. Thank you. Ms. Barr.

Ms. BARR. I think your question goes to the heart of our recommendation in the high-risk series, which calls for a strategic reexamination of what is needed. These programs have been in place, and I think in one of the opening statements are referred to as relics. They have been around for a long time. I think what this calls for is a reevaluation of the programs, ask some questions basically about the relevance of the program, the missions, the goals, what is it that we need to control, what is it that we can share with others, and then what is the framework that we need to best equip us to do that.

Clearly, any interagency process is messy from the get-go. So, when there is not clear communication and coordination, it further exacerbates the problem. Those are issues that I think can be resolved with the current structure.

I would also make just one other comment. If you look abroad, at other countries' systems for export controls, I think it is quite interesting that you will find that in many other countries, they

have single licensing agencies for export control. So it is just an interesting point of comparison. There could be some things to be learned from that.

Senator AKAKA. Thank you very much. I want to thank this panel very much for your testimonies, your responses. It will be helpful to us, and again, I thank you and we will have our second panel. Thank you.

Mr. BORMAN. Thank you, Mr. Chairman.

[Pause.]

Senator AKAKA. This hearing will be in order.

I want to welcome the second panel of witnesses. They are the Hon. William Reinsch, President of the National Foreign Trade Council and former Under Secretary of Commerce for the Export Administration, Department of Commerce. Also, Daniel Poneman, Principal of the Scowcroft Group and former Senior Director for Nonproliferation and Export Controls, National Security Council, and Edmund Rice, President, Coalition for Employment Through Exports.

As you know, it is the custom to swear you in, so I ask you to rise and raise your right hand.

Do you swear that the testimony you are about to give this Subcommittee is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. REINSCH. I do.

Mr. PONEMAN. I do.

Mr. RICE. I do.

Senator AKAKA. Thank you. Let it be noted in the record that our witnesses answered in the affirmative.

Let me call for your testimony, and let me call on the Hon. William Reinsch for his testimony first.

TESTIMONY OF WILLIAM A. REINSCH,[1] PRESIDENT, NATIONAL FOREIGN TRADE COUNCIL

Mr. REINSCH. Thank you, Mr. Chairman. I think we decided a few minutes ago this is the geezer panel. All of us have been involved in this issue for a long time, in my case for more than 30 years, and we have a wealth of experience from different perspectives, both inside and outside the system. My own statement provides a little bit of detail about my background.

Consistent with the Subcommittee's jurisdiction, I want 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.

From the perspective of users of the system, the main problems are delay and uncertainty in decisionmaking, 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 list up to date by removing

[1] The prepared statement of Mr. Reinsch appears in the Appendix on page 70.

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.

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 the controled item is a foreign policy decision, a national security decision, a commercial decision, and often a nonproliferation 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 various departments as well as 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. Mr. Poneman is largely responsible for that Executive Order, so he may want to spend a little bit more time on it.

In reality, things do not always work quite so smoothly. Making the wheels turn requires persistence and discipline. Deadlines become meaningless if they are not enforced. Deciding an application, or more likely a number of them, raises a policy issue that can take the matter out of the system entirely and leave the license applications hanging while the agencies haggle over the underlying policy.

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 applications has been growing 8 to 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 involve close collaboration between the U.S. and its allies. Successful execution of those collaborative programs requires appropriate, timely sharing of technical data and technology over the entire life cycle 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, 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 of 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.

Probably the most unsatisfactory aspect of the current system, and the previous panel discussed this, 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 Department's licensing. This authority belongs to the State Department, 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. These decisions could have significant effects on a company's business strategy, since determining that a license 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. Occasional changes have occurred since then, but 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.

Now, over the years, there have been a variety of proposals for reform. There are essentially three approaches that I want to comment on. 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 my organization is a member, has proposed a set of administrative changes for both licensing systems that would be helpful in making them more efficient, and we support those strongly and are glad to see that the Administration is proceeding to implement them. They are not, however, fundamental reforms.

The second way to go 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 1990s. My written statement, Mr. Chairman and Senator Voinovich, provides some detail about why that won't work.

To save time, I will skip to the proposal that I think will work, which is an approach 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 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 while still ensuring that all relevant parties are able to participate in the process.

The 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, 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.

I have not in my comments, Mr. Chairman, addressed the question of resources and I want to make clear that is not an oversight. A plea for more resources is the standard response of every Federal agency to every problem. When I ran BIS, I made the same plea. More money in this case would no doubt be helpful, particularly after the significant BIS budget cuts this year that Mr. Borman referred to. I do not, however, believe it is the most critical issue. Competent dedicated civil servants labor in a system whose problems are self-imposed, or in some cases 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 Subcommittee to address the fundamentals, however difficult that might prove to be, rather than settle for palliatives.

Finally, Mr. Chairman, let me congratulate you and the Subcommittee on your examination of this issue and let me urge you to continue with it. During my time working on export controls, I have been involved in one way or another in 13 or 14 efforts to rewrite the EAA. I have lost count. Only five of those succeeded and the last one was 20 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 then work with the Banking Committee on legislation to implement them. Thank you.

Senator AKAKA. Thank you very much. I should mention to you that your full statements will be included in the record.

Mr. Poneman.

TESTIMONY OF DANIEL B. PONEMAN,[1] PRINCIPAL, THE SCOWCROFT GROUP

Mr. PONEMAN. Thank you, Mr. Chairman, and Ranking Member Voinovich. I am delighted to be here. I will try to be succinct.

I believe that the U.S. export control system is an anachronism. It was designed for a world that no longer exists. When the last

[1] The prepared statement of Mr. Poneman appears in the Appendix on page 74.

rewrite of the Export Administration Act was signed by a President into law, the hammer and sickle still rose above the Kremlin, CoCom still existed, the Berlin Wall stood tall. All that has changed. CoCom's successor doesn't have the strength that CoCom had. In fact, it seems almost quaint to recall that under CoCom, the United States had the right to reject an export from an allied country to a third country; and that worked.

Meanwhile, Federal structures have not been updated to accommodate this new reality. They have not accounted for the changing role of technology. They have not accounted for the globalization of technology. They have not adequately accounted for the increasing availability overseas of the same technology that we seek to control. And meanwhile, the internal stresses and strains that you heard reported in the earlier panel continue to plague our export controls.

What is to be done? For years, as Mr. Reinsch has reminded us, we have tried unsuccessfully to fix the system. Reviewing for this afternoon's testimony, I looked at a panel I participated in mandated by the Congress in the late 1990s, and I will submit a copy of the export control chapter for the record.[1] It still makes good reading. Unfortunately, it is still relevant. In other words, it has not been implemented.

So let us go to first principles. Why do we have export controls? I dwell on a few reasons in my written submission. I will just note here the prevalent one, in my view, is to protect U.S. and allied military advantage over our adversaries. That means we have got to protect the source of our military superiority. That is increasingly innovation and the technology that keeps our fighting forces the best-equipped in the world. And over time, as we all know, that technology has come increasingly from the civilian sector and from investments financed by retained earnings, and therefore we need to encourage that kind of investment in advanced technology. Many of these companies that make these investments rely on exports for their health.

Therefore, to the extent that we throttle those companies by unnecessary—an important qualification—export controls, we are throttling our own source of innovation and our own source of military strength. The commonplace that you hear—national security versus economic security—is false dichotomy. Economic strength drives military strength.

What would I do? First of all, reform is way overdue. We need to rewrite the Export Administration Act. It has distinctions that are rooted in the CoCom system that is gone and what it should do is, in place of talking about national security controls and foreign policy controls and anachronisms from the past, it should focus on multilateral controls versus unilateral controls. That actually matters. And it should be harsh on unilateral controls because to a first order, my view is that unilateral controls tend to fail and therefore they should be subjected to some rigorous disciplines and oversight by the Congress to see if they are going to achieve their stated mission.

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[1] The copy of the Export Control Chapter 4 submitted by Mr. Poneman appears in the Appendix on page 109.

Second, under this new law, all U.S. export controls should be implemented pursuant to what I would call generally accepted standards of good government. Mr. Reinsch referred to these. They were codified for the dual-use system in Executive Order 12981, which I would also like to see included in the record.[1] I don't want to run over time, so I will summarize by saying that they are characterized by certain principles:

One, transparency. All agencies get to look at the license applications or commodity jurisdiction submissions.

Two, deadlines, and a deadline means if you don't meet the deadline, it defaults to a decision, not to paralysis.

Three, accountability. Whoever is responsible for enforcing these controls should speak to the Congress and the President, and explain how they are implementing these reforms.

Now, when this is first put into place, this kind of a system, I think you will need an overall list review. It seems to me when you were talking about the tens of thousands of applications that we heard in the earlier panel, that says to me there is something wrong about the size of our effort versus the size of the problem, and I think we need to address that head-on. Presumably, it would produce a result of higher fences around fewer items, but we should go through that exercise.

But second, once that review was complete, I think we should let the process decide which items should be controlled and should not be controlled, and this would be my last point so I will just dwell on it for a moment. Many of us were involved in discussions in the 1990s about whether communication satellites should shift from the munitions list to the dual-use list and back, and we had endless conversations among people who knew very little about the underlying technologies.

And I remember that for me, the penny dropped in talking with my interagency colleagues when I said, let us just say on the nine parameters defining which satellites were munitions, baseband processors and embedded encryption and so on, if we agree on this today, how long would that solution last? Six months? Eighteen months, max? We don't need a point solution. We don't need to write that in a regulation. It took us longer to write the regulations than it took the companies to come up with the next-generation technology.

What we need is to have a process as you have in common law. You have a case in controversy. You look at this item coming up for consideration and say, does this present a threat if exported? And you let, if you will, a common law system replace what we now have more of a civil code, line-drawing, definition-drawing kind of approach to export controls.

Now, I do not suggest this is the only solution, but I do think that when we have a new Administration coming up of either party, it is a rare opportunity and an important time, given the stakes for our Nation and its security, to really go back to first principles and try to do it right. And in that respect, as my colleagues before me, I would like to commend and welcome the Sub-

[1] Copy of Executive Order 12981 submitted by Mr. Poneman appears in the Appendix on page 105.

committee's efforts to participate in that effort and I am sure all of us would be grateful for further opportunities to assist in any way we can. Thank you, sir.

Senator AKAKA. Thank you, Mr. Poneman. And now we will hear from Mr. Rice.

TESTIMONY OF EDMUND B. RICE,[1] PRESIDENT, COALITION FOR EMPLOYMENT THROUGH EXPORTS, INC

Mr. RICE. Mr. Chairman and Senator Voinovich, thank you. You asked us to use the GAO high-risk report as the jumping-off point for our testimony, so let me make four quick points summarizing my written statement.

The first is that the GAO report traces export control problems to weak interagency coordination and inefficiencies. I think the Subcommittee should take a broader and more fundamental look than that. I believe the weaknesses stem from more basic policy issues which are not being addressed and those are then reflected through the operations of these export control systems.

My second point is that in the dual-use system, the U.S. Government, and that is both the Executive Branch and the Congress, is having difficulty in adjusting U.S. policy and export controls to global forces, which you both noted in your opening statements. Dual-use technologies diffuse. There is almost nothing on the dual-use control list that is U.S.-only sourced. Almost everything now can be purchased globally. There is a growing disparity between the U.S. and other governments' policies on export controls, leading the United States to increasingly move toward unilateral controls, as the previous witnesses have also mentioned. And military capability increasingly depends on commercial technology, which is changing the make-up of the defense industrial base and the responsibility of the export control systems to take that into account in their licensing decisions and policies.

My third point is that these global forces are working against U.S. controls, particularly when they are unilateral. In the most recent control initiatives by the U.S. Government, that is the recontrol of certain technologies to China to try to prevent the Chinese military from getting these items, and the new rulemaking that is just underway to attempt to control the transfer of technological knowledge to certain foreign nationals when they are in the United States are both unilateral controls and are destined, as Mr. Poneman just indicated, to not be successful.

My fourth point is that in the munitions area, the export licensing system has not kept up with the direction of U.S. defense policy, again as Bill Reinsch first mentioned. Multinational defense cooperation and joint operations in the field have not been adequately supported by the licensing system, and in fact, that has been one of the major impetuses for the Executive Branch to take on the reforms that they described in their testimony because of the rising chorus of complaints from the acquisitions people at the Pentagon and our combatant commanders.

So my conclusion is that the Executive Branch is moving to address some aspects of the logjam through their reform efforts and

[1] The prepared statement of Mr. Rice appears in the Appendix on page 78.

these efforts have been underway since the January 2007 high-risk report was issued. But more resources and greater efficiency cannot address the global dynamics without a more fundamental look at policy and policy changes and that is a management issue at a higher level than the GAO has analyzed. Thank you.

Senator AKAKA. Thank you, Mr. Rice. And now, Senator Voinovich for your questions.

Senator VOINOVICH. Thank you, Mr. Chairman.

This has been around a long time, hasn't it, this whole issue? As a member of the Senate Foreign Relations Committee, I am always concerned with who is paying attention to management. Dick Armitage paid a lot of attention to it, and then Zoellick came in and he toured the world, and we had Henrietta Fore and now we have Patrick Kennedy there. I just don't think they pay enough attention to management in the State Department. From what I have heard, the GAO has come back with a nice report, but you really think you ought to junk the thing and come up with a whole new system that is relevant to being in a global marketplace and how everything has changed.

Would any of you be willing to sit down with the other people who are at this table and come back with a comprehensive recommendation from the users on how this thing could be improved and share it with this Subcommittee? I understand you represent the private sector, but you are the customers. I mean, you are coming to the shop, and when I was governor, when I was mayor, if I had lots of complaints from people out there, what I did was get my folks together with them. The other thing I found out is a lot of times, people in the agencies are not happy with the system, either. They have some ideas on how things can be improved.

But would you be willing to sit down and come back with recommendations on how you really think this thing could get done properly and maybe have that available to the next person over there so that maybe we can make some headway with it and try and get somebody in a new Administration to be in charge of the transformation because you know very well it is not going to happen in a year. It is going to take a couple of years to get—more than that, probably, if you are going to really get the job done.

Mr. PONEMAN. Oh, yes. I might just say, Senator, I suspect I was joking beforehand, none of us had gray hair when we started working on export controls. Now, I won't say how much came from export controls, but some. But I think, speaking for myself, I would be willing to work with anyone who is committed to trying to improve this system because I genuinely believe we have already paid some price in our security for lack of reform. I don't want to see us pay a higher price, and my assessment from having seen so many of these efforts fail, Senator, is that each President gets about one shot and that shot lasts about 1 year. And now would be the time to lay the intellectual groundwork, and frankly the stakeholder buy-in, that could allow any President come January 20 to say, OK, we are going to fix this. I would be happy to participate.

Senator VOINOVICH. Gentlemen, I would be interested if you folks would get together and share that with us, come back, get everybody at a table and say, this is what we think is a consensus on

how we really straighten this out. I am sure that Senator Akaka and I would be glad to work with you and maybe get somebody from the Department there and get GAO at the table and work out a strategic plan and set some goals. Mr. Reinsch, you don't think that they need more people there, or——

Mr. REINSCH. I think more money would be useful. I know more about BIS than the State Department. Certainly, more resources would be welcome. However, as long as the system is the way it is and the number of licenses are growing the way they are, you can give them all the money in the world and it is not going to improve the functioning of the system. You need to get a handle consistent with what Mr. Poneman suggested of what it is you are trying to control, and if you do that, then you can operate more efficiently. My guess is, if you do that, you can do it with the number of people they have now.

I am happy to participate and am very much interested in doing exactly what you have suggested. Mr. Rice and I periodically convene a group that consists of, as near as I can tell, most of the companies who care about this, and we are happy to enlist them.

I would add a cautionary note, Senator, that we have been down this road before and our experience is that the proposals that industry comes up with and submits to the Congress tend to be the high-water mark from our point of view. The criticism and the attacks come always from only one side, from the people that want to have more controls, and the amendments in Congress come only from one side, from the people who want to have more controls, and the business community generally starts with high hopes and ends up being disappointed with the process. The result has been that there is, frankly, in the business community, some cynicism about going down this road again because they have been disappointed in the past.

Senator VOINOVICH. Well, I don't think there is any other option.

Mr. REINSCH. Well, that said, I think we are happy to undertake it, but I just want to——

Senator VOINOVICH. I just think that we are vulnerable right now and I think that we need to get on it.

It is the management here. In so many areas, it is archaic, an anachronism, you name it. And if we don't get it right one of these days, we are in really deep trouble because other people have these technologies. I think what you were saying is if I am a business person today and I have to come up with technology and I know it is not going to have to abide by certain restrictions, then I am going to go with the more relaxed level of regulation rather than get involved with regulations that could be very important to our national security, but are less convenient for my business. So I will say, well, here is where I am putting my money and I will go that direction. So, in effect, what I think you are saying is that stymies people from going forward because they figure, I have to make some money and if I am going to go over here, I may not ever be able to get it off the ground.

Mr. RICE. Senator, you identified the critical element for moving forward, and that is leadership by the White House, usually a new White House. When President Bush came into office, he was seized with this issue and spent a lot of time on it in the first 8 months

of 2001 and a great deal of progress was made. But then, of course, September 11, 2001, and the efforts were eclipsed. But they said to me at the time that it can be done.

Senator VOINOVICH. And you need somebody at the State Department that pays attention to management and transformation.

Mr. RICE. That is right.

Mr. REINSCH. And in that regard, Senator, they are a lot better than they used to be. To give the State Department credit, I think the current management is a significant improvement over previous management in both this administration and the previous one.

Senator VOINOVICH. Well, I have to say that I was impressed with the first 4 years and what Armitage did, and Condoleezza Rice is a very fine woman, but I think that there wasn't anybody over there that was paying enough attention to management and getting up early in the morning and moving the system along. I think we fell down. Thank you.

Senator AKAKA. Well, thank you, Senator Voinovich.

Mr. Poneman, you recommended the creation of an export controls career path. Could you please elaborate on this? You mentioned some things, but can you elaborate on this, describing what it would look like?

Mr. PONEMAN. It is a concept, Mr. Chairman, that is rooted, again, in the changing world that we live in, and my own personal experience is that the private sector, by definition, pays some significant premium over salaries that are paid in the government and you end up with technologies, sir, that are being analyzed by people who might have had their training many years ago and they are trying to, frankly, keep up with the private sector, and it is hard to do.

I was not speaking specifically about the Commerce Department. I would say probably the Commerce Department is the one place where that is more of a defined career path in export controls, but there are other parts of the interagency where you need to do the analytical work that says, this technology, that is too dangerous. This one, no, that is really available in six other countries and so on. That is the kind of agency that requires a career path that says, if you get into this, there are promotion opportunities and they could be SES slots or whatever is done inside the Federal Government to ensure that you get the best and the brightest and that they are invested with a mission that they believe in.

I don't have a detailed proposal, sir, but I think something that would enable the Federal Government to have at its disposal first-line, first-rate technologists to be good enough to analyze the technologies that may or may not be dangerous going out the door because if you don't have people who are good enough to do that kind of analysis, then the whole system starts to break down.

Senator AKAKA. Mr. Poneman, isn't there an export controls or licensing officer career path now, and if not, why not?

Mr. PONEMAN. Well, first of all, I have been out of government for a number of years. As I said, my impression is that in the Commerce Department, there is. But I think that in some parts of the extended complex, in different agencies to which these licenses are referred within the first 9 days, the license is, I think, understand-

ably referred to people who have technological expertise wherever they may be found. They may be found in parts of agencies that aren't committed to export control itself but may be, if you will, the U.S. custodian of those kinds of technologies, and it is in those kinds of circumstances that I think there just need to be ways to compensate and advance those people to show that they are valued in the U.S. Government system and so that they are attracted to serve.

Mr. REINSCH. May I comment on that, Mr. Chairman?

Senator AKAKA. Yes, Mr. Reinsch.

Mr. REINSCH. I think you have hit on something important, but I would frame it a little bit differently. At the Department of Commerce, within that Bureau, the only mission is export controls and the people there are, therefore, committed to it and they are trained to do that. At the Department of Defense and Department of State, this is a minor matter compared to the many other missions that they have.

One of the problems I have always observed at the Defense Department, for example, is at the political management level, everybody is too busy to spend much time on this. I mean, functionally, despite lines of authority, functionally, there really isn't anybody between Ms. McCormick, who is a Director, and the Deputy Secretary who focus on this with any large percentage of their time.

In the State Department, this is not a path to career success, being in DDTC. It is something that you do if you don't want to travel and you are not a Foreign Service officer.

How you upgrade, if you will, these units and make the function more important within their Department, it seems to me, is what it would be useful to focus on, and that in part relates to something that Senator Voinovich said, which is how do you get senior management in these Departments to prioritize this problem, take it on board and invest their own time and energy into managing it and making clear to their people that it is a valued part of the mission and the people there have a career path upwards beyond it.

Senator AKAKA. Mr. Reinsch, in your written testimony, you described two different unitary systems, approaches to reform the export control system. In one case, an independent agency would administer both the dual-use and arms export control systems. If such an independent agency was created, who do you think would or should administer it?

Mr. REINSCH. Well, that is why it probably won't be created because we won't be able to reach agreement on that question. The original idea, which was proposed by Senator Garn and Senator Heinz, for whom I worked, and Senator D'Amato in the 1980s was to create an independent agency by basically ripping this function out of the existing agencies, simply abolishing BIS, abolishing DTSA, abolishing DDTC, and creating an independent agency over here that reported to the NSC and the President, thus eliminating the interagency squabbles by eliminating the interagency involvement.

I explained in my statement why I think that won't work, but simply put, what will happen, if you embark down that road, is at a key point in the process, the Secretary of State, Secretary of Commerce, Secretary of Defense will all come in, not to you but to

their authorizing committees and say, well, this has promise, but there is this small universe of licenses that we simply have to have a veto over. They are just too important for us not to have oversight. And their authorizing committees will agree with that and exceptions will be built into this new office. In 5 years, the bureaucracy will be back to normal and those small little exceptions will have grown into offices that are about the size of the current bureaus.

That is why I ended up suggesting that a better approach is not to try to cut the agencies out of the process. They all have equities. They all should be at the table. I think the system works well—works best when they all are at the table and playing the roles they are assigned. The salient thing is if you abolish the difference between dual-use and weapons and put everybody into the same system, then you eliminate half the squabbles. You don't get these long arguments, well, is it a weapon or is it a dual-use item? It is what it is and subject to the same process.

You use the process that Mr. Poneman described in order to default to decision and use a series of deadlines and invest in responsibility in agencies and accountability in agencies to get to where you want to be at the end. That way, you don't stick it to any agency, frankly. You leave them as part of the process, but you do it in a framework where they argue about what is important, which is should this item be controlled or not to this end user, and not what is increasingly irrelevant, is it a weapon or is it a dual-use item. That doesn't matter anymore. In fact, most of the things they argue about are both. Why waste time on it?

Senator AKAKA. Mr. Reinsch, the first panel did respond to the question of your recommendations.

Mr. REINSCH. They were unusually polite. [Laughter.]

Senator AKAKA. I just wanted to ask you whether you had any comment on the first panel's response to your recommendation.

Mr. REINSCH. They were more polite than I thought they would be. I thought Ms. McCormick had it right when she explained how her unit is organized. They focus on technologies, which is what they should do. To the extent they have different people on State and Commerce Department's licenses, it is because they have a system that forces them to report in different directions and to deal with different processes. If they had only one process and one reporting structure, they could dispense with that and focus on what is more important, the technologies.

That is the main comment I have. I don't know what they would say if you got them in the back room and asked them off the record. It might be an interesting exercise. Mr. Kessler can do that sometime and see what they say.

Senator AKAKA. Mr. Rice, National Security Presidential Directive 56 put a 60-day ceiling, with some exceptions, on DDTC's license processing time. According to Ambassador Mull's written testimony, DDTC has already lowered average processing time for each license from 36 to 18 days. What, if any, potential risk does this stated 60-day licensing processing requirement pose to our economic interests?

Mr. RICE. Well, Mr. Chairman, the 60-day target, and it is a target in the NSPD, is subject to exceptions where there is a need for

more information, interagency disputes, etc. So it is really not a hard deadline and I don't think it should be because as your question infers, there are going to be instances when difficult issues come up about end uses, end users, the reliability of information, and more time needs to be taken, and so some of those cases inevitably will take longer.

As Bill Reinsch just indicated, though, having some discipline in the system that is imposed externally on these agencies is a good thing because it keeps them focused on the job at hand and ultimately under this new system will require them to show cause as to why, if there is a pattern of delays, why those are occurring, and I think that is a good thing.

But your question goes to the heart of the need to take an adequate time to make the right decision and that is the most important thing, not a specific time frame.

Senator AKAKA. Yes. Mr. Rice, you recommended that we approve a project or program license for munitions transfers to a defense project with an ally, but you also testified that we do not have a common agreement with our allies on dual-use exports and a common set of policies on munitions sales to third parties. Why not make one conditional on the other? That is, why not grant a program license only with States with whom we have worked out a common policy on dual-use and munitions sales?

Mr. RICE. I certainly agree with that because again, as your question infers, if the United States were to simply enter into these projects willy-nilly with unreliable partners, then it would increase the proliferation threat, and I think that is what the United States is doing with these intergovernmental projects.

The problem that I was trying to elucidate, which I believe Mr. Reinsch also mentioned in his testimony, is that under the current licensing system, if the United States enters into one of these projects, for example, with the United Kingdom or with Australia, to take two examples of close allies, there is still a requirement in some instances for thousands of individual licenses then to be processed for transfers of individual items or technologies pursuant to a project that the U.S. Government has already entered into with these other governments.

That is one of the major problems in this explosion of licensing, which this fiscal year, left untreated, is going to reach 85,000 or 90,000, and it is one of the reasons why the heads of state in both the United Kingdom and Australia, went to President Bush at various times last year and complained about the munitions licensing system here as interfering with existing defense cooperation projects.

My point is that if the defense establishment here has decided and it has been approved to have such cooperation, then the licensing system should not be an obstacle to completing that, and some of the companies that are trying to carry out responsibilities for the United States under contract under these cooperative agreements have found a significant barrier just as then-President Howard and Prime Minister Blair found in reviewing this with their own governments.

So to me, the decision of going to a project or program license is really going to be a key test of whether these reforms that were

testified to earlier are going to have any real relevance to fixing the problems. Time tables on license processing are one thing. Resources are another. But one of the central elements of real reform, and I think one of the criteria that some committee ought to use in judging progress on this, is whether this area is fixed. And since the NSPDs are classified, as you well know, we haven't been able to see the black and white, so we don't know. We are hopeful that when they are finally unveiled that this will be included.

Senator AKAKA. Thank you all for your responses. I have one final question to all of you. You have all recommended ways to reform the export control system, so my question to you is please identify your top three recommendations. Mr. Reinsch.

Mr. REINSCH. Well, for my part, eliminating the commodity jurisdiction problem, the distinction between weapons and dual-use, list—reviewing and reducing the number of items on the list, I think those two are overwhelmingly the more important. Probably the third one would be putting in streamlining devices like the project license that Mr. Rice talked about and the use of a trusted end user or validated end user approach where the credentials or bona fides of end users could be established, and once established, there could be a stream of technology flow to that person, that entity, without separate licensing because they have been vetted. I think those would be my three.

Senator AKAKA. Mr. Poneman.

Mr. PONEMAN. Since I had 2 minutes to think about it, I am grateful for Mr. Reinsch. I would say my first recommendation is, and this really falls into the category of what we really just ought to do to clean this up, we should have a law. We should have an Export Administration Act under which we can go around and tell people, this is how a law ought to be defined, and that law, I think, should not merely tinker at the edges of the old system. Your able staff should start with a blank sheet of paper and talk to all their relevant colleagues and committees. And to my way of thinking, the division should be unilateral versus multilateral controls because I think that is where so many of these pivotal decisions get made.

