

*U.S. DEPARTMENT OF COMMERCE*  
*Office of Inspector General*

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**PUBLIC  
RELEASE**

*BUREAU OF EXPORT  
ADMINISTRATION*

*Management of the Commerce  
Control List and Related  
Processes Should Be Improved*

*Inspection Report No. IPE-13744/March 2001*

*Office of Inspections and Program Evaluations*





**UNITED STATES DEPARTMENT OF COMMERCE**  
**The Inspector General**  
Washington, D.C. 20230

March 23, 2001

**MEMORANDUM FOR:** William A. Reinsch  
Under Secretary for Export Administration

**FROM:** Johnnie E. Frazier 

**SUBJECT:** Final Inspection Report: *Management of the Commerce Control List and Related Processes Should Be Improved (IPE-13744)*

As a follow up to our February 23, 2001, draft report, attached is a final copy of the second report required by the National Defense Authorization Act for Fiscal Year 2000. As you know, this legislation mandates that by March 30 of each year through 2007, we issue a report to the Congress on the policies and procedures of the U.S. government with respect to the export of technologies and technical information to countries and entities of concern. This second report focuses on BXA's policies and procedures for the design, maintenance, and application of the Commerce Control List (CCL). The report includes comments from your March 19, 2001, written response. A copy of your response is included in its entirety as an appendix to the report.

The report offers a number of specific recommendations that we believe, if implemented, will improve the management of the CCL and related processes. However, while BXA was generally in agreement with the recommendations we made to address the agency's management of the CCL, we are concerned that you have not agreed with several of our key recommendations to improve the timeliness and transparency of the commodity classification process. Given that BXA is responsible for administering the dual-use export licensing process, we believe that it should assume a leadership role in moving to correct many of the weaknesses we noted in our report. While we have carefully considered your response to the draft report and made some adjustments in our final report, we are reaffirming our recommendations, with slight modifications in recommendations number 2, 13, and 14. We request that you provide us with an action plan addressing the recommendations in our report within 60 calendar days.

We thank your staff for the assistance and courtesies extended to us during our evaluation. If you have any questions about our report or the requested action plan, please contact me at (202) 482-4661, or Jill Gross, Assistant Inspector General for Inspections and Program Evaluations, at (202) 482-2754.

Attachment

## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	i
INTRODUCTION .....	1
OBJECTIVES, SCOPE, AND METHODOLOGY .....	2
BACKGROUND .....	4
FINDINGS AND CONCLUSIONS .....	13
I.    Improvements Are Needed in BXA’s Management of the Commerce Control List .....	13
A.    Process for updating the CCL can be too lengthy .....	13
B.    Items decontrolled by the Wassenaar Arrangement need to be reviewed for possible reclassification or deletion from the CCL .....	17
C.    The CCL can be made more user-friendly .....	20
II.   The Commodity Classification Process Continues to Cause Concerns .....	27
A.    Timely processing of CCATS is still a problem .....	27
B.    Commodity classification process needs to be more transparent .....	32
III.  Commodity Jurisdiction Process Needs Improvement .....	38
A.    CJ determination requests are not being processed in a timely manner .....	38
B.    CJ process should be automated to improve interagency exchange of information .....	41
C.    DTC needs to consult with BXA and Defense on all CJ requests .....	44
IV.  Other OIG Concerns Related to the Commerce Control List .....	47
A.    Jurisdictional issues concerning night vision technology need to be resolved .....	47
B.    Jurisdictional issues concerning space qualified items need to be resolved .....	51
RECOMMENDATIONS .....	55
APPENDIXES	
A: List of Acronyms .....	57
B: Countries Participating in Multilateral Export Control Regimes .....	58
C: Agency Comments on Draft Report .....	60

## EXECUTIVE SUMMARY

The House and Senate Armed Services Committees, through the National Defense Authorization Act for Fiscal Year 2000, directed the Inspectors General of the Departments of Commerce, Defense, Energy, and State, in consultation with the Director of Central Intelligence and the Director of the Federal Bureau of Investigation, to assess the adequacy of export controls and counterintelligence measures to prevent the acquisition of militarily sensitive U.S. technology and technical information by countries and entities of concern.<sup>1</sup> The legislation mandates that the Inspectors General report to the Congress by March 30 each year until 2007.

Last year, the Offices of Inspector General conducted an interagency review of (1) federal agencies' (including research facilities) compliance with the "deemed export" regulations and (2) U.S. government efforts to prevent the illicit transfer of U.S. technology and technical information through select intelligence, counterintelligence, foreign investment reporting, and enforcement activities.<sup>2</sup> Last year's report focused on three activities that the Commerce Department, principally through the Bureau of Export Administration, carries out or participates in to help prevent the illicit transfer of sensitive U.S. technology: deemed export controls, the Visa Application Review Program, and the Committee on Foreign Investment in the United States.<sup>3</sup>

For the current year, the OIGs agreed to conduct an interagency review of the Commerce Control List (CCL) and the U.S. Munitions List (USML). The CCL is maintained by BXA and contains items subject to control under the Export Administration Regulations. The CCL specifies the commodities, software, and technology that are subject to the regulations, as well as what controls are placed on these items, depending on the country to which the items are to be exported. Items on the CCL are grouped together by type of commodity and then assigned an Export Control Classification Number (ECCN). The USML is administered by the State Department and lists items subject to the International Traffic in Arms Regulations. Exporters use both lists to determine whether they need to apply for an export license for their item(s).

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<sup>1</sup>Public Law 106-65, October 5, 1999.

<sup>2</sup>*Interagency Review of the Export Licensing Process for Foreign National Visitors*, conducted by the Offices of Inspector General at the U.S. Departments of Commerce, Defense, Energy, and State, D-2000-109, March 2000, and *Interagency Inspector General Assessment of Measures to Protect Against the Illicit Transfer of Sensitive Technology*, conducted by the Offices of Inspector General at the U.S. Departments of Commerce, Defense, Energy, State, and the Treasury, and the Central Intelligence Agency, 00-OIR-06, March 2000.

<sup>3</sup>*Improvements Are Needed in Programs Designed to Protect Against the Transfer of Sensitive Technologies to Countries of Concern*, U.S. Department of Commerce Office of Inspector General, IPE-12454-1, March 2000.

Our review focused on BXA's policies and procedures for the design, maintenance, and application of the CCL in order to protect against the illicit export or transfer of militarily sensitive technologies and commodities. Specifically, our objectives were to (1) examine how the CCL is managed, including whether it is user-friendly and how commodities and technologies are added and removed from it; (2) determine whether there is still a need for greater transparency in BXA's commodity classification process, as stated in our June 1999 export control report;<sup>4</sup> and (3) determine whether there is a need for more transparency in State's commodity jurisdiction process. Our specific observations are as follows:

### **Improvements Are Needed in BXA's Management of the Commerce Control List**

We found several areas in which BXA could improve its management of the CCL.

- ~ BXA has taken a long time—from six months to over a year—to update the CCL with changes agreed to at plenary sessions for the multilateral regimes that the U.S. government is a member of. For example, changes agreed to at both the May 1999 Nuclear Suppliers Group plenary meeting and the October 1999 Missile Technology Control Regime plenary meeting still have not been incorporated into the CCL. While a significant part of the delay is at BXA, we also found that the Department of Defense may be taking longer than necessary to conduct its review and clearance of any changes (see page 13).
- ~ We found that some items captured under several ECCNs are being controlled on the CCL for national security reasons, yet they are not controlled by the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, the multilateral regime from which the largest number of ECCNs on the CCL are derived. BXA generally does not have the authority to unilaterally impose national security controls for items not controlled by the multilateral regimes. If the United States wants to control such items, it should impose foreign policy controls only, such as those for Anti-Terrorism (see page 17).
- ~ We met with and spoke to users of the CCL to obtain their impressions on how easy it is for them to use and apply the list to their potential exports. While many of them found the CCL easier to use than the USML, they provided us with numerous examples of how the CCL can be made more user-friendly, such as by removing some outdated terminology being used in the CCL and making the list easier to navigate (see page 20).

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<sup>4</sup>*Improvements Are Needed to Meet the Export Licensing Requirements of the 21<sup>st</sup> Century*, U.S. Department of Commerce Office of Inspector General, IPE-11488, June 1999.

## **The Commodity Classification Process Continues to Cause Concerns**

Through the commodity classification process, BXA advises exporters on whether an item is subject to the CCL and, if applicable, identifies the appropriate ECCN. As part of our 1999 export licensing review, we identified two areas in the commodity classification process that needed improvement: (1) the processing of the classifications was untimely and (2) the commodity classification process was not transparent because BXA was not referring all munitions-related commodity classifications to the Defense and State Departments. BXA's failure to refer such commodity classifications to the other licensing agencies, as called for in guidance issued by the National Security Council in 1996, leaves it vulnerable to incorrect classifications. While BXA concurred with our 1999 recommendation to work with the National Security Council to develop specific criteria and procedures for the referral of munitions-related commodity classifications to Defense and State, it has taken no action to correct these problems. As a result, during our current review, we found that these same problems still exist. In addition, we determined that BXA should provide State with a copy of the final determination for any commodity classifications reviewed by State (see page 27).

## **Commodity Jurisdiction Process Needs Improvement**

Exporters who need assistance in determining whether an item is subject to the USML can request a commodity jurisdiction (CJ) determination from State, which has export licensing jurisdiction for items on the USML. As part of the CJ review process, State is to refer all CJ determination requests to BXA and Defense to obtain their opinion about the licensing jurisdiction for the particular item. We found that, contrary to the 1996 National Security Council guidance, the CJ determination requests are not being processed in a timely manner by any of the involved agencies. In addition, determination requests are currently being processed manually, leading to transparency and accountability problems in the CJ process. Finally, there are concerns that State may be making incorrect CJ determinations because it does not always consult with BXA or Defense. Specifically, we identified at least two cases in which State made an incorrect CJ determination without consulting with BXA or Defense. In both cases, the error caused inconvenience and expense to the exporters involved (see page 38).

## **Other OIG Concerns Related to the Commerce Control List**

During our review, we discovered a breakdown in the interagency process for resolving jurisdictional disputes involving night vision equipment and "space qualified" items. With regard to the night vision equipment, the issue is whether such equipment should be licensed by BXA, as was agreed to by the licensing agencies in a 1992 memorandum of understanding, or should be considered munitions and thus licensed by State. Due to the inability of the licensing agencies to resolve this dispute, license applications are being delayed, and exporters are confused as to which agency they should apply to for

a license for these goods. In addition, the U.S. government has been unable to make a decision as to which agency has jurisdiction for 16 categories of space qualified items<sup>5</sup> (e.g., traveling wave tubes), currently on the CCL. The conflict involving these items arose when the export licensing jurisdiction for satellites was transferred from BXA to State in fiscal year 1999. State and Defense believed that these items should have been transferred along with the satellites, but BXA disagrees. The National Security Council was tasked with making a decision as to which agency has jurisdiction for these items and was expected to rule in April 2000. However, no decision had been made on any of the items as of January 2001 (see page 47).

On page 55, we offer recommendations to the Under Secretary for Export Administration to address the concerns raised in this report.



In BXA's March 16, 2001, written response to our draft report, the Under Secretary for Export Administration essentially stated that the agency was not in agreement with a number of our findings and recommendations. While BXA was generally in agreement with the recommendations we made to address the agency's management of the CCL, the agency did not agree with most of our recommendations to improve the timeliness and transparency of the commodity classification process. We are particularly concerned about BXA's position on our commodity classification recommendations because the agency concurred with similar recommendations made in our June 1999 report, but since that time, neither the timeliness nor the transparency of the commodity classification process has improved.

With regard to our recommendations designed to help improve the CJ process, BXA was mostly in agreement with them, although it did not believe that the recommendation for improving the timeliness of the process could realistically be implemented given staffing and resource shortages. It is our belief that if BXA needs additional staff to meet CJ processing deadlines and does not have the resources to fund or reallocate the needed positions, then it is incumbent upon the agency to justify the need in its budget submissions. For the recommendations on the night vision and space-qualified licensing jurisdictional disputes, the agency responded that it has already been in contact with the NSC regarding these disputes and that further correspondence from BXA, as recommended by the OIG, would not result in the matters being resolved more quickly. After receiving BXA's response to this recommendation, we asked BXA to clarify whether or not its contact with the NSC was with the current Administration or

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<sup>5</sup>According to the Export Administration Regulations, the term "space qualified" refers to products designed, manufactured, and tested to meet the special electrical, mechanical, or environmental requirements for use in the launch and deployment of satellites or high-altitude flight systems operating at altitudes of 100 km or higher.

just the previous Administration. BXA informed us that the Under Secretary for Export Administration verbally discussed this matter with the current NSC staff. While this partially meets the intent of our recommendation, we still maintain that BXA should formally raise this matter, in writing, to the new head of the NSC. Finally, in some cases, the Under Secretary contended that our recommendations were better directed to either the State Department or the NSC rather than to BXA. While clearly many of our recommendations require BXA to work in concert with other agencies and the NSC, we maintain that our recommendations are addressed to the appropriate agency.

To address BXA's comments, we have made changes to the report and its recommendations, where necessary. BXA's complete response has been included as Appendix C to this report.

## INTRODUCTION

The Inspectors General of the Departments of Commerce, Defense, Energy, and State, in consultation with the Director of Central Intelligence and the Director of the Federal Bureau of Investigation, are required by the National Defense Authorization Act for Fiscal Year 2000 to conduct an assessment of the adequacy of current export controls and counterintelligence measures to prevent the acquisition of sensitive U.S. technology and technical information by countries and entities of concern.

The act states that the Inspectors General should report to the Congress no later than March 30 of each year from 2000 to 2007. To meet the first year reporting requirement of the act, each OIG reviewed certain aspects of its agency's export controls and counterintelligence measures and reported on the results. Two interagency reports highlighting crosscutting issues were also prepared.<sup>6</sup> Our report focused on three activities that the Commerce Department, principally through the Bureau of Export Administration, carries out or participates in to help prevent the illicit transfer of sensitive technology: including (1) deemed export controls, (2) the Visa Application Review Program, and (3) the Committee on Foreign Investment in the United States.<sup>7</sup> To comply with the second year requirement of the National Defense Authorization Act, the OIGs agreed to conduct an interagency review of the Commerce Control List (CCL) and the U.S. Munitions List (USML).

Program evaluations are special reviews that the OIG undertakes to give agency managers timely information about operations, including current and foreseeable problems. By highlighting problems, the OIG hopes to help managers move quickly to address them and to avoid similar problems in the future. The evaluations are also conducted to detect and prevent fraud, waste, and abuse and to encourage effective, efficient, and economical operations. Program evaluations may also highlight effective programs or operations, particularly if they may be useful or adaptable for agency managers or program operations elsewhere.

We conducted our evaluation from September 7, 2000, through January 19, 2001. This evaluation was conducted pursuant to the authority of the Inspector General Act of 1978, as amended, and in accordance with the *Quality Standards for Inspections* issued by the President's Council on Integrity

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<sup>6</sup>*Interagency Review of the Export Licensing Process for Foreign National Visitors*, conducted by the Offices of Inspector General at the U.S. Departments of Commerce, Defense, Energy, and State, D-2000-109, March 2000, and *Interagency Inspector General Assessment of Measures to Protect Against the Illicit Transfer of Sensitive Technology*, conducted by the Offices of Inspector General at the U.S. Departments of Commerce, Defense, Energy, State, and the Treasury, and the Central Intelligence Agency, 00-OIR-06, March 2000.

<sup>7</sup>*Improvements Are Needed to Programs Designed to Protect Against the Transfer of Sensitive Technologies to Countries of Concern*, U.S. Department of Commerce Office of Inspector General, IPE-12454-1, March 2000.

and Efficiency. At the conclusion of the evaluation, we discussed our observations and recommendations with the Under Secretary for Export Administration and other key bureau officials.

## OBJECTIVES, SCOPE, AND METHODOLOGY

The overall objective of our program evaluation was to assess BXA's policies and procedures for the design, maintenance, and application of the CCL in order to adequately control the export of militarily critical technologies. In particular, we evaluated how the CCL is managed, including whether it is user-friendly and how commodities and technologies are added to and removed from the list. We also examined whether there is still a greater need for transparency in BXA's commodity classification process, as stated in our June 1999 export control report.<sup>8</sup> Finally, we examined whether there is a need for greater transparency in State's commodity jurisdiction process.

Our review methodology included interviews with various BXA officials, including senior managers, attorneys, regulation and policy officials, programmers, and licensing officials. We also spoke with officials at Defense, State, Energy, and the National Security Council. We observed several Technical Advisory Committee<sup>9</sup> meetings and participated in a Regulation and Procedures Technical Advisory Committee meeting. In conjunction with the Defense OIG, we compared the Export Control Classification Numbers (ECCNs) on the CCL with the items on the export control lists of the multilateral regimes of which the United States is a member. We also interviewed exporters to determine if it is easy for them to use and apply the CCL to potential exports. Three organizations also provided written comments on the user-friendliness of the CCL.

In addition, we followed up on our recommendations concerning commodity classifications from our June 1999 export licensing report. The Departments of Defense and State have repeatedly indicated a need for more transparency in the commodity classification process. Unfortunately, we were unable to conduct a sample similar to the one we conducted during our 1999 export licensing review to determine if there had been any improvement in this area because BXA did not provide us with the necessary raw

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<sup>8</sup>*Improvements Are Needed to Meet the Export Licensing Requirements of the 21<sup>st</sup> Century*, U.S. Department of Commerce Office of Inspector General, IPE-11488, June 1999.

<sup>9</sup>The Technical Advisory Committees consist of technical experts from industry who are to advise the Secretary of Commerce on export control matters and to be consulted on revisions to the CCL.

data in a timely manner.<sup>10</sup> Thus, we primarily relied on our review results from our 1999 export licensing report to evaluate whether BXA is properly referring commodity classifications to these agencies.

Finally, to coordinate the review of interagency issues and determine the work to be performed by each OIG team, the four OIGs formed an interagency working group and held monthly meetings during the review. Similar to the approach adopted for last year's reporting requirement, the four OIGs decided that each would issue a report on the findings of its agency review, and all four would contribute to and approve a consolidated report on crosscutting issues.