Second, I would strongly urge that the same procedural disciplines that were codified by Executive Order 12981 be made generally applicable across the systems, commodity jurisdictions, licensing, munitions. They are good disciplines. I think they should apply.

And third, I think we should, again, in terms of reconceptualizing, think more in terms of a common law approach. I think, to be honest, it is chasing a will-o'-the-wisp to say, the regulations just have to be clearer. Just write it clearer. Just get that last nth detail, and it is 0.0001 centimeters, not 0.01 centimeters. This approach would be disaster. What we need to do is to get transparency among the agencies. If everybody is not included but rather we try to get the real experts to say, "this one is dangerous, this one is not," because of an overly prescriptive, if you will, have a civil code of approach to this thing, I think it is going to produce mountains of paper and mountains of conflict without a benefit to our national security.

Senator AKAKA. Mr. Rice.

Mr. RICE. Mr. Chairman, I will identify two. One is to reestablish a high-level policy management of both the dual-use and munitions systems at the policy level within the White House. That is far and away, I think, the most important thing.

The second is to give much greater attention to our diplomacy with our allies on trying to harmonize, to the extent possible, export control policies between the United States and other countries because as we move increasingly toward unilateral controls, which we are doing, we are destined to have even greater problems with these systems.

Senator AKAKA. Well, I want to thank all of you and all of our witnesses today. It is my hope that the work each of your organizations is doing will help U.S. export controls systems become more efficient and effective at balancing national security, foreign policy, and economic interests.

As with all complex systems, there is always room for improvement. I believe that our discussion today highlighted many of the fundamental improvements that can be implemented now and also when the next Administration takes office early next year. I intend to follow up with some of the suggestions you have already made.

This Subcommittee will continue to focus on reforms to critical aspects of our national security. Over the next few months, we will examine and seek recommendations for improvements to our arms control and nonproliferation, foreign assistance, and public diplomacy bureaucracies and processes.

The hearing record will be open for 1 week for additional statements or questions other members may have, and again, I thank you for your valuable contribution. We will continue to work together on this.

This hearing is adjourned.

[Whereupon, at 4:37 p.m., the Subcommittee was adjourned.]

APPENDIX

Beyond Control: How to Reform Export Licensing Agencies to Improve Protection of National Security and Economic Interests

Stephen D. Mull
Acting Assistant Secretary for Political Military Affairs
Testimony before the Senate Subcommittee on Oversight of Government Management, Homeland Security and Governmental Affairs Committee
Washington, DC
April 24, 2008

Last July I had the opportunity to speak with the House Committee on Foreign Affairs' Subcommittee on Terrorism, Nonproliferation and Trade regarding protection of national security and foreign policy interests while facilitating exports. Since then, Department of State has accomplished much in the way of export control reforms. We believe the reforms we have already implemented over the past year and those we will implement within the next year provide the proper balance between defense trade facilitation and national security and foreign policy interests.

The Department of State has been responsible for regulating defense trade since 1935, with the objective of ensuring that defense trade supports U.S. national security and foreign policy interests. The Department's primary mission in this regard is to deny our adversaries access to U.S. defense technology, while facilitating appropriate defense trade with our allies and coalition partners to allow for their legitimate self defense needs and to fight effectively alongside U.S. military forces in joint operations. We carry out our work on the authority of the Arms Export Control Act (AECA) and Foreign Assistance Act of 1961, according to the International Traffic in Arms Regulations (ITAR), including the U.S. Munitions List (USML). The USML covers items specially designed for military applications, and its 20 categories extend from firearms to the Joint Strike Fighter. The Secretary of State has assigned the Bureau for Political-Military Affairs the responsibility for performing this critical national security function for the State Department.

In recent years, the administration of U.S. export controls has become an increasingly complex challenge as a result of our adversaries' increasingly

aggressive efforts to obtain U.S. technology; the demands of conducting extensive joint operations and warfare with increasingly diverse partners in Iraq, Afghanistan and elsewhere; the more globalized and interoperable world economy; and a growing and significant transnational terrorist threat that uses unconventional methods.

All of these trends reflect in the increasing number of licenses received by the PM Bureau and the value of overall licensed trade. In FY 2007, the PM Bureau received approximately 81,000 licensing applications for exports valued at approximately $100 Billion. In FY 2008, the PM Bureau anticipates that the trend of an average annual eight percent increase will continue. As a global industrial base continues to emerge, the licensing applications received each fiscal year become more complex. This is particularly true in the area of Technical Assistance Agreements (TAA) - the export of defense technology and services, which includes furnishing assistance to a foreign person in the design, development, and production of defense articles. Such agreements reflect the complexities inherent in globalization, reflecting business transactions involving multiple countries and third country nationals, as well as intricate flows of technology. In FY 2007, more than 9,000 TAAs were received and the value of defense services provided with such agreements is roughly equal to or greater than the value of hardware exports. We refer nearly all such agreements to the Department of Defense's Defense Technology Security Administration for review to ensure the proposed activities are consistent with our national security interests.

I am pleased to report that in the past year we have instituted a number of reforms and other initiatives to improve our ability to manage this challenge in a way that protects the U.S., while ensuring our allies have what they need to participate with us in military operations to protect our common interests. These initiatives include enhanced leadership and staffing of our defense trade operations; more robust enforcement activities; innovative new treaties with our closest defense trading partners; and a number of business practice reforms – many of which are formalized in a January 2008 directive from President Bush – that have substantially improved our efficiency. And with continued cooperation from Congress and industry, we aim to introduce even greater reforms in the months ahead.

The secret of any organization's success lies in the strength of its human resources, so filling long-term vacancies and better organizing our defense

trade staff has been one of our top goals at State. In the past six months, we have restructured our operation to create a new position of Deputy Assistant Secretary for Defense Trade and Regional Stability to provide a single point of policy oversight for all aspects of defense trade, be it direct commercial sales or foreign military sales, and appointed the highly-experienced Frank Ruggiero to fill the job. With the arrival of Robert Kovac in December 2007 as Managing Director of our Directorate of Defense Trade Controls and Kevin Maloney in January 2008 as Director of the Office of Defense Trade Controls Licensing, an accomplished senior leadership for the directorate is fully in place after many months of vacancies. Additionally, we have substantially reduced a large number of personnel vacancies at the licensing officer level, greatly increasing our productivity.

Improving our administration of defense trade controls requires more than just good people. It also demands undertaking a fresh and imaginative approach to the structure of our work, and two such examples of this are our recently concluded Treaties on Defense Cooperation with the United Kingdom and Australia, which the President has submitted to the Senate for Advice and Consent.

The treaties recognize the UK and Australia as two of our closest allies and largest defense trade partners, and will permit without prior written U.S. authorization the export of USML items, with certain exceptions, to both countries for combined military and counter-terrorism operations, joint research, development and production projects, mutually agreed special military projects and items for the U.S. military's use. The State Department will maintain its authority of which end-users can have access to USML items under the treaties by vetting an approved community of defense-related entities in both countries. Both the UK and Australia have agreed to prevent the re-export and re-transfer of such items outside the approved community without U.S. approval. If ratified, the treaties will be self-executing; and we have already prepared implementing arrangements to identify which defense articles, projects, and recipients are within the scope of the Treaties. These arrangements would become effective on the date of entry into force of the Treaties.

These treaties should become good examples of the Department's managing risk to fulfill its dual obligations to build partnership capacity and to protect

U.S. military technology via exports controls. In the past two years the Department has processed roughly 23,400 license applications for the United Kingdom and Australia, with only 15 licenses denied, none of which were for exports to either government. Given these facts, we are comfortable with creating a license free zone for mutually agreed end-users and projects with the UK and Australia. Among the benefits we expect to see from implementing these treaties is a reduction in the overall growth rate in license applications received, freeing us up to adjudicate other license applications even more expeditiously.

We have also focused intently on improving our business practices with a series of reforms, many of which are formalized in President Bush's Export Control Directive in January 2008. Many of the reforms included in the directive address the recommendations put forward last year by the Coalition for Security and Competitiveness. The package of reforms required under this directive will improve the manner in which the U.S. Department of State licenses the export of defense equipment, services and technical data, enabling the U.S. Government to respond more expeditiously to the military equipment needs of our friends, allies, and particularly our coalition partners.

The Directive mandates the commitment of additional financial and other resources, as well as procedural reforms, which will expedite the processing of export license applications for items controlled by the U.S. Munitions List. Although license processing times will be reduced as a result of this directive, the Administration is committed to ensuring that existing measures to prevent the diversion of such items to unauthorized recipients remain strong and effective.

Under the new procedures, the Secretary of State will implement guidance to ensure the review, analysis, and decision on export authorization requests for International Traffic in Arms Regulations (ITAR)-controlled articles, services, and technologies will be completed within 60 days from the submission of a completed license application. Certain national security exceptions, such as the need to perform end-use verification or notify Congress of the proposed export, will be outlined specifically. These guidelines will be available publicly.

In addition, we have instituted a mandatory review of any case related to our war efforts in Afghanistan and Iraq that is pending for greater than seven

days. We also now have concurrent review of TAA applications with DOD, which has proven to expedite the review of such items.

According to the directives, we will also soon provide a plan to the Office of Management and Budget outlining the resources required to carry out the directive without an increase in budgeted funds. The plan includes the financial and personnel resources necessary for the Directorate of Defense Trade Controls to execute its range of responsibilities, and will address the authority for and implementation of additional self-financing mechanisms, which will provide 75% of the Directorate's mission.

The President also directed that we implement a policy to grant access to third country and dual nationals from other NATO countries, European Union Member States, Japan, Australia, and New Zealand to certain licensed defense exports without the need for a separate export authorization. This policy was implemented in December 2007 with a Federal Register publication that permits these employees to be considered authorized under an approved license or TAA. This will alleviate the need for companies to seek non-disclosure agreements for such nationals and recognizes the low risk of transferring technologies to nationals of these countries under an approved license or TAA.

The President directed the National Security Council to work with State, Defense, and Commerce to issue revised guidance regarding interagency coordination of the commodity jurisdiction process. The goal is to provide for a timely mechanism to complete commodity jurisdiction requests or resolve interagency disputes within 60 days. We are working with the NSC and our colleagues from Defense and Commerce to make this process work smoothly.

The President also directed State to establish an interagency committee to serve as a forum to facilitate timely consideration and resolution of interagency disputes on defense export authorizations and commodity jurisdiction decisions. The committee will be chaired by the Deputy Assistant Secretary for Defense Trade and Regional Security, with membership at the Deputy Assistant Secretary level. State and Defense will be permanent members of the committee, with Commerce participating when commodity jurisdiction issues are addressed, and Homeland Security participating when the committee addresses compliance, enforcement, and specific commodity jurisdiction issues relating to technologies of homeland

security concerns, and other issues as determined by the Secretary of State. Other executive branch agencies may be invited to participate as necessary by the Secretary of State or as directed by the President.

The Directive also provides instruction to State to finish upgrading its electronic licensing system, with the goal of ensuring that all reviewers (within State and in other agencies) can electronically receive, distribute, and respond to the full range of documentation and material that is required or requested in support of the licensing process, including commodity jurisdiction requests. It ensures U.S. industry may interact, as appropriate, with the State Department on a fully electronic basis. In addition, by July 22, State, with assistance from Defense, Commerce, and Homeland Security, will provide the NSC with a plan to achieve electronic interoperability among these departments and with other relevant executive branch agencies.

Our efforts to accomplish these actions are well underway, and we look forward to engaging with U.S. industry as we work to implement these efforts over the coming months. Our results so far have been striking. At the beginning of FY07 DDTC had over 10,000 pending applications. By the end of March this year, we reduced the number to approximately 3,500 More strikingly, we now only have 68 cases over 60 days old, 41 of which are in the process of Congressional notification. In the summer of 2007, we had approximately 700 cases over the 60 day mark. It should be noted there always will be a significant number of cases in the processing pipeline (this simply reflects the hundreds of new applications we receive daily) and some cases will be difficult from a national security and foreign policy perspective. We have also reduced average processing time for each license by nearly 50 percent in the past year, going from nearly 36 to 18 days.

But we can do better, and we will. An important key to our success will be an effective and efficient partnership between the State Department and the Congress in the regulation and oversight of America's defense trade. In the weeks ahead, we hope to sit down with our partners here on the Hill to explore additional reforms that we can undertake together that will improve our government's overall efficiency, including greater use of information technology to support quicker and more transparent information sharing between the Congress and the Executive branch and clearer timelines and benchmarks for our decision-making process.

Finally, we can not just focus our efforts on improving our licensing operations. An important component of our mission is ensuring the enforcement of U.S. law to ensure that end-users of U.S. military equipment and technology using the equipment within the restrictions that we might impose. Last summer, the Department of Justice appointed the first National Export Control Coordinator to support a nationwide export enforcement initiative. We have been working closely with the coordinator since his appointment and continue to experience a growth in the number of export enforcement cases for which we are asked to support both the FBI and ICE. In FY 2007, law enforcement actions (DHS-ICE) pursuant to the AECA and the ITAR resulted in 165 arrests, 138 indictments, and 97 convictions. The focus of these cases continues to involve efforts related to China, Iran and terrorist groups.

In the end, U.S. export control policy is designed to enhance our national security and foreign policy interests, which of course includes protecting sensitive technology and preserving our economic strength and industrial base. Those two standards are sometimes in conflict. What we as your government owe the American people is designing a system that adjudicates such conflicts efficiently and transparently. We hope, with your help and support, to continue to reform our system with that goal in mind in order to protect our national interest.

DIRECTOR DEFENSE TECHNOLOGY SECURITY ADMINISTRATION BETH M. MCCORMICK TESTIMONY BEFORE THE SENATE HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA
APRIL 24, 2008, 2:00 P.M.

Chairman Akaka, Senator Voinovich, Members of the Subcommittee.

I appreciate the opportunity to appear before you today to discuss the Department of Defense's (DoD's) role in the export control process.

While DoD is not a regulatory authority, we provide the national security perspective to the Departments of State and Commerce in the export control process. In this role DoD, possesses unique capabilities to provide technical expertise, develop and validate coalition and interoperability requirements, and provide program insight necessary to ensure exports and technology security controls protect U.S. national security.

Within the Department, the Under Secretary of Defense for Policy has delegated the Defense Technology Security Administration (DTSA) the responsibility for all matters related to export control. DTSA's contribution to technology protection is multifaceted -- it includes participation in a robust export license review process within the U.S. Government, and active participation in international control regimes and bilateral dialogues with key international partners.

Our mission involves two inherent tensions: maintaining the U.S. military technological advantage while supporting interoperable coalition forces, and protecting critical U.S. technology while assuring the health of the U.S. defense industrial base. In this era of uncertainty and surprise, these two tensions will continue to intensify and require us to remain at the forefront of technological advancements and to build partnership capacity to meet the challenges of the ever-changing global security environment. The strategic goals of DTSA summarize it best:

1. **Preserve critical U.S. military technological advantages.** We must ensure our fighting men and women not only have the best equipment, but have a significant technological edge that provides them an advantage over any potential adversary.

2. **Support legitimate defense cooperation with foreign friends and allies.** DTSA annually processes over 40,000 export licenses a year. Roughly 75% of those export licenses reflect direct commercial sales to our closest foreign friends and allies.

3. **Assure the health of the defense industrial base.** DTSA will continue to balance national security issues while being receptive to the needs of the U.S. industrial defense base.

4. **Prevent proliferation and diversion of technology that could prove detrimental to U.S. national security.** DTSA works with government agencies and friendly nations to impede Weapons of Mass Destruction (WMD)-related trafficking and improve controls over existing weapons, materials and expertise.

DTSA is a full partner in the interagency export license process, with over 200 military, career civil service, and contractor personnel supporting the review and adjudication of these cases. We review these license applications to ensure that national security and the security of the warfighter are taken into consideration.

To that end, three DTSA directorates which contribute to the export control process are comprised of highly capable civilian servants and military personnel with extensive backgrounds in DoD and with other U.S. Government agencies, as well as the U.S. defense industry.

The Licensing and Policy Directorates are comprised of highly qualified civilian and military national security, foreign affairs, and intelligence specialists. These experts bring a wide range of backgrounds and experience to bear which qualify them to represent DoD and assess the national security implications of technology transfers as well as the global challenges we face.

DTSA's Technology Directorate is comprised of military and civilian scientists and engineers, all with advanced degrees. With extensive knowledge of DoD acquisition programs as well as work experience in various defense research laboratories and the U.S. defense industry, this directorate plays a vital role in DTSA's evaluation of the technical implications of export licenses.

In addition to our internal review of license applications, we closely consult and coordinate with the Military Services, the Joint Staff, and regional and functional offices in the Office of Secretary of Defense and, as required, other DoD components on license applications.

We continue to see an increase in the number of licenses sent to DoD for review every year. Since 2001, DTSA has seen an average yearly increase of 9.5% in munitions licenses and 11.6% in dual-use licenses. At the same time, we have increased efficiency in the process with DoD average processing time dropping by 8 days for State licenses and by 3 days for Commerce licenses.

In 2007 DTSA reviewed 23,868 munitions licenses with an average processing time of 15 days. That same year, DTSA reviewed 15,578 dual-use licenses, with an average case processing time of 13 days.

In 2008 we anticipate receiving 2,400 more munitions licenses than we did in 2007, and approximately 1,200 more dual-use licenses. Processing time for 2008 is currently averaging 13 days for munitions reviews and 12 days for dual use.

To meet these timelines for both State and Commerce licenses, we continually review the processes used to adjudicate license applications. DTSA utilizes a daily license prescreening process in which every license staffed from State and Commerce is reviewed by senior members of the licensing, technology and policy directorates. Following formal standard operating procedures, each license is reviewed to determine if it can be recommended for immediate approval based on precedent, the level of technology and/or the nature of the transaction. Using the prescreening process, DTSA is able to evaluate and provide a DoD recommendation for roughly a third of referred licenses back to State and Commerce in 1-to-5 days.

In addition, we use an electronic licensing system to receive, staff, adjudicate, and return our recommendation to the appropriate regulatory authority. This electronic licensing system is used for approximately 70% of the licenses we receive from the State Department and 100% of the licenses we receive from the Commerce Department. This has had a significant impact on our ability to be more efficient in the way we process export license recommendations. This reflects a dramatic improvement over past practices which required hand-delivery of hard-copy licenses.

Efficiency and timeliness, however, are not our only priorities. Prescreening and electronic licensing allow DoD reviewers to concentrate their attention on more complicated and sensitive requests dealing with commodities or capabilities not previously exported, or involving special end-user or regional stability concerns. To this end, we also utilize cross-functional teams comprised of experts to focus on the most complex export control programs and issues.

Finally, as Director, I have established internal procedures that allow the staff and external reviewers the opportunity to bring the most challenging and complex cases to my attention to receive guidance and adjudication during weekly license review meetings. The meetings also highlight licenses supporting key acquisition programs and support to military operations in Iraq and Afghanistan.

Combined, these initiatives create the right blend of synergy within our organization to address the constantly increasing caseload. DTSA's license review process is not "one-size-fits-all." We carefully review the totality of the export, the technology, end-user and end-use and develop a DoD recommendation specific to the item to be transferred and the country of destination. This process enables DTSA to focus our resources on licenses and issues which truly impact national security.

The U.S. export control process must be supplemented with complementary efforts by friends and allies aimed at protecting sensitive technology, ensuring that it is not used against U.S. and coalition forces. DTSA, together with other Departments and Agencies, works with partner countries and international control regime members to guard against proliferation and diversion of controlled items, including sensitive technology and WMD, to countries of concern. Accordingly, DTSA actively participates in the development of proposals for international

regimes such as the Wassenaar Arrangement, the Missile Technology Control Regime, and the Australia Group.

We face significant challenges as the lines between commercial and military technology become more blurred. The capability of commercial technology is more and more on par with that used in military systems, at the same time the DoD is increasingly dependent on commercial off-the-shelf technology. Because of this changing environment, DoD participates in commodity review proceedings to identify jurisdictional control over items and technology, to include commodity jurisdiction process under the International Traffic in Arms Regulations, and the commodity classification process, under the Export Administration Regulations.

Overall, our Departments work effectively together in the export control process. Not surprisingly, the roles and missions of the three Departments are different; our equities are not the same, but the balance between our perspectives makes for a healthy interagency debate.

The Export Control initiatives announced by President Bush in January address the need to reform the export control process to ensure proper levels of control for continued U.S. economic competitiveness and innovation while protecting national security. We are committed to working with our colleagues at Commerce and State to implement these initiatives.

Mr. Chairman, this concludes my statement. I appreciate the opportunity to join you today and would be happy to answer any further questions you may have regarding this subject.

Testimony by Matthew S. Borman, Deputy Assistant Secretary of Commerce
Bureau of Industry and Security
U. S. Department of Commerce

Before the Senate Committee on Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
April 24, 2008

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

Mr. Chairman, distinguished members of the Committee, thank you for the opportunity to discuss how we protect the national security and economic interests of the United States. In the post 9-11 era, we must be ever vigilant and we have been by continually updating our export licensing processes and refining how we at the Bureau of Industry and Security, promote the continued technology leadership, economic power, and national security of the United States.

A Changing Economic and Security Picture: Implications for our Export Control Regimes

Much of the architecture of our export control system was built during the Cold War when the world, while still dangerous, was in some ways a simpler place. The West confronted a clearly defined enemy, one which our allies shared, and we also held a significant technological advantage over our adversary. In the past, the United States was able to maintain its technological superiority over others, particularly our enemies, largely through a "denial" strategy where we prohibited the transfer or export of technology to other markets. The system of export controls that developed around this denial strategy was premised on the assumption that we had something others couldn't get – and the way to keep others from getting it was to deny U.S. firms the opportunity to sell it.

Dramatic changes in the economic landscape, however, challenge the underlying assumptions and foundations upon which our traditional denial strategy was based. As markets become increasingly integrated, production and supply chains for single goods now span the globe. Investment capital, technology, and intellectual talent are now more widely distributed. Moreover, many of the world's best and brightest have come to the United States, conducting research at our country's leading universities, research institutes, and technology firms. The consequence is that the fences we constructed in the past to preserve our technological superiority can no longer afford us the same level of protection.

It is not just changes in the economic landscape, however, which compels us to rethink our system of export controls. Today, we face more and varied national security risks from an increasing number of international actors – conventional challenges from nation-states, asymmetric and potentially catastrophic challenges from both nation-states and non-state actors, and the diffuse challenge of disruptive technologies that may enable adversaries of all kinds to

rapidly diminish our traditional overmatch advantages. And while our security is increasingly linked with others, we must still recognize that sometimes our allies, in addition to them being economic competitors, do not always share our security views.

These changes in both the political and economic landscape place tremendous pressure on our system of export controls which requires us to fine tune our strategies.

The Role of BIS in this Changing Global Landscape

The effective and efficient operation of the U.S. export control system is of the highest priority for BIS. The BIS Mission Statement succinctly encapsulates the role of BIS as a national security agency within the Department of Commerce. BIS' role is to

> Advance U.S. national security, foreign policy, and economic objectives by ensuring an effective export control and treaty compliance system and promoting continued U.S. strategic technology leadership.

The Bureau's paramount concern is the security of the United States, which includes its economic security, cyber security, and homeland security. Through administering U.S. dual-use export controls – that is, for products that have both civilian and military applications, BIS' focus is to stem the proliferation of weapons of mass destruction and the means of delivering them, to halt the spread of weapons and related technology to terrorists or countries of concern, and to further U.S. foreign policy objectives. The Bureau's mandate to protect U.S. national security includes not only supporting U.S. national defense, but also ensuring the health of the U.S. economy and the competitiveness of U.S. industry. Thus, BIS seeks to promote a strong U.S. defense industrial base, by ensuring that its regulations do not impose unreasonable burdens on innovation and commercial activity.

International cooperation and engagement is also critical to the Bureau's activities. Fulfilling the Bureau's mission of promoting security depends heavily upon international cooperation with our principal trading partners and other countries of strategic importance. BIS facilitates this international cooperation through ongoing multilateral dialogues in the context of the multilateral export control regimes (the Wassenaar Arrangement, Nuclear Suppliers Group, Australia Group, Missile Technology Controls Regime), and non-proliferation treaties such as the Chemical Weapons Convention. BIS also holds bilateral dialogues with countries that are major U.S. export markets such as the High Technology Cooperation Group with India and the High Technology Working Group with China.

The Bureau also has extensive cooperation with other departments and agencies and U.S. industry in carrying out its mission. BIS cooperates closely with the Departments of Energy, Defense, and State and the intelligence community in making policy, establishing jurisdiction and setting control levels for technology, and reviewing export license applications. BIS also works closely with a number of other agencies, principally the Departments of Homeland Security and Justice, in enforcing its dual-use export controls.

The Bureau carries out four major functions -- policy, licensing, outreach, and enforcement -- in administering the U.S. dual-use export control system. Policy is generally

established and revised through an interagency process, often chaired by the National Security Council, involving the Departments of Defense and State, with participation by other departments as warranted. Policy is implemented through the Export Administration Regulations (EAR) published by BIS. Regulatory revisions are typically cleared by the Departments of Defense and State and other departments as appropriate.

BIS frequently revises the EAR to adapt to changes in technology, markets, threats, and country policy. In fiscal year 2007, for example, BIS published 23 revisions to the EAR. These revisions adjusted control levels for certain technologies, revised export and reexport controls for the People's Republic of China, and imposed new foreign policy controls on North Korea. One of the ways BIS ensures that the dual-use export control system is efficient and effective is by frequent revisions to the EAR to ensure the controls are focused on the current challenges.

Executive Order 12981, as amended, governs the interagency license review process, which is thorough and comprehensive. After a company submits its license application, a BIS licensing officer reviews the application. The Departments of Defense, Energy, State, and other departments as warranted, review and make recommendations to BIS. Applications also undergo a review by the intelligence community. Under Executive Order 12981, applications that reviewing departments disagree on are "escalated" to the Operating Committee (OC). The OC is an interagency panel of senior career experts. Further escalations go first to the Advisory Committee on Export Control Policy (ACEP), which is at the Assistant Secretary level. If further escalation is needed, a disputed application goes then to the Export Administration Review Board (EARB) (cabinet level), and could ultimately go to the President. Escalations above the ACEP are extremely rare and there have been none during this Administration.

Over the past ten years, BIS has received between 10-20,000 license applications per year, with a high of 19,296 applications in fiscal year (FY) 2007. The average processing time for all BIS licenses in FY 2007 was 28 days.

Reviewing departments disagree on only a small fraction of license applications. In FY 2007, 0.8 percent of all cases received by BIS were escalated to the OC and only .13 percent were further escalated to the ACEP. The OC's case average processing time in the first half of FY 2008 was 14 days, the processing time set forth in Executive Order 12981. Applications at the ACEP are generally resolved with only one meeting, which takes place once a month. The dispute resolution process is therefore working as intended.

One of the ways BIS assesses the effectiveness of the licensing process is through end-use checks. When performed prior to approval (pre-license check), the check provides feedback on the reviewing agencies' initial recommendation to approve a particular transaction. When performed after an item is delivered, the results of a post-shipment verification provide direct feedback on the effectiveness of the license review process. BIS conducted over 850 end-use checks worldwide in FY 2007.

Keeping U.S. industry informed of its obligations under the EAR is another critical part of ensuring that the dual-use export control system is efficient and effective. BIS typically conducts approximately 45 live seminars annually across the United States and in two to three countries abroad each year. BIS evaluates the effectiveness of these seminars through detailed evaluation forms from participants. Moreover, BIS has recently established an on-line training

room on its website for individualized, cost-effective outreach to individuals and small and medium sized enterprises in the United States and around the world. The on-line training room has already received over 10,000 hits from interested internet users. BIS also offers webinars and other on-line materials and tutorials to aid in its outreach efforts and participates in related outreach events organized by other agencies and entities.

The major activities of BIS' enforcement program include investigating criminal and administrative violations and imposing civil sanctions for violations of the EAR, IEEPA, the Chemical Weapons Convention Implementation Act (CWCIA), and related statutes and regulations. Consistent with the President's national security priorities, BIS prioritizes its enforcement activities on cases relating to the proliferation of weapons of mass destruction, terrorism, and military diversion. In FY 2007, BIS Special Agents made 23 arrests, and assisted in obtaining 16 convictions and $25.3 million in criminal fines. Administratively, 65 cases were settled through Final Orders totaling $5.8 million in fines.

A significant challenge for BIS is the long-standing lapse of the Export Administration Act of 1979, as amended (EAA). This lapse hinders the ability of BIS to employ up-to-date authorities to enforce the dual-use export control system. While in lapse, the EAA cannot be updated and thus the enforcement authorities of BIS's Special Agents' have not kept pace with an ever changing criminal landscape.

BIS's Special Agents need updated tools to combat proliferation in an era of globalization. For example, BIS's agents are currently unable to work directly with their foreign law enforcement counterparts. In addition, they do not have the authority to conduct undercover operations—or even make a simple arrest – *in the United States* without undergoing a cumbersome bureaucratic process. While effective cooperation between U.S. law enforcement agencies has enabled our agents to overcome some of these hurdles, they need updated enforcement authorities to enhance our national security by enabling domestic and international investigations and enforcement actions to proceed more quickly, efficiently, and effectively.

S. 2000, the "Export Enforcement Act of 2007," sponsored by Senator Christopher Dodd, would reauthorize the EAA and enhance the enforcement authorities of BIS's Special Agents. We support prompt enactment of this bill, which is similar to the Department's proposal, and would address one of the most significant challenges BIS faces in administering the dual-use export control system.

BIS Initiatives to Address the Dynamic Nature of the Geopolitical System

While BIS strives for efficiency and accuracy in administering U.S. dual-use export controls, the Bureau is constantly reviewing, revising, and updating its policies to make the process more effective. These efforts are focused by the dual-use export control reform directive issued by the President on January 22, 2008 and the report of the Secretary's Deemed Export Advisory Committee (DEAC) issued in December 2007. In addition, to address the Government Accountability Office January 2007 report, BIS has established a new Performance Goal in the FY 2009 President's budget request. Collectively, these efforts will further BIS's ability to effectively operate, with our interagency partners, our dual-use export control system.

U.S. Export Control Reform Directives

This past January, the President announced a series of U.S. export control reform directives to ensure that dual-use export control policies and practices support the National Security Strategy while facilitating U.S. economic and technological leadership. To further these objectives, the President directed that certain steps be taken to enhance the focus of the dual-use export control system in three main areas.

First, the directives focus the dual-use export control system on foreign end-users of U.S. high technology products in order to adapt to the changing threat environment and the globalization of technology and markets. Export control policy focused on foreign end-users will permit the facilitation of U.S. high-tech exports to "trusted customers," while preventing those foreign parties acting contrary to U.S. national security and foreign policy interests to receive sensitive technologies. The expanded Entity List, the Validated End-User (VEU) Program, and the Intracompany Transfer License Exception are among the initiatives that focus on specific foreign end-users.

Second, because technological and economic competitiveness are vital to the long- term national security of the United States, the directive stresses that the U.S. export control system must constantly reassess to ensure that the appropriate items are controlled. To achieve this goal, among other initiatives, the Bureau has begun a systematic review and update of the Commerce Control List (CCL). BIS has already completed the first phase of this effort with the publication of website guidance and clarifications to certain Commerce Control List entries. BIS continues to work on the second and third phases of this review by developing proposed changes to unilateral and multilateral controls over the next several months.

Third, the directive requires heightened transparency in BIS' administration of the dual-use export control system. To achieve this, BIS intends to publish advisory opinions and other additional relevant information to assist exporters in complying with the regulatory requirements.

Deemed Export Advisory Committee Report

The report of the Secretary's Deemed Export Advisory Committee (DEAC) provides specific focus on the challenge of foreign national's access to controlled dual-use technology in the United States. The report points out that technological talent is increasingly ubiquitous. Many of the world's best and brightest come to the United States to study or conduct research at our universities; many others are developing cutting edge technologies at our country's leading companies. The challenge is how to protect U.S. security interests while maintaining our research institutions and companies as the destinations of choice for talented foreign students and professionals. The DEAC recently concluded that current policy is not equipped to handle today's information economy, changes in the nature of the post-Cold War threat to national security, the increased globalization of technology development and manufacturing, and the heightened development of cutting-edge technologies abroad. The committee therefore endorsed a revised approach to deemed exports and presented BIS with a number of specific reform proposals.

BIS has carefully considered the recommendations made by the DEAC and taken up many of them. For example, BIS will soon formally establish an Emerging Technology and Research Advisory Committee to undertake reviews of emerging technologies and ensure that the CCL remains up-to-date in this regard. BIS is also in the process of developing the review criteria when authorizing deemed exports to foreign nationals. Additionally, BIS will consider factors raised in the DEAC report as it is conducting its comprehensive review of the CCL.

Additional Effectiveness Measure

BIS now has an additional tool to further measure the effectiveness of the dual-use export control system. Its new performance goal, to "Maintain and Strengthen an Adaptable and Effective U.S. Export Control and Treaty Compliance System," will measure the percentage of shipped transactions in compliance with the licensing requirements of the Export Administration Regulations (EAR). This measure evaluates how effective the dual-use export control system is in ensuring that items subject to a BIS licensing requirement are exported in compliance with the EAR. BIS will measure exporter compliance with the EAR by reviewing, on an annual basis, the entire compilation of export transactions subject to a license requirement (*i.e.,* licensed and license exception shipments) and determining what percentage are in compliance with the EAR following any BIS intervention as necessary. BIS interventions will comprise actions taken to mitigate or resolve non-compliance findings (*i.e.,* counseling, outreach, warning letters, and enforcement referral).

Conclusion

The United States faces unprecedented security challenges from threats of terrorism to proliferation of weapons of mass destruction and advanced conventional weapons to instability in a number of regions in the world. The United States also faces unprecedented economic challenges from the increasing worldwide diffusion of high technology and global markets. The United States must, therefore, ensure that the dual-use export control system is properly equipped to meet those challenges. BIS is continually evaluating and revising the dual-use export control system to effectively meet those challenges.

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EXPORT CONTROLS

State and Commerce Have Not Taken Basic Steps to Better Ensure U.S. Interests Are Protected

Statement of Ann Calvaresi Barr, Director
Acquisition and Sourcing Management

GAO-08-710T

April 24, 2008

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Highlights

Highlights of GAO-08-710T, a testimony before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Homeland Security and Governmental Affairs, U.S. Senate

EXPORT CONTROLS

State and Commerce Have Not Taken Basic Steps to Better Ensure U.S. Interests Are Protected

Why GAO Did This Study

In controlling the transfer of weapons and related technologies overseas, the U.S. government must limit the possibility of sensitive items falling into the wrong hands while allowing legitimate trade to occur. Achieving this balance has become more challenging due to redefined security threats and a globalized economy. The export control system is a key component of the safety net of programs intended to balance multiple U.S. interests.

The export control system is managed primarily by the State Department, which regulates arms exports, and the Commerce Department, which regulates dual-use exports that have military and civilian applications. Unless an exemption applies, arms exports require licenses, while many dual-use exports do not require licenses.

Based on GAO's extensive body of work on the export control system, this testimony focuses on export licensing inefficiencies, poor interagency coordination, and limits in State's and Commerce's ability to provide a sound basis for changes to the system.

In prior work, GAO made recommendations to address vulnerabilities in the export control system, but many have not been implemented. Because of these vulnerabilities and others identified in the larger safety net of programs, GAO has designated the effective protection of technologies critical to U.S. national security interests as a high risk area warranting strategic reexamination.

To view the full product, including the scope and methodology, click on GAO-08-710T. For more information, contact Ann Calvaresi Barr at (202) 512-4841 or calvaresibarra@gao.gov.

What GAO Found

State and Commerce have not managed their respective export licensing processes to ensure their effective operations. In November 2007, GAO reported that procedural and automation weaknesses, along with workforce challenges, created inefficiencies in State's arms export licensing process. In less than 4 years, median processing times for license applications nearly doubled, with State's backlog of open cases peaking at 10,000. According to State officials, the department has begun analyzing its licensing data and implementing actions that will allow it to better manage its workload and determine the most effective workforce structure. While Commerce's license application processing times for dual-use exports have remained relatively stable, the overall efficiency of its process is unknown. This is due in part to Commerce's lack of performance measures for all steps in its process and analyses that would allow it to identify opportunities for improvement.

Poor coordination among State, Commerce, and the other departments involved in the export control system has created vulnerabilities. State and Commerce have disagreed on which department has jurisdiction over the export of certain items. In one case, Commerce determined that an item was subject to its less restrictive export requirements when, in fact, it was State-controlled. Such improper determinations and unclear jurisdiction not only create an unlevel playing field—because some companies may gain access to markets that others will not—it also increases the risk that sensitive items, such as missile-related technologies, will be exported without the appropriate review and resulting protections. Further, State and Defense took almost 4 years to reach agreement regarding when certain arms export licensing exemptions could be used by exporters in support of Defense-certified programs. This lack of agreement could have resulted in export requirements being applied inconsistently. Also, in response to a GAO recommendation, State and Commerce only recently began regularly receiving information on criminal enforcement actions—information that is important to consider upfront when reviewing license applications for approval.

Despite dramatic changes in the security and economic environment, State and Commerce have not undertaken basic management steps to ensure their controls and processes are sufficient and appropriate for protecting U.S. interests. Notably, neither department has assessed its controls in recent years. Nevertheless, State and Commerce maintained that no fundamental changes to their export control system were needed. Earlier this year, the White House announced that the President signed directives intended to ensure that the export control system focuses on meeting security and economic challenges. Similarly, legislation to make changes to the export control system has been introduced. However, few details about the basis for these initiatives are known. In the past, GAO has found that export control initiatives not grounded in analyses have generally not resulted in the desired improvements to the system.

Mr. Chairman and Members of the Subcommittee:

It is my pleasure to be here today to discuss the U.S. export control system—one component of the government's safety net of programs designed to protect critical technologies while allowing legitimate defense trade. In controlling the transfer of weapons and related technologies to other countries and foreign companies, the U.S. government must consider and strike a balance among multiple and sometimes conflicting national security, foreign policy, and economic interests. Achieving this balance has become increasingly difficult given the evolving security threats we face, the quickening pace of technological innovation, and the increasing globalization of the economy. GAO has examined not only the export control system but also other components of the safety net, such as the foreign military sales program, reviews of foreign investments in U.S. companies, and a program for identifying militarily critical technologies. Within each component and across the safety net, we identified significant vulnerabilities and threats that prompted us in 2007 to designate the effective protection of technologies critical to U.S. national security interests as a new high-risk area warranting strategic reexamination.[1] I believe that today's hearing contributes to that reexamination.

The export control system is a particularly complex component of the government's safety net. The system is managed primarily by the Departments of State and Commerce, though other departments such as Defense, Homeland Security, and Justice play active roles in the system. State regulates arms exports,[2] while Commerce regulates exports of dual-use items, which have both military and civilian applications. Exports subject to State's regulations generally require a license, unless an exemption applies. Many Commerce-controlled items do not require a license for export to most destinations. However, in managing their respective systems, both departments are responsible for limiting the possibility of export-controlled items and technologies falling into the wrong hands while allowing legitimate trade to occur.

Over the last decade and most recently in November 2007, we have reported on various aspects of the U.S. export control system and the

[1] See GAO, *High Risk Series: An Update*, GAO-07-310 (Washington, D.C.: January 2007).

[2] "Arms" refers to defense articles and services as specified in 22 U.S.C. § 2778.

weaknesses and challenges that affect the system's overall effectiveness.[3] My statement today focuses on: (1) inefficiencies in the export licensing processes, (2) poor interagency coordination, and (3) limits in State's and Commerce's ability to identify problems and provide a sound basis for making changes to the system.

My statement is based on GAO's extensive body of work on the export control system. We have made a number of recommendations to address the weaknesses and challenges we identified, but many of them have yet to be implemented. We conducted these performance audits in accordance with generally accepted government auditing standards. Those standards require that we plan and perform audits to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Summary

State and Commerce have not managed their export licensing processes to ensure their effective operation. In 2007, we found that State's export licensing process was hindered by procedural weaknesses, problems with a key electronic processing system, and human capital challenges. These inefficiencies contributed to State's median processing times nearly doubling from 14 days in fiscal year 2003 to 26 days in 2006 and a significant increase in State's backlog of open cases. According to State officials, the department has begun analyzing its licensing data and implementing measures that will allow it to better manage its workload and determine the most effective workforce structure. For the small percentage of dual-use exports that require licenses, Commerce's median processing times have remained relatively stable at about 40 days. However, the overall efficiency of Commerce's application review process is unknown. This is due in part to Commerce's lack of performance measures for all steps in its review process.

Our prior work has also found that poor coordination among State, Commerce, and other departments involved in export controls has further weakened the system. For example, State and Commerce have disagreed on which department controls the export of certain items. In one case, Commerce determined that an item was subject to its less restrictive

[3] See list of related GAO products at the end of this statement.

export requirements when it was, in fact, State-controlled. Such improper determinations and unclear jurisdiction not only create an unlevel playing field because some companies may gain access to markets that others will not, it also increases the risk that sensitive items, such as explosive detection devices, will be exported without the appropriate review and resulting protections. Further, State and Defense took almost 4 years to reach agreement regarding when certain licensing exemptions could be used by exporters in support of Defense-certified programs. This lack of agreement could have resulted in export requirements being inconsistently applied. Finally, in response to our prior recommendation, State and Commerce only recently began regularly receiving information on criminal enforcement actions from Justice—information that is important to consider upfront as part of the license application review process.

State and Commerce have not undertaken basic steps to ensure their controls and processes are sufficient and appropriate to protect U.S. interests. Notably, neither department has systematically assessed its controls in recent years—despite dramatic changes in the security and economic environment. Nevertheless, State and Commerce have maintained that no fundamental changes to the export control system were needed. Earlier this year, the White House announced the President signed directives intended to ensure that the export control system focuses on meeting security and economic challenges. Legislation has also been introduced to make changes to the export control system. However, few details about the basis for these initiatives are known. In the past, we have reported that export control initiatives not grounded in analyses have generally not resulted in the desired improvements to the system.

Background

The U.S. government has a myriad of laws, regulations, policies, and processes intended to identify and protect critical technologies so they can be transferred to foreign parties in a manner consistent with U.S. national security, foreign policy, and economic interests. Advanced weapons and militarily useful technologies are sold by U.S. companies for economic reasons and by the U.S. government for foreign policy, security, and economic reasons. Yet, the technologies that underpin U.S. military and economic strength continue to be targets for theft, espionage, reverse engineering, and illegal exports. As a result, the safety net of programs, many which were put in place decades ago, not only has to protect critical technologies but it also has to do so in a manner that allows legitimate trade with allies and other friendly nations.

The U.S. export control system for defense-related items involves multiple federal agencies and is divided between two regulatory bodies—one managed by State for arms and another managed by Commerce for dual-use items (see table 1).

Table 1: Roles and Responsibilities in the Arms and Dual-Use Export Control Systems

Principal regulatory agency	Mission	Statutory authority	Implementing regulations
State Department's Directorate of Defense Trade Controls	Regulates export of arms by giving primacy to national security and foreign policy concerns	Arms Export Control Act of 1976[a]	International Traffic in Arms Regulations
Commerce Department's Bureau of Industry and Security	Regulates export of dual-use items by weighing economic, national security, and foreign policy interests	Export Administration Act of 1979[b]	Export Administration Regulations
Other federal agencies			
Department of Defense	Provides input on which items should be controlled by either State or Commerce and conducts technical and national security reviews of export license applications submitted by exporters to either State or Commerce		
Department of Homeland Security	Enforces arms and dual-use export control laws and regulations through border inspections and investigations[c]		
Department of Justice	Investigates any criminal violations in certain counterintelligence areas, including potential export control violations, and prosecutes suspected violators of arms and dual-use export control laws		

Source: Cited laws and regulations.

[a]22 U.S.C. 2751 et seq.

[b]50 U.S.C. App. 2401 et seq. Authority granted by the act terminated on August 20, 2001. Executive Order 13222, Continuation of Export Control Regulations, issued August 2001, continues the export controls established under the Act and the implementing Export Administration Regulations. Executive Order 13222 requires an annual extension and was recently renewed by Presidential Notice on August 15, 2007.

[c]Homeland Security, Justice, and Commerce investigate potential dual-use export control violations. Homeland Security and Justice investigate potential arms export control violations.

State's and Commerce's implementing regulations contain lists that identify the items and related technologies each department controls and establish requirements for exporting those items. Exporters are responsible for determining which department controls the items they seek to export and what the regulatory requirements are for export. The two departments' controls differ in several key areas. In most cases, Commerce's controls over dual-use items are less restrictive than State's controls over arms. Many items controlled by Commerce do not require licenses for export to most destinations, while State-controlled items

generally require licenses for most destinations. Also, some sanctions and embargoes only apply to items on State's U.S. Munitions List and not to those on the Commerce Control List. For example, Commerce-controlled items may be exported to China while arms exports to China are generally prohibited.

Even when items are exempt from licensing requirements, they are still subject to U.S. export control laws. Responsibility for enforcing those laws and their associated regulations largely rests with various agencies within Commerce, Homeland Security, Justice, and State. These enforcement agencies conduct a variety of activities, including inspecting items to be exported, investigating potential export control violations, and pursuing and imposing the appropriate penalties. Punitive actions, which are either criminal or administrative, can be taken against violators of export control laws and regulations. Justice can prosecute criminal cases, where the evidence shows that the exporter willfully and knowingly violated export control laws. Prosecutions can result in imprisonment, fines, and other penalties. State or Commerce can impose fines, suspend export licenses, or deny export privileges for administrative violations.

Inefficiencies in the Processing of License Applications Hinder the Export Control System

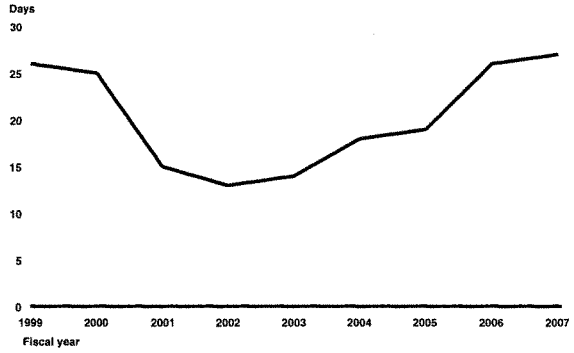
Reviews of export license applications require time to deliberate and ensure that license decisions are appropriate. Such reviews, though, should not be unnecessarily delayed due to inefficiencies or be eliminated for efficiency's sake—both of which could have unintended consequences for U.S. security, foreign policy, and economic interests. However, State and Commerce have not managed their respective export licensing processes to ensure their efficient operation.

As we have previously reported, inefficiencies have contributed to increases in State's processing times for license applications and related cases and its inability to keep pace with a growing workload.[4] State's processing times for arms export cases began increasing in fiscal year 2003—with median processing times nearly doubling from 14 days to 26 days by fiscal year 2006 (see fig. 1). During this period, State's workload increased by 20 percent, from about 55,000 to 65,000 cases. State was unable to keep pace with this growing number of cases, which resulted in

[4] GAO, *Defense Trade: State Department Needs to Conduct Assessments to Identify and Address Inefficiencies and Challenges in the Arms Export Process*, GAO-08-89 (Washington, D.C.: Nov. 30, 2007).

a significant number of open cases awaiting review and final action. At the end of fiscal year 2006, this so called "backlog" reached its peak at over 10,000 open cases, prompting State to undertake extraordinary measures—such as extending work hours and canceling training and industry outreach—to reduce the number of open cases. However, such measures were not sustainable and did not address underlying inefficiencies. Concerns were also raised that these measures could have the unanticipated effect of shifting the focus from the mission of protecting U.S. interests to simply closing cases to reduce the number of open cases.

Figure 1: Median Processing Times for Arms Export Cases, Fiscal Year 1999 through April 2007 (in days)



Source: GAO analysis of State data.

At the time of our 2007 review, we found that State had not analyzed licensing data to identify inefficiencies and develop sustainable solutions to manage its review process and more effectively structure its workforce. Through our extensive analysis of State's data, we determined that the overall trend of increased processing times and open cases was attributable to several factors, including procedural weaknesses, problems with its new electronic processing system, and human capital challenges, many of which had gone unnoticed and unaddressed by State.

- **Procedural Weaknesses**: State lacked screening procedures to promptly identify those cases needing interagency review. As a result, cases often languished for weeks in a queue awaiting assignment or initial review before being referred to another agency, such as Defense, for further review. State also lacked procedures to expedite certain cases. We found that processing times in fiscal year 2006 for exports to the United Kingdom and Australia, which by law were to be expedited, did not differ significantly from processing times for other allied countries.[5] Similarly, processing time goals for applications in support of Operations Iraqi Freedom and Enduring Freedom were not being met.

- **Electronic Processing Problems:** State officials have cited D-Trade—its new automated system for processing cases—as the most significant effort to improve efficiency. However, State's implementation of D-Trade has been problematic and has not been the promised panacea for improving processing times. Our analysis showed that there was no significant difference in processing times for similar cases whether they were submitted via D-Trade or the traditional paper-based system. State relied on this automated solution without reengineering the underlying processes or developing tools to facilitate the licensing officer's job. For example, D-Trade has limited capabilities to reference precedent cases that would allow licensing officers to leverage work previously done on similar cases, which could not only help to expedite the processing of a case but could also ensure greater consistency among similar cases. Further, D-Trade experienced performance problems that State officials attributed to poorly defined requirements and a rush to production. For example, because of a glitch in January 2007, 1,300 cases received during a 3-day period had to be resubmitted by exporters, which resulted in rework.

- **Human Capital Challenges:** State has also faced human capital challenges in establishing and retaining a sufficient workforce with the experience and skills needed to efficiently and effectively process arms export cases. For example, the number of licensing officers on board was at the same level in fiscal years 2003 and 2006, despite an almost 20 percent increase in cases over that period. As a point of comparison, in fiscal year 2005, State had 31 licensing officers who closed approximately 63,000 cases while Commerce had 48 licensing officers who closed approximately 22,000 cases. Additionally, Defense had not

[5] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1225 (2004).

been providing State with its full complement of detailed military officers, who are generally assigned to review complex agreements.[6] State officials have acknowledged that more work was falling on fewer experienced staff. According to these officials, in the summer of 2006, about half of State's licensing officers had less than a year of experience, and many lacked the authority needed to take final action on cases.

These findings prompted us to recommend that State conduct analyses of its licensing data to assess root causes of inefficiencies and then identify and implement actions that would allow it to better manage its workload, reexamine its processes, and determine the most effective workforce structure. We are encouraged to learn that, under the direction of new leadership responsible for managing the arms export control system, State has recently committed to implementing these recommendations and taking actions to address the issues we identified. Specifically, State has informed us that it (1) has implemented procedures to more quickly determine whether cases should be referred to other agencies or State bureaus for review and instituted senior level reviews of cases that are over 60 days old, (2) is planning future D-Trade upgrades that are expected to facilitate case reviews by licensing officers and allow managers to better oversee the processes, and (3) has restructured its licensing divisions to ensure a more equitable distribution in the workload and skill level of licensing officers based on our analysis. While these recently reported actions are encouraging, we have not yet examined them to determine their effects.

Concerns about efficiency have largely focused on State's processing of applications for arms exports, in part, because few dual-use exports subject to Commerce's controls require licenses. In 2005, for example, 98.5 percent of dual-use exports, by dollar value, were not licensed.[7] While few dual-use exports are licensed, the number of license applications processed by Commerce has increased in recent years—increasing by over

[6] The Foreign Relations Authorization Act, Fiscal Year 2003 (Pub. L. No. 107-228, § 1401(c) (2002)) states that the Secretary of Defense should ensure that 10 military officers are continuously detailed to State's Directorate of Defense Trade Controls.

[7] This amount reflects only the export of items specifically identified on Commerce's control list. If an item is not listed on the control list but is subject to Commerce's regulations, it falls into the category know as EAR 99. In 2005, 99.98 percent of EAR99 items were exported without licenses. Amounts do not include data for exports to Canada.

50 percent from fiscal years 1998 through 2005.[8] During that time period, Commerce's overall median processing times have remained stable, around 40 days, and are consistent with time frames established by a 1995 executive order.[9] However, the overall efficiency of Commerce's licensing process is unknown in part because Commerce lacks efficiency-related measures and analyses that would allow it to identify opportunities for improvement. For example, to determine the efficiency of its license application review process, Commerce only measures its performance in terms of how long it takes to refer an application to another agency for review. Commerce does not have efficiency-related measures for other steps in its review process, such as how quickly a license should be issued once other agencies provide their input, or for the entire process. During the course of our prior reviews, Commerce did not provide us with evidence that would indicate it has undertaken analyses of licensing data to determine if previously established time frames are still appropriate or to identify the drivers of its workload or the bottlenecks in its processes that would allow it to implement actions to improve efficiency.

Poor Interagency Coordination Creates Vulnerabilities

Since multiple departments have a role to play in the export control system, its effective operation depends on those departments working together. However, we have identified instances related to export control jurisdiction, the use of license exemptions, and the dissemination of enforcement information when poor coordination among the departments has created vulnerabilities in the system's ability to protect U.S. interests. The departments have taken action to address some—but not all—of these vulnerabilities.

Given the different restrictions State and Commerce have on the items subject to their controls, the determination of which items fall under State's export jurisdiction and which fall under Commerce's is fundamental to the U.S. export control system. However, we have

[8] GAO, *Export Controls: Improvements to Commerce's Dual-Use System Needed to Ensure Protection of U.S. Interests in the Post-9/11 Environment*, GAO-06-638 (Washington, D.C.: June 26, 2006).

[9] Under Executive Order No. 12981 and 15 C.F.R. §750.4, the entire dual-use license application process—including an interagency escalation process if agencies cannot reach agreement—is to be completed within 90 days, unless an agency appeals the decision to the President who is given no time limit. However, few applications are escalated through the interagency dispute resolution process, which means that reviews of most applications are completed within 40 days.

previously reported that State and Commerce have disagreed on which department has jurisdiction over certain items. In some cases, both departments have claimed jurisdiction over the same items, which was the case for certain missile-related technologies.[10] In another case, for example, Commerce improperly determined that explosive detection devices were subject to Commerce's less restrictive export control requirements when they were, in fact, State-controlled.[11] Such jurisdictional disagreements and problems are often the result of minimal or ineffective coordination between the two departments and the departments' differing interpretations of the regulations. Despite our recommendations to do so, the two departments have not yet come together to resolve these jurisdictional disputes or develop new processes to improve coordination. Until these disagreements and coordination problems are resolved, exporters—not the government—will continue to determine which restrictions apply and, therefore, the type of governmental review that will occur. Not only does this create an unlevel playing field and competitive disadvantage—because some companies may gain access to markets that others will not—but it also increases the risk that critical items will be exported without the appropriate review and resulting protections.

Even when jurisdiction over an export-controlled item is clearly established, there is not always agreement among the departments on when an export license is required. While State generally requires a license for most arms exports, its regulations exempt exports that meet specific criteria from licensing requirements. For a limited number of licensing exemptions, Defense may confirm that the export qualifies for the use of an exemption in support of Defense activities, such as sharing of technical data related to defense acquisition programs and defense cooperative agreements with allies and friendly nations. However, our work revealed that State and Defense had different interpretations of the exemptions and what exports could be certified by Defense.[12] For example, State officials maintained that one exemption was only for use by U.S. government personnel, while Defense officials stated it was available for use by

[10] GAO, *Export Controls: Clarification of Jurisdiction for Missile Technology Items Needed*, GAO-02-120 (Washington, D.C.: Oct. 9, 2001).