The Under Secretary for Export Administration, in responding to the statement above that “[t]he Departments of Defense and State have repeatedly indicated a need for more transparency in the commodity classification process,” stated that if either of these agencies believed this was an important issue, they would have made a formal proposal to BXA and/or the NSC. Again, while we do not disagree with BXA that these agencies should have formally raised this issue with BXA and/or the NSC, we must point out that Defense has testified numerous times before the Congress (including those congressional committees responsible for the reauthorization of the Export Administration Act) that greater transparency is needed in the commodity classification process.

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<sup>10</sup>We requested the data from BXA on November 1, 2000, but did not receive it until January 10, 2001. This did not allow us enough time to complete a proper sample in time to meet the March 30 deadline for this report.

## BACKGROUND

The United States controls the export of dual-use commodities for national security, foreign policy, and nonproliferation reasons under the authority of several different laws. Dual-use commodities are goods and technologies that have both civilian and military applications. The primary legislative authority for controlling the export of dual-use commodities is the Export Administration Act of 1979, as amended.<sup>11</sup> Under the act, BXA administers the Export Administration Regulations by developing export control policies, issuing export licenses, and enforcing the laws and regulations for dual-use exports.

### U.S. Export Controls for Dual-Use Goods and Technologies

The 1979 act authorizes export controls to be used only after full consideration of the impact on the economy of the United States and only to the extent necessary to:<sup>12</sup>

- ~ restrict the export of goods and technology that would make a significant contribution to the military potential of any other country or combination of countries that would prove detrimental to the national security of the United States;
- ~ restrict the export of goods and technology where necessary to further significantly the foreign policy<sup>13</sup> of the United States or to fulfill its declared international obligations; and
- ~ restrict the exports of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.

Within the Export Administration Regulations, the CCL lists items (commodities, software and technology) subject to the export licensing authority of BXA. Those items subject to the Export

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<sup>11</sup>The Act expired on August 20, 1994, and was reauthorized by Pub. L. 106-508 (November 13, 2000) until August 20, 2001. During the lapse, a national emergency declared under Executive Order 12924 (August 19, 1994), and extended by annual Presidential Notices, continued in effect the provisions of the Act.

<sup>12</sup>Export Administration Act of 1979, as amended, sec. 3; 50 U.S.C. app. sec. 2402(2).

<sup>13</sup>According to Section 6(a)(3) of the act, foreign policy controls expire annually, unless they are extended by the Congress. In order for foreign policy controls to be extended, the President must submit a report to the Congress explaining why it is necessary for the United States to continue to control these items.

Administration Regulations but not specified on the CCL are designated as “EAR99.”<sup>14</sup> The CCL is organized into 10 categories (see Table 1).

**Table 1 CCL Categories**

#	Description
0	Nuclear Materials, Facilities and Equipment, and Miscellaneous
1	Materials, Chemicals, “Microorganisms,” and Toxins
2	Materials Processing
3	Electronics
4	Computers
5	Telecommunications and Information Security
6	Lasers and Sensors
7	Navigation and Avionics
8	Marine
9	Propulsion Systems, Space Vehicles, and Related Equipment

**Source:** Export Administration Regulations, October 2000.

Within each category, individual items are identified by an ECCN in five “groups” designated by a letter:

- A. Equipment, Assemblies, and Components
- B. Test, Inspection, and Production Equipment
- C. Materials
- D. Software
- E. Technology

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<sup>14</sup>Normally, a license is not required for an item classified as EAR99 unless certain prohibitions apply (e.g., export to an embargoed destination) or there is a concern about the end user or end use.

Beside each ECCN is a brief description of the item(s). Following this description is the actual entry containing "License Requirements," "License Exceptions," and "List of Items Controlled" sections (see Figure 1).

Figure 1 Sample CCL Entry

<b>Commerce Control List Supplement No. 1 to Part 774</b>	
<b>2A290 Generators and other equipment specially designed, prepared, or intended for use with nuclear plants.</b>	
<b>License Requirements</b>	
<i>Reason for Control:</i> NP, AT	
<i>Control(s)</i>	<i>Country Chart</i>
NP applies to entire entry	NP Column 2
AT applies to entire entry	AT Column 1
<b>License Exceptions</b>	
LVS:	N/A
GBS:	N/A
CTV:	N/A
<b>List of Items Controlled</b>	
<i>Unit:</i> \$ value	
<i>Related Controls:</i> Nuclear equipment is also subject to the export licensing authority of the Nuclear Regulatory Commission. (See 10 CFR part 110.)	
<i>Related Definitions:</i> N/A	
<i>Items:</i>	
a. Generators, turbine-generator sets, steam turbines, heat exchangers, and heat exchanger type condensers designed or intended for use in a nuclear reactor;	
b. Process control systems intended for use with the equipment controlled by 2A290.a.	
Export Administration Regulations EAB 288-July 1998	

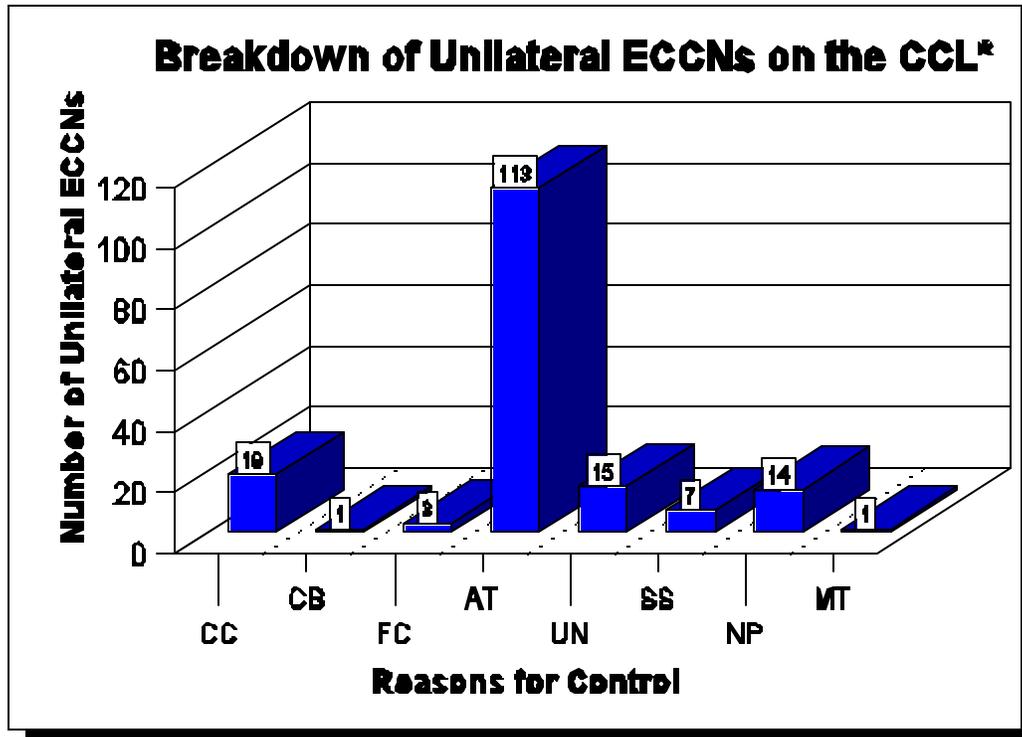
The "License Requirements" section contains all possible reasons for control in order of precedence. In addition, the section shows that depending on the country the item is to be exported to and the reason for control, the item may or may not require a license. Some of the main "Reasons for Control" include (1) Anti-Terrorism, (2) Chemical and Biological Weapons, (3) Crime Control, (4) Chemical Weapons Convention Treaty, (5) Missile Technology, (6) National Security, (7) Nuclear Nonproliferation, (8) Regional Stability, and (9) Short Supply.

The “License Exceptions” section provides a brief eligibility statement that may apply to a particular transaction. License exceptions provide for license-free export based on the circumstances of a particular transaction. The circumstances covered by the different license exceptions vary widely and, as Figure 1 demonstrates, may include the low value of a shipment (or also known as LVS), shipments to Group B countries (or also known as GBS), and shipments to civil end users (or also known as CIV). Typically, this section should be consulted only after determining whether a license is required based on analysis of the entry, including which country the item is being exported to.

Finally, the “List of Items Controlled” section under each ECCN is divided into four parts: (1) units, (2) related controls, (3) related definitions and (4) items. The “units” section identifies the unit of measure applicable to each entry. The “related controls” section provides such information as to whether another U.S. government agency has export licensing authority over items related to those controlled by an entry or whether another ECCN may control similar items. The “related definitions” section identifies definitions or parameters that apply to all items controlled by the entry. Finally, the “items” section generally contains a more specific list of all items controlled under the ECCN.

There are 472 ECCNs listed on the CCL, of which 137 are controlled unilaterally by the United States. Items may be unilaterally controlled because they are in short supply, not readily available from any other country, or because the United States does not want to export the items for foreign policy reasons (see Figure 2 for a breakdown of the unilaterally controlled ECCNs). As Figure 2 illustrates, most of the unilaterally controlled items are controlled for anti-terrorism reasons. This is because most of the items were once controlled by the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (hereafter referred to as Wassenaar Arrangement) for national security reasons (see page 10 for an explanation of the Wassenaar Arrangement) as well as foreign policy reasons. When the Wassenaar Arrangement decontrolled these items, the United States removed the national security controls but chose to retain its existing foreign policy controls (specifically anti-terrorism) on these items to ensure that they would continue to be subject to a case-by-case review for export or reexport to terrorist supporting countries.

Figure 2



CC=Crime Control, CB=Chemical and Biological Weapons, FC=Firearms Convention, AT=Anti-Terrorism, UN=United Nations, SS=Short Supply, NP=Nuclear Nonproliferation, and MT=Missile Technology

\*Totals to more than 137 because some ECCNs have multiple reasons for control.

Source: OIG Analysis of CCL as of October 2000

### Export Controls Maintained in Cooperation with Other Nations

According to the Export Administration Act of 1979, as amended:

“It is the policy of the United States (A) to apply any necessary controls to the maximum extent possible in cooperation with all nations, and (B) to encourage observance of a uniform export control policy by all nations with which the United States has defense treaty commitments or common strategic objectives.”<sup>15</sup>

<sup>15</sup>Export Administration Act of 1979, sec.3; 50 U.S.C. app. sec. 2402.

Until its dissolution on March 31, 1994, the Coordinating Committee on Multilateral Export Controls (COCOM) was the primary multinational export control organization through which the United States and member countries controlled exports to countries of concern.<sup>16</sup> Today, the United States is a member of several multilateral regimes concerned with the export of dual-use and munitions items to countries of concerns. Those organizations include the Australia Group, the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG), and the Wassenaar Arrangement. Export controls for dual-use goods and technologies controlled by the Wassenaar Arrangement are generally administered by BXA and controlled for national security reasons on the CCL. Export controls for dual-use goods and technologies controlled by the other three organizations are generally controlled for foreign policy reasons. However, some items controlled by the MTCR and NSG are also controlled for national security reasons if the items are also controlled by the Wassenaar Arrangement.

None of the four multilateral regimes are based on treaty obligations, which means that none of the regimes are binding under international law. Each regime operates on the basis of a consensus in developing or amending guidelines, procedures, and control lists. Thus, all members must agree to any change to the control lists. However, unlike COCOM, each regime operates under the principle of "national discretion."<sup>17</sup> This means that each member can decide how it will carry out regime obligations.

All four regimes maintain a denial notification procedure, whereby members agree to notify the group when a license for a controlled item is denied. However, only the Australia Group, MTCR, and NSG have a "No Undercut Policy," whereby members agree not to approve an identical sale without first consulting with the member issuing the denial notification. This process helps to prevent the undercutting of a member's denial.

Of the 472 ECCNs listed on the CCL, 339<sup>18</sup> of them are controlled by the multilateral regimes (see Figure 3 for a breakdown of the source of ECCNs on the CCL).

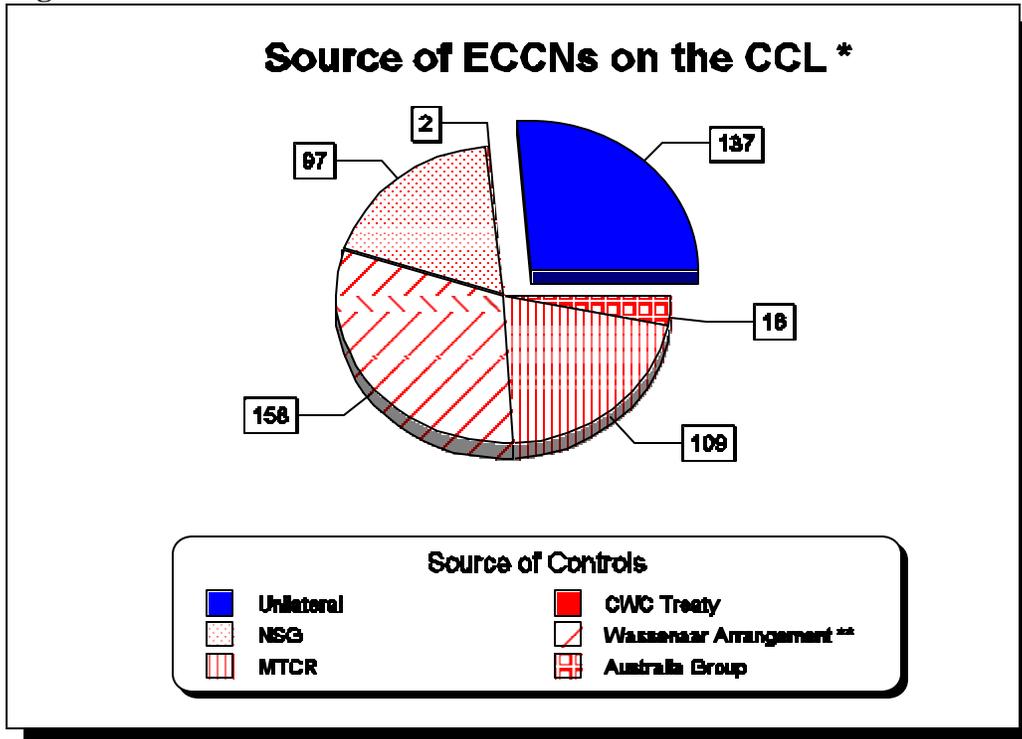
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<sup>16</sup>With the end of the Cold War, COCOM, which blocked the transfer of high-tech items to the former Soviet Union and other nations of concern, was seen by many member countries as no longer necessary.

<sup>17</sup>Under COCOM, member countries surrendered some of their national sovereignty and national discretion by allowing other member countries to vote on export cases that required COCOM approval. If a member objected, the export was denied.

<sup>18</sup>Of the 339 ECCNs, 4 are also controlled for unilateral reasons. Thus, 339 ECCNs controlled multilaterally plus 137 ECCNs controlled unilaterally (see page 7) will not total to 472.

Figure 3



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

\*\* Includes both the Wassenaar Arrangement Dual-Use and Munitions Lists.

Source: OIG Analysis of CCL as of October 2000

### Wassenaar Arrangement

The Wassenaar Arrangement, the successor regime to COCOM, has 33 member states and is designed to respond to the new security threats of the post-Cold War era (see Appendix B for a list of member countries). The Wassenaar Arrangement's stated purpose is to contribute to regional and international security and stability by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, such as computers, machine tools, and satellites.<sup>19</sup>

There are two control lists under the Wassenaar Arrangement: (1) the List of Dual-Use Goods and Technologies and (2) the Munitions List. The Wassenaar Arrangement has the most extensive control lists of all the current regimes and meets twice a year to discuss and negotiate changes to its lists. Most of the industrial equipment controlled by the Wassenaar Arrangement is widely traded in commercial

<sup>19</sup>Internet web address: <http://www.wassenaar.org/docs/index1.html>

markets. However, the Wassenaar Arrangement does obligate its members to exchange information on certain dual-use transfer approvals and denials in an effort to enhance international security and regional stability.

### Australia Group

The Australia Group is an informal forum of 32 industrialized countries that cooperate in curbing the proliferation of chemical and biological weapons through the coordination of export controls, the exchange of information, and other diplomatic actions (see Appendix B for a list of member countries). Members have agreed to adopt controls on chemical weapons precursors; dual-use chemical manufacturing facilities and equipment; biological agents used against humans, animals, and plants; dual-use biological equipment; and related technologies.

The Australia Group was formed in 1985 when, in response to the use of chemical weapons during the Iran-Iraq War, Australia called for a meeting of like-minded countries to consider harmonizing export controls on precursors to chemical weapons. The group later expanded its focus to include chemical production equipment and technologies. In 1990, the scope was expanded further to include measures to prevent the proliferation of biological weapons.

The Australia Group's primary focus is the coordination of export controls on an agreed list of dual-use items that could be applicable to the production of chemical and biological weapons. This list includes dual-use (1) chemical precursors; (2) chemical weapon-related production equipment; (2) pathogens and toxins that affect humans, livestock animals, and/or food plants; and (4) biological production equipment (e.g., fermenters). The Australia Group members meet once a year to adjust policies and procedures as necessary.

### Missile Technology Control Regime

MTCR was formed in 1987 by the United States and six other countries (the membership now totals 32 nations) to limit the proliferation of missiles capable of delivering weapons of mass destruction (see Appendix B for a list of member countries).<sup>20</sup> Although the members are not bound by a treaty, they have agreed on guidelines to coordinate their national export controls to prevent missile proliferation. The guidelines provide licensing policy, procedures, review factors, and standard assurances for missile technology exports and form the basis for U.S. missile technology controls.

The MTCR annex to the guidelines, the list of missile-related commodities and technology subject to controls, is divided into two categories. Category I items are subject to a strong presumption of denial

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<sup>20</sup>The six other countries were Canada, France, Germany, Italy, Japan, and the United Kingdom.

and are rarely licensed for export. They include such items as complete missile systems; unmanned air-vehicle systems, such as cruise missiles; and certain complete subsystems, such as rocket engines. Category II items cover a wide range of commodities, including propellants and flight instruments, that could be used for missile or satellite launches.

### Nuclear Suppliers Group

NSG, formally established in 1992, sets controls on nuclear material, equipment, and technology unique to the nuclear industry and on dual-use items that have both nuclear and non-nuclear commercial and military applications. Currently NSG has 39 members (see Appendix B for a list of member countries).