[11] GAO, *Export Controls: Processes for Determining Proper Control of Defense-Related Items Need Improvement*, GAO-02-996 (Washington, D.C.: Sept. 20, 2002).

[12] GAO, *Defense Trade: Clarification and More Comprehensive Oversight of Export Exemptions Certified by DOD are Needed*, GAO-07-1103 (Washington, D.C.: Sept. 19, 2007).

contractors working in direct support of Defense activities. For approximately 4 years, the lack of a common understanding of the exemption created a vulnerability as regulations and licensing requirements could have been inconsistently applied. Further, we found that State and Defense lacked comprehensive data to oversee the use of these exemptions. Such data would allow the departments to identify and assess the magnitude of transfers certified for exemption use. Specifically, Defense's 2006 annual report to State on the use of the exemptions provided data on 161 certifications, but we identified 271 additional certifications that were not included in Defense's report because they were not entered into a centralized Defense database. We understand that, in response to our recommendation, State and Defense established a working group and recently reached agreement to resolve the issues identified in our report.

When an exporter applies for a license, both State and Commerce are to consider whether the parties to the proposed export are eligible to sell or receive controlled items and technologies. Individuals or companies indicted or convicted of violating various laws may be denied from participating in proposed exports. Therefore, information on criminal export control prosecution outcomes should help inform the export control process by providing State and Commerce with a complete picture of the individual or company seeking an export license. Prosecuting export cases can be difficult, since securing sufficient evidence to prove the exporter intentionally violated export control laws can represent unique challenges, especially when the item being exported is exempted from licensing or the case requires foreign cooperation. We reported in 2006 that while Justice and the other enforcement agencies have databases that capture information on their enforcement activities, the outcomes of criminal cases were not consistently shared with State and Commerce.[13] Instead State and Commerce relied on informal processes to obtain information on indictments and convictions, which created gaps in their knowledge. For example, we found that the watchlist used by Commerce to screen applications was incomplete as it did not contain 117 companies and individuals that had committed export control violations. Prompted by our recommendation, Justice began providing State and Commerce with quarterly reports on criminal enforcement actions so that such

[13] GAO, *Export Controls: Challenges Exist in Enforcement of an Inherently Complex System*, GAO-07-265 (Washington, D.C.: Dec. 20, 2006).

information can be considered upfront during the license application review process.

Absence of Assessments Limits Ability to Identify Problems and Make Improvements to the System

To adapt to the accelerating pace of change in the global security, economic, and technological environment, federal programs need to systematically reassess priorities and approaches and determine what corrective actions may be needed to fulfill their missions.[14] For example, to meet the challenges of the 21st century, agency leaders need to reexamine their programs, asking questions related to their program's relevance and purpose, how success should be measured, and whether they are employing best practices. Given the two departments' missions of controlling defense-related exports while allowing legitimate trade, State and Commerce should not be exceptions to this basic management tenet. Although dramatic changes have occurred in the security and economic environment since the start of the 21st century, State and Commerce have not conducted systematic assessments to determine whether their controls and processes are sufficient and appropriate or whether changes are needed to better protect U.S. interests. Despite providing us with no basis for their positions and the existence of known vulnerabilities, both departments informed us that no fundamental changes to their respective systems were needed.

Earlier this year, the President signed a package of directives that, according to the White House, will ensure that U.S. export control policies and practices support national security while facilitating economic and technological leadership. Relatively few details about the directives or the basis for particular initiatives have been publicly released, though they reportedly incorporate recommendations provided by industry. We have not had an opportunity to review the specifics of the directives, how they were formulated, or how they will be implemented. Legislation has also been introduced to make changes to the export control system.[15]

While we have not had an opportunity to evaluate the new directives, a note of caution may be drawn from our work regarding a prior set of

[14] GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325SP (Washington, D.C.: February 2005) and *21st Century Challenges: Transforming Government to Meet Current and Emerging Challenges*, GAO-05-830T (Washington, D.C.: July 13, 2005).

[15] S. 2000, the Export Enforcement Act of 2007, was introduced in August 2007 and H.R. 4246, the Defense Trade Controls Performance Improvement Act of 2007, was introduced in November 2007.

initiatives that were also designed to improve the export control system. In 2000, the Defense Trade Security Initiatives (DTSI), which was characterized as the first major post-Cold War revision to the U.S. export control system, was unveiled. DTSI was comprised of 17 different initiatives developed by State and Defense to expedite and reform the U.S. export control system. At the time, we determined that no analysis of the problems that the initiatives were intended to remedy or demonstration of how they would achieve identified goals had been conducted.[16] It turned out that the justifications for the initiatives was, in part, based on anecdotes that were factually incorrect or only told part of the story. In one example cited by Defense, the lengthy processing time for an export license caused a foreign firm to cancel its contract with a U.S. aerospace company, but upon closer examination, we learned that U.S. government had denied the license because of concerns regarding the foreign firm's ties with the Chinese military. Because there was little assurance that DTSI would result in improvements to the system, we were not surprised during our subsequent work when we found that the initiatives had generally not been successful. For example, D-Trade was one of the initiatives, but as already discussed, its anticipated efficiencies have not yet been realized. Additionally, processing time goals established in DTSI for applications to assist allies in increasing their military capabilities have not been met. Other initiatives have not been widely used by exporters. For example, we reported that between 2000 and 2005, State had only received three applications for comprehensive export authorizations for a range of exports associated with multinational defense efforts, including the Joint Strike Fighter.[17] According to Defense and contractor officials, while such authorizations were intended to lessen the administrative burden and improve processing times for routine export authorizations, companies have opted not to use them because of the extra costs associated with their compliance requirements.

Conclusions

The government's safety net of programs is intended to protect critical technologies while still allowing legitimate trade. Therefore, the components of that system must address known vulnerabilities and be able to adapt to a changing global environment if they are to individually

[16] GAO, *Defense Trade: Analysis of Support for Recent Initiatives*, GAO/NSIAD-00-191 (Washington, D.C.: Aug. 31, 2000).

[17] GAO, *Defense Trade: Arms Export Control System in the Post-9/11 Environment*, GAO-05-234 (Washington, D.C.: Feb. 16, 2005).

and collectively protect and promote U.S. national security, foreign policy, and economic interests. Our past work demonstrates that State and Commerce have not managed the export control system to better ensure its overall effectiveness in protecting U.S. interests. Recent actions taken by the departments to begin addressing some of the management issues and vulnerabilities identified in our prior reports are encouraging. However, other recommendations, most notably those related to export control jurisdiction, remain unimplemented. While the implementation of our recommendations is an important first step for improving the efficiency and effectiveness of the export control system, a sustained commitment on the part of the departments to engage in a continuous process of evaluation, analysis, and coordination is needed. It is only then that meaningful and sustainable improvements to the export control system can be developed and implemented to ensure the efficiency and effectiveness of the system in protecting U.S. interests.

Mr. Chairman this concludes my statement. I would be happy to answer any questions you or other members of the subcommittee may have.

GAO Contacts and Acknowledgments

For questions regarding this testimony, please contact me at (202) 512-4841 or calvaresibarra@gao.gov. Johana R. Ayers, Assistant Director; Marie Ahearn, Jennifer Dougherty, Karen Sloan, and Anthony Wysocki made key contributions to this statement. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement.

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

April 24, 2008

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.

Statement of Daniel B. Poneman
Before the Subcommittee on Oversight of Government Management,
the Federal Workforce, and the District of Columbia
U.S. Senate
April 24, 2008

Dear Mr. Chairman and members of the Subcommittee: I am honored to appear before you to testify on reforming the export licensing agencies to advance national security and economic interests. The subject is timely, as reform of US export controls is long overdue, and the prospect of a new presidential administration creates a rare opportunity to put our house in order.

My experience in this area is rooted in the six years I spent at the National Security Council, where my responsibilities included interagency coordination regarding US export controls.

I will be blunt. The US export control system is broken. It was designed for a world that no longer exists. When the last major rewrite of the Export Administration Act entered into force, the hammer and sickle still flew above the Kremlin, the Berlin Wall stood tall, the strategy of containment of Soviet Communism unified the policies and practices of the United States and its allies, the United States had unique and unchallenged technological superiority across the spectrum of military technologies, the United States also had the ability, through the Coordinating Committee on East-West Trade (or CoCom), to veto technology exports from any and all of its Western allies to our Communist adversaries, and Pentagon procurements comprised the principal engine for military innovation.

Reflecting those realities, the US export control system was based on a statute that was divided into "national security controls" (supporting US participation in CoCom) and "foreign policy controls" (which category ended up including all non-CoCom controls, ranging from restraints on implements that could be used for torture to the full array of nonproliferation controls). The agencies responsible for implementing these controls counted on the expertise of officials who could at least secure the advice of procurement officials who understood the nature of the technology to be controlled.

All that has changed. The Cold War has ended. The Berlin Wall has fallen and Germany has been reunified. CoCom has been dissolved. CoCom's successor, the Wassenaar Arrangements, do not allow one government to veto a proposed export of another. Globalization has led to the proliferation of technology to individuals and officials around the world, undermining the possibility that a "Fortress America" approach to export controls could succeed in preventing advanced military technologies. The source of our military strength now results from the innovation that gives us a technological edge over our adversaries, and that innovation often comes from the private sector (*e.g.*, information technology) rather than from the government.

Meanwhile, the Federal Government has been unable to update its structures to adapt to this new reality. The increasingly anachronistic and arbitrary division of export controls into "national security" controls and "foreign policy" controls, with two very different sets of rules and procedures, persists. Moreover, the bureaucratic tangle that has long plagued the interagency administration of US export controls also continues. Indeed, that internal division and stress characterizes relations both within and between the Legislative and Executive branches, to the point where it has been impossible to enact an updated version of the Export Administration Act. Thus, we are left with the embarrassing fact that year after year our whole system of export controls rests on the power of the president to invoke the International Economic Emergency Powers Act.

What is to be done? For years we have witnessed a variety of attempts either to rewrite or revise the EAA. All have failed.

We need to go to first principles. Why do we have export controls? Three objectives dominate:

1. To protect US and allied military advantage over our adversaries;
2. To send a political signal to -- or impose a cost upon -- another government;
3. To avoid US involvement in actions contrary to US values.

The first objective is fundamental to our national security. But to design an export control system to protect our military advantage we need to understand the source of that advantage. As noted above, increasingly the source of our military advantage is our technical superiority over our adversaries. That technical superiority increasingly relies on investment in new technologies in the commercial sector. That investment, in turn, depends on companies' success in generating sufficient revenues to underwrite research and development. Thus, to the extent that export controls place an undue burden on US companies and their competitiveness in an increasingly global marketplace, those controls actually become counterproductive and hurt US security.

Of course, many export controls do not pose "undue" burdens, for example, those that ensure that gap-closing technologies not widely available do not fall into the wrong hands. An "undue" burden implies either that the technology is so widely available that US controls cannot be effective, or that the controls themselves are so onerous that the benefit in averting diversion of the technology in question is outweighed by the burden on the technological advance of the US exporter.

The second objective of an export control is to impose a commercial burden on a trading partner in order to show political disapproval or, conversely, to remove an existing control to reward positive actions by another government. Here, too, before imposing such a control, the US Government should weigh the benefit of that political message against the burden that would fall disproportionately on the US exporter of the controlled item (as opposed to being evenly borne by all citizens), both as a matter of fairness and of undermining our technological edge.

The third objective is the least complicated. The United States, for example, would never permit the export of implements of torture. It would not matter if such implements were easily obtained elsewhere, or whether no other nation on earth restricted such exports, since the export of such items is abhorrent to the values embraced by all Americans.

From those principles flow certain implications about how to structure the US export control system. Before trimming our sails to acknowledge the political difficulties of far-reaching reform, let me sketch out an ideal for purposes of discussion:

- First, the Export Administration Act should be rewritten, starting with a set of objectives of the US export control system, which then drive the structure of our statutory controls. The anachronistic division of the law into national security and foreign policy controls would be removed. Instead, the law would be divided into sections on multilateral and unilateral controls. Unilateral controls should only be authorized to the degree that rigorous cost-benefit analyses established that they were on balance beneficial to the United States. The President would sign the revised EAA into law.

- Second, under this new law all US export controls would be implemented pursuant to generally-accepted standards of good government. Specifically --

    - License applications would be addressed in a timely manner according to fixed deadlines, agencies would have full transparency into license applications but would have an affirmative obligation to object. In other words, silence on an application would be deemed to constitute consent to the granting of the license. Thus, the process would default to a decision, not default to inaction or paralysis.

    - An agency objecting to the granting of a license could appeal a decision to approve the license, only in such case as the higher level interagency representative – such as a Senate-confirmed presidential appointee – "pulled up" the application from below. This would encourage officials to take responsibility for making decisions, rather than simply "passing the buck" to a higher level.

    - The head of the export processing function would be accountable both to the President and to the Congress, reporting periodically on the implementation of US export controls, with explanations for failure to comply fully with the deadlines or other requirements of the system.

    - Instead of the current system of parallel processes for munitions and dual-use items, a single system would be applied to both commodity jurisdiction and licensing determinations. Executive Order 12981, of December 5, 1995, would provide a good starting point for a system that would allow every agency transparency into – and a say in – all classification or licensing decisions, while imposing the procedural disciplines necessary for US export controls to comply with traditional standards of good government. This would ensure procedural fairness among the agencies, and prevent "forum shopping" by exporters looking for the "easiest" approval.

    - In order to protect the ability of the US Government to exercise critical discretion to slow or stop any particular export that presented a threat to US national security, the export control system would need a "national security kick-out" provision that would permit the President to suspend the procedural disciplines in any given case, provided that the President justified that action in a letter to the Congressional leadership.

    - At the outset of this new system, the Executive Branch would review all existing controls with a view to eliminating all unilateral controls that could not be justified under the newly-enacted standards. It would also consider adoption of mechanisms to "right-size" the license application pool to the resources dedicated by the US Government to administer controls. For example, pre-approval of qualified companies to export (subject to federal audit), block approval of a series of licenses all linked to the same system, etc., could be used to prevent the system from becoming overloaded to the point of producing inevitable processing errors and delays. This list review should produce "higher fences around fewer items".

    - Once the initial list review is complete, the US Government would abandon large-scale list reviews, in which federal employees would seek to establish clear and detailed definitions of which goods, services, and technologies fell into

which categories. This has always been a cumbersome process, and often takes longer to conduct than the technology generations to which it relates. Rather, the license application review process itself would define which items required different levels of control. In essence, our commodity jurisdiction and classifications would be implemented more under a "common law" than a "civil code" approach.

- Third, the US Government would seek to hire qualified personnel to implement this export control system, and would provide opportunities for advancement and other benefits consistent with establishing a career path able to attract people qualified to perform this critical task well.

I do not suggest that this is the only approach to reforming US export controls. I recognize that starting from scratch and going back to first principles could generate fierce debate, and may fail in the end. But I also believe that tinkering around the edges of our current export control system may offer a palliative but no lasting solution to a problem that has dogged the US Government at least since the end of the Cold War. Now, as we face the prospect of a new Administration in less than a year, is precisely the right time to go back to first principles and seek to design an export control system that is most likely to advance US national security for the years ahead, by blocking the transfer of sensitive items that could hurt US and allied interests, while protecting the investment and innovation that nourish the roots of our military superiority. Only a system based on first principles will re-establish the broad consensus, across party lines and between the branches of government, necessary to restore US export controls to the level of effectiveness and efficiency that every American has a right to expect.

Statement of Edmund B. Rice
To the
Subcommittee on Oversight of Government Management
Committee on Homeland Security and Governmental Affairs
United States Senate
April 24, 2008

Today's hearing and the Subcommittee's ongoing inquiry into U.S. efforts to control the transfer of militarily-sensitive technology are focused on an important issue, both for U.S. national security and for U.S. technological leadership. From both a policy and a government management viewpoint, the two U.S. export control systems have significant issues that require urgent attention from the Congress and the Executive Branch. Some are being addressed; others are not.

As a reference point for today's hearing, the Subcommittee has cited the 2007 High Risk Areas report (GAO-07-310) by the Government Accountability Office (GAO), which included "protection of technologies critical to U.S. national security interests"(pages 20-26) as an area of the federal government with significant problems. GAO identified eight programs related to protection of critical technologies. Today, the Subcommittee focuses on two: controls on transfers of dual-use technologies under the Export Administration Act and the Export Administration Regulations and controls on transfers of munitions under the Arms Export Control Act and the International Trafficking in Arms Regulations.

In its main finding, GAO contends that both export control systems have "weaknesses (that) are largely attributable to poor coordination within complex interagency processes, inefficiencies in program operations and a lack of systematic evaluations for assessing program effectiveness and identifying corrective actions." GAO also notes that "significant forces have heightened the U.S. government's challenge of weighing security concerns with the desire to reap economic benefits."

While the GAO findings are accurate, they are too narrowly focused and incomplete. Moreover, there have been significant developments since GAO issued the report in January 2007 that the Subcommittee should take into account in its inquiry. These additional relevant aspects and new developments differ between the dual-use and munitions control systems, as follows.

ISSUES REGARDING EXPORT CONTROLS ON DUAL-USE TECHNOLOGIES

The weaknesses in the U.S. controls on dual-use technologies stem primarily from the inability of the U.S. government – both Congress and the Executive Branch – to adopt policies that take into account and respond effectively to fundamental changes in the interaction between technological progress globally, the relationship between civilian and military technological developments and the post-Cold War geo-political situation. As a result, mid-level U.S. officials have struggled for years to adapt an outmoded dual-use export control system to a rapidly changing environment, without having a coherent national policy to guide them. When GAO identifies administrative and operational weaknesses in the dual-use system, most of these

problems stem from a larger failure among the highest level of U.S. policy-makers to establish a realistic and workable policy to regulate the transfer of U.S.-origin dual-use technologies.

When the Export Administration Act was last comprehensively revised, in 1979, most militarily-sensitive dual-use technologies were in the possession of the United States and a small group of U.S. allies. Most such technologies were developed by and for military organizations, with limited application to civilian uses. The U.S. and its allies had a consistent policy that governed the transfer of such technologies to other nations and they had a well-functioning and disciplined multi-lateral system, COCOM, to administer consistent controls on such transfers. That situation had been maintained for thirty years, dating from the 1949 advent of the Western Alliance's export control system, which began as an adjunct to NATO in counteracting the Soviet Union, China and their allies.

Today, none of those conditions exist. Militarily-significant dual-use technologies largely originate in the civilian sector and are later adapted to military use, as evidenced by the Defense Department's increasing acquisition of civilian-origin items for sensitive applications, now formally called Commercial Off-the-Shelf (COTS) acquisition. Such items, by definition, are not subject to control by governments. Dual-use technology is widely available globally in open commerce; very few, if any, dual-use technologies are possessed solely by the U.S. There is no multi-lateral agreement on the transfer of most dual-use technologies or items, although there are several narrowly-focused informal and tacit arrangements among some governments for cooperation in controlling dual-use technologies, but without any common policy or disciplines. These informal understandings are embodied in four multi-lateral bodies: the Wassenaar Arrangement (dual-use and certain munitions), the Nuclear Suppliers Group (nuclear technology), the Missile Technology Control Regime (medium- and long-range missiles) and the Australia Group (chemical- and biological weapons-related technology). There are also side agreements among the U.S. and some of its allies on dual-use transfers to specific countries of concern. None of these are comprehensive or disciplined control regimes.

Yet, U.S. export controls on dual-use technologies largely have not been adapted to current global realities. Increasingly, U.S. controls on dual-use items and technology are unilateral, with little coordination with even our closest allies. When GAO (correctly) questions the effectiveness of U.S. dual-use controls, it is highlighting the futility of U.S.-only attempts to regulate the transfer of items and technologies in global commerce when other major sources, as well as transfer points in global trade, do not have parallel controls, and in certain respects fundamentally disagree with the United States. Contrary to the GAO finding, this failure is not the result of weaknesses in administrative or interagency process; rather, this is a more fundamental failure of the U.S. – both Congress and the Executive Branch – to adopt a policy, in statute and regulation, that is realistic and workable in today's world.

Unfortunately, the most recent moves by the U.S. government in dual-use export control regulations indicate that the U.S. is moving even further toward unilateral, and therefore ultimately ineffective, control measures. Both initiatives have occurred after the GAO High Risk report was issued.

RECENT U.S. RE-CONTROLS FOR CHINA UNDERSCORE U.S. ISOLATION

First, in July, 2007, the Export Administration Regulations (EAR) were amended to re-control several dozen dual-use technologies that the Defense Department and the intelligence community identified as being acquired by China and applied to China's accelerating military modernization. As with the U.S. military, Chinese military capabilities have been significantly improved with the application of dual-use technologies that are freely available commercially. The goal of the U.S. regulation is to impede the application of U.S.-origin technologies to China's military and to set up a system for making distinctions between Chinese entities that are part of the Chinese defense industrial base and those that are purely civilian in orientation, for purposes of targeting U.S. controls.

While both goals are laudable and rational from a U.S. security perspective, the new U.S. controls remain unilateral. These dual-use items remain in open global commerce beyond the jurisdiction of the U.S. This is despite a U.S. diplomatic initiative, beginning in 2006, to bring our allies' export control policies into line with the new U.S. focus on denying access by the Chinese military to the identified dual-use technologies. No other government has agreed. As a result, direct bilateral U.S. trade with China has been re-regulated for these items, but China faces no restrictions in obtaining equivalent technologies from other countries. Moreover, the U.S. attempt to regulate the re-export of U.S. origin to China from third countries is hampered by the refusal of other governments to adopt parallel controls. While entities subject to U.S. controls are now required to comply with the U.S. controls, it is not illegal under other nations' laws for entities in those other countries to acquire and transfer U.S. origin items to China.

It is not unreasonable for the U.S. government to be concerned about, and take steps to stop, the transfer of dual-use items to China for its military programs. However, it is a mistake for anyone in the U.S. government to expect that purely unilateral U.S. controls will have a measurable effect on the global availability of these technologies to China. At worst, it would be a mistake to base U.S. security policy or assessments of our military posture vis-à-vis China on a mis-placed expectation that these unilateral U.S. export controls will have any significant effect on China's ability to acquire these technologies and use them for military purposes.

U.S. EFFORTS TO CONTROL TRANSFERS OF TECHNOLOGICAL KNOWLEDGE ARE FUTILE

The second development since the GAO report is the announced U.S. government goal of expanding U.S. controls on the transfer of technological knowledge to foreign nationals while in U.S. territory. Under U.S. export control parlance, such transfers are called "deemed exports", since the transfer of information to a foreign national is "deemed" to be an export because he retains the information when he leaves the U.S.

The U.S. government long has attempted to control the transfer of technological knowledge to certain foreign nationals when they are in the U.S. However, as with the new China controls, the U.S. restrictions are unilateral. In December, 2007 a U.S. government-chartered advisory panel described the difficulty of controlling the transfer of technological knowledge, especially if

attempted unilaterally. Nevertheless, work is now under way within the U.S. government to draft an expansion of the existing U.S. controls, with the primary goal of extending the regulation of the transfer of knowledge to naturalized citizens of friendly governments who earlier had been citizens of governments that are of concern to the U.S.

This developing regulatory initiative is in response to warnings from the FBI and the Office of the Director of National Intelligence of increasing espionage within U.S. territory that targets U.S. dual-use technology. Efforts to counter this threat are certainly warranted, but cannot be relied upon without other governments' cooperation. No other government has controls equivalent to the U.S. in this area.

Therefore, as with the recent re-control of certain dual-use technologies sought by the Chinese military, the expansion of controls on technology transfers to certain foreign nationals is unilateral. As a result, the coming "deemed export" regulations are likely to impose a significant compliance burden on U.S. academic and research institutions and U.S.-based corporations without having any measurable effect on the global transfer of technological information. As with dual-use items, virtually all dual-use technological knowledge is now globally dispersed and therefore un-controllable by the U.S. Moreover, any information originating in the U.S. that exists on the Internet is available for global transfer regardless of governments' controls.

U.S. MUNITIONS CONTROLS HAVE BEEN AN OBSTACLE TO DEFENSE COOPERATION

On January 22, 2008, the White House announced that the President had signed two directives that export controls on dual-use and munitions items be fundamentally revised. Of the two directives (both classified), the changes in the procedures for munitions controls are the more extensive. The White House explained the changes as necessary to remove regulatory obstacles to defense cooperation programs with our allies.

The White House announcement came as a response to rising concern in the Defense Department, among our closest allies and among U.S. defense contractors that the munitions licensing system was out of synch with U.S. policy to foster cooperative development programs with our allies and multi-national military operations. Indeed, the State Department's munitions licensing office had become overwhelmed with some 80,000 license applications and only 40 licensing staff. Long delays ensued, negatively impacting the development of multi-national defense systems and the ability of U.S. forces to operate with our allies in the field. Worse, some license decisions negatively affected ongoing U.S. defense programs with our allies.

In contrast to the problems with the dual-use control system, the munitions controls deficiencies were more specific: controls had not been adjusted to accommodate U.S. defense policy. The defense cooperation and interoperability policies were in effect, but the control system lagged. The White House directive on munitions carries the promise of resolving much of the difficulty. However, implementation is now the key question, requiring continued attention by senior U.S. officials. A previous effort to revise munitions controls was started by the Bush White House in its first term, only to run into the ground in the early 2000's due to bureaucratic intransigence

and lack of follow-through. As a result, the problems with cooperation and interoperability became acute. Completion of this second attempt is now crucial.

A key element of improvement would be the implementation of a "project" or "program" license for munitions transfers. Under this proposal, a defense project with an ally would be approved and the necessary technology transfers identified. Individual transfers would occur under an overall project license to the approved defense partners. This would remove the need for thousands of individual licenses under the current regulations. Such a proposal is a key element of a set of recommendations made in March, 2007 by a coalition of U.S. organizations on behalf of U.S. defense contractors who have run into licensing obstacles in carrying out their responsibilities in U.S. cooperative defense projects with our allies.

U.S. EXPORT CONTROLS AFFECT DEFENSE POSTURE AND TECHNOLOGICAL LEADERSHIP

GAO focuses on administrative and operational weaknesses in the export control systems, principally in interagency relationships. That view is too narrow. The more fundamental issues relate to the failures (1) to adjust U.S. dual-use controls to the realities of open global trade in such technologies and the isolation of the U.S. controls from other countries', including our closest allies, and (2) to update munitions controls to support U.S. defense policies in cooperative development programs with our allies and multi-national operations in the field.

The impact of these disconnects is four-fold. First, unilateral dual-use controls impose significant compliance burdens on U.S.-located companies that are not faced by companies in other countries. This translates into a competitive disadvantage for U.S. technology firms in global markets. Purchasers of dual-use technologies can obtain equivalent items and information from non-U.S. sources in virtually every situation. Over time, unilateral U.S. controls serve to strengthen the performance of non-U.S. firms in global markets and weaken the performance of U.S. firms. While some U.S. officials are well aware of this impact, the policy-making system for dual-use controls does have a mechanism to take such effects into account. Any accommodation of market realities is episodic. This is the real management failure of the dual-use system.

Second, both the dual-use and munitions control systems have not been geared to consider the effect of controls on the defense industrial base, which now includes both defense contractors and commercial firms that supply off-the-shelf items for defense purposes. All such firms must be able to survive in the commercial marketplace, but export controls often are an obstacle to a successful business plan. Defense Department acquisitions no longer are the sole determinant of long-term survival for the defense industrial base. Current pending reforms in the control systems are essential to improving the survivability of the defense industrial base.

Third, the increasingly unilateral character of U.S. export controls, particularly in the dual-use area, threatens U.S. technological leadership. As U.S. controls increasingly restrict the interaction of U.S. companies globally and the ability of U.S. academic and research institutions to attract and educate the most talented students from countries that are subject to controls, both the affected commercial transactions and the students move to non-U.S. sources. Over time,

commercial innovation and scientific advances shift away from the U.S. Funding follows. Non-U.S. firms and academic institutions take the lead and the U.S. is left behind. This is not theory: already commercial research and development in several dual-use areas are moving out of the U.S., driven out in part by U.S. attempts to control technological flows. Academic leadership will follow as controls are expanded on transfer of knowledge.

Fourth, U.S. security policy becomes grounded in a mis-placed reliance on controls on technology transfer. Qualitative military superiority, a central element of U.S. defense strategy, assumes that the U.S. will maintain a technological edge over our adversaries. This is a two-part strategy: to continually advance U.S. military technology and to retard that of our adversaries. The increasingly strident warnings in the annual reports on Chinese military advances are one indication that the assumption of U.S. superiority in technology is becoming less reliable. The U.S. is trying to expand and tighten controls on Chinese access to militarily-significant dual-use technology. Yet we do not have the cooperation of even our closest allies in this effort. Just as we mis-judged the ability of North Korea and Iran to acquire dual-use technology and apply it to their weapons programs, so we are depending on an unreliable and ultimately failing export control system to restrict technology to a perceived antagonist in the western Pacific theatre.

These effects are the more significant management failures related to export controls. The Executive Branch is moving to address some of the administrative and regulatory weaknesses in the dual-use and munitions systems. However, thus far the larger policy questions remain unresolved.

BACKGROUND
BEYOND CONTROL: REFORMING EXPORT LICENSING AGENCIES FOR NATIONAL SECURITY AND ECONOMIC INTERESTS
April 24, 2008

Background

National security, foreign policy, and economic interests are weighed by the Federal agencies overseeing U.S. exports of military and dual-use technology factors. The Export Administration Act (EAA) (50 U.S.C. 2401) and the Arms Export Control Act (22 U.S.C. 2778) provide the statutory basis for making these evaluations and were created to prevent the nation's enemies from gaining a military advantage.[1] The context of export controls has changed since modern export regulations were originally put in place, before and during the Cold War. Since then, rapid globalization, decentralized networks of enemy non-state actors, and quickly advancing, more accessible technology, have presented new challenges to U.S. national security and economic interests.

A well functioning export control system is essential to achieve national interests while maintaining international stature.[2] Smooth coordination with allies who desire U.S. defense technology in attaining shared goals is also an important function. Export control processes balance industrial interests against national security.[3] Effective and efficient processes and bureaucratic structures should reflect existing national security, foreign policy, and economic interests and respond to evolving challenges.

The Structure of the Export Control Bureaucracy

The two lead government agencies for export controls are the Departments of State and Commerce. The Directorate of Defense and Trade Controls (DDTC) at the Department of State issues export licenses for military arms technology under the International Trafficking in Arms Regulations (ITAR).[4] Under ITAR, the U.S. Munitions List identifies, within 21 categories of defense equipment, specific types of export items which the U.S. controls.[5] Such items include

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[1] CRS Report, *The Export Administration Act: Evolution, Provisions, and Debate*, Update January 15, 2007.

[2] GAO, *Vulnerabilities and Inefficiencies Undermine System's Ability to Protect U.S. Interests*, GAO-07-1135T, July 26, 2007.

[3] Hudson Institute, *Export Controls and Technology Transfers: Turning Obstacles into Opportunities*, December 6. 2006.

[4] ITAR and the U.S. Munitions List are the President's authority, pursuant to the Arms Export Control Act (P.L. 90-269, amended in 1976), to regulate the import and export of defense articles.

[5] http://www.pmddtc.state.gov/docs/ITAR/2007/official_itar/ITAR_Part_121.pdf, accessed April 18, 2008.

firearms, artillery, space systems, and missiles. The DDTC, as a general rule, tends toward broad restrictions within its export control system due to national security and foreign policy concerns.[6]

The Bureau of Industry and Security (BIS) of the Department of Commerce manages the export of commercial and military useful, or dual-use, technology under International Emergency Economic Powers Act (IEEPA) (P.L. 95-223) provisions extending the regulations under the EAA. BIS relies on the Export Administration Regulations and the Commerce Control List (CCL), which contains detailed information about approximately 2,400 dual-use items, to identify items requiring licences for reasons of national security, foreign policy, or short-supply.[7] Other factors involved in determining if an export license is required include the country of final destination, parties involved in the export, those parties' previous involvement in proliferation activities, and the planned final use of the item.[8] Their focus, unlike State's, tends to be narrower, since not all items clearly have a dual-use.[9] Other agencies involved in the export control process, supporting both DDTC and BIS, include the Departments of Defense, Energy, Homeland Security, Justice, and the Intelligence Community. They provide technical, law enforcement, and intelligence support.

The License Application Process

DDTC and BIS each have their own unique process for evaluating license applications. Arms

State	Commerce
•DDTC reviews application and screens parties against its watchlist of parties of concern •DDTC licensing officer determines if application needs interagency review (Defense and appropriate State bureaus) •DDTC conducts final review to approve, deny, or return without action •DDTC notifies congressional committees of applications that meet certain thresholds before issuance of license	•BIS reviews application and screens parties against its watchlist of parties of concern •BIS licensing officer determines if application needs interagency review (Defense, State bureaus, Energy, CIA, and/or Justice) •When interagency agreement exists, BIS makes final decision to approve, deny, or return without action •If there is disagreement among the agency, application goes through interagency escalation process •Under an executive order, the entire license application review process— including escalation— is to be completed within 90 days.

applications go to DDTC, and applications for the export of items with dual commercial and military use go to the Department of Commerce. Most steps are common to both. Figure 1 lists both processes side by side.

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[6] Information provided by GAO's Acquisition and Sourcing Management Office, March 27, 2008.

[7] CRS Report, January 15, 2007.

[8] GAO, *Improvements to Commerce's Dual-Use System Needed to Ensure Protection of U.S. Interests in the Post-9/11 Environment*, GAO-06-638, June 2006.

[9] Information provided by GAO's Acquisition and Sourcing Management Office March 28, 2008.

Figure 1: Export Control Processes at the Departments of State and Commerce

State of the Export Control Bureaucracy: At High-Risk

Export controls are among the mechanisms the U.S. has to evaluate defense-related exports against its national security, foreign policy, and economic interests. Three U.S. Presidents, George H.W. Bush, Bill Clinton, and George W. Bush, have relied on IEEPA to issue Executive Orders (Executive Orders 12730, 12942, and 1322) to extend the authority of the EAA, and temporary legislative extensions, which had since lapsed.[10]

In January 2007 the Government Accountability Office (GAO) issued an update of its High-Risk List, a list that GAO has used since 1990 to identify resource-intense programs that have serious weaknesses, including for the first time U.S. government programs which identify and protect critical weapon and military useful technologies. GAO reported that, while each federal program to protect critical technology had its own challenges, poor coordination, inefficient operations, and a lack of systematic evaluations risked U.S. national security and economic interests.[11] In the summer of 2007, GAO reiterated its concerns about the risks of an ineffective export controls system. In testimony before the Subcommittee on Terrorism, Nonproliferation, and Trade, House Committee on Foreign Affairs GAO cited documentation of vulnerabilities in the export control system's ability to protect U.S. national security, foreign policy, and economic interests.[12]

Management Problems Identified within the Export Control Bureaucracy

A number of GAO reports identify key problems within the export control bureaucracy. Within each report, GAO also made recommendations that addressed issues central to effective and efficient management of the existing system of controls.

GAO's 2005 study of the arms export control system in the aftermath of 9/11 focused on arms export licensing trends, changes in the arms export control system, the status of arms export licensing streamlining efforts, and the coordination efforts between the agencies involved in the arms export controls process. Significant management difficulties were identified. During the first seven months of fiscal year 2004, the DDTC missed its license processing goal in support of Operation Iraqi Freedom by a wide margin. The median processing times were three to six times higher than what the Department of State required for applications. This also happened during three years of declining licensing officer levels, from 37 to 32. Six of ten military officer detailees were not assigned to the DDTC, as had been called for in the Foreign Relations

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[10] CRS Report, January 15, 2007.

[11] GAO, *High Risk Series: An Update*, GAO-07-310, January 2007.

[12] GAO-07-1135T, July 26, 2007.

Authorization Act for Fiscal Year 2003, likely contributing to the lack of efficiency at DDTC.[13]

In a 2006 study of BIS, GAO had similar concerns about the export control agency's lack of systematic analysis. BIS did not comprehensively analyze data about dual-use export items nor did they have any explicit performance measures. GAO also discovered that 147 parties on the agency's watchlist, the list that identified individuals and companies that could possibly threaten U.S. national security, were omitted from this critical screening process. This situation was caused by a lack of specific watchlist criteria and the absence of regular reviews to determine if parties of concern were on the list. Furthermore, GAO noted that many of its previous recommendations were not implemented.[14]

GAO's 2007 study of DDTC found an increased licensing caseload of 20%, a doubling of process times, and a 50% increase in the number of license cases that remained open between 2003 and 2006. State was advised to conduct systematic analyses identifying root causes of problems to improve their ability to handle licensing applications. During a three month period in late 2006, DDTC extended working hours and curtailed activities other than licensing to reduce the number of open cases. Despite the 40% reduction in open cases, severe management and human capital challenges persisted. The automated licensing system known as D-Trade did not improve process efficiency significantly. In fiscal year 2006, the median processing time for D-Trade license applications was 23 days versus the 25 days for paper-based applications. The system lacked tools for referencing prior work completed, automated access to regulations, and guidance that might improve efficiency Furthermore, the number of licensing officers remained relatively constant between 31 and 35. However, many of those licensing officers were unable to take final action on license applications since they had not gained enough experience to have signature authority.[15]

In its June 2007 testimony before the House of Representatives Subcommittee on Terrorism, Nonproliferation, and Trade, GAO also addressed vulnerabilities at both DDTC and BIS that were rendering the export control system ineffective. One key finding was that disagreements between the DDTC and BIS over jurisdiction of items, such as missile-related and explosive detection equipment, had not been resolved, leaving the exporter, in many cases, to determine the suitable type of government review. Clear guidance, for the sake of the exporter and the export enforcer, was also missing contributing to confusion about who had to apply for licenses. BIS further lacked efficiency-related performance measures for all steps in the licence application review process.[16]

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[13] GAO, *Arms Export Control System in the Post-9/11 Environment*, GAO-05-234, February 2005.

[14] GAO-06-638, June 2006.

[15] GAO, *State Department Needs to Conduct Assessments to Identify and Addresses Inefficiencies and Challenges in the Arms Export Process*, GAO-08-89, November 2007.

[16] GAO-07-1135T, July 26, 2007.

GAO also identified a significant difference in the licensing officer workforce at the BIS and DDTC. Based on fiscal year 2006 data, State's DDTC has 64 total positions filled, not all of them licensing officers, to close 65,275 cases. Commerce's BIS had a staff of 351 personnel, composed of analysts, licensing officers, and enforcement agents, to close 23,673 cases. In addition to this, BIS license application process time was considerably longer than DDTC's.[17]

A number of organizations and commissions have also expressed their concerns about the current state of the export controls system. These reports offer insights and recommendations that address the balance between national security, foreign policy, and economic interests.

The 1999 report of the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction (Pursuant to P.L. 104-293) identified export controls as a way to restrain the spread of potentially dangerous technology. The Commission identified three ways that export controls help prevent proliferation: they clarify which technologies contribute to proliferation, they prevent dangerous goods from reaching their destinations, and they provide a legal basis for punishing violators. Four recommendations were presented by the Commission. First, export controls should be targeted on end-users of concern; second, multilateral coordination and enforcement of export controls must be strengthened; third, government agencies participating in the export controls system must have adequate management controls in place; and, fourth, a single export control system should be considered.[18]

In 2006 the Hudson Institute released a conference report that envisioned deeper defense industry integration between the U.S. and its allies in Europe. Based on globalization, the need for interoperability between allies, and the development of joint technology programs, the conferees provided a number of recommendations to create an effective and efficient export controls system. Recommendations included expanding the export controls workforce, the establishment of fast-track procedures, updating export control laws, and a focus on risk management rather than risk elimination.[19]

Conclusion

Many weaknesses within the nation's export controls systems have been identified by GAO and others. The involvement of leaders charged with managing export controls will likely aid in the identification and correction of ineffective and inefficient bureaucratic structures, processes, and staffing plans. Key recommendations from this hearing may aid the next administration in establishing an effective system of export controls that support U.S. national security, foreign policy, and economic interests.

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[17] Information provided by GAO's Acquisition and Sourcing Management Office, March 27, 2008.

[18] Report of the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction, July 1999.

[19] Hudson Institute, December 6, 2006.

Congressional Research Service

Memorandum April 21, 2008

TO: Senate Homeland Security and Government Affairs Committee, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

FROM: Ian F. Fergusson,
Specialist in International Trade and Finance
Richard F. Grimmett,
Specialist in National Defense
Foreign Affairs, Defense, and Trade Division

SUBJECT: Background for Hearing on U.S. Export Controls

This memorandum responds to your request for background information in support of your upcoming hearing on the U.S. export control system. The memo discusses the legislative authority, structure, and function of U.S. dual-use and defense export controls. It also discusses current issues related to the administration of those controls. If you have any questions concerning the material in this memorandum, please contact Ian Fergusson at 7-4997 or Richard Grimmett at 7-7675.

Overview of the U.S. Export Control System

The United States restricts the export of defense items or munitions, so-called "dual-use" goods and technology, certain nuclear materials and technology, and items that would assist in the proliferation of nuclear, chemical and biological weapons or the missile technology to deliver them. Defense items are defined by regulation as those "specifically designed, developed, or configured, adapted, or modified for a military application, has neither predominant civilian application nor performance equivalent to an item used for civilian application, or has significant military or intelligence application "such that control is necessary." Dual-use goods are commodities, software, or technologies that have both civilian and military applications.

U.S. export controls are also utilized to restrict exports to certain countries in which the United States imposes economic sanctions. Through the Export Administration Act (EAA), the Arms Export Control Act (AECA), and other authorities, Congress has delegated to the executive branch its express constitutional authority to regulate foreign commerce by controlling exports. In its administration of this authority, the executive branch has created a diffuse system by which exports are controlled by differing agencies under different regulations. This section describes the characteristics of the dual-use, munitions, and nuclear

controls. The information contained in the section also appears in chart form in Appendix 1.

Various aspects of this system have long been criticized by exporters, non-proliferation advocates and other stakeholders as being too rigorous, insufficiently rigorous, lax, cumbersome, too stringent, or any combination of these descriptions. In January 2007, the Government Accountability Office (GAO) designated government programs designed to protect critical technologies, including the U.S. export control system, as a 'high-risk area' "that warrants a strategic re-examination of existing programs to identify needed changes."[1] The report cited poor coordination among export control agencies, disagreements over commodity jurisdiction between State and Commerce, unnecessary delays and inefficiencies in the license application process, and a lack of systematic evaluative mechanisms to determine the effectiveness of export controls.

The Dual-Use System

The Export Administration Act (EAA). The EAA of 1979 (P.L. 96-72) is the underlying statutory authority for dual-use export controls. The EAA, which is currently expired, periodically has been reauthorized for short periods of time. The last incremental extension expired in August 2001. At other times and currently, the export licensing system created under the authority of EAA has been continued by the invocation of the International Emergency Economic Powers Act (IEEPA)(P.L. 95-223). EAA confers upon the President the power to control exports for national security, foreign policy or short supply purposes. It also authorizes the President to establish export licensing mechanisms for items detailed on the Commerce Control List (see below), and it provides some guidance and places certain limits on that authority.

Several attempts to rewrite or reauthorize the EAA have occurred over the years. The last comprehensive effort took place during the 107th Congress. The Senate adopted legislation, S.149, in September 2001, and a competing House version, H.R. 2581, was developed by the then House International Relations Committee, and the House Armed Services Committee. The full House did not act on this legislation. More modest attempts to update the penalty structure and enforcement mechanisms in context of renewing the 1979 Act for a period of 5 years has been introduced in the 110th Congress as the Export Enforcement Act of 2007 (S. 2000).

The EAA, which was written and amended during the Cold War, was based on strategic relationships, threats to U.S. national security, international business practices, and commercial technologies many of which have changed dramatically in the last 25 years. Some Members of Congress and most U.S. business representatives see a need to liberalize U.S. export regulations to allow American companies to engage more fully in international competition for sales of high-technology goods. Other Members and some national security analysts contend that liberalization of export controls over the last decade has contributed to foreign threats to U.S. national security, that some controls should be tightened, and that Congress should weigh further liberalization carefully.

Administration. The Bureau of Industry and Security in the Department of Commerce administers the dual-use export control system. The export licensing and

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[1] GAO-07-310, *High-Risk Series: An Update*, January 2007, pp. 20-26.

enforcement functions that now form the agency mission of BIS were detached from the International Trade Administration in 1980 in order to separate it from the export promotion functions of the Department of Commerce. In FY2006, BIS processed 18,941 licenses with a value of approximately $36 billion. During the same fiscal year, BIS approved 15,982 applications, denied 189, and returned 2,763 (usually because a license was not necessary), for an approval rate of 98.8%, disregarding the returned licenses.[2] BIS was appropriated $72.9 million in FY2008 with budget authority for 365 positions. The President's FY2009 request for BIS is $83.7 million, a 14.8% increase from FY2008, with budget authority for 396 positions. In addition to its export licensing and enforcement functions, BIS also enforces U.S. anti-boycott regulations concerning the Arab League boycott against Israel.

Implementing Regulations. The EAA is implemented by the Export Administration Regulations (EAR)(15 C.F.R. 730 *et seq*). As noted above, the EAR is continued under the authority of the International Economic Emergency Powers Act (IEEPA) in times when the EAA is expired. The EAR sets forth licensing policy for goods and destinations, the applications process used by exporters, and the Commerce Control List (CCL). The CCL is the list of specific goods, technology, and software that are controlled by the EAR. The CCL is composed of ten categories of items: nuclear materials, facilities, and equipment; materials, organisms, microorganisms, and toxins; materials processing; electronics; computers; telecommunications and information security; lasers and sensors; navigation and avionics; marine; and propulsion systems, space vehicles, and related equipment. Each of these categories are further divided into functional groups: equipment, assemblies, and components; test, inspection, and production equipment; materials; software; and technology. Each controlled item has an export control classification number (ECCN) based on the above categories and functional group. Each ECCN is accompanied by a description of the item and the reason for control. In addition to discrete items on the CCL, nearly all U.S. origin commodities are "subject to the EAR." This means that any product "subject to the EAR" may be restricted to a destination based on the end-use or end-user of the product. For example, a commodity that is not on the CCL may be denied if the good is destined for a military end-use, or to an entity known to be engaged in proliferation.

Licensing Policy. The EAR sets out the licensing policy for dual-use commodities. Items are controlled for reasons of national security, foreign policy, or short-supply. National security controls are based on a common multilateral control list, however the countries to which we apply those controls are based on U.S. policy. Foreign Policy controls may be unilateral or multilateral in nature. Items are controlled unilaterally for anti-terrorism, regional stability, or crime control purposes. Anti-terrrorism controls proscribe nearly all exports to the 5 state sponsors of terrorism. Foreign policy-based controls are also based on adherence to multilateral non-proliferation control regimes such the Nuclear Suppliers' Group, the Australia Group (chemical and biological precursors), and the Missile Technology Control Regime.

The EAR sets out time-lines for the consideration of dual-use licenses and the process for resolving interagency disputes. Within 9 days from receipt, Commerce must refer the license to other agencies (State, Defense, or NRC as appropriate), grant the license, deny it, seek additional information, or return it. If the license is referred to other agencies, the agency to which it is referred must recommend the application be approved or denied within thirty days. The EAR provides a dispute resolution process for a dissenting agency to appeal

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[2] BIS has not released its annual report detailing its activities in FY2007.

an adverse decision. The interagency dispute resolution process is designed to be completed within 90 days. This process is depicted graphically in Appendix 2.

Enforcement and Penalties. Because of the expiration of the EAA, current penalties for export control violations are based on those contained in the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 *et seq*). For criminal penalties, IEEPA sanctions individuals up to $1 million or up to 20 years imprisonment, or both, per violation [50 U.S.C. 1705(b)]. Civil penalties under IEEPA are set at $250,000 per violation. IEEPA penalties were recently raised to the current levels by the International Emergency Economic Powers Enhancement Act (P.L. 110-96), which was signed by President Bush on October 16, 2007.

Enforcement is carried out by the Office of Export Enforcement (OEE) at BIS. OEE has a staff of approximately 164 in Washington and eight domestic field offices. OEE is authorized to carry out investigations domestically and works with Department of Homeland Security (DHS) to conduct investigations overseas. OEE also conducts pre-license and post-shipment verification along with in-country U.S. embassy officials overseas.

The Export Enforcement Act of 2007. One of the persistent concerns about the administration of the dual-use system is that it operates under the emergency authority of the International Economic Emergency Powers Act (IEEPA), the underlying EAA having last expired in 2001. On August 3, 2007, the administration-supported Export Enforcement Act of 2007 (S.2000) was introduced by Senator Dodd. The draft bill would reauthorize the Export Administration Act for five years and amend the penalty and enforcement provisions of the Act. The proposed legislation would revise the penalty structure and increase penalties for export control violations. The bill would raise criminal penalties for individuals up to $1 million and raise the term of potential imprisonment to ten years for each violation. For firms, it would raise penalties to the greater of $5 million or 10 times the value of the export. Under the 1979 EAA, the base penalty was the greater of $50,000 or 5 times the value of the export, or five years imprisonment. It would expand the list of statutory violations that could result in a denial of export privileges. and it extends the term of such denial from not more than 10 years to not more than 25 years.

The enforcement provisions of the Administration proposal would expand the authority of the Department of Commerce to investigate potential violations of EAA overseas. It provides for enforcement authority at other places at home and abroad with the concurrence of the Department of Homeland Security. The proposed draft legislation would restate the enforcement provisions of the EAA to account for the current structure of Customs and Border Security and the Immigration and Customs Enforcement in the Department of Homeland Security. It would also direct the Secretary of Commerce to publish and update best practices guidelines for effective export control compliance programs. It also would expand the confidentiality provisions beyond licenses and licensing activity to include classification requests, enforcement activities, or information obtained or supplied concerning U.S. multilateral commitments. The bill included new language governing the use of funds for undercover investigations and operations and establishes audit and reporting requirements for such investigations. It also authorized wiretaps in enforcement of the act.

Some in the industry community have criticized the legislation for focusing on penalties and enforcement without addressing business concerns such as streamlining the license process. While the Administration favors the 5 year renewal period of the current

EAA as a period in which a new export control system may be devised, the length of the extension may also serve to take the pressure off such reform efforts.

Military Export Controls

Arms Export Control Act of 1976 (AECA). The AECA provides the statutory authority for the control of defense articles and services. It sets out foreign and national policy objectives for international defense cooperation and military export controls. Section 3(a) of the Arms Export Control Act (AECA) sets forth the general criteria for countries or international organizations to be eligible to receive United States defense articles and defense services provided under the act. It also sets express conditions on the uses to which these defense items may be put. Section 4 of the Arms Export Control Act states that U.S. defense articles and defense services shall be sold to friendly countries "solely" for use in "internal security," for use in "legitimate self-defense," to enable the recipient to participate in "regional or collective arrangements or measures consistent with the Charter of the United Nations," to enable the recipient to participate in "collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security," and to enable the foreign military forces "in less developed countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries." The AECA also contains the statutory authority for the Foreign Military Sales program, under which the U.S. government sells U.S. defense equipment, services, and training on a government-to-government basis.

Licensing Policy. The International Traffic in Arms Regulations (ITAR) sets out licensing policy for exports (and some temporary imports) of U.S. Munitions List (USML) items. A license is required for the export of nearly all items on the USML. Canada has a limited exemption as it is considered part of the U.S. defense industrial base. In addition, the United States has recently signed treaties with the United Kingdom and Australia to exempt certain defense articles from licensing obligations to approved end-users in those countries. These treaties must be ratified by the Senate. Unlike some Commerce controls, licensing requirements are based on the nature of the article and not the end-use or end-user of the item. The United States prohibits munitions exports to countries either unilaterally or based on adherence to United Nations arms embargoes.[3] In addition, any firm engaged in manufacturing, exporting, or brokering any item on the USML must register with DDTC and pay a yearly fee, currently $1,750, whether it seeks to export or not during the year.

Congressional Requirements. A prominent feature of the AECA is the requirement of congressional consideration of foreign arms sales proposed by the President. This procedure includes consideration of proposals to sell major defense equipment, defense articles and services, or the re-transfer to other nations of such military items. The procedure is triggered by a formal report to Congress under Sections 36 of the Arms Export Control Act (AECA). In general, the executive branch, after complying with the terms of applicable section of U.S. law, usually those contained in the Arms Export Control Act, is free to proceed with an arms sales proposal unless Congress passes legislation prohibiting or modifying the proposed sale.

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[3] Proscribed countries include Belarus, Burma, China, Cuba, Haiti, Iran, Liberia, Libya, North Korea, Somalia, Sudan, Syria, and Vietnam. In addition, exports to Iraq, Afghanistan, Rwanda, and D.R. Congo are reviewed on a case-by-case basis.

The traditional sequence of events for the congressional review of an arms sale proposal has been the submission by the Defense Department (on behalf of the President) of a preliminary or "informal" classified notification of a prospective major arms sale **20** calendar-days before the executive branch takes further formal action. This "informal" notification is submitted to the Speaker of the House (who traditionally has referred it to the House Foreign Affairs Committee), and to the Chairman of the Senate Foreign Relations Committee. This practice stems from a February 18, 1976, letter of the Defense Department making a *nonstatutory* commitment to give Congress these preliminary classified notifications. It has been the practice for such "informal" notifications to be made for arms sales cases that would have to be formally notified to Congress under the provisions of Section 36(b) of the Arms Export Control Act (AECA)[4]. These "informal" notifications always precede the submission of the required statutory notifications, but the time period between the submission of the "informal" notification and the statutory notification is not fixed. It is determined by the President. He has the obligation under the law to submit the arms sale proposal to Congress, but only after he has determined that he is prepared to proceed with any such notifiable arms sales transaction.

Under Section 36(b) of the Arms Export Control Act, Congress must be formally notified **30** calendar-days before the Administration can take the final steps to conclude a government-to-government foreign military sale of major defense equipment valued at $14 million or more, defense articles or services valued at $50 million or more, or design and construction services valued at $200 million or more. In the case of such sales to NATO member states, NATO, Japan, Australia, or New Zealand, Congress must be formally notified **15** calendar-days before the Administration can proceed with the sale. However, the prior notice thresholds are higher for NATO members, Australia, Japan or New Zealand. These higher thresholds are: $25,000,000 for the sale, enhancement or upgrading of major defense equipment; $100,000,000 for the sale, enhancement or upgrading of defense articles and defense services; and $300,000,000 for the sale, enhancement or upgrading of design and construction services, so long as such sales to these countries do not include or involve sales to a country outside of this group of nations.

Commercially licensed arms sales also must be formally notified to Congress **30** calendar-days before the export license is issued if they involve the sale of major defense equipment valued at $14 million or more, or defense articles or services valued at $50 million or more (Section 36(c) AECA[5]). In the case of such sales to NATO member states, NATO, Japan, Australia, or New Zealand, Congress must be formally notified **15** calendar-days before the Administration can proceed with such a sale. However, the prior notice thresholds are higher for sales to NATO members, Australia, Japan or New Zealand specifically: $25,000,000 for the sale, enhancement or upgrading of major defense equipment; $100,000,000 for the sale, enhancement or upgrading of defense articles and defense services, and $300,000,000 for the sale, enhancement or upgrading of design and construction services, so long as such sales to these countries do not include or involve sales to a country outside of this group of nations. It has not been the general practice for the

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[4] 22 U.S.C. 2776(b).