NSG publishes guidelines and an annex setting forth how members should proceed in imposing restrictions on affected exports and listing the items that each member nation should make subject to export controls. The guidelines establish the underlying precepts of the regime, provide a degree of order and predictability among suppliers, and help ensure consistent standards and interpretations of NSG controls.

Part 1 of the NSG guidelines governs the exports of nuclear materials and equipment that require the application of International Atomic Energy Agency safeguards at the recipient facility. Part 2 of the NSG guidelines governs the exports of nuclear-related dual-use equipment and materials, including both nuclear and nuclear-related dual-use exports. The annex is the actual list of items subject to NSG controls. The annex also contains a General Technology Note, which requires that exports of technology directly associated with listed items be subject to the same degree of scrutiny and control as the items themselves.

Formal annual plenary meetings are held to provide the opportunity for multilateral consultations. The meetings give members the opportunity to review the annex and the guidelines to ensure that NSG controls are focused on truly sensitive nuclear technology and provide the means to meet evolving nuclear proliferation challenges.

## FINDINGS AND CONCLUSIONS

### I. Improvements Are Needed in BXA's Management of the Commerce Control List

As the agency that has the responsibility for administering the Export Administration Regulations, BXA manages the CCL. As part of our review, we evaluated how the CCL is constructed, including whether it is user-friendly and how commodities and technologies are added and removed from it.

In conducting our work, we found several problems that we believe BXA needs to address to improve its management of the CCL. First, we noted that it has taken a long time—from six months to over a year—for the CCL to be updated with agreed-upon multilateral changes. Not implementing agreed-upon multilateral changes in a timely manner might be perceived as a lack of commitment on the part of the United States to adhere to the policies of the multilateral control regimes. Second, we found that the reason given for controlling some items captured under a few ECCNs is incorrect. As a result, BXA may be requiring exporters to apply for a license when a license should not be required. Finally, we interviewed a variety of exporters and received written comments from two organizations to obtain their opinions on how easy it was for them to use the CCL. They provided us with many examples of how the CCL can be made more user-friendly, such as by eliminating the overlap of items appearing on both the CCL and USML and modifying the CCL's structure to make it easier to navigate. For all our findings, we are making appropriate recommendations to address the problems we encountered.

#### A. *Process for updating the CCL can be too lengthy*

As previously discussed, the United States is a member of four multilateral export control regimes: the Wassenaar Arrangement, the Australia Group, NSG, and MTCR. Each year, the U.S. government sends representatives from the Departments of Commerce, Defense, Energy (as appropriate), and State to the plenary sessions of the various regimes to discuss a number of export control issues, including changes to the multilateral control lists. Upon returning from the plenary sessions, the licensing agencies meet to decide how the United States will implement any new control changes. For example, if a new control is added to a particular multilateral list, the United States must decide whether it wants to control the item as a dual-use or munitions item. The Department of Commerce is responsible for administering the changes for dual-use goods and technologies on the CCL, and the Department of State is responsible for implementing changes for munitions items on the USML.

The process used by BXA to implement control regulation changes to the CCL is as follows:

- ~ Upon returning from multilateral regime plenary sessions, BXA representatives provide the BXA Regulations and Policy Division a copy of any changes.
- ~ Based on the changes, the division prepares a draft regulation.
- ~ The division inputs information about the regulation into an automated tracking system, which assigns a Regulatory Identification Number.<sup>21</sup>
- ~ The division then circulates the draft for clearance by the appropriate officials within BXA, including the Office of Strategic Trade & Foreign Policy Controls, the Office of Nonproliferation Controls and Treaty Compliance, the Office of Export Enforcement, the Office of Administration, and the Office of Chief Counsel for Export Administration.
- ~ At this stage of the process, the division submits its determination of whether the draft regulation is or is not significant (including the preamble) to the Department's Office of Assistant General Counsel for Legislation and Regulation for Office of Management and Budget (OMB) consideration in advance of interagency review.
- ~ Once the draft regulation is cleared within BXA, the Assistant Secretary for Export Administration sends it to the Departments of Defense, Energy (for any nuclear-related changes), and State, as well as the Technical Advisory Committees for review.
- ~ Once BXA has received interagency clearance and comments from the Technical Advisory Committees, the regulation goes back to the Office of Chief Counsel for a final review.
- ~ The Office of Chief Counsel forwards the regulation to the Department's Office of General Counsel for transmittal to OMB for review. After the regulation is cleared by OMB, the Office of General Counsel assigns the regulation a document number.<sup>22</sup>

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<sup>21</sup>A Regulatory Identification Number is used by the OMB to track and review regulations during the final review stages.

<sup>22</sup>If the regulation was previously determined to be significant (see bullet five above), the entire regulation is submitted to OMB. Otherwise, OMB receives just the preamble and a summary of the regulation.

~ Once the Office of General Counsel assigns a document number, the regulation is signed by the Assistant Secretary for Export Administration and published in the *Federal Register*.

While there are no specified time frames for how long this process should take, we noted, during our review, that it can take anywhere from six months to over a year for the CCL to be updated with agreed-upon multilateral changes. For example, changes agreed to at both the May 1999 NSG plenary session and the October 1999 MTCR plenary session still have not been implemented by the United States. With regard to the 1999 NSG changes, an official in the Regulation and Policy Division informed us that BXA has not begun to prepare draft regulations reflecting the 1999 NSG changes. Specifically, we were told that the former director for BXA's Nuclear Technology Controls Division provided the Regulation and Policy Division a copy of the 1999 NSG revised control list but failed to specify the changes, thus making it difficult for the division staff to prepare draft regulations. However, it should also be noted that according to an engineer in the Nuclear Technology Controls Division, the changes that occurred as a result of the 1999 NSG plenary session were primarily minor editorial corrections.

With regard to the October 1999 MTCR changes, we were told that BXA's Missile Technology Controls Division forwarded the changes to the Regulations and Policy Division in May 2000. From May 2000 to September 2000 the missile division worked with the regulations division to resolve questions raised after the publication of the European Union's control list incorporating the October 1999 MTCR changes. In addition, because some of the changes affected ECCN entries that are controlled for both national security and missile technology reasons, the Regulations and Policy Division forwarded them to the Strategic Trade Division for review. Due to disagreement over the wording on some of the new controls between the Missile Technology Controls Division and the Strategic Trade Division, it took from September 2000 until early February 2001, to resolve the disagreements. The Regulations and Policy Division has since revised the draft regulations with the agreed upon changes and has sent them back to the Strategic Trade Division for clearance.

While the two above examples illustrate that there are problems with BXA's internal procedures for implementing agreed-upon multilateral controls, we also identified some timeliness problems associated with the Department of Defense's review of proposed multilateral changes to the CCL. For example, changes agreed upon by all participants at the December 1999 Wassenaar Arrangement plenary session were not published until July 2000. In this case, Defense took three months to review the

changes, whereas State took less than one month. In addition, while we identified various reasons<sup>23</sup> for BXA not implementing the changes agreed-upon at the October 1999 Australia Group plenary meeting until October 2000, we again found that Defense took almost three months to clear the draft regulation, whereas State only took a little over three weeks. Since all of the licensing agencies participate in the multilateral plenary sessions, they are all aware of any control changes agreed to by the United States before BXA provides them with the draft regulations to review. BXA officials informed us that the delays caused by Defense were generally not a matter of Defense's having major problems with the draft regulations, but rather a matter of its not making the regulation review a priority. When questioned about this matter by the Defense OIG, the Deputy Under Secretary of Defense for Technology Security Policy admitted that Defense's review was not as timely as it should have been in these cases. However, he also pointed out that the regulation changes sent by BXA can be voluminous.

However, these sorts of delays in updating the CCL could cause problems for both the U.S. government and exporters. For instance, if additional goods and technologies are added to one of the multilateral control lists, the United States will not be able to adequately monitor these items until they are added to the CCL. For example, the 1999 Australia Group plenary session participants agreed to add "titanium carbide" and "silicon carbide" to its control list. However, BXA did not add these items to the CCL until a year later, during which time U.S. exporters could have shipped these items without a license.<sup>24</sup> Because any such shipments would not be documented by BXA, bureau officials could not tell us whether this had actually happened. On the other hand, U.S. exporters may face an undue burden of applying for license applications for items that the multilateral regimes have agreed to decontrol. For example, the 1999 Australia Group plenary session participants also agreed to decontrol diagnostic test kits and food test kits that contained Australia Group controlled toxins, with minor exceptions. We should note that while no applications were received by BXA for these particular items in fiscal year 2000, the potential still exists for exporters to unnecessarily apply for licenses when items are not decontrolled in a timely manner.

As a participating member in the multilateral control regimes, the U.S. government has an obligation to implement all decisions made by the regimes in a "reasonable" time period. Not implementing agreed upon multilateral changes in a timely manner might be perceived as a lack of commitment on the part of

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<sup>23</sup>We identified an additional two reasons that contributed to the delay in implementing the regulations which, in our opinion, appear to be reasonable. First, BXA and the Food and Drug Administration had a difficult time reconciling differences over a definition for a medical product containing botulinum toxin. Second, some of the new Australia Group controls conflicted with some of the Chemical Weapons Convention Treaty controls, which resulted in numerous meetings between staff from the Chemical and Biological Controls Division and the Office of Chief Counsel for Export Administration.

<sup>24</sup>These items are currently controlled on the CCL under ECCN 2B350 - "Chemical manufacturing facilities and equipment."

the United States to adhere to the policies of the multilateral control regimes. Some BXA officials suggested that the United States follow the lead of the European Union, which averages three to four months to implement any new Wassenaar Agreement changes. We recommend that BXA review its own clearance process and procedures and work with the other licensing agencies, including Defense, Energy, and State, to determine if the current process for updating the CCL can be adjusted in order to publish regulations more expeditiously. In addition, BXA should immediately implement the regulatory changes resulting from the May 1999 NSG plenary session and the October 1999 MTCR plenary session.



In responding to our draft report, the Under Secretary for Export Administration stated that BXA concurs with our recommendation to review its internal regulatory review process and agrees that the internal process should be streamlined, although he cited resource constraints as an inhibiting factor. BXA also supports efforts to expedite the interagency regulatory review process. As such, BXA indicated that it has begun a weekly regulations priority meeting to discuss the status of all pending regulations and to work to make changes in a more timely manner. With regard to implementing the regulatory changes resulting from the May 1999 NSG plenary session and the October 1999 MTCR plenary session, BXA stated that this effort is currently in process.

***B. Items decontrolled by the Wassenaar Arrangement need to be reviewed for possible reclassification or deletion from the CCL***

Dual-use goods and technologies controlled by the Wassenaar Arrangement are controlled for national security reasons on the CCL.<sup>25</sup> However, we found that some items captured under several ECCNs ending in "018" are being controlled on the CCL for national security reasons, yet are not controlled by the Wassenaar Arrangement. BXA generally does not have the authority to unilaterally impose national security controls for these items. By doing so, BXA is requiring exporters to apply for a license when, had there been no national security controls on these items, a license may not have been required. To remedy this problem, BXA, in conjunction with Defense and State, should review the national security controlled items that have been decontrolled by the Wassenaar Arrangement to determine (a) whether the national security controls for these items should be removed and (b) whether these items should continue to be controlled for foreign policy reasons under the CCL.

As previously mentioned, the Wassenaar Arrangement succeeded COCOM in March 1994. As part of the transition to the post-Cold War era, the participating members of the Wassenaar Arrangement

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<sup>25</sup>Some dual-use goods controlled by the Wassenaar Arrangement are under the licensing jurisdiction of the State Department and are contained on the USML.

agreed to decontrol many items formerly controlled under COCOM. However, for foreign policy reasons, the United States government decided to continue to control these items unilaterally. To do so, the United States substituted foreign policy controls (e.g., Anti-Terrorism) in place of the former national security controls for these items on the CCL.

In comparing the CCL with the Wassenaar Arrangement control lists, we found that BXA did not remove national security controls for all of the items that the Wassenaar Arrangement decided to decontrol. Specifically, we identified several items under ECCNs 0A018, 0E018, 1C018, and 8A018 that are no longer controlled by the Wassenaar Arrangement, yet they are still being controlled by BXA for national security reasons (see Table 2 for a description of these items).

According to Section 5(c)(6) of the Export Administration Act of 1979, as amended, “any export control imposed under this section which is maintained unilaterally by the United States shall expire 6 months after the date of the enactment of this paragraph, or 6 months after the export control is imposed...” with some exceptions.<sup>26</sup> Furthermore, our review found no other items unilaterally controlled on the CCL for national security reasons. When we discussed this matter with BXA officials, we were informed that these items were only on the CCL at the request of State. However, these officials were unable to explain why these items are still being controlled for national security reasons and whether BXA has the legal authority to impose unilateral national security controls for these items.

Because these items are controlled for national security reasons, exporters submitted a total of 15 license applications to BXA in fiscal year 2000 for power controlled searchlights (ECCN 0A018 a.) and bayonets (ECCN 0A018 d.).<sup>27</sup> No applications were received for the remaining items. According to the Export Administration Regulations’ Country Chart, the exporters involved in these transactions would not have been required to submit a license application to BXA for these items had they not been controlled for national security reasons. As such, these items may be subjected to tighter controls than the Export Administration Act allows for, thus causing an undue burden on exporters.

To correct this problem, we recommend that BXA, in conjunction with Defense and State, review the national security controlled items that have been decontrolled by the Wassenaar Arrangement to determine (a) whether the national security controls for these items should be removed and (b) whether these items should continue to be controlled for foreign policy reasons under the CCL.

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<sup>26</sup>For instance, if the Secretary of Commerce determines that there is no foreign availability of the items at the end of the 6-month period, the control may be renewed for periods of not more than 6 months each. However, it should be noted that none of the items in question meet the criteria for exceptions.

<sup>27</sup>Of the 15 applications, all but one was approved. The remaining application was returned without action at the applicant’s request.

**Table 2 National Security Controlled Items on the CCL That Have Been Decontrolled by the Wassenaar Arrangement**

ECCN	Description	Reason for Control
0A018	<i>Items on the International Munitions List<sup>1</sup></i>	NS, AT, UN
	<ul style="list-style-type: none"> <li>a. Power controlled searchlights and control units...</li> <li>d. Bayonets;</li> </ul>	
0E018 <sup>2</sup>	<i>Technology for the development, production, or use of items controlled by 0A018b. through 0A018e.</i>	NS, AT, UN
1C018	<i>Commercial charges and devices containing energetic materials on the International Munitions List</i>	NS, AT, UN
	<ul style="list-style-type: none"> <li>a. Shaped charges specially designed for oil well operations...</li> <li>b. Detonating cord or shock tubes...</li> <li>c. Cartridge power devices...</li> <li>d. Detonators (electric and non-electric) and assemblies thereof...</li> <li>e. Igniters...</li> <li>f. Oil well cartridges...</li> <li>g. Commercial cast or pressed boosters...</li> <li>h. Commercial prefabricated slurries and emulsions...</li> <li>i. Cutters and severing tools...</li> <li>j. Pyrotechnic devices when designed exclusively for commercial purposes</li> <li>k. Other commercial explosive devices and charges...</li> </ul>	
8A018	<i>Items on the International Munitions List</i>	NS, AT, UN
	b.4. Marine boilers...	

<sup>1</sup>The U.S. government has decided to control some items classified as munitions items by the multilateral regimes on the CCL instead of the USML.

<sup>2</sup>Since a portion of ECCN 0E018 controls technology for 0A018d., and 0A018d., by our analysis, is a unilateral control, then the same would apply to that portion of 0E018 that links to 0A018d.

NS=National Security, AT=Anti-Terrorism, and UN=United Nations  
Source: Export Administration Regulations, October 2000.

The Under Secretary for Export Administration's response to our draft report stated that BXA agrees with our position that any items that are not appropriately controlled for national security reasons should be reviewed and the controls revised as necessary. The response further states that BXA has attempted to initiate discussions with the State Department to undertake this review and revision but it would like us to encourage the State Department to agree to this effort. While we do not have the authority to make recommendations to the State Department, this recommendation is included in the March 2001 interagency OIG export licensing report on the Commerce Control List and the U.S. Munitions List. However, while BXA agreed with the intent of our recommendation, it disagreed with our specific recommendations to determine whether the goods in question should continue to be controlled under the CCL, and, if so, to replace the national security control for these goods with the appropriate foreign policy control. We agree with BXA's point that the items in question are already controlled for foreign policy reasons in addition to the national security controls. As a result, we have modified our recommendation to more accurately reflect this fact. However, we still believe that BXA, in conjunction with Defense and State, needs to determine whether these goods should continue to be controlled for foreign policy reasons on the CCL given that the Wassenaar Arrangement has removed them from its munitions list.

***C. The CCL can be made more user-friendly***

During our review, we asked users of the CCL how easy it is for them to use and apply the list to their potential exports. We believe that the clearer the CCL is, the more likely an exporter will be able to comply with the export regulations and the less time BXA will have to spend on answering questions and rerouting license applications. We interviewed a variety of exporters, and we received written comments from the National Customs Brokers and Forwarders Association of America, the National Council on International Trade Development, and the Regulations and Procedures Technical Advisory Committee. Most users believed that the CCL is easier to understand and use than the USML, mainly because the CCL is structured as a "positive" list, meaning that if an item is not explicitly listed, then it is not covered. Conversely, the USML tends to be a "negative" list, meaning that items do not have to be explicitly listed in order to be covered by the list. Despite the fact that users found the CCL easier to use than the USML, they still found the CCL difficult to understand and work with in many ways. They provided us with numerous suggestions of how the CCL can be improved to make it more user-friendly.

We have tried to highlight most of the examples that were provided to us that would not involve changes in U.S. government export policy to implement. Specifically, we found that some items appear on both the CCL and the USML. In addition, there is considerable confusion over the use of the

ambiguous terms “specialized” and “specially designed” for military applications or for technically defined equipment in the CCL. Also, pointers from the CCL to the USML are unnecessarily confusing, and we found some outdated terminology being used in the CCL. Finally, there are some ways in which the CCL’s structure can be modified to make it easier to navigate. We believe that BXA needs to convene a working group to address problems with the CCL, as well as work with State and the applicable congressional committees that are considering new legislation for dual-use exports to resolve the issues relevant to both the CCL and the USML.

#### Items appearing on both the CCL and the USML

Numerous ECCNs on the CCL also can be interpreted as being on the USML. For example, ECCN 1A984 is listed in the CCL as “chemical agents, including tear gas containing one percent or less of CS or CN<sup>28</sup>; smoke bombs; non-irritant smoke flares, canisters, grenades, and charges; and other pyrotechnic articles having dual military and commercial use.” Similarly, Category XIV(a) of the USML covers “chemical agents, including but not limited to lung irritants, vesicants, lachrymators, tear gases (except tear gas formulations containing one percent or less of CN or CS), sternutators and irritant smoke, and nerve gases, and incapacitating agents.” The only clear difference between the CCL and the USML in these two listings is that the CCL would cover tear gas containing one percent or less of CS or CN, whereas the USML would cover any tear gas containing over one percent. However, because of the USML’s statement “including but not limited to” any of the items, with the exception of the tear gas, listed under ECCN 1A984 could also arguably fall under Category XIV(a) of the USML. Such confusion is not necessary, and BXA should work with State’s Office of Defense Trade Controls (DTC) to remedy this problem which occurs with approximately 45 ECCNs on the CCL.

#### Confusion over the terms “specialized” and “specially designed”

There has long been a debate about the use of the terms “specialized” and “specially designed” for military applications or for technically defined equipment in certain ECCNs. For example, ECCN 2B018, one of many ECCNs that contain these terms, covers “*specialized* machinery, equipment, gear, and *specially designed* parts and accessories therefor, including but not limited to the following, that are *specially designed* for the examination, manufacture, testing, and checking of arms, appliances, machines, and implements of war . . . [emphasis added].” Because the terms are ambiguous, they are being interpreted in a number of different ways by both the government and industry. These informal interpretations have resulted in serious uncertainties as to the scope of controls.

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<sup>28</sup>CS is orthochlorobenzalmalononitrile and CN is chloroacetophenone.

The terms “specialized” and “specially designed” should not be used as substitutes for complete technical descriptions of what is being controlled. We recognize that the use of these terms stems from their use by the Wassenaar Arrangement and other multilateral regimes, and that BXA is well aware of this problem. In fact, BXA staff are currently participating in an expert group, sponsored by the Wassenaar Arrangement, to address the problem. To avoid further confusion, it is preferable to address this problem multilaterally because the CCL effectively mirrors the Wassenaar Arrangement dual-use list. Therefore, we encourage BXA’s efforts to resolve this problem in conjunction with the multilateral regimes.

#### Confusing pointers

The CCL closely mimics the structure of the European Union and Wassenaar Arrangement dual-use lists, even using the same numbering scheme. However, some items on the European Union and Wassenaar Arrangement lists are subject to State’s jurisdiction in this country. Therefore, certain ECCNs (or parts of ECCNs) on the CCL “point” to State as having the licensing jurisdiction for the item(s). Specifically, the entries state that “These items are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls. See 22 CFR part 121.”

However, the pointers are confusing for two reasons. First, they do not provide exporters with any specific information, such as the USML category in which the item(s) fall. So, exporters are potentially faced with reviewing the entire USML to find the appropriate category for their item. This information could easily be included in the pointers. Second, in some cases, even after scouring the entire USML, exporters cannot find any reference to their item. Two examples of this problem are ECCNs 9B115 and 9B116. The only possible category in which these items might fall on the USML is Category XXI, Miscellaneous Articles, which is characterized as “Any article not specifically enumerated in the other categories of the U.S. Munitions List which has substantial military applicability and which has been specially designed or modified for military purposes.” Exporters can often be left guessing whether this is in fact the correct category for their item. The CCL should not only “point” to the USML, but it should provide an exporter with the specific category within the USML so as to avoid confusion.

#### Term on the CCL is outdated

The CCL describes some ECCNs as being on the International Munitions List. For example, ECCN 1C018 is titled “Commercial charges and devices containing energetic materials on the International Munitions List.” However, the International Munitions List was eliminated when its creator, COCOM, was dissolved in March 1994. The successor list to the International Munitions List is the Wassenaar Arrangement Munitions List, which is what the CCL should be referencing. The CCL should be updated to reflect this change.

### List navigation issues

Several structural and reference changes could be made to make the CCL easier to use. For example, several users cited the two-column format of the CCL as being hard to use. We found this to be particularly true when the CCL is viewed in an electronic format, such as over the Internet. Because of the narrow columns, a user has to do much scrolling up and down to read an entry, which is confusing. Also, users suggested that emphasizing words such as “and,” “or,” and “all” in the ECCN entries would help exporters determine exactly what is intended to be controlled. Changing the CCL to a one-column format and emphasizing certain key words would help exporters more easily navigate the entries.

Many users told us that having a consolidated index of items on the CCL and USML would greatly help in navigating the two lists and understanding which agency has jurisdiction for a particular item. It would serve as a single source for exporters to consult to determine which list they should review to determine whether they need to apply for an export license. In addition, the exercise of creating such an index would likely help ameliorate many of the overlapping jurisdiction and confusing pointer problems discussed above.

Another helpful change would be to cross-reference between the CCL and the applicable Schedule B or Harmonized Tariff Schedule of the United States codes.<sup>29</sup> The National Customs Brokers and Forwarders Association of America told us that referencing the CCL against the applicable Schedule B or Harmonized Tariff Schedule codes would be very helpful to its members. The association pointed out that most people responsible for the shipping of items for export (and those who must determine whether an item is a licensable export) do not have the technical knowledge required to make the fine distinctions necessary to determine which ECCN an item might fall under. However, because all shippers, freight forwarders, and customs brokers are very familiar with the Schedule B or Harmonized Tariff Schedule codes, it would be helpful to start with these codes and work back to the CCL. As an example, if an exporter is shipping an item with a Harmonized Tariff Schedule code of 1234.67.8901, there could be reference next to this code telling the exporter to check ECCN 1C350. We recognize that this approach was tried nearly 40 years ago, and that problems arose because items can often be categorized as being in more than one Schedule B or Harmonized Tariff Schedule code. However, given the time that has elapsed and the changes to the CCL in the meantime, it is certainly appropriate to reconsider whether such a cross-referencing system might help make today’s CCL more user-friendly.

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<sup>29</sup>The Harmonized Tariff Schedule of the United States provides the applicable tariff rates and statistical categories for all merchandise imported into the United States. It is based on the international Harmonized Tariff System, the global classification system that is used to describe most world trade in goods. The Harmonized Tariff Schedule of the United States is administered by the U.S. International Trade Commission. Schedule B codes, also based on the international Harmonized Tariff System, are used to classify products being exported from the United States. The Census Bureau’s Office of Foreign Trade Statistics administers the Schedule B codes.

## Conclusions

There are several reasons for the problems associated with using the CCL. First, the current annual reviews of the CCL are insufficient to address the types of problems discussed above. While BXA officials try to ensure that the list is current and does not contain errors, the emphasis during the annual reviews is to ensure that any changes, mostly due to changes made by the multilateral regimes, are accurately reflected in the CCL. As a result, the CCL does not receive a thorough “scrub” every year to address many of the problems identified during our review. The last time the underlying structure of the list was addressed was in 1996, when BXA published the first comprehensive rewrite of the Export Administration Regulations in over 40 years. Second, comparative reviews of the CCL and USML are infrequent at best. In fact, no one at BXA or DTC could remember when the two lists had last been reviewed in tandem. Finally, some of the problems exporters have with using both the CCL and USML are simply due to the different structures of the two lists, as described earlier. Because of this fact, it is difficult for users to navigate between the two lists and determine which agency has licensing jurisdiction.

To encourage greater compliance with the CCL, BXA should endeavor to make the list as user-friendly as possible. To its credit, BXA has taken some steps in recent years to make the CCL easier to use. For example, it was very helpful to multinational exporters when BXA, in 1996 as part of its rewrite of the Export Administration Regulations, adopted virtually the same numbering system for the CCL as is used by the European Union and the Wassenaar Arrangement. Now, multinational exporters can more easily find their item on the CCL, as well as on the European Union or Wassenaar Arrangement lists, to determine what controls may be applicable. However, based on the numerous examples enumerated above, there is still much room for improvement in the user-friendliness of the CCL. Because the CCL can be confusing for exporters, exporters may make errors in determining whether their item is covered by the CCL. As a result, they may not apply for a license when one is required.

To address the concerns we have identified, we recommend that BXA convene a working group of interested constituents (small and large exporters, trade associations, and U.S. government agency representatives), under the auspices of the Regulations and Procedures Technical Advisory Committee, to improve the user-friendliness of the CCL. In addition, BXA should work with State to (1) eliminate the current overlap of items and make sure that it is very clear on which list an item falls, and (2) create a user-friendly consolidated index of the items on the CCL and USML. To ensure that this happens, we recommend that BXA also work with the applicable congressional committees, that are considering new legislation for dual-use exports, to ensure that any new Export Administration Act or similar legislation includes a requirement that the agencies eliminate the overlap and create such an index for both the CCL and the USML.

Finally, BXA's annual scrubs of the CCL should also take into account any corrections or changes that would help to make the CCL easier for exporters to use.

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In responding to our draft report, BXA made several comments about the user-friendliness problems addressed in this section. In particular, BXA noted, in the case of the example we presented about an item appearing on both the CCL and USML, that the ambiguity the OIG refers to is present in the USML entry and not in the CCL entry. We tend to agree. However, the item still appears on both lists, which is the problem we are most concerned about. In addition, BXA is not convinced that the terms "specialized" and "specially designed" are as ambiguous as our report states. Regardless, the agency does recognize that there is confusion and is working with the Technical Advisory Committees and within the multilateral regime structure to come up with new definitions for these terms. Furthermore, BXA's response indicates that it would be willing to include "pointers" to the USML if DTC would commit to continuing to support this effort to keep the information up-to-date.

With regard to the idea of switching the CCL from a two-column format to a one-column-format to improve list navigation, BXA said that in 1995 the Government Printing Office informally estimated that such a switch would double the cost of printing the Export Administration Regulations, in which the CCL is contained. Nevertheless, the agency has at least agreed to explore the possibility of a one column electronic version of the CCL. Finally, the agency believes that coordinating the CCL to the Schedule B or Harmonized Tariff Schedule would be a very time-consuming and difficult, if not impossible, task. This may be accurate, but we did not assess the viability of such a task as part of our review. As was the case with many of the potential "fixes" mentioned in our report, we merely reported what users of the CCL told us would be helpful to them in navigating and using the list. We believe that assessing the feasibility of implementing any of these options is best left to the working group that we are recommending be convened.

As to our recommendation, the Under Secretary for Export Administration stated that BXA already works through the Regulations and Procedures Technical Advisory Committee and other advisory committees when making changes to the CCL and that because of the large number of regulatory changes each year, the CCL undergoes a continuous "scrub." The Under Secretary noted that the CCL already contains several indices and that the agency would welcome the availability of a USML item-specific index, which could be made available with the CCL index. In addition, BXA noted that past discussions with State on eliminating the overlap between the CCL and USML have consistently not been productive. Thus, BXA suggests revising this recommendation to request that the NSC chair a working group to improve the user-friendliness of the CCL.

We disagree with BXA's suggestion. We recognize that there are some instances where it is appropriate to request the assistance of the NSC, as we have recommended for the night vision and space qualified issues in this report (see pages 51 and 54). These issues are more appropriately dealt with by the NSC because they are of interest to all agencies involved in the U.S. government's export licensing process and the agencies have tried, unsuccessfully, to resolve the issues on their own. However, many, if not most, of the problems regarding the CCL's ease of use are most appropriately dealt with by BXA and not the NSC. Until BXA makes a request of State to assist in solving these problems, it cannot be sure that State will refuse to help. In addition, given both the expertise contained in the Regulations and Procedures Technical Advisory Committee and the eagerness of the committee to address many of the user-friendliness problems, we believe that it is appropriate for BXA to convene a working group under the committee's jurisdiction to address the clarity and navigation concerns involving the CCL.

Finally, we noted that BXA's response did not address our recommendation for BXA to work with the applicable congressional committees, especially those that are considering new legislation for dual-use exports, to ensure that any new Export Administration Act or similar legislation includes a requirement that the agencies eliminate the overlap and create such an index for both the CCL and the USML. Therefore, we request that BXA address, in its action plan, what actions it intends to take to implement this recommendation.

## II. The Commodity Classification Process Continues to Cause Concerns

As the agency charged with administering the Export Administration Regulations, BXA is responsible for determining whether an item or activity is subject to these regulations and, if so, what licensing, or other requirements, apply. In general, BXA holds the exporter responsible for classifying an export item, but BXA will advise an exporter on whether an item is subject to the regulations and, if so, identify the appropriate ECCN. When making written commodity classification requests,<sup>30</sup> exporters must provide descriptive literature or brochures, precise technical specifications, or papers that describe the items in sufficient technical detail to enable BXA engineers to accurately classify the items. It is important to note that after exporters receive a CCATS determination, they still must apply for a license if one is required.

Exporters can submit written requests electronically or in paper form. These are entered into BXA's Commodity Classification Automated Tracking System (CCATS), which is commonly used by BXA officials to refer to classification requests from exporters. In fiscal year 2000, BXA processed 2,049 CCATS<sup>31</sup> requests with 4,202 line items.<sup>32</sup>

During our 1999 export licensing review, we identified two areas in the CCATS process that needed improvement. First, we found that the processing of CCATS was untimely, resulting in unnecessary delays for exporters. Second, and more importantly, we found that the CCATS process was not transparent, leaving it vulnerable to incorrect classifications. In our current review, we found that these same problems still exist.

### A. *Timely processing of CCATS is still a problem*

According to Section 10 (l)(1) of the Export Administration Act of 1979, as amended,

“In any case in which the Secretary receives a written request asking for the proper classification of a good or technology on the control list, the Secretary shall, within *10 working days* after receipt of the request, inform the person making the request of the proper classification. [Emphasis added]”

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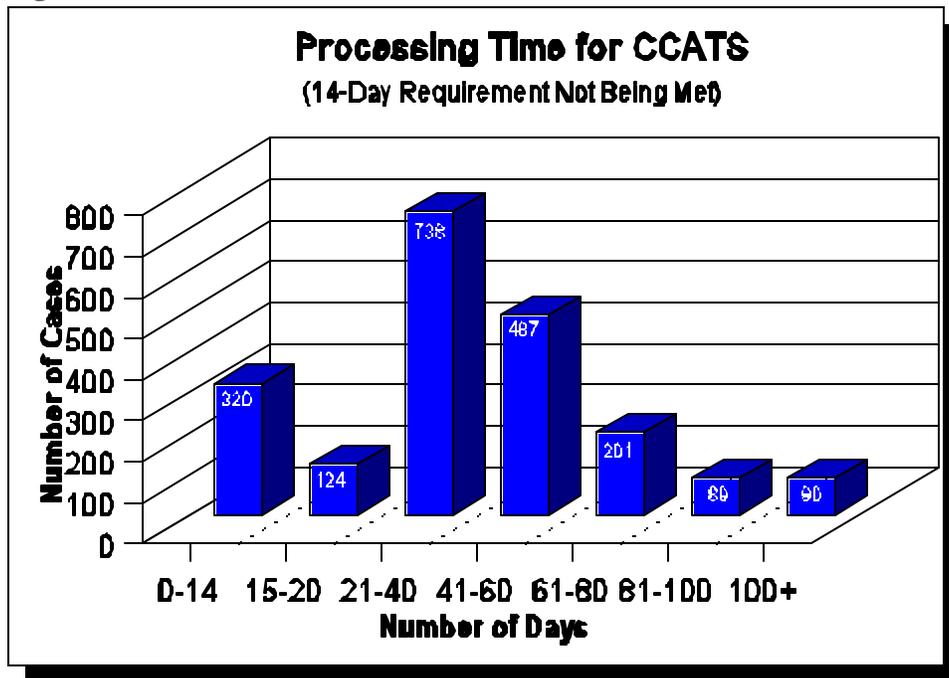
<sup>30</sup>BXA also responds to many phone inquiries about commodity classifications, but advice provided over the phone is not considered to be a binding determination.

<sup>31</sup>For the purpose of this review, the term “CCATS” refers to non-encryption CCATS.

<sup>32</sup>According to 15 C.F.R. § 748.3, each classification request should be limited to six items, but exceptions may be granted by BXA on a case-by-case basis for several related items if the relationship between the items is satisfactorily substantiated in the request.

Furthermore, the Export Administration Regulations, which implement this requirement, indicate that all commodity classification requests submitted by exporters must be completed within *14 calendar days*.<sup>33</sup> However, of the 2,049 CCATS BXA processed in fiscal year 2000, 1,729 (or approximately 84 percent) were over the legislatively mandated deadline (see Figure 4 for a breakout of CCATS processing time). Specifically, BXA took an average of 41 days to process all CCATS requests in fiscal year 2000. While the Export Administration Regulations do not require exporters to seek a classification from BXA before shipping their items, based on the number of CCATS BXA processed in fiscal year 2000, many exporters apparently take advantage of this service to ensure that they are classifying their products properly in order to be compliant with the regulations. As such, delays in CCATS processing could delay U.S. exporter shipments unnecessarily if it is determined that no license is required.

Figure 4



Source: Office of Administration, BXA

<sup>33</sup>15 C.F.R. §750.2. It is unknown why the Export Administration Act states that CCATS will be completed within 10 working days and the Export Administration Regulations states that CCATS will be completed within 14 calendar days. Regardless, 10 working days and 14 calendars equate to approximately the same time frame.

When we discussed this data with BXA managers responsible for CCATS, we were told that the licensing officers' first priority is to process license applications due to the strict processing time frames under Executive Order 12981. However, we want to reemphasize the point we made to both BXA managers and licensing officers in our 1999 export licensing report: while Executive Order 12981 mandates timely processing of export license applications, the Export Administration Act requires the timely processing of CCATS. Therefore, we recommend that BXA review its priorities and staffing levels and make adjustments to improve its timeliness in processing CCATS requests.

In addition, during our 1999 export licensing review, BXA managers informed us that they did not have the management tools available to keep track of licensing officers' processing of CCATS. Specifically, they could not tell from the Export Control Automated Support System (ECASS) management reports they received if a CCATS was overdue because the licensing officer was waiting for additional information from the exporter that was necessary to complete the review,<sup>34</sup> or because of inaction on the part of the licensing officer. Unlike the automated export license application process, ECASS had not been programmed to allow a licensing officer to place a CCATS in a "hold without action" status while waiting for additional information from the exporter, thus "stopping the clock" with regard to mandated processing times. To remedy this problem, we recommended in our 1999 export licensing report that BXA program ECASS to allow for the "hold without action" feature to help managers keep track of licensing officers' performance.