[5] 22 U.S.C. 2776(c)

Administration to provide a 20-day "informal" notification to Congress of arms sales proposals that would be made through the granting of commercial licenses.[6]

A congressional recess or adjournment does not stop the 30 calendar-day statutory review period. It should be emphasized that after Congress receives a statutory notification required under Sections 36(b) or 36(c) of the Arms Export Control Act, for example, and 30 calendar-days elapse without Congress having blocked the sale, the executive branch is free to proceed with the sales process. This fact does not mean necessarily that the executive branch and the prospective arms purchaser will sign a sales contract and that the items will be transferred on the 31st day after the statutory notification of the proposal has been made. It would, however, be legal to do so at that time.

Administration. Exports of defense goods and services are administered by the Directorate of Defense Trade Controls (DDTC) at the Department of State. DDTC is a component of Bureau of Political-Military Affairs and consists of four offices: Management, Policy, Licensing, and Compliance. In FY2008, DDTC was funded at a level of $12.7 million and had a staff of 78 ($6.6 million for licensing activities, 44 licensing officers). In the 12 months ending March 2008, DDTC completed action on 83,886 export license applications, and its FY2009 budget request reported that license application volumes have increased by a 8% a year.[7] DDTC's FY2009 budget request, however, did not ask for additional staffing and its budget request called for an increase of $0.4 million to $13.1 million ($6.9 million for licensing activities) . On March 24, 2008, nineteen Members of Congress wrote to the Chairwoman and Ranking Member of the House State and Foreign Operations Appropriations Subcommittee to request a funding level of $26 million, including $8 million collected yearly from registration fees. Senator Biden, in his Foreign Relations Views and Estimates letter to Senate Budget Committee also described DDTC as "seriously understaffed" and suggested "a doubling of that figure ($6.9 million for licensing) is warranted."[8]

Critics of the defense trade system have long decried the delays and backlogs in processing license applications at DDTC. The new National Security Presidential Directive (NSPD-56), signed by President Bush on January 22, 2008 directed that the review and adjudication of defense trade licenses submitted under ITAR are to be completed within 60 days, except where certain national security exemptions apply. Previously, except for the Congressional notification procedures discussed above, DDTC had no defined time-line for the application process. DDTC's backlog of open cases, which had reached 10,000 by the end of 2006, has been reduced to 3458 by March 2008. During this period, average processing time of munitions license applications have also trended downward from 33 days

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[6] Similar notification requirements and reporting thresholds also apply to prospective re-transfers of United States-origin major defense equipment, defense articles or defense services as stipulated in Section 3(d) of the Arms Export Control Act (AECA); commercial technical assistance or manufacturing licensing agreements (see Section 36(d) AECA), and leases or loans of defense articles from U.S. Defense Department stocks (see Sections 62 and 63 AECA). As with arms sales, Congress can block any of these reportable transactions by enacting a joint resolution of disapproval as stipulated in the Arms Export Control Act (AECA) (see 22 U.S.C. 2753, 2776, 2796).

[7] Department of State, Budget Justification, FY2009, p. 109.

[8] Committee on Foreign Relations, Views and Estimates Letter, *Congressional Record*, February 26, 2008, p. S1965.

to 15 days. However, GAO reported in November 2007 that DDTC was using "extraordinary measures- such as extending work hours, canceling staff training, meeting, and industry outreach, and pulling available staff from other duties in order to process cases" to reduce the license backlog, measures that it described as unsustainable.[9]

Enforcement and Penalties. The AECA provides for criminal penalties of $1 million or ten years for each violation, or both. AECA also authorizes civil penalties of up to $500,000 and debarment from future exports. DDTC has a small enforcement staff (18 in the Office of Defense Trade Compliance) and works with the Defense Security Service and the Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) units at the Department of Homeland Security (DHS). DDTC assists the DHS and the Department of Justice in pursuing criminal investigations and prosecutions. DDTC also coordinates the Blue Lantern end-use monitoring program, in which U.S. embassy officials in-country conduct pre-license checks and post-shipment verifications. In FY2006, DDTC completed 489 end-use cases, 94 (19%) of which were determined to be unfavorable.

Nuclear

A subset of the abovementioned dual-use and military controls are controls on nuclear items and technology. Controls on nuclear goods and technology are derived from the Atomic Energy Act as well as from the EAA and the AECA. Controls on nuclear exports are divided between several agencies based on the product or service being exported. The Nuclear Regulatory Commission regulates exports of nuclear facilities and material, including core reactors. The NRC licensing policy and control list is located at 10 C.F.R. 110. BIS licenses "outside the core" civilian power plant equipment and maintains the Nuclear Referral List as part of the CCL. The Department of Energy controls the export of nuclear technology. DDTC exercises licensing authority over nuclear items in defense articles under the ITAR.

Defense Technology Security Administration (DTSA).

DTSA is located in the Department of Defense, Office of the Under Secretary of Defense for Policy under the Assistant Secretary of Defense for Global Security Affairs. DTSA coordinates the technical and national security review of direct commercial sales export licenses and commodity jurisdiction requests received from the Departments of Commerce and State. It develops the recommendation of the DOD on these referred export licenses or commodity jurisdictions based on input provided by the various DOD departments and agencies and represents DOD in the interagency dispute resolution process. In calendar year 2007, DTSA completed 41,689 license referrals. Not all licenses from DDTC or BIS are referred to DTSA; memorandums of understanding govern the types of licenses referred from each agency. DTSA coordinates the DOD position with regard to proposed changes to the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). It also represents the DOD in interagency fora responsible for compliance with multinational export control regimes. For FY2008, DTSA had a staff of 187 civilian and active duty military employees and received funding of $23.3 million.

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[9] GAO Report 08-89, *Defense Trade: State Department Needs to Conduct Assessments to Identify and Address Inefficiencies and Challenges in the Arms Export Process*, November 2007.

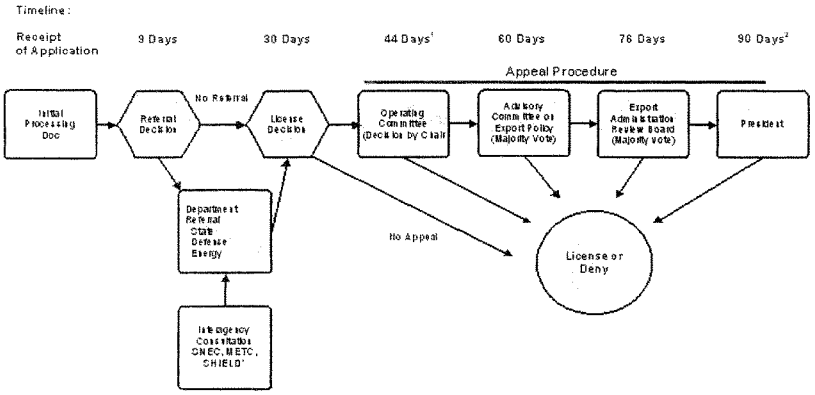
Appendix 1: Basic Export Control Characteristics

Characteristic	Dual-Use	Munitions	Nuclear
Legislative Authority	Export Administration Act (EAA) of 1979 (expired); International Emergency Economic Powers Act of 1977 (IEEPA)	Arms Export Control Act of 1976 (AECA)	Atomic Energy Act of 1954
Agency of Jurisdiction	Bureau of Industry and Security (BIS)(Commerce)	Directorate of Defense Trade Controls (DDTC)(State)	Nuclear Regulatory Commission (NRC) (facilities and material) Department of Energy (DOE) (technology) BIS ('outside the core'civilian power plant equipment) DDTC (nuclear items in defense articles)
Implementing Regulations	Export Administration Regulations (EAR)	International Traffic in Arms Regulations (ITAR)	10 C.F.R. 110 - Export and Import of Nuclear Material and Equipment (NRC) 10 C.F.R. 810 - Assistance to Foreign Atomic Energy Activities (DOE)
Control List	Commerce Control List (CCL)	Munitions List (USML)	List of Nuclear Facilities and Equipment; List of Nuclear Materials (NRC) Nuclear Referral List (CCL) USML Activities Requiring Specific Authorization (DOE)
Relation to Multilateral Controls	Wassenaar Arrangement (Dual-Use) Missile Technology Control Regime (MTCR) Australia Group (CBW) Nuclear Suppliers' Group	Wassennaar Arrangement (munitions) MTCR	Nuclear Suppliers' Group International Atomic Energy Agency

Licensing Policy	Based on item, country, or both. Anti-terrorism controls proscribe exports to 5 countries for nearly all CCL listings.	Most Munitions License items require licenses; 21 proscribed countries.	General/Specific Licenses (NRC) General/Specific Authorizations (DOE)
Licensing Application Timeline	Initial referral within 9 days; agency must approve/deny within 30 days; 90 appeal process. (See Appendix 2)	60 days with national security exceptions; Congressional notification period for significant military equipment.	No timeframe for license applications.
Penalties	Criminal: $1 million or 20 years;Civil: $250,000/Denial of export privileges. (IEEPA)	Criminal: $1 million/10 years prison Civil: $500,000/forfeiture of goods, conveyance. Denial of Export Privileges for either.	Criminal: Individual- $250,000/12 years to life; Firm- $500,000 (For NRC and DOE) Civil: $100,000 per violation (For NRC)

SOURCE: CONGRESSIONAL RESEARCH SERVICE

Appendix 2: Dual-Use Export Licensing Process (Executive Order 12981, December 5, 1995)



[1]The time periods for the appeal procedure reflect a 5 day window of appeal and an 11 day period for each body to make a decision

[2] A License application must be resolved or appealed to the president within 90 days. The order does place a time limit on a presidential decision.

*SNEC, Sub-Groups on Nuclear Export Policy; MTEC, Missile Technology Export Control Group; SHIELD Chemical and Biological Weapons Control Group

PREPARED BY IAN F. FERGUSSON, CONGRESSIONAL RESEARCH SERVICE

Congressional Research Service

Memorandum April 21, 2008

TO: Senate Homeland Security and Government Affairs Committee,
Subcommittee on Oversight of Government Management, the
Federal Workforce, and the District of Columbia

FROM: Kenneth Katzman
Specialist in Middle Eastern Affairs
Ian F. Fergusson
Specialist in International Trade and Finance
Foreign Affairs, Defense, and Trade Division

SUBJECT: United Arab Emirates: Political Background and Export Control Issues.

This memorandum responds to your request for background on the United Arab Emirates and concerns about that country's export control law and practices. If you have any requests concerning this material, please contact Kenneth Katzman (7-7612) or Ian Fergusson (7-4997).

Political and Economic Background

The UAE is a federation of seven emirates (principalities): Abu Dhabi, the oil-rich capital of the federation; Dubai, its free-trading commercial hub; and the five smaller and less wealthy emirates of Sharjah; Ajman; Fujayrah; Umm al-Qawayn; and Ras al-Khaymah. The UAE federation is led by the ruler of Abu Dhabi, Khalifa bin Zayid al-Nuhayyan, now about 60 years old. The ruler of Dubai traditionally serves concurrently as Vice President and Prime Minister of the UAE; that position has been held by Mohammad bin Rashid Al Maktum, architect of Dubai's modernization drive, since the death of his elder brother Maktum bin Rashid Al Maktum on January 5, 2006.

In part because of its small size – its population is about 4.4 million, of which only about 900,000 are citizens – the UAE is one of the wealthiest of the Gulf states, with a gross domestic product (GDP) per capita of about $55,000 per year in terms of purchasing power parity. Islamist movements in UAE, including those linked to the Muslim Brotherhood, are generally non-violent and perform social and relief work. However, the UAE is surrounded by several powers that dwarf it in size and strategic capabilities, including Iran, Iraq, and Saudi Arabia, which has a close relationship with the UAE but views itself as the leader of the Gulf monarchies.

The UAE has long lagged behind the other Persian Gulf states in political reform, but the federation, and several individual emirates, have begun to move forward. The most significant reform, to date, took place in December 2006, when limited elections were held for half of the 40-seat Federal National Council (FNC); the other 20 seats continue to be appointed. Previously, all 40 members of the FNC were appointed by all seven emirates, weighted in favor of Abu Dhabi and Dubai (eight seats each). UAE citizens are able to express their concerns directly to the leadership through traditional consultative mechanisms, such as the open majlis (council) held by many UAE leaders.

The UAE's social problems are likely a result of its open economy, particularly in Dubai. The Trafficking in Persons report for 2007 again placed the UAE on "Tier 2/Watch List" (up from Tier 3 in 2005) because it does not comply with the minimum standards for the elimination of trafficking but is making significant efforts to do so. The UAE is considered a "destination country" for women trafficked from Asia and the former Soviet Union.

Defense Relations With the United States and Concerns About Iran. Following the 1991 Gulf war to oust Iraqi forces from Kuwait, the UAE, whose armed forces number about 61,000, determined that it wanted a closer relationship with the United States, in part to deter and to counter Iranian naval power. UAE fears escalated in April 1992, when Iran asserted complete control of the largely uninhabited Persian Gulf island of Abu Musa, which it and the UAE shared under a 1971 bilateral agreement. (In 1971, Iran, then ruled by the U.S.-backed Shah, seized two other islands, Greater and Lesser Tunb, from the emirate of Ras al-Khaymah, as well as part of Abu Musa from the emirate of Sharjah.) The UAE wants to refer the dispute to the International Court of Justice (ICJ), but Iran insists on resolving the issue bilaterally. The United States is concerned about Iran's military control over the islands and supports UAE proposals, but the United States takes no position on sovereignty of the islands. The UAE, particularly Abu Dhabi, has long feared that the large Iranian-origin community in Dubai emirate (est. 400,000 persons) could pose a "fifth column" threat to UAE stability. Illustrating the UAE's attempts to avoid antagonizing Iran, in May 2007, Iranian President Mahmoud Ahmadinejad was permitted to hold a rally for Iranian expatriates in Dubai when he made the first high level visit to UAE since UAE independence in 1971.

The framework for U.S.-UAE defense cooperation is a July 25, 1994, bilateral defense pact, the text of which is classified, including a "status of forces agreement" (SOFA). Under the pact, during the years of U.S. "containment" of Iraq (1991-2003), the UAE allowed U.S. equipment pre-positioning and U.S. warship visits at its large Jebel Ali port, capable of handling aircraft carriers, and it permitted the upgrading of airfields in the UAE that were used for U.S. combat support flights, during Operation Iraqi Freedom (OIF).[1] About 1,800 U.S. forces, mostly Air Force, are in UAE; they use Al Dhafra air base (mostly KC-10 refueling) and naval facilities at Fujairah to support U.S. operations in Iraq and Afghanistan.

The UAE, a member of the World Trade Organization (WTO), has developed a free market economy. On November 15, 2004, the Administration notified Congress it had begun negotiating a free trade agreement (FTA) with the UAE. Several rounds of talks were

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[1] Jaffe, Greg. "U.S. Rushes to Upgrade Base for Attack Aircraft." *Wall Street Journal*, March 14, 2003.

held prior to the June 2007 expiration of Administration "trade promotion authority," but progress had been halting, mainly because UAE may feel it does not need the FTA enough to warrant making major labor and other reforms. Despite diversification, oil exports still account for one-third of the UAE's federal budget. Abu Dhabi has 80% of the federation's proven oil reserves of about 100 billion barrels, enough for over 100 years of exports at the current production rate of 2.2 million barrels per day (mbd). Of that amount, about 2.1 mbd are exported, but negligible amounts go to the United States. The UAE does not have ample supplies of natural gas, and it has entered into a deal with neighboring gas exporter Qatar to construct pipeline that will bring Qatari gas to UAE (Dolphin project). UAE is also taking a leading role among the Gulf states in pressing consideration of alternative energies, including nuclear energy, to maintain Gulf energy dominance.

Export Control Issues

Cooperation Against Terrorism. The relatively open society of the UAE – along with UAE policy to engage rather than confront its powerful neighbors – has also caused differences with the United States on the presence of terrorists and their financial networks. However, the UAE has been consistently credited by U.S. officials with attempting to rectify problems identified by the United States.

The UAE was one of only three countries (Pakistan and Saudi Arabia were the others) to have recognized the Taliban during 1996-2001 as the government of Afghanistan. During Taliban rule, the UAE allowed Ariana Afghan airlines to operate direct service, and Al Qaeda activists reportedly spent time there.[2] Two of the September 11 hijackers were UAE nationals, and they reportedly used UAE-based financial networks in the plot. Since then, the UAE has been credited in U.S. reports (State Department "Country Reports on Terrorism: 2006, released April 30, 2007") and statements with: assisting in the 2002 arrest of senior Al Qaeda operative in the Gulf, Abd al-Rahim al-Nashiri;[3] denouncing terror attacks; improving border security; prescribing guidance for Friday prayer leaders; investigating suspect financial transactions; and strengthening its bureaucracy and legal framework to combat terrorism. In December 2004, the United States and Dubai signed a Container Security Initiative Statement of Principles, aimed at screening U.S.-bound containerized cargo transiting Dubai ports. Under the agreement, U.S. Customs officers are co-located with the Dubai Customs Intelligence Unit at Port Rashid in Dubai. On a "spot check" basis, containers are screened at that and other UAE ports for weaponry, explosives, and other illicit cargo.

The UAE has long been under scrutiny as a transhipment point for exports to Iran and other proliferators. In connection with revelations of illicit sales of nuclear technology to Iran, Libya, and North Korea by Pakistan's nuclear scientist A.Q. Khan, Dubai was named as a key transfer point for Khan's shipments of nuclear components. Two Dubai-based companies were apparently involved in trans-shipping components: SMB Computers and Gulf Technical Industries.[4] On April 7, 2004, the Administration sanctioned a UAE firm, Elmstone Service and Trading (FZE), for allegedly selling weapons of mass destruction-related technology to Iran, under the Iran-Syria Non-Proliferation Act (P.L. 106-178). More

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[2] CRS conversations with executive branch officials, 1997-2007.

[3] "U.S. Embassy to Reopen on Saturday After UAE Threat." *Reuters*, March 26, 2004.

[4] Milhollin, Gary and Kelly Motz. "Nukes 'R' US." *New York Times* op.ed. March 4, 2004.

recently, in June 2006, the Bureau of Industry and Security (BIS) released a general order imposing a license requirement on Mayrow General Trading Company and related enterprises in the UAE. This was done after Mayrow was implicated in the transhipment of electronic components and devices capable of being used to construct improvised explosive devices (IED) used in Iraq and Afghanistan.[5]

Current Controls. The UAE is not subject to any blanket prohibitions regarding dual-use Commerce exports. In general, the UAE faces many of the same license requirement as other non-NATO countries. In the Export Administration Regulations (15 CFR 730 *et seq)*, the UAE is designated on Country Group D and thus is not eligible for certain license exceptions for items controlled for chemical/biological and missile technology reasons. Reexports of U.S. origin goods from one foreign country to another subject to EAR are also controlled, and may require the reexporter regardless to nationality to obtain a license for reexport from BIS.

The Treasury Department's Office of Foreign Assets Control maintains a comprehensive embargo on the export, re-export, sale or supply of any good, service or technology to Iran by U.S. origin, including to persons in third countries with the knowledge that such goods are intended specifically for the supply, transhipment or re-exportation to Iran (Iranian Transaction Regulations, 31 CFR 560.204). Re-exportation of goods, technology and services by non- U.S. persons are also prohibited if undertaken with the knowledge or reason to know that the re-exportation is intended specifically for Iran. (31 CFR 560.205). In addition, BIS also maintains controls on exports and reexports for items on the Commerce Control List (EAR, 15 CFR 746.7).

The lack of an effective export control system in the UAE and the use of the emirates' ports as transhipment centers has been a concern to U.S. policymakers. To that end, BIS released an advanced notice of proposed rule-making on February 26, 2007 that would have created a new control designation: "Country Group C: Destinations of Diversion Control." This designation would have established license requirements on exports and re-exports to countries that represent a diversion or transhipment risk for goods subject to the Export Administration Regulations. According to BIS, the Country C designation was designed "to strengthen the trade compliance and export control system of countries that are transhipment hubs."[6] Designation on the Country Group C list could lead to tightened licensing requirements for designees. Although no countries were mentioned in the notice, it was widely considered to be directed at the United Arab Emirates.

Perhaps as a response to the possibility of becoming a 'Country C' designee, the UAE Federal Council passed the emirate's first ever export control statute in March 2007. That law, was also created a control body known as the National Commission for Commodities Subject to Import, Export, and Re-export Controls and that law was signed on August 31, 2007 by Emirates President H.H. Sheikh Khalifa bin Zayed Al Nahyan. Reportedly, the law's structure and control lists were modeled after the export control regime of Singapore, another

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[5] BIS, "General Order Concerning Mayrow General Trading and Related Enterprises," 71 *Federal Register* 107, June 5, 2006.

[6] "Country Group C: Destinations of Diversion Control," Advanced Notice of Proposed Rulemaking, 72 *Federal Register* 8315, February 26, 2007.

prominent transhipment hub.[7] It remains unclear, however, the extent to which the law is being enforced or whether resources are being devoted to preventing the diversion or illegal transhipment of controlled U.S. goods and technologies.[8]

The United States has one export control officer (ECO) on the ground in the UAE to investigate violations of U.S. dual-use export control laws. This officer may be augmented by U.S. Foreign Commercial Officers in conducting end-use check and post-shipment verifications. A recent GAO report mentioned a "high-rate of unfavorable end-use checks for U.S. items exported to the UAE," but the report did not elaborate further.[9]

The United States also has engaged in technical cooperation to assist the UAE in developing its export control regime. Officials from BIS and other agencies reportedly traveled to the UAE in June 2007 to discuss the proposed statute.[10] In addition, the Department of State has also provided training through its Export Control and Related Border Security (EXBS) program. This program provides participating countries with licensing and legal regulatory workshops, detection equipment, on-site program and training advisers, and automated licensing programs. Since FY2001, UAE has received between $172-$350 thousand annually in this assistance. For FY2009, State has requested $200 thousand for the UAE under this program.

Recent U.S. Aid to UAE

	FY2005 and FY2006 (Combined)	FY2007	FY2008 (est.)	FY2009 (req)
NADR (Non-Proliferation, Anti-Terrorism, De-Mining, and Related) - Anti-Terrorism Programs (ATA)	$1.094 million	$1.581 million	$300,000	$925,000
NADR- Counter-Terrorism Financing	$300,000 (FY2006 only)	$580,000		$725,000
NADR-Export Control and Related Border Security Assistance	$250,000	$172,000	$300,000	$200,000
International Military Education and Training (IMET)			$14,000	$15,000
International Narcotics and Law Enforcement (INCLE)			$300,000	

SOURCE: DEPARTMENT OF STATE, FY2009 BUDGET JUSTIFICATION

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[7] "U.S. to Query UAE On Export Controls in June Visit," *International Trade Reporter*, May 25, 2007.

[8] In the time since the UAE's action, there has been no further activity on the proposed 'Country C' rule-making.

[9] GAO Report 08-58, *Iran Sanctions: Impact in Furthering U.S. Objectives Is Unclear and Should Be Reviewed*, December 2007.

[10] "U.S. Team Heading to UAE This Month To Discuss New Export Control Regulation," *International Trade Reporter*, June 7, 2007.

Executive Order 12981—Administration of Export Controls

December 5, 1995

By the authority vested in me as President by the Constitution and the laws of the United States of America, including but not limited to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et. seq.*) ("the Act"), and in order to take additional steps with respect to the national emergency described and declared in Executive Order No. 12924 of August 19, 1994, and continued on August 15, 1995,

I, William J. Clinton, President of the United States of America, find that it is necessary for the procedures set forth below to apply to export license applications submitted under the Act and the Export Administration Regulations (15 C.F.R. Part 730 *et. seq.*) ("the Regulations") or under any renewal of, or successor to, the Export Administration Act of 1979, as amended (50 U.S.C. App. 2401 *et. seq.*) ("the Export Administration Act"), and the Regulations. Accordingly, it is hereby ordered as follows:

Section 1. *License Review.* To the extent permitted by law and consistent with Executive Order No. 12924 of August 19, 1994, the power, authority, and discretion conferred upon the Secretary of Commerce ("the Secretary") under the Export Administration Act to require, review, and make final determinations with regard to export licenses, documentation, and other forms of information submitted to the Department of Commerce pursuant to the Act and the Regulations or under any renewal of, or successor to, the Export Administration Act and the Regulations, with the power of successive redelegation, shall continue. The Departments of State, Defense, and Energy, and the Arms Control and Disarmament Agency each shall have the authority to review any export license application submitted to the Department of Commerce pursuant to the Act and the Regulations or under any renewal of, or successor to, the Export Administration Act and the Regulations. The Secretary may refer license applications to other United States Government departments or agencies for review as appropriate. In the event that a department or agency determines that certain types of applications need not be referred to it, such department or agency shall notify the Department of Commerce as to the specific types of such applications that it does not wish to review. All departments or agencies shall promptly respond, on a case-by-case basis, to requests from other departments or agencies for historical information relating to past license applications.

Section 2. *Determinations.* (a) All license applications submitted under the Act and the Regulations or any renewal of, or successor to, the Export Administration Act and the Regulations, shall be resolved or referred to the President no later than 90 calendar days after registration of the completed license application.

(b) The following actions related to processing a license application submitted under the Act and the Regulations or any renewal of, or successor to, the Export Administration Act and the Regulations shall not be counted in calculating the time periods prescribed in this order:

(1) *Agreement of the Applicant.* Delays upon which the Secretary and the applicant mutually agree.

(2) *Prelicense Checks.* Prelicense checks through government channels that may be required to establish the identity and reliability of the recipient of items controlled under the Act and the Regulations or any renewal of, or successor to, the Export Administration Act and the Regulations, provided that:

(A) the need for such prelicense check is established by the Secretary, or by another department or agency if the request for prelicense check is made by such department or agency;

(B) the Secretary requests the prelicense check within 5 days of the determination that it is necessary; and

(C) the Secretary completes the analysis of the result of the prelicense check within 5 days.

(3) *Requests for Government-To-Government Assurances.* Requests for government-to-government assurances of suitable end-use of items approved for export under the Act and the Regulations or any renewal of, or successor to, the Export Administration Act and the Regulations, when failure to ob-

tain such assurances would result in rejection of the application, provided that:

(A) the request for such assurances is sent to the Secretary of State within 5 days of the determination that the assurances are required;

(B) the Secretary of State initiates the request of the relevant government within 10 days thereafter; and

(C) the license is issued within 5 days of the Secretary's receipt of the requested assurances. Whenever such prelicense checks and assurances are not requested within the time periods set forth above, they must be accomplished within the time periods established by this section.

(4) *Multilateral Reviews.* Multilateral review of a license application as provided for under the Act and the Regulations or any renewal of, or successor to, the Export Administration Act and the Regulations, as long as multilateral review is required by the relevant multilateral regime.

(5) *Consultations.* Consultation with other governments, if such consultation is provided for by a relevant multilateral regime or bilateral arrangement as a precondition for approving a license.

Sec. 3. *Initial Processing.* Within 9 days of registration of any license application, the Secretary shall, as appropriate:

(a) request additional information from the applicant. The time required for the applicant to supply the additional information shall not be counted in calculating the time periods prescribed in this section.

(b) refer the application and pertinent information to agencies or departments as stipulated in section 1 of this order, and forward to the agencies any relevant information submitted by the applicant that could not be reduced to electronic form.

(c) assure that the stated classification on the application is correct; return the application if a license is not required; and, if referral to other departments or agencies is not required, grant the application or notify the applicant of the Secretary's intention to deny the application.