While BXA concurred with our recommendation at the time, it has recently informed us that, "Due to competing priorities and limited resources, the 'hold without action' feature has not been programmed into ECASS for CCATS processing, although it has been slated as an ECASS action item." However, when we asked BXA specifically when this task might be completed, we were informed that it may be included as part of the ECASS redesign efforts, albeit several years down the road. Again, we are not convinced that this feature, which has already been programmed into ECASS for processing license applications, should be difficult to implement now. Therefore, we again recommend that BXA program ECASS to allow for the "hold without action" feature to help managers keep track of licensing officers' performance and thus help them better meet the legislative deadline on CCATS review.

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<sup>34</sup> Although both the Export Administration Regulations and BXA's web page make clear that a commodity classification request requires the applicant to submit appropriate technical specifications of the commodity, software, or technology in order for BXA to evaluate the request, exporters do not always submit sufficient information.

Another contributing factor to processing delays is the lack of written procedures for assigning CCATS to multiple licensing divisions. When a CCATS is subject to controls that are handled by more than one division, it must be reviewed by all applicable divisions. Again, during our 1999 review, we found that BXA had no written procedures outlining the requirements for reviewing CCATS that involve more than one division. As a result, we were told, misunderstandings occurred, which resulted in processing delays. At that time we recommended that BXA develop policy and procedures for the intra-agency review of CCATS, as it had done for its intra-agency licensing review. Although BXA concurred with this recommendation in 1999, we learned during our current review that BXA still has not established new procedures in this area. This is still a concern, as in fiscal year 2000, there were 199 non-encryption CCATS referred to multiple divisions. Thus, we again recommend that BXA develop policy and procedures for the intra-agency review of CCATS.



For the first recommendation made in this section, dealing with improving the timeliness of processing CCATS, the Under Secretary for Export Administration's response to our draft report stated that it agreed with our recommendation in principle but believes it is unrealistic in practice. Specifically, the response points out that staff in BXA's Strategic Trade Division processed 92 percent of all non-encryption CCATS and 96 percent of all CJ determination requests in fiscal year 2000. The Under Secretary contends that only if staffing levels and related funding for specific technical functions are increased can BXA simultaneously improve its ability to meet the deadlines for the processing of license applications, commodity classifications, and commodity jurisdiction requests. As a result, BXA asserts that it cannot consider implementing this recommendation unless it is coupled with a recommendation to the requisite budget authorities in the Congress to provide the necessary resources.

Clearly staffing levels are a contributing factor to BXA's inability to process CCATS in a timely manner. However, it is our belief that if BXA needs additional staff to meet deadlines for the processing of commodity classification requests (or license applications and commodity jurisdictions) and does not have the resources to fund needed positions, then it is incumbent upon the agency to justify the need in its budget submissions.<sup>35</sup> For this reason, we recommended that BXA review its priorities and staffing levels. It is very possible that additional staff may be needed to improve the timeliness of CCATS processing. Therefore, we request that BXA address, in its action plan, what actions it intends to take.

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<sup>35</sup>We would like to point out that BXA's initial fiscal year 2002 budget submission included a request for eight additional full time equivalent staff in order to help it carry out its statutorily mandated tasks, including regime support, classifications, and regulatory development. The Department approved four of these full time equivalent staff and the budget submission is currently pending before OMB.

For the second recommendation regarding programming ECASS to allow for the “hold without action” feature, the Under Secretary for Export Administration stated that BXA intends to implement this recommendation as part of its ECASS redesign project.

Finally, for the last recommendation on developing policies and procedures for the intra-agency review of CCATS, the Under Secretary for Export Administration’s response to our draft report stated that the agency is not convinced that the data cited by the OIG in this report are evidence of a problem. Nevertheless, the agency will remind its engineers of the need to refer CCATS to others when the engineer who receives the CCATS is not the proper officer to review that item. However, until BXA sees evidence of a significant problem in this area, the Under Secretary stated that the agency has no plans to draft new procedures.

We are troubled by BXA’s disagreement with this recommendation because the agency concurred and agreed to take action when the OIG made the same recommendation in 1999. We would hope, given that processing time for CCATS has actually increased since our 1999 report, that BXA would take immediate action to eliminate any processing delays resulting from the confusion surrounding the review of CCATS by more than one licensing division. As stated in our report, there were 199 non-encryption CCATS referred to multiple divisions in fiscal year 2000.

We also must take issue with BXA’s assertion that the agency did not have the opportunity to review the figure of 199 non-encryption CCATS before it was provided to the OIG and that the agency was unsure of the origin of this figure. After some confusion over the completeness of previous CCATS figures provided to the OIG by BXA, on January 11, 2001, the Director of BXA’s Office of Administration authorized an ECASS information technology specialist to directly provide the OIG with the data previously requested on November 1, 2001. This data was provided to the OIG on January 16, 2001, in an e-mail that was also sent to a senior manager in the agency, as well as to BXA’s audit liaison. We believe that it was incumbent upon BXA management, if it was in disagreement with the figure of 199 non-encryption CCATS, to notify the OIG of its concerns soon after the information was provided rather than questioning the origin and accuracy of the data in the agency’s response to our draft report. In addition, we note that the data was directly pulled from ECASS, BXA’s database system that processes, stores, and transmits dual-use license applications and CCATS. While ECASS has its problems, as discussed in our 1999 report, it is the most reliable system available to BXA managers to query for information, such as the number of non-encryption CCATS referred to multiple divisions in fiscal year 2000.

**B. Commodity classification process needs to be more transparent**

An April 1996 memorandum from the National Security Council (NSC) set forth guidance for processing commodity jurisdictions and commodity classification requests in an effort “to improve interagency coordination and transparency” with regard to these processes (see Chapter III, page 38, for further discussion on the commodity jurisdiction process). Essentially, the NSC guidance continues the process of allowing exporters to initiate commodity classification requests with BXA to determine whether items are subject to the Export Administration Regulations.

However, the guidance also directs BXA to “share with State and Defense all commodity classification requests for items/technologies specifically designed, developed, configured, adapted and modified for a military application, or derived....” from such items or technologies. Specifically, it instructs BXA to refer these munitions-related commodity classification requests to State and Defense, allowing them a two-working-day turnaround time. At the end of the two days, silence will be deemed to be consent, and BXA may proceed with the processing of a final and binding commodity classification in accordance with its own regulations, practices, and policies.

Commodity classification referral guidance needs to be clarified

During both our current review and our 1999 export licensing review, Defense<sup>36</sup> and State have continually indicated to us a need for more transparency in the CCATS process. Specifically, they want this process to be completely open to interagency review similar to the export licensing process. To illustrate the need for this, the agencies routinely point to a 1995 case in which BXA mistakenly classified an investigative report on the crash of a Chinese rocket carrying a satellite as needing no export license. BXA allowed the release of this report without consulting with Defense or State. BXA

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<sup>36</sup>Complicating this matter is a May 1996 memorandum from Defense to BXA stating that it did not want the opportunity for an initial review of munitions-related commodity classifications and instead requested that BXA provide, on a weekly basis, a copy of such completed commodity classifications requests and decisions to Defense. However, during our 1999 review, we learned that Defense had changed its position since its 1996 delegation and wanted to review all CCATS. At a minimum, we believed that Defense needed to rescind its initial delegation to BXA not to review these CCATS so that it could at least start receiving those CCATS that BXA would send, in accordance with the NSC guidelines. Therefore, in our 1999 report we recommended that BXA consult with Defense to determine if it wanted to continue its delegation to BXA on munitions-related CCATS or withdraw it, but no action on this matter had been taken by either agency prior to our current review. Finally, in December 2000, in response to a memorandum from the Department of Defense’s Office of Inspector General pertaining to this matter, the Deputy Under Secretary of Defense for Technology Security Policy stated, “DOD has long maintained that all commodity classification decisions must be subject to prior interagency review...and DOD has testified numerous times before Congress that greater transparency is needed....” Yet, as of January 2001, Defense had still not rescinded its 1996 delegation.

later admitted that the report fell under State's jurisdiction since the accident occurred in part of the rocket, not in the satellite.

As part of our 1999 export licensing review, we sought to determine whether past commodity classification determinations made by BXA did, in fact, support the concerns of Defense and State that BXA's CCATS determinations were not always accurate. We asked analysts from the Defense Threat Reduction Agency<sup>37</sup> to review 103 CCATS line items (100 from a random sample and an additional 3 not part of the sample) to determine if they agreed with BXA's decision in those cases. The analysts disagreed with BXA's decision in five of the cases.<sup>38</sup> In two of the five cases, the agency argued that the items were not under the CCL, and the CCATS should have been referred to State as commodity jurisdiction requests. BXA disagreed. In the remaining three cases, Defense agreed that the items fell under the CCL but disagreed with BXA's classification of the ECCN. This is significant because controls associated with ECCNs vary and one may have stricter controls than another. BXA ultimately agreed with Defense's classification for one of the three CCATS but maintained its original position on the other two.

As a result of this exercise, the then-Deputy Director of the Defense Threat Reduction Agency stated that this demonstration showed that while in the vast majority of CCATS cases there was no difference in the conclusions of the Defense Threat Reduction Agency and BXA, there is an opportunity for mistakes that could undercut its review of potential munitions items and ultimately affect its license review rights. We agreed. While disagreement on five cases may seem to be statistically insignificant, we believed there could be value added in allowing Defense and State the opportunity to review all munitions-related commodity classification requests. However, regardless of what the above exercise indicated, BXA still contended that it was properly referring all "munitions-related" commodity classifications to State.

We believe the overall disagreement in the CCATS process stems from the fact that the 1996 NSC referral guidance relating to commodity classifications is open to interpretation. BXA interprets the language very narrowly such that it will only refer classifications that, in its opinion, are clearly "munitions-related." Defense and State make a broader interpretation of the language that would require most commodity classifications to be referred. Realizing that the problem with CCATS referrals centered on each agency's interpretation of what "munitions-related" meant, we recommended in our 1999 export licensing report that BXA work with NSC to develop specific criteria and procedures on how to implement its 1996 guidance for the referral of munitions-related commodity

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<sup>37</sup>Officials from State's Office of Defense Trade Controls chose not to participate in the review.

<sup>38</sup>Defense was unable to make a determination on 20 of the original 100 CCATS in the sample because there was insufficient supporting documentation in the case file.

classifications to Defense and State. Although BXA concurred with our recommendation in its response to our 1999 draft report, it has taken no action on this important matter.

In fact, BXA only referred 13 of the 2,049 non-encryption CCATS it processed in fiscal year 2000 to State (as stated earlier, per Defense's delegation of authority to BXA, BXA did not refer any CCATS to Defense in the same time frame).<sup>39</sup> Since there is no way Defense or State can question commodity classifications that are not referred, we believe these agencies may have a legitimate concern that BXA may be advising exporters that munitions-controlled items are licensable by BXA or require no license at all.

During the course of our review, BXA officials also informed us of the results of a sampling of classifications it performed for the period May 3, 2000, to August 11, 2000, which showed that 32 out of 1,195 CCATS processed during this time frame, or 2.6 percent, were returned to the exporters without action. In these cases, the exporters were advised to seek a license or commodity jurisdiction request from the State Department because BXA's staff believed that the items were likely covered under the USML. Thus, while BXA may have only officially referred 13 CCATS to State in fiscal year 2000, BXA officials contend that there were at least 32 other CCATS that likely fell under State's licensing jurisdiction that were not officially referred because they were returned without action to the exporter.<sup>40</sup>

Recognizing that the small number of CCATS referred may not alone be indicative of whether BXA properly referred all munitions-related CCATS it processed during this time period, we intended to conduct a sample similar to the one we conducted in our 1999 export licensing review to provide us with more insight into this matter (see page 33). Unfortunately, because BXA did not provide us with the necessary raw data in a timely manner, we were unable to conduct a new sample during this review.<sup>41</sup>

While we are not proposing that BXA refer *all* CCATS to both Defense and State at this time, we do strongly believe that BXA needs to be proactive and work with Defense and State to make the CCATS process more transparent with regard to items or technologies specifically designed, developed, configured, adapted, and modified for a military application, or derived from such items as

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<sup>39</sup>The final CCATS determination in all 13 cases agreed with State's recommendation.

<sup>40</sup>Recognizing that the time period from which the sample of 32 was drawn did not cover the entire fiscal year, we extrapolated the 2.6 percent rate to the entire number of CCATS processed during the fiscal year to come up with a figure of 53. Thus, it might be reasonable to assume that a total of 66 of the 2,049 non-encryption CCATS processed in fiscal year 2000, or 3.2 percent, were either returned without action for USML reasons (53) or officially referred to State (13).

<sup>41</sup>We requested the data from BXA on November 1, 2000, but did not receive it until January 10, 2001. This did not allow us enough time to complete a proper sample in time to meet the March 30 Congressional deadline for this report.

called for in the 1996 NSC guidance. After discussing our concerns with one NSC official responsible for export control policy, we believe that NSC would be willing to revisit the issues we have raised here if requested by the participating agencies. As such, we strongly recommend that BXA request NSC to form a working group (including BXA, Defense, and State) to review the 1996 CCATS guidance, revise it if necessary, and develop specific criteria and procedures to ensure that the referral of munitions-related commodity classifications to Defense and State is handled in a timely, transparent, and appropriate manner by all agencies involved.

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BXA's response to our draft report stated that while it concurred with this same recommendation in its response to our 1999 export licensing report, it believes that the NSC should first form a working group to focus on the commodity jurisdiction process, which it maintains is neither timely nor effective, rather than review CCATS, a process which BXA does not believe is broken. While our report certainly recognizes several problems in the commodity jurisdiction process and makes several recommendations to help improve this process, none of the licensing agencies, including BXA, raised a problem about interpreting the CJ language in the 1996 NSC guidance (see Chapter III, page 38). While our findings on the CJ process did not warrant a recommendation for BXA to request that the NSC review the CJ process, if BXA believes that the NSC should look at this process, in addition to the CCATS referral guidance, we would encourage BXA to request such a review.

BXA also points out in its response that it believes that the intent of this recommendation— broader referral of CCATS—is inconsistent with our recommendation to process CCATS in a timely manner. Specifically, BXA believes that by increasing the number of CCATS referred, the processing times will increase, rather than decrease. However, based on the 13 CCATS that BXA referred to DTC in fiscal year 2000, BXA's conclusion cannot be supported. Specifically, DTC responded to BXA within its allotted time frame—two working days—in every case. In addition, according to the 1996 NSC guidance, if at the end of two working days, BXA has not received a response from the agencies, silence is deemed to be consent, and BXA can proceed with the processing of a final CCATS in accordance with its own regulations, practices, and policies.

The agency's response also contends that the OIG has based its whole finding in this area on the technical analysis provided by Defense. We disagree. We believe that a CCATS decision could ultimately impact policy decisions, especially if BXA incorrectly informs an exporter through a CCATS that no license is required, as it did in the 1995 case involving the investigative report on the crash of a Chinese rocket carrying a commercial communications satellite. Furthermore, our report does not recommend that BXA refer all CCATS to DTC and Defense. However, it does highlight the fact that all three licensing agencies (BXA, DTC, and Defense) have a different interpretation of the term "munitions-related," which is the key criteria that BXA uses to determine whether or not it will refer a

CCATS to DTC and Defense. As such, we again reiterate the importance for BXA to be proactive and request the NSC to form a working group (including BXA, DTC, and Defense) to review the 1996 CCATS guidance, revise it if necessary, and develop specific criteria and procedures to ensure that the referral of munitions-related commodity classifications to DTC and Defense is handled in a timely, transparent, and appropriate manner by all agencies involved.

Finally, we must take issue with BXA's assertion that it had provided us the data necessary to conduct our sample in September 2000 on the number of CCATS BXA processed during fiscal year 2000. Besides the fact that there were various problems with the CCATS data provided to us in September 2000, we could not conduct a sample on these CCATS until we had a breakdown of this number. Specifically, we needed to know (1) how many CCATS were classified with a valid ECCN, including how many were classified as EAR99; (2) how many CCATS were classified as "license exception;" and (3) how many CCATS BXA was unable to classify. As our report stated, we made a request to BXA on November 1, 2000, to provide us this breakdown of the CCATS data. However, BXA did not provide us with this data until January, 10, 2001. Thus, we did not have enough time to complete a proper sample in time to meet the March 30 Congressional deadline for this report.

#### Final CCATS determinations should be shared with State

As mentioned earlier, the 1996 NSC guidance requires BXA to refer all munitions-related commodity classifications to DTC for its review and allows it two-working days to provide BXA with a recommendation. Once DTC provides its CCATS recommendation to BXA, it receives no indication from BXA as to whether the recommendation was accepted. However, DTC officials informed us that they would like to know what BXA's final determination on such a CCATS is in order to "close out" their files. In addition, if the final CCATS determination indicates that the item in question falls under the USML, DTC could then possibly conduct an outreach visit to the U.S. exporter who submitted the CCATS.

When we asked DTC officials if they had ever asked BXA to provide them with the final CCATS determinations, they replied in the negative. By the same token, when we asked BXA officials why they did not notify DTC of the final CCATS determination, they responded that DTC has never requested a copy of the final determination. However, BXA officials indicated that they would accommodate such a request from DTC. Therefore, in the spirit of transparency, we recommend that BXA provide DTC with a copy of the final determination for any CCATS it reviews.



In responding to our draft report, the Under Secretary for Export Administration stated that BXA will provide copies of the closed CCATS to DTC only if it requests them. While we agree with BXA that

DTC should have made this request to BXA directly, we believe that BXA should take the lead on this matter—in the spirit of transparency—and provide State with a copy of the closed CCATS it reviews. Finally, it should also be noted that DTC does provide BXA with a copy of all closed CJ determination requests that it processes.