Sec. 4. *Department or Agency Review.* (a) Each reviewing department or agency shall specify to the Secretary, within 10 days of receipt of a referral as specified in subsection 3(b), any information not in the application that would be required to make a determination, and the Secretary shall promptly request such information from the applicant. If, after receipt of the information so specified or other new information, a reviewing department or agency concludes that additional information would be required to make a determination, it shall promptly specify that additional information to the Secretary, and the Secretary shall promptly request such information from the applicant. The time that may elapse between the date the information is requested by the reviewing department or agency and the date the information is received by the reviewing department or agency shall not be counted in calculating the time periods prescribed in this order. Such information specified by reviewing departments or agencies is in addition to any information that may be requested by the Department of Commerce on its own initiative during the first 9 days after registration of an application.

(b) Within 30 days of receipt of a referral and all required information, a department or agency shall provide the Secretary with a recommendation either to approve or deny the license application. As appropriate, such recommendation may be with the benefit of consultation and discussions in interagency groups established to provide expertise and coordinate interagency consultation. A recommendation that the Secretary deny a license shall include a statement of the reasons for such recommendation that are consistent with the provisions of the Act and the Regulations or any renewal of, or successor to, the Export Administration Act and the Regulations and shall cite both the statutory and the regulatory bases for the recommendation to deny. A department or agency that fails to provide a recommendation within 30 days with a statement of reasons and the statutory and regulatory bases shall be deemed to have no objection to the decision of the Secretary.

Sec. 5. *Interagency Dispute Resolution.* (a) *Committees.* (1)(A) *Export Administration Review Board.* The Export Administration Review Board ("the Board"), which was established by Executive Order No. 11533 of June 4, 1970, and continued in Executive Order No. 12002 of July 7, 1977, is hereby

continued. The Board shall have as its members, the Secretary, who shall be Chair of the Board, the Secretary of State, the Secretary of Defense, the Secretary of Energy, and the Director of the Arms Control and Disarmament Agency. The Chairman of the Joint Chiefs of Staff and the Director of Central Intelligence shall be nonvoting members of the Board. No alternate Board Members shall be designated, but the acting head or deputy head of any member department or agency may serve in lieu of the head of the concerned department or agency. The Board may invite the heads of other United States Government departments or agencies, other than the departments or agencies represented by the Board members, to participate in the activities of the Board when matters of interest to such departments or agencies are under consideration.

(B) The Secretary may, from time to time, refer to the Board such particular export license matters, involving questions of national security or other major policy issues, as the Secretary shall select. The Secretary shall also refer to the Board any other such export license matter, upon the request of any other member of the Board or the head of any other United States Government department or agency having any interest in such matter. The Board shall consider the matters so referred to it, giving due consideration to the foreign policy of the United States, the national security, the domestic economy, and concerns about the proliferation of armaments, weapons of mass destruction, missile delivery systems, and advanced conventional weapons and shall make recommendations thereon to the Secretary.

(2) *Advisory Committee on Export Policy.* An Advisory Committee on Export Policy ("ACEP") is established and shall have as its members the Assistant Secretary of Commerce for Export Administration, who shall be Chair of the ACEP, and Assistant Secretary-level representatives of the Departments of State, Defense, and Energy, and the Arms Control and Disarmament Agency. Appropriation representatives of the Joint Chiefs of Staff and of the Nonproliferation Center of the Central Intelligence Agency shall be nonvoting members of the ACEP. Representatives of the departments or agencies shall be the appropriate Assistant Secretary or equivalent (or appropriate acting Assistant Secretary or equivalent in lieu of the Assistant Secretary or equivalent) of the concerned department or agency, or appropriate Deputy Assistant Secretary or equivalent (or the appropriate acting Deputy Assistant Secretary or equivalent in lieu of the Deputy Assistant Secretary or equivalent) of the concerned department or agency. Regardless of the department or agency representative's rank, such representative shall speak and vote at the ACEP on behalf of the appropriate Assistant Secretary or equivalent of such department or agency. The ACEP may invite Assistant Secretary-level representatives of other United States Government departments or agencies, other than the departments and agencies represented by the ACEP members, to participate in the activities of the ACEP when matters of interest to such departments or agencies are under consideration.

(3)(A) *Operating Committee.* An Operating Committee ("OC") of the ACEP is established. The Secretary shall appoint its Chair, who shall also serve as Executive Secretary of the ACEP. Its other members shall be representatives of appropriate agencies in the Departments of Commerce, State, Defense, and Energy, and the Arms Control and Disarmament Agency. The appropriate representatives of the Joint Chiefs of Staff and the Nonproliferation Center of the Central Intelligence Agency shall be nonvoting members of the OC. The OC may invite representatives of other United States Government departments or agencies, other than the departments and agencies represented by the OC members, to participate in the activities of the OC when matters of interest to such departments or agencies are under consideration.

(B) The OC shall review all license applications on which the reviewing departments and agencies are not in agreement. The Chair of the OC shall consider the recommendations of the reviewing departments and agencies and inform them of his or her decision on any such matters within 14 days after the deadline for receiving department and agency recommendations. As described below, any reviewing department or agency

may appeal the decision of the Chair of the OC to the Chair of the ACEP. In the absence of a timely appeal, the Chair's decision will be final.

(b) *Resolution Procedures.* (1) If any department or agency disagrees with a licensing determination of the Department of Commerce made through the OC, it may appeal the matter to the ACEP for resolution. A department or agency must appeal a matter within 5 days of such a decision. Appeals must be in writing from an official appointed by the President by and with the advice and consent of the Senate, or an officer properly acting in such capacity, and must cite both the statutory and the regulatory bases for the appeal. The ACEP shall review all departments' and agencies' information and recommendations, and the Chair of the ACEP shall inform the reviewing departments and agencies of the majority vote decision of the ACEP within 11 days from the date of receiving notice of the appeal. Within 5 days of the majority vote decision, any dissenting department or agency may appeal the decision by submitting a letter from the head of the department or agency to the Secretary in his or her capacity as the Chair of the Board. Such letter shall cite both the statutory and the regulatory bases for the appeal. Within the same period of time, the Secretary may call a meeting on his or her own initiative to consider a license application. In the absence of a timely appeal, the majority vote decision of the ACEP shall be final.

(2) The Board shall review all departments' and agencies' information and recommendations, and such other export control matters as may be appropriate. The Secretary shall inform the reviewing departments and agencies of the majority vote of the Board within 11 days from the date of receiving notice of appeal. Within 5 days of the decision, any department or agency dissenting from the majority vote decision of the Board may appeal the decision by submitting a letter from the head of the dissenting department or agency to the President. In the absence of a timely appeal, the majority vote decision of the Board shall be final.

Sec. 6. The license review process in this order shall take effect beginning with those license applications registered by the Secretary 60 days after the date of this order and shall continue in effect to the extent not inconsistent with any renewal of the Export Administration Act, or with any successor to that Act.

Sec. 7. *Judicial Review.* This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any rights to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

William J. Clinton

The White House,
December 5, 1995.

[Filed with the Office of the Federal Register, 2:31 p.m., December 6, 1995]

NOTE: This Executive order was released by the Office of the Press Secretary on December 6, and it was published in the *Federal Register* on December 8.

Message to the Congress on Administration of Export Controls

December 5, 1995

To the Congress of the United States:

In order to take additional steps with respect to the national emergency described and declared in Executive Order No. 12924 of August 19, 1994, and continued on August 15, 1995, necessitated by the expiration of the Export Administration Act on August 20, 1994, I hereby report to the Congress that pursuant to section 204(b) of the International Emergency Economic Powers Act, 50 U.S.C. 1703(b) ("the Act"), I have today exercised the authority granted by the Act to issue an Executive order (a copy of which is attached) to revise the existing procedures for processing export license applications submitted to the Department of Commerce.

The Executive order establishes two basic principles for processing export license applications submitted to the Department of Commerce under the Act and the Regulations, or under any renewal of, or successor to, the Export Administration Act and the

Combating Proliferation of Weapons of Mass Destruction

Report of the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction

Pursuant to Public Law 293, 104th Congress

Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction

P.O. Box 18205
Washington, D.C. 20036-8205
(202) 331-4060
Fax (202) 296-5545

July 14, 1999

The Honorable Trent Lott
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Mr. Leader:

In accordance with the Intelligence Authorization Act for Fiscal Year 1997 (P.L. 104-283) and the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (P.L. 105-277), we hereby submit the report of the Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction.

The Commission was established in January 1998 to perform its assessment and report to Congress on specific administrative, legislative, and other changes it believes would improve U.S. performance in combating proliferation.

It has been an honor to serve.

Respectfully submitted,

John M. Deutch
Chairman

Arlen Specter,
Vice Chairman

Anthony C. Beilenson

Stephen A. Cambone*

M.D.B. Carlisle

Henry F. Cooper

J. James Exon

Dave McCurdy

Janne Nolan

Daniel Poneman

William Schneider, Jr.

Henry D. Sokolski

*** nominated**
**** resigned**

Enclosure

Chapter 4
Export Controls

The most effective measures to combat proliferation are those that persuade governments not to acquire weapons of mass destruction. To the extent such restraint is lacking, export controls can reinforce other measures aimed at combating proliferation.

Profound and fundamental changes in the sources of technology for military application have occurred. To an increasing degree, enabling technology for advanced military capabilities is drawn from the commercial sector. The defense industrial sector is no longer the leading developer in areas crucial to military performance such as telecommunications, computation, microelectronics, etc. Moreover, these technologies are available from suppliers throughout the world. This worldwide commerce in advanced technology is helping to sustain U.S. economic growth and the technology leadership that is critical to our military strength. But it is also intensifying the problem of proliferation.

The export control system needs to adapt to these changes if it is to contribute to combating proliferation effectively. This can be accomplished by refocusing the export control system from broad-based, technology-driven controls to limiting or denying access to proliferation-enabling technologies by potential proliferators. Reinforced by the coordinated employment of other policy instruments available to the US Government, ranging from diplomacy to arms transfers, export controls can provide leverage to these initiatives to achieve U.S. goals in combating proliferation.

Export controls have made—and continue to make—significant contributions to combating proliferation. This is done in three ways. First, the very process of developing export controls within a nation, or negotiating export controls multilaterally, educates government officials and individual companies about technologies, materials, and equipment that could be diverted for proliferation-related purposes. Doing so facilitates the broad-based voluntary compliance by exporters without which no system could function effectively.

Second, export controls, and the enforcement apparatus that supports them, can prevent dangerous goods from reaching their intended destinations. In this connection, the Commission acknowledges the determination and creativity in enforcing export controls by U.S. officials.

Third, export controls provide a legal basis for punishing violators. For those exporters who fail to comply, violation of export controls may result in fines, denial of export privileges, or in extreme cases, prison sentences.

Export controls properly administered will continue to be one of the principal tools in combating proliferation.

The Proper Role of Export Controls in Combating Proliferation

An effective export control system requires a national consensus on its importance and objectives. What technologies are we trying to deny to a potential proliferator? Why? For how long?

Protecting U.S. national interests requires (1) a clear policy backed by (2) a strong consensus on the proper role of export controls in the context of both the growing availability of proliferation-related technology and today's difficult diplomatic environment. The United States now lacks both. The lack of a clear policy reflects an absence of consensus both within and between Congress and the Administration on the role of export controls. Indeed, this issue has become more polarized in the past two years. The Congress has reversed executive branch decisions in such areas as computer exports and the process for reviewing commercial communications satellite license applications. The range of views is broad, from those who favor unilateral controls to those who are only prepared to support export controls with broad multilateral support.

The Commission believes that the recommendations outlined below can increase the effectiveness of export controls in combating proliferation:

> ***Recommendation 4.1:*** *Target U.S. export controls and enforcement efforts on end-users of concern.*

For export controls to keep proliferation-sensitive materials, equipment and technology out of the wrong hands, assessments of the likely end user should be critical to decisions of whether to approve or deny an export license. This is increasingly true, as shown by our experience in Iraq. Proliferators will revert to using "low" technology when they are denied access to high technology and their WMD aspirations require only a "low-tech" solution.

Moreover, many dual-use items have such broad civilian applications that unless the control system is sufficiently focused on end-users of real proliferation concern, U.S. controls could needlessly constrain many innocent exports while failing to deny proliferators the capacity to develop or produce weapons of mass destruction. As more and more items fall into the "dual-use" area, it will be increasingly important to target U.S. controls on end-users that present a credible risk of diversion to a proliferation-related end-use.

Automation can help meet this objective. For example, if the Shipper's Export Declarations already required by law were collected electronically, they would provide a wealth of data that would include vital information both for assessing proliferators' procurement patterns and for determining when a proposed export should be denied. Mandating exporter participation in the Automated Export System would also save the expense of manually

inputting the data from 500,000 declarations each month. This would be good for national security ***and*** economic interests, as it would facilitate government identification of—and interdiction of—dangerous shipments, while sparing industry a cumbersome and obsolete paper process. Such expanded use of the information reported on export declarations could also demonstrate global procurement patterns of proliferators, and thus support a new diplomatic effort to win greater multilateral support for effective export controls.[11]

Additional steps to improve our ability to target end-users include:

- Increase resources devoted to research of open primary source information (e.g., Dunn & Bradstreet's, Web sites) to help identify, for example, front companies in procurement networks used by entities attempting to acquire weapons of mass destruction.
- Develop mechanisms to increase information sharing between industry and government and within the government on end-users of concern.
- Improve our ability to conduct post-shipment verification by granting greater discretion in how resources for verifications can be used or by providing more resources.

> ***Recommendation 4.2:*** *Strengthen multilateral coordination and enforcement of export controls.*

Since proliferators are not constrained by "Buy American" legislation, any export control policy that does not embrace all major sources of supply is doomed to fail. Here we face two challenges. First, our allies have made it abundantly clear that they will not resubmit their exports to a potential U.S. veto, as in the days of the Coordinating Committee on Multilateral Export Controls (CoCom), through which Western countries restricted the export of strategic materials and technology to Communist nations. Instead, even multilateral export controls—including the new Wassenaar regime, which replaced CoCom—are now implemented at the "national discretion" of each government, which inevitably tempts many to relax their enforcement when there is money to be made through exports. Many governments license exports that the United States would deny because they disagree over which countries— e.g., China, India, Iran—should be the targets of these controls. This loss of consensus is another victim of the end of the Cold War and, with it, the easy East versus West labeling of friend and foe.

[11] The U.S. Customs Service has developed and implemented a pilot program, the Automated Targeting System—Anti-Terrorism, which builds on the efficiencies of AES to identify exports of goods which may be in violation of U.S. law. The ATS-AT is a useful tool for law enforcement to identify and interdict such shipments in a timely fashion as well as providing a database of exports which could be the basis for analysis.

Second, many of the countries that were traditionally targets of multilateral export controls have now become sufficiently developed to constitute significant suppliers themselves, with Russia and China being only the most notable examples. No multilateral export system that excludes these key players can ultimately succeed.

The United States should therefore pursue vigorous diplomatic efforts to maximize multilateral support for the U.S. approach to export controls. Here, national security and commercial interests coincide. Weaker export controls in foreign countries will both promote trade in weapons-related articles in those countries, and weaken American exporters adhering to higher standards of control by siphoning sales and investments to less-constrained foreign competitors.

It is not enough, however, to agree with other governments on control lists and target countries. ***Effective international enforcement*** is essential to achieving U.S. proliferation objectives. Effectiveness, in turn, turns on equivalent enforcement among control regime members, in terms of degree of scrutiny, processing times, and policies determining when an export should be approved or denied. Absence of equal enforcement will confer uneven commercial advantages on one member state over another and reward non-compliance. Intelligence-sharing offers a unique contribution to effective enforcement by cueing licensing and enforcement authorities to dangerous exports involving member states in a multilateral regime. Other measures to enhance effective enforcement, however, include post-shipment end-user checks, training for foreign export control enforcement agencies, and financial and in-kind support to resource-poor export control organizations abroad.

Recommendation 4.3: *Enhance discipline in the U.S. export control system.*

The complexity of the U.S. export control system has also blurred our focus on the principles of good government that should discipline the administration of any effective system:

- ***Transparency.*** Any agency should have the right to review any export license, with the corresponding duty to express a view on that license or have its silence deemed as consent. Agencies should also be allowed to review written commodity classification or jurisdiction determinations that have been made by other agencies.

- ***Deadlines.*** Agencies should be given clear deadlines for action on a proposed license, with silence deemed consent, except in those cases (for example, policy-sensitive arms sales) in which such deadlines are inappropriate.

- ***Default to Decision.*** The system should provide for clear escalation and decision procedures—up to the President—to assure that the review process defaults to a decision rather than to gridlock. Critical to this principle is that specific officials should

be made ***accountable*** for ensuring that the interagency review process reaches a decision within an allotted period, or for referring the matter to more senior interagency review with the issues framed for decision by that higher body.

To be sure, there will be cases involving difficult foreign policy issues—such as the sale of advanced military capability to areas where regional security and stability dominate—in which it makes no sense to straitjacket the interagency review process by artificial deadlines. For the vast majority of cases, however, these principles for the review of license applications provide a useful discipline to a system that too often degenerates into delay and inaction.

Recommendation 4.4: *Rationalize common export control functions where it advances American interests.*

The end of the Cold War brought about the elimination of parallel export control systems in most nations. The side-by-side existence of separate export control systems for dual-use and munitions-related exports was needed to support multilateral controls through CoCom as well as national controls on munitions list exports. Typically, the trade-related ministries managed dual-use export controls or economic ministries in allied countries while the foreign ministry operated the munitions export control system. The inability since the 1994 dissolution of CoCom to develop an international consensus on multilateral constraints on dual-use exports to combat proliferation meant that most of our former CoCom partners substantially limited dual-use controls and refused to allow one another a continued veto over exports to destinations of proliferation concern.

The United States has continued to maintain a robust system of dual-use and munitions controls. Export controls on dual-use products aim to block proliferation-related items and technology from end-users of proliferation concern. Export controls on munitions list items are maintained to permit arms transfers to be employed as an instrument of foreign policy.

Both systems share common functions. Cases must be reviewed and enforced. The Department of Commerce issues approximately 11,000 dual-use export licenses per year, while the Department of State issues approximately 45,000 munitions licenses per year. There is considerable unevenness in the distribution of resources for the two export licensing and enforcement systems, as well as different procedures for interagency review. The Department of Commerce applies 300 employees to its export licensing and enforcement functions while the Department of State applies less than fifty to license processing. As a result, there are significant differences in processing time and administrative procedures between the two systems.

There is scope for increasing the efficiency of the export control process in the United States by a measure of rationalization of some common functions. The enforcement

function is shared as a statutory requirement by both systems, and involves similar skills in implementation. End-user checks, for example, are required in some cases in both systems. Enforcement investigations, and associated enforcement activities, may benefit from rationalization as well.

In the first instance, the current dual-use and munitions export control systems should be fully automated, either through a government-wide computer system or through systems that are fully compatible, and use of the automated system by exporters should be mandatory. Automation of cases that interface effectively between each agency is both practical and desirable. As commercial technology assumes a more central role in munitions list equipment, there can be considerable benefit to U.S. policy from a data processing system that is mutually reinforcing of the separate regimes. As discussed above, Shipper's Export Declarations (SEDs)—already required by law—could be collected and processed electronically to provide an abundance of data that could contribute to assessing proliferator procurement patterns.

Beyond these administrative improvements, the Commission believes that a single system may bring several advantages. It could enhance compliance, since reducing confusing red tape could make it easier for exporters to follow the law and officials to enforce it. Since proliferators purchase both dual-use goods and munitions items, a single system would allow licensing officers to communicate more regarding end-users of concern, reducing the stovepiping of information that could prevent the detection of worrisome acquisition patterns.

In rationalizing these two systems, we must preserve our ability to apply different standards of approval for dual-use and munitions items. Each system now has different statutes and regulations, forms and nomenclatures, rules and procedures, practices and bureaucracies. Security and commercial implications will of course vary enormously across the spectrum of controlled exports, from ball bearings to desktop computers to fighter aircraft. These differences require varying standards of scrutiny, safeguards, and penalties. For munitions, it is essential that the United States retain the ability to approve or deny export licenses based on foreign policy considerations, without regard to such considerations as foreign availability.

Once these steps have been implemented and operated, the Administration should review the results to evaluate the progress toward more efficient administration of export controls. If this review supports pursuing further reform, we recommend that consideration be given (1) to implementation of "one-stop shopping," where an exporter may file a single application into either the State or Commerce "mailbox," confident that the receiving agency will see that it is referred to all relevant agencies and reviewed under the appropriate statutory framework, and (2) to unification of dual-use and munitions systems under a single management structure. The Commission suggests that this review be conducted at the outset of the Presidential administration beginning on January 20, 2001.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Chairman Daniel K. Akaka (#1)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

In Mr. Reinsch's written testimony, he identified that by failing to keep the control lists up to date by removing lower level items that have become widely available, an increasing number of license applications has resulted.

Do you agree with Mr. Reinsch's statement?

Answer:

Mr. Reinsch's testimony accurately noted the large number of policy interests involved in exporting technology and controlled items abroad. I agree that because of the wide variety of interests involved, each of the relevant agencies implementing those policies should be engaged in the export control process. I note that the Directorate of Defense Trade Controls constantly reviews the United States Munitions List (USML) to ensure that it covers the right things, and we are currently consulting the Congress – as required under the Arms Export Control Act – regarding the removal of a number of items from the USML.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Chairman Daniel K. Akaka (#2)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

Mr. Reinsch and Mr. Rice, in their written testimony, both mention that requiring separate licenses within a government-approved project – meaning a policy decision was made – creates a bureaucratic burden, frustrates our allies and creates delays for companies.

Why are separate licenses required?

Answer:

A Government-to-Government Agreement usually sets out broad parameters for cooperation and places responsibility on the governments to carry out the projects specified. Export licenses authorize U.S. companies to work with foreign companies to implement the projects. These licenses ensure that the companies involved operate within the law and regulations. Items to be exported are identified, as are the consignees, recipient companies, and ultimate end users. An exporter is required to define, in advance, defense articles, technical data, and defense services which would be provided, and also take on the compliance aspects of being responsible for other parties as holder of the comprehensive authorization. Where there are approved USG-supported programs, with MOUs in place, the details of what will be exported in the program often evolve incrementally over

time, and licenses are issued accordingly. License processing timelines have dropped significantly, with most cases turning around in 60 days or less, so we do not believe the licensing requirement delays critical programs. Furthermore, we believe it is important to vet specific exports and the companies involved in accordance with the law and regulation.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Chairman Daniel K. Akaka (#3)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

National Security Presidential Directive 56 pledged additional financial resources for the timely adjudication of defense trade licenses. Yet, the DDTC's fiscal year 2009 budget request did not call for additional staffing.

Why was no additional staff requested and where do you plan to invest the additional resources?

Answer:

In accordance with the January 2008 Presidential Directive on Export Control Reform, the Department has submitted to OMB a resource plan which outlines the resources required to carry out the directives, without any increase in the total of otherwise budgeted funds. As required, the plan submitted addressed the authority for and implementation of additional self-financing mechanisms so that up to 75 percent of the Directorate's mission will eventually be provided by these new self-financing sources.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Chairman Daniel K. Akaka (#4)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

In Mr. Poneman's written testimony, he made a number of recommendations. They included: rewriting the Export Administration Act based on a set of objectives of the U.S. export control system, a default-to-decision process, mandatory reports to the President and to the Congress and a single system for commodity jurisdiction and licensing determination, amongst other suggestions.

Could you comment on his suggestions?

Answer:

Mr. Poneman has made a number of interesting suggestions, though most are directed at the Export Administration Act (EAA) and I will defer to the Department of Commerce (DOC) to provide comments on Mr. Poneman's EAA related suggestions. With regard to his suggestion that there be a single system for commodity jurisdiction, I would like to clarify that there is a single system; the Secretary of State has the authority to determine what is controlled on the United States Munitions List through the commodity jurisdiction process. The DOC has the statutory authority to make commodity classifications. Agencies that disagree with a commodity jurisdiction determination, or with a commodity classification, can escalate their disagreement to the President, if necessary, under

a process overseen by the National Security Council. With regard to his comments on the timeliness and transparency of the system, I note that munitions export license processing times have improved significantly since May 2007, and should continue to improve as the Department implements additional improvements to the system. While we are always open to new ideas, I believe the system currently in place effectively promotes the difficult balance of export controls – ensuring that our allies have the technology and equipment they need while preventing that same technology and equipment ending up in the hands of our enemies.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Chairman Daniel K. Akaka (#5)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

National Security Presidential Directive 56, signed by President Bush on January 22, 2008, directed that the review and adjudication of defense trade licenses submitted under International Traffic in Arms Regulations are to be completed within 60 days, except where certain national security exceptions apply.

a. What percentage of licenses is currently being processed consistent with this directive and what percentage are being granted exceptions?

b. What are the types of national security exceptions that can delay a license past this deadline?

Answer:

a. Over 99 percent of trade licenses submitted under the ITAR are reviewed and adjudicated within 60 days. Most cases that have been in process for more than 60 days require Congressional notification; the others are covered by one of the other national security exceptions, published in the Federal Register on April 15.

b. There are five types of national security exceptions:

1) When Congressional notification is required. Congressional notification is required when different types of equipment or services in a particular transaction reach dollar value thresholds in accordance

with Arms Export Control Act (AECA) Sections 36(c) and (d). The thresholds themselves depend primarily upon which nations would receive the equipment or services in the proposed transaction.

2) When required government assurances have not been received. These apply, to assurances required for certain exports of missile technology and to cluster munitions.
3) When end-use checks have not been completed. These are commonly referred to as "Blue Lantern" checks, and range from simple contacts to verifying the bona fides of the transaction to physical inspection of the export in question.
4) When the Department of Defense has not completed its review.
5) When the transaction requires a waiver of a legal or regulatory restriction (for example, a transaction that would be captured by a sanctions regime).

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Chairman Daniel K. Akaka (#6)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

D-Trade, DDTC's automated licensing system, only showed a two-day advantage – 23 days instead of 25 – versus paper license applications in 2006.

a. How has D-Trade been upgraded to further improve license processing efficiency at DDTC?

b. When do you expect to finish upgrading the electronic licensing system?

Answers:

a. We are using a continuous improvement cycle for our automated licensing application. Improvements to the application, coupled with revised business rules and processes such as those included in NSPD 56, will result in additional efficiencies. The next version of the application will allow industry to electronically submit amendments to the three licensing forms now available in DTRADE.

b. We are upgrading the application through continuous improvement. Meanwhile the Directorate is developing the Information Management Plan required under the NSPD for the next generation automated licensing system.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Chairman Daniel K. Akaka (#7)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

In your written testimony, you identified a plan for DDTC to increase its self-financing mechanisms, which would provide 75% of the Directorate's mission.

How much does DDTC currently collect from user registration fees and how is the money used?

Answer:

Currently DDTC receives about $9 million annually through the collection of registration fees. As mandated by law, we use these fees to pay for licensing and compliance contractors and our automation efforts.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Chairman Daniel K. Akaka (#8)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

According to the State Department's website, the Export Control and Related Border Security program helps other countries improve their export control systems.

a. What export control training activities are taking place in the United Arab Emirates?

b. What measures of effectiveness do you use to determine if this program is successful?