### III. Commodity Jurisdiction Process Needs Improvement

While the commodity classification process assists exporters in determining whether an item is subject to the Export Administration Regulations, exporters also may need assistance in determining whether an item is subject to the International Traffic in Arms Regulations. Items subject to these regulations are on the USML, which is under the licensing jurisdiction of State's DTC. Exporters who are unsure whether an item is on the USML can request a commodity jurisdiction (CJ) determination from DTC to rule on the export licensing jurisdiction for the item. DTC's response to the exporter will indicate whether the item is on the USML, and if not, state that it may be covered by the CCL. The CJ process can also be used to consider moving an item currently covered by the USML to BXA's licensing jurisdiction. It is important to note that CJ determinations only rule on the proper licensing authority for an item and do not represent an approval to export. An exporter must still apply for an export license, if one is required.

According to the 1996 NSC guidance, as discussed in the previous chapter, DTC is to refer all CJ requests to BXA and Defense to obtain their opinions about the licensing jurisdiction for the particular item. Occasionally CJ determination requests are also referred to the Department of Energy or other potentially interested agencies, such as the Federal Aviation Administration or the National Aeronautics and Space Administration. In reviewing the CJ process, and in particular the CJ determination requests that were referred to BXA, we found that the requests were not being processed in a timely manner by any of the involved agencies. In addition, we believe that the current manual processing of CJ determination requests is leading to transparency and accountability problems in the process. Therefore, we are recommending that an electronic system be developed for the CJ process. Finally, we are concerned that DTC may be making incorrect CJ determinations because it does not always consult with BXA or Defense. In the two cases we identified where DTC did not consult with BXA,<sup>42</sup> DTC's error caused both inconvenience and expense to the exporters involved.

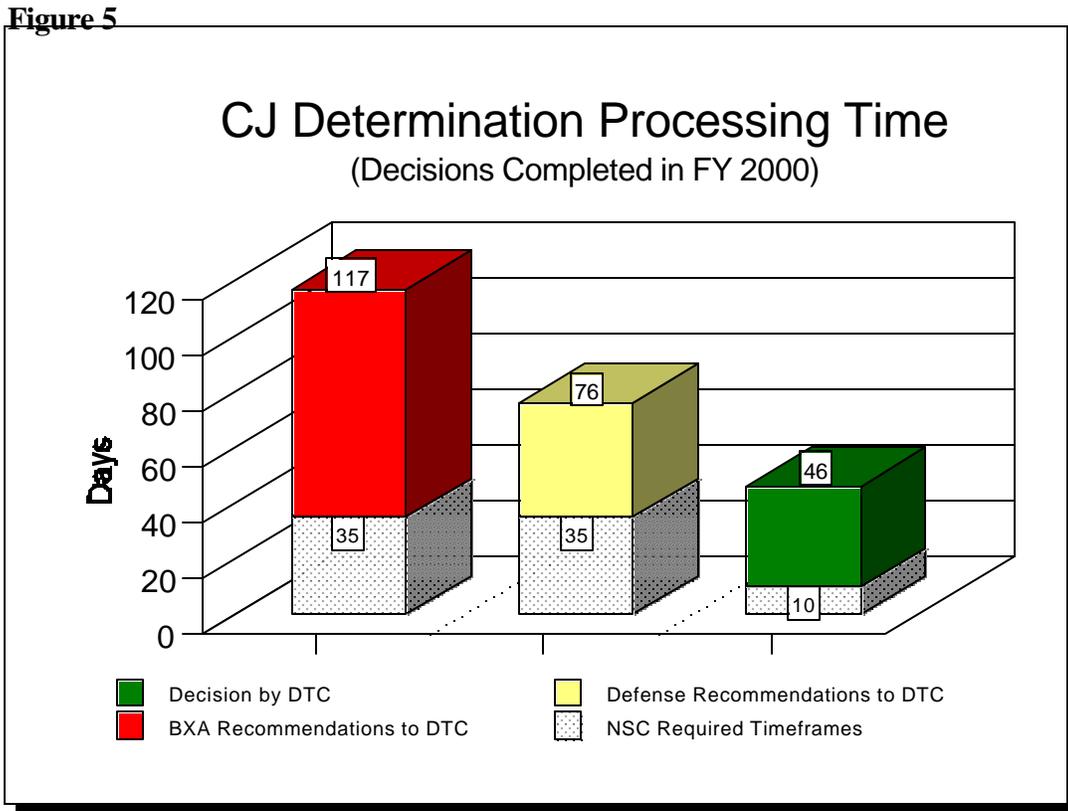
#### A. *CJ determination requests are not being processed in a timely manner*

Of the 220 CJ determination requests initiated in fiscal year 2000, 101 had been completed as of the end of the fiscal year. In reviewing these completed CJ requests, we found that BXA, Defense, and State were not timely in processing them (as shown in Figure 5). Specifically, BXA took, on average, 117 calendar days to provide an opinion to DTC on the CJ requests, while Defense took an average of 76 calendar days. In addition, DTC was not timely once it received the opinions from BXA and Defense. On average, DTC took another 46 calendar days to respond to exporters on CJ

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<sup>42</sup>These two cases only came to our attention because the exporters contacted BXA for assistance. Therefore, it is very possible that there were more instances in which DTC did not consult with BXA or Defense. State OIG attempted to determine if there were additional examples of this problem, but records at DTC and Customs (the originator of the determination requests) were not sufficient for such information to be determined.

determination requests. In total, CJ determination requests took an average of 163 calendar days, or nearly 5 ½ months, to complete.



Source: Office of Defense Trade Controls, Department of State

Under the 1996 NSC guidance, the entire CJ determination process, from the time DTC receives a complete CJ determination request to when a reply is provided to the exporter, is to take 95 calendar days. BXA and Defense, as well as any other agency that is referred a CJ determination request, has 35 days to provide DTC with a response.<sup>43</sup> DTC then has 10 days to review the CJ determination requests and make a decision on the export licensing jurisdiction. From there, should either BXA or Defense disagree with DTC's decision, there is an escalation process whereby higher level officials can be called on to resolve the disagreement. The process calls for a case to first be escalated to the Assistant Secretary of State, then if there is still disagreement, escalated to either the Under Secretary or the Secretary of State. At each of these two levels, agencies have 5 days to decide whether to escalate and then the official has 10 days to make a decision. Finally, if there is still interagency

<sup>43</sup> For extraordinary cases, agencies may request an additional 10 days to provide a response to DTC.

disagreement, BXA or Defense can escalate the case to the President for resolution. The NSC guidance does not provide a time limit for the President's resolution of a disputed CJ case.

In addition to the timeliness problem with completed CJ requests, we also identified 114 CJ determination requests that had not been completed in the prescribed 95-day time frame and were still open as of October 10, 2000. Of the 114 open requests, 42 were over one year old, with the oldest being 1,980 days old, or nearly 5 ½ years old. Some of these open CJ determination requests, particularly the very old ones, involve controversial items or technologies that BXA, DTC, and Defense are currently debating over which agency has licensing jurisdiction.

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

With regard to BXA's contribution to the timeliness problems in the CJ process, the main reason officials gave us for taking an average of 117 calendar days to provide an opinion to DTC was that BXA's licensing officers, who review the CJ requests, have competing priorities. According to BXA managers, the licensing officers' primary responsibility is to process export license applications, which have mandated time frames for completion under Executive Order 12981. As a result, processing CJ determination requests, as well as other tasks such as completing CCATS, are afforded a lower priority and are completed as time allows.

We recognize that Executive Order 12981 mandates the timely processing of export license applications. However, CJ requests are also important, and the guidance provided by NSC should not be ignored. An NSC representative with whom we discussed the CJ timeliness problems told us that if the agencies were not meeting the time frames for processing CJ requests because they were not mandated by legislation or executive order, the Council could consider creating an executive order to stress the importance of the time frames. Because the time frames for completing CJ determination requests are clearly important, we recommend that BXA review its priorities and staffing levels and make adjustments to improve its timeliness on CJ requests.



The Under Secretary for Export Administration's response to our draft report stated that the agency agrees with this recommendation in principle but believes it to be unrealistic in practice. As mentioned earlier in the CCATS chapter, the Under Secretary points out that staff in the Strategic Trade Division of the Office of Strategic Trade and Foreign Policy Controls, processed 92 percent of all non-encryption CCATS and 96 percent of all CJ determination requests in fiscal year 2000. The Under Secretary contends that only if staffing levels and related funding for specific technical functions are increased can BXA simultaneously improve its ability to meet the deadlines for the processing of license

applications, commodity classifications, and commodity jurisdiction requests. As a result, BXA maintains that it cannot consider implementing this recommendation unless it is coupled with a recommendation to the requisite budget authorities in the Congress to provide the necessary resources.

Clearly staffing levels and competing priorities are a contributing factor to BXA's inability to process CJ determination requests in a timely manner. However, it is our belief that if BXA needs additional staff to meet deadlines for the processing of commodity jurisdiction requests (or license applications and commodity classifications) and does not have the resources to reallocate or fund needed positions, then it is incumbent upon the agency to justify the need in its budget submissions. For this reason, we recommended that BXA review its priorities and staffing levels. It is very possible that additional staff may be needed to improve the timeliness of its processing of CJ requests. We request that BXA address, in its action plan, what actions it intends to take to implement this recommendation.

***B. CJ process should be automated to improve interagency exchange of information***

One of our objectives in reviewing the CJ process was to determine whether there is a need for improved transparency in the CJ process; that is, structuring the process so that all agencies involved are fully informed about the jurisdiction opinions that are provided by other agencies, as well as the final determination made by DTC. There was a general sense on the part of BXA management that the agency's opinions were not always given the same weight as of those of DTC or Defense and that BXA was not always informed about decisions made by other agencies as part of the process. We found that there was little validity to BXA's claim that its opinion was not always sufficiently considered. However, we did find that DTC did not refer to both BXA and Defense all CJ determination requests it received in fiscal year 2000. We also determined that the manual system for processing CJ requests is unreliable and does not lend itself to providing transparency and accountability for the CJ process. To solve this problem, we believe that an electronic processing system is needed to improve the exchange of information between the agencies.

In reviewing the 101 completed fiscal year 2000 CJ determination requests, we were encouraged to find that there is general agreement among the three agencies (BXA, DTC, and Defense) as to which agency has the appropriate licensing jurisdiction. For the completed CJ determination requests, BXA's position appears to have been given due consideration by DTC, as there was just one case where BXA disagreed with DTC's final decision on a CJ request. Commerce declined to escalate the case. However, it is important to note that there were an additional 110 cases that had been referred to BXA that DTC had not yet closed out at the time of our analysis. BXA believes that there are a fair number of these remaining cases upon which the three agencies do not agree and that the disagreement is why the cases have not been closed out.

However, we also found that the process is not always transparent and that improvement is needed in how information is shared between the agencies. In particular, we found that DTC did not refer all CJ requests it received in fiscal year 2000 to BXA and Defense, as required by the 1996 NSC guidance. Specifically, there were nine cases that were not referred to BXA, and six cases that were not referred to Defense. According to interviews conducted by the State OIG, DTC officials stated that they did not refer these cases because (1) it was “obvious” that the commodities involved were USML items, (2) the exporter was submitting a second CJ on the same item for reconsideration and the NSC guidelines are unclear on how to handle cases submitted for reconsideration, or (3) there were administrative or data entry errors that caused DTC not to make the referrals. We do not believe that such justifications are valid, particularly in light of the fact that the technical experts who are best able to decide on the licensing jurisdiction of an item reside in BXA and Defense. The State OIG will be making recommendations to DTC to correct this problem.

In terms of how information is shared between agencies, we found that the CJ process is a manual one that relies on faxing information back and forth between the agencies. DTC, when it receives a CJ request, faxes a copy to BXA and Defense for their opinions. When BXA and Defense have completed their review, they fax their opinions back to DTC. Then, when DTC makes its final determination, it faxes the decision to BXA and Defense for their information. If either agency disagrees with DTC’s decision, it has five days to either provide rebuttal information or escalate the case for resolution by higher level officials. That information is also transmitted via fax.

There are several problems associated with the CJ cases being processed and tracked manually.

- ~ Under such a manual system, BXA and Defense are unable to see each other’s position on a CJ determination request unless they specifically ask for it and then it has to be faxed or sent by courier. Depending on the workload of the staff at DTC, such requests are not always promptly fulfilled. Having this information would be helpful to the technical experts at both agencies so that they could view the opinions of other “experts” and perhaps see an issue or viewpoint that they had not considered.
- ~ Because of the manual process, managers told us that sometimes the 5-day rebuttal period has already passed by the time the appropriate technical expert is given the fax from DTC. This can happen when someone is on vacation or is not diligent in removing incoming faxes from the fax machine. Thus, in these cases, BXA misses its opportunity to rebut and/or escalate.
- ~ Because the information is not automated, BXA and Defense do not have access to historical CJ information. According to BXA technical experts, such information would be very helpful in reviewing future CJ requests from the same company or for “like” products. It would also

likely save time for the engineers, in that they would not have to conduct duplicative research on a company or commodity that has previously been reviewed.

- ~ BXA managers told us they believe that they simply do not receive copies of all DTC decisions on CJ determination requests. While it would be very difficult to determine whether this is true, in a process that relies on people and fax machines, it is certainly plausible that a fax machine may have malfunctioned or that a DTC staff person never sent the fax.

All of these problems are due to the fact that there is a manual system for processing CJ determination requests. It is simply a good management practice to be able to track where a CJ request is in the process, who has it, how long it has taken to be processed, what history there is on the case or similar cases, and what information has been supplied by another agency. All of these parameters are difficult or impossible to achieve under the current manual system. Further, adhering to the time frames set forth in the NSC guidance is very difficult when documents and information are manually transferred. Under the current system, documents can be lost, misplaced, or misdirected, resulting in unnecessary delays. We believe that an electronic processing system is needed to improve the exchange of information between the agencies and also to improve the timeliness of the CJ determination process. Therefore, we recommend that BXA work with DTC and Defense to create, or include as part of the current systems redesign efforts, an automated system for referring and processing CJ cases, similar to the automated licensing system.



In responding to our draft report, the Under Secretary for Export Administration stated the proposal to automate the CJ process may be a good one. However, he noted that administration of the CJ process is the responsibility of the State Department. If requested to do so by State, BXA said that it will work with DTC and Defense to improve the process. The Under Secretary also believed that it would also be inappropriate for BXA to include such a process in its ECASS redesign and the recommendation is better directed to State. Further, even if the recommendation were best directed to BXA, the Under Secretary contends that the agency does not have the resources necessary to implement such a recommendation. We recognize that State has primary responsibility for the CJ process, but we believe that all agencies need to participate in the design of a new system for the CJ process because each agency has unique needs and requirements that may impact how a new system is designed. Thus, in referring to current system redesign efforts, we were primarily referring to the interagency U.S. Export Systems Automation Initiative, which is being managed by Defense and is currently funded for \$30 million over three years. We encourage BXA to work with DTC and Defense, as part of the U.S. Export Systems Automation Initiative, to automate the CJ process. We should also note that State OIG, in its report, makes similar recommendations to DTC on the critical need for automation of the CJ process.

**C. DTC needs to consult with BXA and Defense on all CJ requests**

In reviewing the CJ determination process, we identified at least two cases where U.S. Customs Service agents seized shipments at the border after DTC erroneously informed them that the shipments were munitions items. However, in both cases, the items were actually CCL items, and in one case the exporter actually had a current export license from BXA for the items it was exporting. Because of DTC's error, the exporters were highly inconvenienced, and in one case, the exporter was forced to hire legal counsel and expend funds to represent its interests with Customs and DTC.<sup>44</sup> These situations should not have happened and would have easily been avoided if DTC had consulted with BXA prior to making its CJ determination and telling Customs to seize the commodities in question.

The first case involved the export of prepreg material<sup>45</sup> to Belgium for use in making aircraft parts for the F-16 aircraft. The commodity is controlled under ECCN 1C990, and no export license was required to ship it to Belgium. The exporter shipped the prepreg material on April 10, 2000. It was shipped in dry ice to keep it at or below a freezing temperature because of its limited shelf life (if stored at room temperature, the material becomes useless in a matter of days.) A Customs officer at the Dallas-Fort Worth International Airport seized a portion of the shipment on April 12, 2000, after, via telephone, DTC incorrectly informed Customs that the material was covered by the USML and a State license was required. Further complicating the matter was that the remainder of the shipment had already left the country and had arrived in London. Customs instructed British authorities to detain the shipment at the London-Heathrow Airport.

After being informed of the situation, the exporter engaged legal counsel in Washington, D.C., to assist in negotiations with Customs to allow the prepreg material to be stored at the exporter's facility during the seizure period so the material could be maintained at a low temperature. Legal counsel was able to secure the return of the material to the exporter's facility (from both the Dallas and London airports), after which they turned to resolving the seizure problem. BXA was called in for assistance, and after much discussion and sharing of documentation, on June 23, 2000, DTC reversed its decision and informed Customs that the prepreg material was not subject to the USML and that the items could be released from seizure. However, the exporter was forced to pay additional shipping fees to return the London portion of the shipment to Dallas for the seizure period and then to re-ship the material back to Europe when it was released (\$10,800), as well as nearly \$70,000 in legal fees expended to resolve the matter.

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<sup>44</sup>During our review, we spoke to both exporters to obtain more information about the seizures.

<sup>45</sup> Prepreg is a material formed by combining a fiber, such as carbon or fiberglass, with a resin. In this case, the firm in Belgium would put the prepreg in a mold and cure it. The result is an unbreakable, but very light material used for aircraft parts.

The second case involved the export of optical sighting devices for firearms to Canada. These items are controlled under ECCN 0A987, and BXA granted a license to the exporter on July 15, 2000. On July 24, the exporter shipped the items, and on August 4, a Customs office in Pembina, North Dakota, called the exporter to confirm that the exporter possessed a valid export license, as was stated on the shipping documents. The exporting company confirmed that it did have a valid license from BXA. However, the Customs officer believed that the shipment might require a license from DTC, presumably because the commodities are used in conjunction with firearms. On August 10, Customs requested a license determination from DTC, and on September 12, DTC ruled that the commodities were covered by the USML and that the exporter required a license from DTC. On September 18, the items were formally seized by Customs.

Meanwhile, the exporter was unaware that the devices had been detained by Customs. Not until its Canadian customer called sometime in late August to report that the shipment was short the seized devices, did the exporter find out that Customs had pulled the devices from the shipment. Not knowing that there was a problem with Customs, the exporter sent several additional shipments containing optical sighting devices through the Pembina border control point, and the devices were removed from these shipments as well. The result was a great deal of confusion on the part of the exporter and its customers concerning the items missing from the shipments. In addition, to ensure that its customers received everything they had ordered, the exporter was forced to re-ship devices (through another border point), at an additional cost of between \$500 and \$1,000. The exporter contacted BXA for assistance in this matter, and after some discussion and exchange of documentation between the two agencies, DTC rescinded its determination on October 11, 2000. The items were finally released by Customs on October 26, 2 ½ months after they were first detained.

We realize that it is appropriate and prudent for U.S. Customs agents to seek assistance from DTC if they have reason to believe that a munitions item is being exported without a license. However, in neither case did DTC notify or contact BXA. We question whether DTC should make such CJ decisions without first consulting with the technical experts at BXA and Defense, as DTC admittedly does not have the technical expertise to make such decisions on its own. Also, because the exporters in both cases highlighted above had proof that their items were subject to the CCL, it would have been prudent for DTC staff to consult with BXA before unilaterally determining that the commodities were subject to the USML. Therefore, we recommend that BXA request that DTC cease its practice of making CJ determinations without first consulting with BXA and Defense, as appropriate.

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BXA's response to our draft report stated that the agency concurs with the recommendation that State's DTC consult with BXA and Defense on all CJ requests, but believes that it does not go far enough. It is the opinion of BXA officials that the entire process of determining the jurisdiction of

commodities should be overhauled, because they believe that the process is neither timely nor effective. We agree that the CJ determination process has problems, but because the process is managed by State's DTC, it is not within the purview of our office to make recommendations that must be implemented by DTC. We note that State OIG, in its 2001 report under the National Defense Authorization Act for Fiscal Year 2000 requirement, made several recommendations to DTC to improve the timeliness and efficiency of the CJ process. In addition, this matter is also addressed in the March 2001 interagency OIG export licensing report on the Commerce Control List and the U.S. Munitions List. We request that BXA, in its action plan, address what actions it intends to take to implement this recommendation.

#### **IV. Other OIG Concerns Related to the Commerce Control List**

As a part of our review to determine how goods and technologies are added to and removed from the CCL, we noted a breakdown in the interagency process for resolving jurisdictional disputes in at least two areas: night vision equipment and “space qualified” items. Specifically, we have noted considerable discord among the licensing agencies regarding the jurisdiction of night vision technology (e.g., image intensifiers, camera modules, focal plane arrays). At issue is whether this equipment should continue to be licensed by BXA or whether it should be considered munitions and licensed by State. Although there is a 1992 interagency memorandum of understanding establishing how BXA should license non-military night vision equipment and commercial systems containing military night vision equipment, it appears that the licensing agencies are not adhering to it. As a result, exporters are confused about which agency they should apply to for a license for these goods. Given that many of these items have been in dispute since 1998, we believe that BXA should bring this matter to the attention of the new head of the National Security Council as soon as possible and push for resolution.

Furthermore, the U.S. government has been unable to make a decision as to which agency has jurisdiction over 16 categories of space qualified items<sup>46</sup> currently controlled under the CCL. It appears that the dispute over these items started, at least in part, with the passage of the National Defense Authorization Act for Fiscal Year 1999, which transferred the licensing jurisdiction for satellites from Commerce to State. In January 2000, an interagency group chaired by NSC and including the Departments of Commerce, Defense, and State was convened to review the 16 categories of items on the CCL that contain space qualified items to determine whether any of them should be transferred from the export licensing jurisdiction of Commerce to that of State. While a decision as to which agency, or agencies if the jurisdiction is to be split somehow, has jurisdiction for these items was expected in April 2000, no decisions had been made on any of the items as of January 2001. Thus, we believe that BXA should also bring this matter to the attention of the new head of the National Security Council as soon as possible and push for resolution.

##### ***A. Jurisdictional issues concerning night vision technology need to be resolved***

In 1994, DTC transferred to BXA export licensing jurisdiction for dual-use night vision equipment, including (1) non-military focal plane arrays, (2) non-military image intensification tubes, and (3) commercial imaging systems containing military second or third generation image intensification tubes or

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<sup>46</sup>According to the Export Administration Regulations, the term “space qualified” refers to products designed, manufactured, and tested to meet the special electrical, mechanical, or environmental requirements for use in the launch and deployment of satellites or high-altitude flight systems operating at altitudes of 100 km or higher.

military focal plane arrays.<sup>47</sup> The transfer was prompted by the Memorandum of Disapproval on the Omnibus Export Amendments Act of 1990, in which then President Bush directed:

“By June 1, 1991, the United States will remove from the U.S. Munitions List all items contained on the COCOM dual use list unless significant U.S. national security interests would be jeopardized.”<sup>48</sup>

In anticipation of this transfer, BXA, Defense, and DTC signed a classified memorandum of understanding in 1992 establishing how BXA would process license applications for night vision equipment, among other items. Until recently, the licensing agencies adhered to the terms of the agreement. However, beginning in 1998, due in part to rapid changes in night vision technology, the agreement began to be ignored. As a result, between fiscal years 1999 and 2000, there was a 15 percent increase in the number of night vision cases escalated to the Operating Committee<sup>49</sup> due to confusion over licensing jurisdiction. Although most of the 259 cases were eventually approved, the same types of applications are repeatedly being escalated because the argument concerning jurisdiction continues unabated. In fact, BXA officials informed us that each night vision case has to be reviewed from the ground up each time, regardless of whether a license may have previously been approved for the same exporter, items, *and* end user. As a result, exporters have complained that the long and unpredictable licensing process could discourage customers from buying night vision products in the United States, especially since some of these items are available on the market from non-U.S. sources.

An example of this problem involves a license application submitted to BXA in a recent year for night vision equipment going to an end user in a North Atlantic Treaty Organization country. As of January 2001, the case was still pending at the Advisory Committee on Export Policy.<sup>50</sup> However, BXA has issued at least two licenses for the same equipment to the same end user in the past. The first license

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<sup>47</sup>59 FR 46548 (September 9, 1994). The remaining night vision equipment is maintained on the USML.

<sup>48</sup>Memorandum of Disapproval for the Omnibus Export Amendments Act of 1990, President Bush, November 16, 1990.

<sup>49</sup>If there is disagreement among the agencies on whether to approve a license application after the initial interagency review period, the application is escalated to a higher level interagency working group called the Operating Committee. The voting members of the committee include representatives from the Departments of Commerce, Defense, Energy, and State. The Chair of the Operating Committee is appointed by the Secretary of Commerce.

<sup>50</sup>The Advisory Committee on Export Policy is the second tier in the dual-use export licensing dispute resolution process. The Committee is chaired by Commerce’s Assistant Secretary for Export Administration, and voting members include Assistant Secretary-level representatives from the Departments of Defense, Energy, and State.

allowed the foreign company to complete the development of the product, while the subsequent license was issued to allow for the initial production of the equipment. The items covered by the current pending license application are needed by the foreign customer to keep the production line open. Based on our review of this particular case, it appears that Defense and State now believe that the night vision equipment in question is a USML item subject to the International Traffic in Arms Regulations.<sup>51</sup>

To try to resolve some of the jurisdictional questions, BXA hosted an information exchange on night vision technology for manufacturers of night vision equipment and several licensing agencies in April 2000.<sup>52</sup> According to BXA officials, the purpose of the meeting was for manufacturers to explain to the U.S. government how they design their products for military and commercial applications, including the performance characteristics of items designed for military use versus commercial use. While BXA officials believed this meeting helped delineate the boundary between the night vision equipment on the CCL and that on the USML, continuing differences of opinion between Defense and BXA continue to delay the export license review process.

For example, one of the differences in opinion results from the lack of clear guidance as to whether the technology is a dual-use or munitions item based on (1) who funded the development of the technology, (2) how much funding was provided, and (3) when the development took place. According to the International Traffic in Arms Regulations, an article may generally be designated a defense article if it “is specifically designed, developed, configured, adapted, or modified for military application.”<sup>53</sup> Thus, Defense and DTC argue that if the design or development of the night vision technology was funded by Defense, regardless of the size of the contribution, they believe that the technology is a munitions item. By the same token, Defense and DTC believe that if the technology was originally “designed” for a military application, regardless of how long ago, the item is a munitions item. On the other hand, BXA officials also point to the International Traffic in Arms Regulations, which further states that an article may be designated as a defense article if it, “Does not have predominant civil applications.”<sup>54</sup> Thus, BXA officials contend that if the technology is currently being used in a commercial application, it is a dual-use item that should be licensed under the Export Administration Regulations.

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<sup>51</sup>Since the current license application is still pending, officials at Defense declined to discuss this case with us.

<sup>52</sup>Although officials from DTC were invited to the meeting, they chose not to attend.

<sup>53</sup>22 C.F.R. §120.3(a).

<sup>54</sup>22 C.F.R. §120.3(a)(i).

Another difference of opinion deals with the fact that these agencies cannot agree upon a definition of a “commercial system.” This is significant because the majority of license applications BXA receives involving night vision technology are for camera systems containing night vision equipment. Again, along with “non-military” image intensification tubes and focal plane arrays, DTC also transferred “commercial systems” (e.g., cameras) containing “military” second or third generation image intensification tubes or “military” focal plane arrays to BXA in 1994. In addition to the debate about what is considered “military,” Defense contends that in order for a camera to be considered a “system,” it must contain a lens, but BXA disagrees. Thus, at BXA’s request, the Sensors and Instrumentation Technical Advisory Committee recently drafted its own definition of a commercial camera which is currently being reviewed by the licensing agencies.

Unfortunately, while the overall policy debate concerning whether this equipment should continue to be licensed by BXA or should be considered munitions and licensed by DTC continues, at least 33 specific night vision products have gotten caught up in the licensing process. In an attempt to resolve the dispute as it relates to these products, State’s Bureau of Nonproliferation requested DTC to initiate a government jurisdiction determination for the items in June 2000. The government jurisdiction process is similar to the CJ process except that instead of an exporter initiating the request, a federal agency does so. However, as of January 2001, DTC had not yet begun to process the request, and we were informed by the State OIG that DTC had decided not to do so. Instead, according to the State OIG, DTC has decided that it wants industry to seek CJs for these items because it does not believe that the government jurisdiction process is an official process.

However, it was DTC that set the precedent for this type of review after the 1996 NSC guidance on CJs was implemented. In fact, the government jurisdiction process has been used and accepted for items other than night vision equipment. As such, we believe that while the 1996 NSC guidance does not discuss government jurisdictions, the same criteria applied to CJs can be used as a baseline for government jurisdictions. Having said that, we recommend that BXA request the NSC to provide guidance on how DTC, Defense, and BXA should process government jurisdictions, similar to the guidance the NSC issued for the CJ process.

The inability of the licensing agencies to resolve this dispute has left exporters confused and uncertain as to which agency to apply to for a license for night vision equipment and technology. In fact, in at least one case, an exporter submitted sister applications (same product, same end use, same country of destination) to both BXA and DTC to see which agency would license its item first. Given the inability of these licensing agencies to resolve the dispute on their own, BXA formally requested, in December 2000, the NSC to determine which agency, or agencies if the jurisdiction should be split somehow, has jurisdiction for the night vision items in dispute. Regardless, given that the jurisdiction for many of these items has been in dispute since 1998, we also recommend that BXA submit a formal written request to

the new head of the NSC asking for early resolution of the jurisdictional issues regarding night vision equipment and technology.



With regard to our recommendation that BXA request the NSC to provide guidance on the processing of government jurisdictions, the Under Secretary for Export Administration's response to our draft report stated that BXA does not regard the government jurisdiction process as legitimate, as it has not been validated by law, regulation, or executive order. Therefore, rather than providing guidance on government jurisdiction processing, BXA would prefer to see the concept abandoned. We disagree with BXA's position. The government jurisdiction process has been useful in the past because it is the only vehicle by which agencies can deal with jurisdictional issues at the agency level rather than escalating the cases to a higher level, such as the NSC. Therefore, we reiterate our recommendation that BXA request the NSC to provide guidance on how DTC, Defense, and BXA should process government jurisdictions, similar to the guidance the NSC issued for the CJ process.

In addition, BXA indicated that NSC staff have informed BXA that the NSC is well aware of this issue and is, in fact, taking steps to bring it to closure. BXA further states that it does not believe letters from BXA would be conducive to resolving the matter more quickly. After receiving BXA's response to this recommendation, we asked BXA to clarify whether its contact with the NSC was with the current Administration or the previous one. BXA informed us that the Under Secretary for Export Administration verbally discussed this matter with the current NSC staff. While this partially meets the intent of our recommendation, we still maintain that BXA should formally raise this matter, in writing, to the new head of the NSC.

***B. Jurisdictional issues concerning space qualified items need to be resolved***

In January 2000, an interagency group chaired by the NSC and including the Departments of Commerce, Defense, and State initiated a review of 16 categories of items on the CCL that contain "space qualified" items (see Table 3 for a list of the 16 items). The purpose of the review was to determine whether any of these items should be transferred from the export licensing jurisdiction of the Commerce Department to that of the State Department. While BXA, with the consent of the group, issued a written statement to exporters indicating that the NSC intended to complete its review by April 2000, no decisions had been reached on any of the items as of January 2001.<sup>55</sup>

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<sup>55</sup>Since the jurisdiction of these items is still under review by NSC, officials at Defense, State, and NSC declined to discuss any of the specifics of the review with us.

It appears that the dispute over these particular items started with the passage of the National Defense Authorization Act for Fiscal Year 1999, which transferred the licensing jurisdiction for commercial communication satellites from Commerce back to State.<sup>56</sup> Specifically, Section 1513(a) of the act states that the transfer applies to “all satellites and related items that are on the Commerce Control List.” Section 1516 of the act further defines related items as, “...satellite fuel, ground support equipment, test equipment, payload adapter or interface hardware, replacement parts, and non-embedded solid propellant orbit transfer engines...” However, because of a disagreement between the two agencies in interpreting this language, the 16 space qualified categories of items did not transfer to State in March 1999 along with the other satellite systems and components. To this end, the Under Secretary for Export Administration testified before the Congress in June 1999, that:

“While the term ‘related equipment’ was defined in our regulations as items used in the launch of satellites such as fuels or explosive bolts, other ‘space qualified’ items, i.e., dual use items that have been certified for use in space applications, were not specifically addressed.”<sup>57</sup>

In addition, the Assistant Secretary for Export Administration has indicated that while many of these space qualified items were originally developed for space applications, they are currently being used in such commercial applications as cell phones and automobiles. Furthermore, BXA officials argue that the licensing jurisdiction authority for many of these items was vested with BXA back in the 1980s and was not part of the original transfer of commercial satellites from State to Commerce. In other words, BXA maintains that the Congress, through the National Defense Authorization Act of 1999, was essentially reversing the shift of authority over satellite items previously transferred to BXA in 1992 and 1996, and many of the items in dispute were under BXA’s jurisdiction before that 1992 transfer and thus should not have be affected by the 1999 move of items back to State.

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<sup>56</sup>As stated previously in section A of this chapter, in 1990 then-President Bush ordered the removal of dual-use items from the USML unless significant U.S. national security interests would be jeopardized. As a part of this effort, State transferred jurisdiction of some commercial communications satellites to Commerce in 1992. Non-military satellites containing certain militarily sensitive characteristics remained on the USML. However, in 1996 then-President Clinton ordered the transfer of the remaining commercial communications satellites from State to Commerce.

<sup>57</sup>Testimony of William A. Reinsch, Under Secretary for Export Administration, before the Senate Foreign Relations Committee, Subcommittee on International Economic Policy, Export and Trade Promotion, Hearing on U.S. Export Control Policies on Satellites and U.S. Domestic Launch Capabilities, June 24, 1999.

**Table 3 Space Qualified Items Currently Being Reviewed by NSC <sup>1</sup>**

ECCN	Item Description	Year Placed on CCL	Agency Positions
3A001.b.1.a.4.c	Traveling wave tubes	1989	CCL
3A001.e.1.c.	Photovoltaic arrays	1989	CCL
3A002.a.3.b.	Tape recorders	Data Not Available	CCL <sup>2</sup>
3A002.g.2.	Atomic frequency standards	1989	In Dispute <sup>4</sup>
3A992.b.3.	Data recorders	Data Not Available	CCL <sup>2</sup>
5A001.a.3.	Telecommunications equipment	Data Not Available	CCL <sup>2</sup>
5A001.b.1. <sup>3</sup>	Telecommunications transmission equipment	1980s	CCL
5A001.b.6. <sup>3</sup>	Radio equipment	1980s	CCL
5E001.b.1.	Technology to develop/produce telecommunications equipment to be used on board satellites	Data Not Available	CCL <sup>2</sup>
6A002.a.1.	Solid state detectors	1989	CCL <sup>2</sup>
6A002.b.2.	Imaging sensors	1989	In Dispute <sup>4</sup>
6A002.d.1.	Cryocoolers	1989	In Dispute <sup>4</sup>
6A002.e.	Focal plane arrays	1989	CCL <sup>2</sup>
6A004.c.	Optical system parts	1992	USML
6A004.d.1.	Optical control equipment	1996	USML
6A008.j.1.	Laser radar	Data Not Available	CCL <sup>2</sup>

<sup>1</sup>This chart is based on BXA's analysis of a State Department position paper, dated September 22, 2000, on this issue. It is unknown what Defense's position is on these items since officials from Defense declined to discuss this issue with us.

<sup>2</sup>BXA and State agree that these items should remain on the CCL but disagree on the licensing requirements for these items.

<sup>3</sup>These categories were deleted by the Wassenaar Arrangement in December 1998. The deletions were made to the CCL in mid-1999, but new categories, 5A991.b.1. and 5A991.b.6., respectively, were created to unilaterally control these items for anti-terrorism reasons.

<sup>4</sup>BXA believes that the items in dispute should be on the CCL, while State believes that these items should be on the USML.

Source: Office of Administration, BXA.

As Table 3 illustrates, BXA and State are actually in agreement on jurisdiction for 13 of the 16 categories, including two items that BXA agrees should be transferred back to the USML.<sup>58</sup> They do admit, however, that there is disagreement on the licensing requirements associated with 7 of the 13 categories for which the agencies agree on jurisdiction. Specifically, BXA has informed us that many of the goods in these categories are exported to Europe and Japan and, as such, can be exported to these destinations without a license.<sup>59</sup> However, State wants BXA to place stronger controls on these items, which would require exporters to apply for a license for these items regardless of the country of final destination. Setting aside the dispute concerning additional licensing requirements, BXA contends that there are really only three space qualified categories on which State has serious questions about jurisdiction.