Answer:

a. The Export Control and Related Border Security (EXBS) program provided various training activities for United Arab Emirate (UAE) officials from 2001 to 2005 aimed at establishing a solid legal and regulatory basis for controlling weapons and related dual-use items, including implementing procedures for adjudicating requests to transfer controlled items and for effectively enforcing controls. In early 2004 the EXBS program provided a legal template for Government of UAE to assist them in drafting its own legislation. Between 2005 and 2008, the EXBS program supported UAE participation in regional EXBS-sponsored events, but did not provide UAE

specific bilateral training since the UAE had not yet passed an export control law. Some of the regional events in which the UAE participated included a Commodity Identification Training in December 2006 and an Enforcement/Interdiction Training in June 2007. The UAE officially adopted an export control law on August 31, 2007. The United States held a legal/regulatory workshop with officials from the UAE Ministry of Foreign Affairs, Justice, Interior, Economy, Federal Customs Authority, Dubai Police, and Federal State Security Organization in September. In 2008 the UAE requested additional specific export control-related training through the bilateral U.S.-UAE Counter-proliferation Task Force (an annual senior-level exchange on nonproliferation issues). In June 2008, the EXBS program funded the Department of Justice to conduct a prosecutorial training for UAE judges and prosecutors handling proliferation related cases. In addition, the EXBS program delivered training on export control-related investigations to UAE officials responsible for enforcing the export control law. Additional training will be delivered at a mutually acceptable date.

b. The EXBS program has developed a comprehensive assessment tool by which it evaluates countries' strategic trade control systems to identify deficiencies and generates a score for each country relative to an ideal standard. The program then conducts reassessments to measure the amount

of progress made in individual countries per unit of assistance. Once a country improves sufficiently, it "graduates" from the program. The graduation rate provides another, though less precise, measure of effectiveness.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Chairman Daniel K. Akaka (#9)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

In GAO's written testimony, Ms. Barr mentioned that the Department of Justice is now providing DDTC and BIS with quarterly reports on criminal enforcement actions that they have taken.

Can you tell us if that information has led you to deny any licenses and, if so, how many?

Answer:

In response to the DoJ report received in August of 2007, we published a notice in the Federal Register of the statutory debarment of fourteen individuals/companies who had been convicted of violating the Arms Export Control Act (AECA). These individuals/companies were then added to the AECA debarred entity list on the DDTC website, and we have them under a policy of denial which is reflected on our watchlist. This means that if they apply for a license or other approval, or if they show up as a source/manufacturer or party to the export on another party's license application, the application or other approval request will be denied.

Additionally, in response to this report, we added another (approximately) 30-40 companies/individuals to our watchlist and placed them under a policy of

denial, because they have been indicted and/or convicted of a statute enumerated in section 38(g)(1) of the AECA and section 120.27 of the International Traffic in Arms Regulations. Like those debarred entities mentioned above, this means that if they apply for a license or other approval, or if they show up as a source/manufacturer or party to the export on another party's license application, the application or other approval request will be subject to a policy of denial.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Senator Mark Pryor (#1)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

Under NSPD 56, one of the primary policy changes is the president's decision to sign defense trade treaties with Australia and the United Kingdom. Under the treaties it is estimated that 70% of the need for those licenses go away. If an American company decides it wants to export something to Australia or the UK, it self-determines that it meets the parameters of the treaty and, without contacting the US government, it exports the item.

a. Is there a concern about unknown front companies buying US equipment to be sold or given to a third party working in the UK or Australia that could exploit this open policy?

b. What are the controls in place to prevent that from happening?

c. Do you have any date on when the Defense trade treaties with Australia and the United Kingdom will come before the Senate?

Answer:

To clarify, the January 2008 Presidential Directive on Export Control Reform did not direct the Administration to conclude defense trade cooperation treaties with the United Kingdom and Australia. Those treaties were signed the by President on, respectively, June 21 and 26, 2007 (for the United Kingdom) and September 5, 2007 (for Australia).

a. Only U.S. companies which are registered with the Department's Directorate of Defense Trade Controls and eligible to export are allowed to utilize the Treaty to export without a license. The USG also will review and approve the UK and Australian entities to be included in the respective Approved Communities, based on a rigorous review process.

b. The UK and Australian Governments will require security clearances for personnel proposed to have access to goods, technologies and services exported under the Treaties, which is more than is required today. The Treaties also obligate both Governments to protect U.S. defense articles exported under the Treaty from unauthorized transfer or diversion under their own laws and regulations governing the protection of classified information. The Implementing Arrangements require extensive recordkeeping by Approved Community Members for all Treaty-related goods, technologies and services, and subjecting these records to audits. The Implementing Arrangements also permit expanded end-use checks. Finally, the USG will still be able to prosecute companies that violate the terms of the Treaties and ultimately remove them from the Approved Community if they do not comply with the terms of the Treaty.

c. The UK Treaty was submitted to the Senate for Advice and Consent on September 20, 2007, and the Australia Treaty was submitted on December 3, 2007.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Senator Mark Pryor (#2)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

In the GAO report issued in 2005, the report mentioned that "six of ten military officer detailees were not assigned to the DDTC, as had been called for in the Foreign Relations Authorization Act for FY 2003, likely contributing to the lack of efficiency at DDTC." Ms. Ann Calvaresi Barr also testified to this during the hearing.

a. In your opinion, why do you think that those military billets have not been filled by the Department of Defense?

b. Have you heard if the Department of Defense is going to rectify this situation in 2009?

Answer:

a. Currently, eight military personnel are assigned to DDTC, including one service member currently deployed in support of Operation Iraqi Freedom. This represents an improvement over the period covered by the report cited above. I understand there are a large number of competing priorities in Defense.

b. The Department of State intends to re-emphasize the requirement for ten military detailees to be assigned to DDTC and expects the vacancies to be filled by DoD in 2009.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Senator Mark Pryor (#3)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

Ms. Ann Calvaresi Barr testified that no program assessments have been done for the past ten years of the process and the divisions among the Departments of Defense, State and Commerce.

a. Is there a plan to address this issue?

b. If so, has that plan been grounded in analysis?

c. Have there been discussion about future restructuring of authorities and/or jurisdictions since the technologies and systems that businesses are requesting licenses for have changed significantly in the past ten years and technology advancements are moving at great speed?

Answer:

a. Yes. Since the OIG's assessment of March 2001, executed in accordance with the National Defense Authorization Act for FY 2000, the OIG has assessed and reviewed export licensing procedures in the Office of Defense Trade Controls yearly.

b. Yes. OIG reviewed the process as it existed in 2000 and found the commodity jurisdiction procedure problematic as to the timeliness of adjudication and the lack of interagency cooperation in the process. Since that report, as evidenced in the answers provided above, the export control

process has reduced the licensing backlog by 50 percent through the addition of staff and updating of procedural systems, even though a significantly larger number of CJ requests occur today as compared to 2000. Similarly, improved interagency cooperation between Defense, Commerce and State has allowed for the procedure to become more stream-lined since 2000.

c. The Administration has not discussed a restructuring of authorities and/or jurisdictions. However, the January 2008 Presidential Directive on Export Control Reform tasks the National Security Council to work with the relevant agencies to review and further streamline the CJ dispute resolution process, and this effort is ongoing. In addition, we continue to review the U.S. Munitions List for applicability to export controls based on the national security and foreign policy of the United States. When agencies agree on proposed changes to the U.S. Munitions List, we notify Congressional staff if those changes might result in the removal of items currently controlled on the ITAR.

Question for the Record Submitted to
Acting Assistant Secretary Stephen D. Mull
Senator Mark Pryor (#4)
Senate Committee on Homeland Security
Subcommittee on Oversight of Government Management,
The Federal Workforce and the District of Columbia
April 24, 2008

Question:

Ms. Ann Calvaresi Barr testified that she believed that it is important for both business and government to know the whole time to process an export license from beginning to end.

Is there a plan to clarify the metrics in both the Departments of State and Commerce?

Answer:

I will answer with respect to export license applications under the jurisdiction of the Department of State. We continually try to improve our outreach efforts, so that the business community clearly understands the munitions licensing process. For example, in a recent interview with Defense News, Deputy Assistant Secretary Ruggiero detailed the procedure in place to ensure cases coming into State are adjudicated within 60 days, including the five national security exceptions which can cause processing to exceed 60 days (these exceptions were published in the Federal Register on April 14, 2008). In addition, the Department routinely publishes the average processing times for license applications on the website of the Directorate of Defense Trade Controls.

CHARRTS No.: SG-05-001
Senate Committee on Governmental Affairs
Hearing Date: April 24, 2008
Subject: Reforming Export Licensing Agencies
Witness: Ms. McCormick
Senator: Senator Akaka
Question: #1

Implementation of NSPD 56

Question. National Security Presidential Directive 56 requires that exports controlled by the International Traffic in Arms Regulations be completed within 60 days, with some exceptions. What actions has the Defense Technology Security Administration taken to ensure this mandate is met?

Answer. To a large degree the new requirement does not change the Defense Technology Security Administration's (DTSA) current processes for export license reviews. Over the past 5 years, DTSA has processed DoD reviews on Department of State license applications in an average of 14 days. DTSA has informed the military services and DoD organizations of the new 60 day requirement to complete license reviews. Under the new NSPD guidelines, DTSA on behalf of DoD is authorized to request an exception to the 60 day requirement by notifying the Department of State that an overriding national security issue exists as a consequence of the license. Director approval is required to invoke the exception. It is anticipated that less than 1% of licenses reviewed (15 cases annually) will require such an exception.

As the regulatory agency for export controls on munitions, the Department of State has issued a Federal Register Notice in response to National Security Presidential Directive 56, entitled "Policy on Review Time for License Applications". The Federal Register reiterates that exports controlled by the International Traffic in Arms Regulations (ITAR) be completed within 60 days except under defined national security exceptions.

DTSA coordinates the DoD review of Department of State license applications for the export of defense related goods and services under the ITAR. DTSA assessments of export applications ensure the transfers are done in a manner that does not endanger U.S. interests or compromise U.S. national security.

Post-Hearing Questions for the Record
Submitted to Mr. Daniel Poneman
From Senator Daniel K. Akaka

"Beyond Control: Reforming Export Licensing Agencies for National Security and Economic Interests"
April 24, 2008

The Wassenaar Arrangement, which replaced the Coordinating Committee on Multilateral Export Controls (CoCom), does not allow for one government to veto a proposed export of another.

What is your assessment of the effectiveness of the Wassenaar Arrangement?

Response: The Wassenaar Arrangements are a modestly useful element in the network of multilateral export control arrangements. Wassenaar provides a forum for government officials to discuss what goods and technologies should be subject to controls, and to develop lists to reflect their conclusions. The utility of these arrangements, however, is limited by a number of factors. Wassenaar is a national discretion regime, so each member makes its own export control decisions independently from all others. Wassenaar lacks a formal "no undercut" provision, which would commit one member to consult other members regarding a proposed export before authorizing shipment; this is a useful mechanism to prevent those in quest of dangerous items to shop among Wassenaar members and purchase from the country with the weakest controls. "No undercut" provisions not only help prevent dangerous exports from reaching dangerous end users, but also discourages regime members from seeking competitive advantages against one another by diluting appropriately stringent export controls. There is also no agreement on what policies to apply in making export control decisions regarding key countries. Transparency arrangements are imperfect, while implementation of the controls – as well as enforcement against violators – is uneven and also not transparent. The Wassenaar Arrangements could be much stronger if these shortcomings were remedied.

Post-Hearing Questions for the Record
Submitted to The Honorable William Reinsch
From Senator Daniel K. Akaka

"Beyond Control: Reforming Export Licensing Agencies for National Security and Economic Interests"
April 24, 2008

The Wassenaar Arrangement, which replaced the Coordinating Committee on Multilateral Export Controls (CoCom), does not allow for one government to veto a proposed export of another.

What is your assessment of the effectiveness of the Wassenaar Arrangement?

Response: Overall, I would give the Wassenaar Arrangement a grade of "B". It has been effective at developing a unified approach toward sales of dual use items and weapons to rogue nations, which is its stated purpose. From a U.S. perspective, it has not been useful in dealing with "gray area" countries like China, which is not one of the Arrangement's targets and where U.S. policy on technology transfer differs in some significant ways from those of our allies. It has also been less than efficient at keeping its technology and weapons lists sufficiently up to date, both in terms of removing older technologies that are widely available and no longer critical and in terms of adding new technologies and weapons. For example, it took the Clinton and Bush Administration years – far longer than necessary – to add MANPADS to the weapons list. The requirement for consensus – which is the only way an organization like this can operate – guarantees a slow pace of decision making.

Post-Hearing Questions and Answers for the Record
Submitted to Matthew S. Borman,
Deputy Assistant Secretary of Commerce,
Bureau of Industry and Security,
U.S. Department of Commerce

"Beyond Control: Reforming Export Licensing Agencies for National Security and Economic Interest"

April 24, 2008

1. *Question: GAO previously identified a lack of systematic analysis of the dual-use export control system at BIS.*

   Have you since undertaken analyses of licensing data to determine if previously established licensing time frames are still appropriate or to identify the drivers of the licensing workload or bottlenecks in the process?

The Bureau of Industry and Security (BIS) has always engaged in a continuous review of its priorities, policies, and programs to ensure that the Bureau advances the national security and economic interests of the United States. BIS noted this in its June 7, 2006, comments on the GAO draft report entitled, Improvement to Commerce's Dual-Use System Needed to Ensure Protection of U.S. Interests (GAO-06-638). In order to accomplish this review, licensing data reports and analysis are provided to BIS management on a weekly, monthly, and quarterly basis to ensure that any issues are quickly identified and resolved.

The comparison of Fiscal Year (FY) 2007 licensing statistics with those of prior years shows the success of this continuous review with the added data source assessment. In FY 2007, 82 percent of all license applications were finalized within 39 days, while an additional 12 percent were closed within 53 days. Additionally, in FY 2007, the average processing time for license applications dropped to 28 days - the lowest processing time in a twelve year period despite the continued rise in the number of work items, including license applications, commodity classifications, commodity jurisdictions and license determinations. In FY 2007, BIS reviewed and finalized 27,129 such work items. This is about a 2 percent increase over the 26,408 work items completed in FY 2006, and about a 71 percent increase over the 15,373 work items completed in FY 2000.

Even with the sharp increase in the sheer number of license applications received by BIS, average license processing times were down 26 percent from FY 2002 to FY 2007. The average processing time for the review of license applications in FY 2002, when 11,039 applications were completed, was 38 days, compared to an average processing time of 28 days in FY 2007 when over 19,512 applications were completed.

2. *Question: The United Arab Emirates (UAE) has been identified in GAO reports and in the media as a transshipment point for U.S. technology to countries such as Iran.*

a. What is BIS's current control designation for the UAE?

The UAE is in Country Group B. Country Group B, a classification contained in the Export Administration Regulations (EAR), is the most common country group. Countries in this country group are accorded neither the least restrictive treatment, such as that applied to the United Kingdom or Japan (both contained in all four subgroups of Country Group A), nor the most restrictive treatment, such as that applied to Cuba or North Korea (both contained in Country Group E).

b. How does the control designation prevent sensitive dual-use technology from being transshipped?

Most items on the Commerce Control List (CCL) contained in the EAR require a license for export to the UAE. All items controlled for chemical, biological, nuclear or missile proliferation reasons require a license for export to the UAE. The UAE's Country Group B designation therefore, does not allow dual-use items controlled for proliferation reasons to be exported to the UAE without a license. Additionally, the U.S. maintains catch-all controls that ensure that items not otherwise controlled require a license when the exporter knows or has reason to believe they are destined for a proliferation end use. The license review process and the follow-up performed by BIS's Export Control Officer (ECO) in the UAE are additional mechanisms in place to help ensure that items licensed to the UAE are not being transshipped.

In addition to the EAR control designation and ECO's activities, the new export control law that the UAE enacted in August 2007 and UAE's implementation of UN Security Council Resolutions (UNSCRs) 1737, 1747, and 1803 further which will be instrumental in preventing transshipments. The UAE's export control law provides a comprehensive mechanism for the export or re-export of any item on the UAE control list. Second, multilateral efforts under the UNSCRs prevent dual-use items from being sold to Iran and have helped bolster UAE controls on transshipment. Recently, the UAE has begun taking effective enforcement actions against trans-shippers.

c. What do you have in place to determine if the current control designation is preventing transshipment?

BIS evaluates the results of End-Use Checks (EUCs) and other information, classified and unclassified, to identify improper transshipments from the UAE. In this regard, BIS has one ECO in the UAE. The ECO is a Special Agent from BIS's Office Export Enforcement serving in the U.S. Embassy in Abu Dhabi, UAE. The ECO's responsibilities include conducting EUCs, both Post Shipment Verifications and Pre-License Checks on intermediate and ultimate consignees of licensed and unlicensed dual-use exports from the United States. The ECO works with various BIS elements, the State Department, and other U.S. Government

agencies in assisting the Government of the UAE to implement export enforcement laws, regulations and policy.

Moreover, BIS has maintained dialogues with the UAE with respect to the comprehensive export control law it enacted last year. In addition to BIS senior management visits to the country, the ECO represents BIS in dealings with various U.S. Government agency representatives within the Embassy to promote UAE's enforcement of its new export control law Under the UAE's export control law, the UAE has the authority to control dual-use items that are being exported, re-exported, or *transshipped*. This new export control system will help the UAE ensure that proliferation related items are not transshipped through the UAE. BIS is working to support continued development of UAE export controls, and, in particular, an expanded commodity control list.

3. *Question: I understand the G8 is not planning to renew its ban on uranium enrichment and reprocessing technology. In addition, the Nuclear Suppliers Group is considering criteria-based conditions allowing the exports of these technologies. I am concerned that these developments could encourage the spread of uranium enrichment and reprocessing technology.*

    a. *Has the rush of countries seeking to be supplier states pursuant to the Global Nuclear Energy Partnership program complicated efforts to limit the spread of these sensitive technologies?*

    b. *If so, what is your plan to make sure international rules on exports of these technologies are not weakened?*

BIS is not involved in the Global Nuclear Energy Partnership program, which is administered by the Department of Energy. Technology for enrichment and reprocessing is under the jurisdiction of the Department of Energy (10 C.F.R. Part 810), and the licensing jurisdiction for the especially designed equipment for enrichment and reprocessing (ENR) resides with the Nuclear Regulatory Commission (10 C.F.R. Part 110).

Pursuant to the EAR, BIS handles the licensing of nuclear dual use items and technology; that is, those items and technologies that have both a nuclear and a non-nuclear use. However, BIS does play an active role within the Nuclear Suppliers Group.

4. *Question: Recent reports noted that India violated U.S. export control laws by importing nuclear and missile technology parts. As recently as 2006, sanctions were imposed on Indian scientists and companies for exporting weapons of mass destruction (WMD)-related technology and expertise to Iran.*

    a. *What steps are you taking to ensure that India will comply with U.S. laws and strengthen its own export control laws sufficiently to stop these violations?*

BIS, through a variety of fora, including the High Technology Cooperation Group (HTCG), engages with the Government of India on compliance with U.S. export control requirements and elements of a effective domestic export control system. As a result of this engagement, India enacted the "The Weapons of Mass Destruction and Their Delivery Systems (Prohibition of Unlawful Activities) Bill of 2005, which provides legal authority for a comprehensive export control system in India. In addition, India agreed to adhere to the Missile Technology Control Regime (MTCR) and the Nuclear Suppliers Group (NSG) regimes, including adopting those regimes' guidelines and their control lists. BIS also has a ECO stationed in India who performs EUCs throughout the country and works with his Indian Government counterparts on various export control issues

b. What actions, if any, have been taken against the Indian Embassy official involved in the U.S. export control law violation?

This question appears to refer to the Cirrus matter, regarding which all questions should be addressed to the Departments of Justice or State.

5. Question: In GAO's written testimony, Ms. Barr mentioned that the Department of Justice is now providing DDTC and BIS with quarterly reports on criminal enforcement actions that they have taken.

Can you tell me if that information has led you to deny any licenses, and if so, how many?

Because BIS began receiving these quarterly reports a short while ago, the Bureau is in the process of assessing the information provided by the Department of Justice to assess the usefulness of its content. Relevant information provided by the Department of Justice to BIS could result in individuals or companies being placed under denial orders. A denial order provides for the exclusion of export privileges and generally includes but is not limited to applying for, obtaining, or using any license, License Exception, or export control document or participating in or benefiting in any way from any export or export-related transaction subject to the Export Administration Regulations for a period not to exceed 10 years.

In FY 2006 there were six (6) denial orders issued and in FY07 there were an additional ten (10) such orders issued.

6. *Question: In Mr. Rice's written testimony, he states that "it is a mistake for anyone in the government to expect that purely unilateral U.S. controls will have a measurable effect" on the availability of technology to China. Clearly, we need our allies' participation to prevent even the re-transfer of U.S. origin items to China.*

Why have we not been able to gain agreement among our allies to adopt our dual-use export control policy?

To answer this question, U.S. dual-use *multilateral* and *unilateral* export controls must be distinguished. With respect to *multilateral* controls, the CCL is harmonized with the control list of the Wassenaar Arrangement for those dual-use goods and technologies with potential military applications controlled for national security reason. Thus, dual-use goods and technologies are not subject to unilateral U.S. controls, but rather are subject to multilateral controls, which serve to increase their effectiveness. Members of the Wassenaar Arrangement, which include most of our closest allies, require exporters to secure government authorization prior to exporting controlled items to non-member states, including China. Our allies occasionally authorize exports to China of products that we would not because they do not have the same strategic interests in East Asia. Our allies generally have not, generally, agreed to our *unilateral* controls.

7. *Question: The Wassenaar Arrangement, which replaced the Coordinating Committee on Multilateral Export Controls (CoCom), does not allow for one government to veto a proposed export of another.*

What is your assessment of the effectiveness of the Wassenaar Arrangement?

Over the past five years, the Wassenaar Arrangement has strengthened its functions in a number of areas. Apart from work done on commodity control lists and in consideration of growing international concerns about unregulated "intangible" transfers, such as by oral or electronic means, of software and technology related to conventional arms and dual-use items, the Wassenaar Arrangement adopted a "Best Practices" document. This document will assist both Wassenaar members and non-member States in responding to the challenges associated with such transfers.

The Wassenaar Arrangement also adopted a *Statement of Understanding on End-Use Controls for Dual-Use Items.* This document is intended to assist Wassenaar members with the application of flexible risk management principles to all three phases on end-use controls – pre-license, application procedure, and post-shipment – in order to hold sensitive dual-use cases to a greater degree of review. In addition, the revised commodity list review procedures contained in the document have resulted in increased efficiency in keeping the Control Lists up-to-date.

Finally, the Wassenaar Arrangement continues to keep pace with advances in technology, market trends and international security development, such as the threat of terrorist acquisition of military and dual-use goods and technologies. Major recent revisions to the Wassenaar Arrangement include: (1) new controls on low light level and infrared sensors; (2)

items of potential interest to terrorists, such as devices used to initiate explosions and specialized equipment for the disposal of improvised explosive devices as well as equipment that could help protect civil aircraft from Man-Portable Air Defense Systems (MANPADS) attacks; (3) revisions to the decontrol note for certain radiophones that have limited encryption capability; and (4) revisions to controls to capture a new type of jamming equipment for satellite systems. These systems are used by insurgents in conflict areas. Finally, significant efforts have been employed by the Wassenaar Arrangement and by its members-states to promote the Arrangement and to encourage non-member States to adopt and adhere to the same standards as the Wassenaar Arrangement.

Post-Hearing Questions and Answers for the Record
Submitted to Ann Calvaresi Barr, Director,
Acquisition and Sourcing Management,
U.S. Government Accountability Office

"Beyond Control: Reforming Export License Agencies for National Security and Economic Interests"
April 24, 2008

It was a pleasure to discuss GAO's work on the U.S. export control system at the subject hearing. As I noted in my statement, the export control system is one component of the government's safety net of programs designed to protect critical technologies while allowing legitimate defense trade.[1] Within each component and across the safety net, we have identified significant vulnerabilities and threats. Accordingly, in January 2007, we designated ensuring the effective protection of technologies critical to U.S. national security interests as a high risk area, which warrants a strategic re-examination of existing programs to identify needed changes and ensure the advancement of U.S. interests. We called for the executive and legislative branches to re-examine the current government programs that comprise the safety net to determine whether they can collectively achieve their mission and evaluate alternative approaches. Such an effort would provide the basis for establishing a comprehensive framework for identifying and protecting critical technologies as U.S. security and economic interests evolve in the 21st century.[2]

Below is GAO's reply to the questions you sent on May 20, 2008.

1. *Mr. Rice states that your focus on administrative and operational weaknesses in export control systems is too narrow and that more important issues relate to failures, one, to adjust U.S. dual-use controls to the realities of open global trade and two, to update munitions controls to support U.S. defense policies in cooperative development programs with our allies.*

   What is your reaction to this criticism?

2. *Mr. Rice states that the failure to develop dual-use controls is not a result of weaknesses in administrative or interagency policy that GAO has identified but a "fundamental failure of the U.S. – both Congress and the Executive Branch – to adopt a policy, in statute and regulation, that is realistic and workable in today's world" because, as Mr. Rice states, "very few, if any, dual use technologies are possessed solely by the U.S."*

   What is your reaction to this statement?

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[1] GAO, *Export Controls: State and Commerce Have Not Taken Basic Steps to Better Ensure U.S. Interests Are Protected*, GAO-08-710T (Washington, D.C.: April 24, 2008).

[2] See GAO, High Risk Series: An Update, GAO-07-310 (Washington, D.C.: January 2007).

Over the last decade, we have reported on various aspects of the export control system for both arms and dual-use items. In so doing, we have repeatedly noted that in controlling these items, the U.S. government must strike a balance among multiple and sometimes conflicting national security, foreign policy, and economic interests. Achieving this balance has become increasingly difficult given the evolving security threats we face, the quickening pace of technological innovation, and the increasing globalization of the economy. Our reports detail systemic weaknesses in how the State Department controls arms exports and how the Commerce Department controls dual-use exports. Some of these weaknesses, such as those related to export license application processing times, may be considered administrative and operational in nature, but they nevertheless undermine the system and have unintended consequences on U.S. security, foreign policy, and economic interests. However, others, such as those related to export control jurisdiction, are fundamental to the system's ability to protect critical technologies. Further, we have found that neither State nor Commerce have conducted systematic assessments to determine whether their respective export controls are sufficient and appropriate in the current security and economic environment or whether changes are needed to better protect U.S. economic and security interests. Both departments need to engage in a continuous process of evaluation, analysis, and coordination. It is through such a process that the departments can identify and implement changes that are needed to ensure that the U.S. government is protecting what is critical while allowing legitimate trade consistent with the existing global economic environment. Absent such analyses the departments and their congressional overseers are not in a position to determine what adjustments—to policies, laws, regulations, and/or processes— are necessary regarding what items are controlled and how they are controlled to respond to an increasingly globalized economy, changing threats, or to changing allied relationships. As we have previously reported, changes to the system that are not grounded in analyses have generally not resulted in the desired improvements to the system.

Mr. Rice's statements regarding dual-use technologies underscores our call for the departments to engage in evaluations of data to assess the effectiveness of their controls and determine what changes are needed. For example, as we reported in 2006, while Commerce is responsible for regulating a wide range of dual-use and commercial items, it only has visibility over the small portion of items it has licensed for export. Through our analysis of data on actual shipments of dual-use items, we found that in 2005 only 1.5 percent of U.S. dual-use exports, by dollar value, were licensed.[3] At the time of our review, Commerce had not conducted comprehensive analyses of such data, to determine, for example, the economic impact of a proposed regulatory change that would add or remove licensing requirements for commodities to a country. The data could also be used to evaluate industry compliance of regulations, especially for unlicensed exports, and target industry outreach activities.

[3] See GAO, *Analysis of Data for Exports Regulated by the Department of Commerce.* GAO-07-197R. (Washington, D.C.: November 13, 2006).

3. In its December 2007 report entitled, Iran Sanctions: Impact on Further U.S. Objectives is Unclear and Should be Revised, GAO found that a ban on U.S. trade and investment in Iran may be circumvented by transshipment through other countries. The United Arab Emirates (UAE) was among those countries identified.

a. Please elaborate on what was meant by a "high rate of unfavorable end-use checks for U.S. items exported to the UAE" in terms of the number of U.S. items identified and the types of exports being transshipped.

b. Could you provide me with a list, classified if necessary, of the number of unfavorable end-use checks and the items covered?

GAO's response to question 3 will be provided under separate cover.

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