While NSC has ruled that the items in question are to remain under the jurisdiction of the Commerce Department until a final decision can be made, BXA officials were concerned that DTC might be licensing these items anyway. Therefore, we discussed this matter with the Director of DTC and he stated that, "Our licensing officers know about these items, and they would not intentionally license them." We requested DTC to query its licensing database to determine whether it had licensed any of these 16 items after March 1999, when licensing jurisdiction for commercial satellites transferred back to DTC. In reviewing this data with BXA officials, we concluded that DTC has in fact licensed some of these items contrary to the NSC guidance. Given that the jurisdiction of these items has been in dispute since March 1999, we recommend that BXA submit a formal written request to the new head of the NSC asking for early resolution of the jurisdictional issues regarding the 16 space-qualified items.



As was the case regarding night vision technology (see page 51), BXA indicated that its officials have discussed the issue of space qualified items with NSC staff. While this partially meets the intent of our recommendation, we still maintain that BXA should formally raise this matter, in writing, to the new head of the NSC.

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<sup>58</sup>Again, it is unknown as to whether or not Defense agrees with BXA's and State's position that 13 of the 16 space qualified items in dispute belong on the CCL.

<sup>59</sup>It should be noted that while many of these items may not require a license to be exported to Europe or Japan, the majority of the items would require a license if they were being exported to countries of concern (e.g., the People's Republic of China or India).

## RECOMMENDATIONS

We recommend that the Under Secretary for Export Administration ensure that the following actions are taken to improve the management of the CCL and the CCATS and CJ processes:

### **Commerce Control List**

1. Review BXA's internal clearance process and procedures for implementing agreed-upon multilateral changes to the CCL and work with the other licensing agencies, including Defense, Energy, and State, to determine whether the current process for updating the CCL can be adjusted in order to publish regulations more expeditiously. In addition, immediately implement the regulatory changes resulting from the May 1999 NSG plenary session and the October 1999 MTCR plenary session (see page 17).
2. In conjunction with Defense and State, review the national security controlled items that have been decontrolled by the Wassenaar Arrangement to determine (a) whether the national security controls for these items should be removed and (b) whether these items should continue to be controlled for foreign policy reasons under the CCL (see page 18).
3. Convene a working group of business and government representatives, under the auspices of the Regulations and Procedures Technical Advisory Committee, to improve the user-friendliness of the CCL. In addition, work with State to (1) eliminate the current overlap of items and make sure that it is very clear on which list an item falls, and (2) create a user-friendly consolidated index of the items on the CCL and USML. To ensure that this happens, work with the applicable congressional committees, that are considering new legislation for dual-use exports, to ensure that any new Export Administration Act or similar legislation includes a requirement that the agencies eliminate the overlap and create such an index for both the CCL and the USML. Finally, ensure that the annual scrubs of the CCL also take into account any corrections or changes that would help to make the CCL easier for exporters to use (see page 24).

### **Commodity Classifications**

4. Review Export Administration priorities and staffing levels and make adjustments to improve BXA's timeliness on CCATS requests (see page 29).
5. Program ECASS to allow for the "hold without action" feature to help Export Administration managers keep better track of licensing officers performance on CCATS (see page 29).
6. Develop policies and procedures for the intra-agency review of CCATS (see page 30).

7. Request that NSC form a working group (including Defense and State) to (a) review the 1996 CCATS guidance, (b) revise it if necessary, and (c) develop specific criteria and procedures to ensure that the referral of munitions-related commodity classifications to Defense and State is handled in a timely, transparent, and appropriate manner by all agencies involved (see page 35).
8. Provide State with a copy of the final determinations for any CCATS it reviews (see page 36).

### **Commodity Jurisdictions**

9. Review Export Administration priorities and staffing levels, as appropriate, and make adjustments to improve BXA's timeliness on CJ determination requests (see page 40).
10. Work with State's DTC and Defense, or include as part of the current system redesign efforts, an automated system for referring and processing CJ cases, similar to the current automated licensing system (see page 43).
11. Request that State's DTC consult with BXA and Defense on *all* CJ requests and cease its practice of making some CJ determinations without first consulting with those agencies, as required by the 1996 NSC guidance (see page 45).

### **Licensing of Night Vision Technology**

12. Request that NSC provide guidance on how DTC, Defense, and BXA should process government jurisdictions, similar to the guidance it issued for the CJ process (see page 50).
13. Submit a formal written request to the new head of the NSC asking for early resolution of the jurisdictional issues regarding night vision equipment and technology (see page 51).

### **Licensing of Space Qualified Items**

14. Submit a formal written request to the new head of the NSC asking for early resolution of the jurisdictional issues regarding the 16 space-qualified items (see page 54).

## **APPENDIX A**

### **List of Acronyms**

BXA	Bureau of Export Administration, Department of Commerce
CCATS	Commodity Classification Automated Tracking System
CCL	Commerce Control List
CJ	Commodity Jurisdiction
COCOM	Coordinating Committee on Multilateral Export Controls
DTC	Office of Defense Trade Controls, Department of State
ECASS	Export Control Automated Support System
ECCN	Export Control Classification Number
MTCR	Missile Technology Control Regime
NSC	National Security Council
NSG	Nuclear Suppliers Group
OIG	Office of Inspector General
OMB	Office of Management and Budget
USML	U.S. Munitions List

**APPENDIX B**

**Countries Participating in Multilateral Export Control Regimes**

Country	WA	AG	MTCR	NSG
Argentina	X	X	X	X
Australia	X	X	X	X
Austria	X	X	X	X
Belarus				X
Belgium	X	X	X	X
Brazil			X	X
Bulgaria	X			X
Canada	X	X	X	X
Cyprus		X		X
Czech Republic	X	X	X	X
Denmark	X	X	X	X
Finland	X	X	X	X
France	X	X	X	X
Germany	X	X	X	X
Greece	X	X	X	X
Hungary	X	X	X	X
Iceland		X	X	
Ireland	X	X	X	X
Italy	X	X	X	X
Japan	X	X	X	X
Latvia				X
Luxembourg	X	X	X	X
The Netherlands	X	X	X	X
New Zealand	X	X	X	X
Norway	X	X	X	X

<b>Country</b>	<b>WA</b>	<b>AG</b>	<b>MTCR</b>	<b>NSG</b>
Poland	X	X	X	X
Portugal	X	X	X	X
Republic of Korea	X	X		X
Romania	X	X		X
Russia	X		X	X
Slovak Republic	X	X		X
Slovenia				X
South Africa			X	X
Spain	X	X	X	X
Sweden	X	X	X	X
Switzerland	X	X	X	X
Turkey	X	X	X	X
Ukraine	X		X	X
United Kingdom	X	X	X	X
United States	X	X	X	X

WA=Wassenaar Arrangement, AG=Australia Group, MTCR=Missile Technology Control Regime,  
NSG=Nuclear Suppliers Group.

## APPENDIX C

### Agency Comments on Draft Report

	<b>UNITED STATES DEPARTMENT OF COMMERCE</b> The Under Secretary for Export Administration Washington, D.C. 20230
March 19, 2001	
MEMORANDUM FOR:	Jill Gross Assistant Inspector General for Inspections and Program Evaluations
FROM:	William A. Reisch 
SUBJECT:	Response to Draft Inspection Report: <i>Management of the Commerce Control List and Related Processes Should be Improved (IPE-13744)</i>
The Bureau of Export Administration's response is attached.	
	

### Detailed Comments on OIG CCL Report Text

#### Executive Summary

##### Page iii

#### **The Commodity Classification Process Continues to Cause Concerns**

BXA disagrees with the statement that "the commodity classification process was not transparent because BXA was not referring all munitions-related commodity classifications to the Defense and State Departments." BXA believes it has applied, and continues to apply, the criteria of the 1996 Commodity Jurisdiction and Commodity Classification procedures. These criteria require Commerce to share with State and Defense all commodity classification requests "for items/technologies specifically designed, developed, configured, adapted and modified for a military application, or derived from items/technologies specifically designed, developed, configured, adapted or modified for a military application." BXA complies with this directive by either returning classification requests to the exporter with instructions to file a license application with State or referring classification requests for items that might fit this criteria to State. See BXA's comments on pages 28-30 of the OIG report for further comment on this issue.

BXA also notes that the report's statement that "BXA needs to provide State with a copy of a final commodity classifications reviewed by State," implies the existence of a legal or policy reason for BXA to do so. While BXA is willing to provide State with such copies, State has not identified to BXA a need or use for such copies.

##### Page iv

The NSC ruling was originally expected in April 2000, not in May as indicated.

##### Page 2

While the OIG reports states that "[t]he Departments of Defense and State have repeatedly indicated a need for more transparency in the commodity classification process", neither department has made any formal proposal on this issue to BXA or the National Security Council (NSC). If those departments believed this was an important issue, they could have made a formal proposal to BXA and/or the NSC.

BXA also takes issue with the report's statement that slow provision of information precluded the OIG from reviewing classification requests from 2000. On September 25, BXA provided the OIG the number of commodity classifications processed to date. We continued to refine that number as various requests were received. Various BXA personnel were in communication with the OIG regarding the delay. The report implies that BXA deliberately withheld information,

which is not the case. In addition, BXA continues to believe the "results" of the 1999 OIG review indicated that BXA was properly referring CCATS. For additional comments on this issue, see BXA's comments on pages 28-30 of the OIG report.

**Page 4**

Footnote 14, should be clarified to state that a license also may be required if there is concern about the end-user or end-use.

**Page 6**

The third paragraph, third sentence should be revised to reflect that, in addition to the reasons cited in the report, the related controls portion of an ECCN may also instruct the reader to refer to certain other ECCNs that control similar items.

In the third paragraph, last sentence, insert "generally" after "items" because some ECCNs do not have a list of items controlled but have the items covered identified solely in the entry heading.

The fourth paragraph, last sentence should reflect the fact that, at the inception of Wassenaar, the United States controlled many of the Wassenaar, national security controlled items for anti-terrorism, foreign policy reasons and continued to maintain those controls. The fact that the United States chose to retain existing foreign policy controls on a number of items when the national security controls on those items were removed is not the same thing as changing the reason for control from national security to foreign policy as the report states. The United States chose to maintain foreign policy (specifically anti-terrorism) controls on these items to ensure that these items would continue to be subject to case-by-case review for export or reexport to terrorist supporting countries.

**Page 8**

First paragraph/last sentence

As a clarification, this sentence should read: "However, some items controlled by the MTCR and NSG are also controlled for national security reasons if the item is also controlled by the Wassenaar Arrangement." The sentence, as it currently reads, could incorrectly imply that foreign policy controls are removed if an item is also controlled for national security reasons. In fact, an item may be controlled for both national security and foreign policy reasons (e.g., M1 or NS) if it is controlled by more than one multilateral export control regime.

**Page 10**

In the first sentence under the heading "Australia Group", the number 30 should be replaced with 32 to reflect current membership in the Australia Group. In the last sentence of the first paragraph under that heading, the phrase "and related technologies" should be moved to the end of the sentence to reflect the fact that Australia Group members have agreed to control related technologies on all of the items mentioned in the sentence.

**Page 13**

**Footnote 23**

This footnote states that BXA's Office of Administration calculates burden hours. This should be amended to note that BXA's Regulatory Policy Division of the Office of Exporter Services actually calculates the burden hours based on input from program offices, as needed. The Office of Administration maintains the records of total burden hours associated with various collections.

**Bullet 4**

The Offices of Chemical and Biological Controls and Treaty Compliance and Nuclear and Missile Technology Controls have been combined since September 2000 into the Office of Nonproliferation Controls and Treaty Compliance.

At this stage of the process, the Regulatory Policy Division submits its determination of whether the rule is or is not significant (including the preamble) to the Office of Assistant General Counsel for Legislation and Regulation (OGC/L&R) for Office of Management and Budget (OMB) consideration in advance of interagency review. Submitting these in advance saves time in the Office of Chief Counsel for Export Administration (OCC-EXA)/OGC/OMB review process if the rule is determined to be not significant. If determined to be significant, once the rule has gone through the interagency clearance process, OCC-EXA sends the entire rule to OGC/L&R for transmittal to OMB for review.

**Page 19/ 20**

**Items appearing on both the CCL and the USML**

The report provides one example of language which is claimed to be an ECCN that can be interpreted as a munitions list item. BXA believes that the quoted language of the ECCN is unambiguous. It is the munitions list language "including but not limited to" which creates any perceived ambiguity. Moreover, State has an opportunity to point out ambiguities in the ECCNs when it clears proposed amendments to the Export Administration Regulations, including all ECCNs on the CCL, something BXA cannot do with respect to the USML. Consequently, this

appears to be a matter that State's Office of Defense Trade Controls (DTC) should address. BXA would be happy to assist DTC on this issue.

**Page 20**

The report asserts, without evidence, that there has long been a debate about the use of the terms "specialized and "specially designed." BXA is not convinced that these terms are as ambiguous as the report states. However, BXA has worked with the Technical Advisory Committees (TACs) to research the utility of establishing a feasible definition for "specially designed". In order to maintain harmonization across multilateral regimes, BXA requested the TACs analyze the suitability of "specially designed" and other defined Missile Technology Control Regime (MTCR) terminology against national security controls in the Wassenaar dual-use list. This project has not yet been completed. In recent multilateral discussions of this topic in Wassenaar, however, a number of countries have expressed reluctance to pursue the possibilities of adopting the MTCR terminology. Initial discussions this year by the Wassenaar Expert Group has led to the consideration of a new definition of "specially designed" for countries to consider. Members have virtually ruled out the possibility of exploring other definitions for frequently used terms such as "designed" and "modified." It is important that the changes suggested by the OIG be undertaken in a multilateral context, as unilateral action by the United States would undermine regime efforts.

**Page 20**

Confusing pointers

BXA would be willing to include "pointers" to the USML if DTC would commit to providing the initial designations for these categories, and more importantly, commit to continuing to support this effort to keep the information up-to-date. BXA can not and should not be expected to provide continuous interpretations of another agency's regulations. It should be noted with regard to such items controlled for NS reasons, that when the Wassenaar control list was implemented into the CCL in 1998, State refused to permit BXA to include a USML category reference or the actual Wassenaar control language to the CCL where appropriate. A "pointer" in the CCL can do no more than point to the USML. Exporters will also need easily obtainable guidance from DTC when an item is on the USML. Exporters should not have to rely on BXA to point them to the appropriate part of a list that is under another agency's jurisdiction.

Last sentence

State (a government agency), not the USMT, (a control list), has licensing jurisdiction.

**Page 21**

First full paragraph

BXA would like to make the pointers in the two Export Control Classifications Numbers cited in this paragraph more explicit and has made efforts to do so. However, redrafting them to point to specific entries on the United States Munitions List would require interpreting that list, a role that is within the authority of the State Department and not BXA.

List navigation issues

With respect to emphasizing certain words on the CCL, the words "and" and "or" are already emphasized by using italics. The additional emphasis of "all" and "any" may be useful and relatively easy to implement. With respect to the advantages of using a one-column format, BXA explored this idea when the Export Administration Regulations were rewritten in 1995. At that time, the Government Printing Office estimated informally that switching to a one column format would double the cost of printing the EAR. This change would also increase significantly the size and weight of the loose leaf EAR. Whether users of the EAR would benefit from a one column format sufficiently to justify the increased cost and size is open to question. BXA can explore the possibility of a producing a one column electronic version. However, even this would likely require additional resources as an additional set might have to be prepared and proofread.

With respect to a combined USML/CCL index, BXA has a very comprehensive CCL index that may be used as a guide. Indexes cannot, however, replace reviewing the actual lists. If the Office of Defense Trade Controls has an index, these two could be combined, but given the current difficulties with jurisdiction issues described in this report, a combined index may further complicate matters, in particular if exporters attempt to rely on an index alone. In addition, the time required to maintain an additional list must be considered in terms of priorities and resources for BXA and DTC.

**Page 22**

Coordinating the CCL to the Schedule B or Harmonized Schedule would be a very time-consuming and difficult, if not impossible, task. These lists serve very different purposes, use different technical language and parameters to describe products, and vary in the level of detail included in the product description. Some ECCNs may have numerous Schedule B numbers associated with them and vice-versa. This is not a new idea and BXA has some experience which suggest that the cost and complexity of implementing it would be excessive. BXA's

enforcement unit uses a partial list which attempts to correlate some of the ECCN's with Harmonized Schedule numbers. The great number of items within a single Harmonized Schedule entry that do not fall within any ECCN makes this tool useful only for screening transactions on a very general basis. The amount of additional work that is needed to arrive at an accurate classification for export control purposes is so great that it would not be useful for the general public. To provide an exact correlation with the Harmonized Schedule, the scope of the ECCNs would have to be expanded, resulting in new export license requirements for thousands of transactions. Both common sense and BXA's experience demonstrate that the IG's suggestion here is impractical. If such a task were feasible, it would require great resources to continue to maintain the accuracy of such a list. BXA does not have resources to devote to such a project. More importantly, those shippers, freight forwarders and customs brokers given responsibility to ship an item are not responsible for determining the license requirements of the item, as suggested in this report. That responsibility falls on the exporter. In the case of a routed transaction, the shipper may be given power of attorney to act as the exporter on behalf of the foreign party, but in such as instance, the U.S. principal party would have to provide the ECCN or technical specification to allow the shipper to make this determination or seek guidance from BXA.

**Page 25**

The report asserts that "delays in CCATS processing could delay U.S. exporter shipments unnecessarily if it is determined that no license is required." BXA believes there is no evidence to support this claim. The Export Administration Regulations do not require exporters to seek a classification from BXA before shipping their items. The data in the report do not indicate that any delays in shipments actually occurred; therefore it is inappropriate to draw this conclusion from the data collected.

**Pages 26 - 27**

Because BXA did not have the opportunity to review this data before it was provided to the OIG and was uncertain of its provenance, we have only recently begun to examine it. Our preliminary conclusion is that we are not convinced that the data cited are evidence of a problem. BXA will, nevertheless, remind its engineers of the need to refer CCATS to others when they are not the proper officer to review that item. However, until we see evidence of a significant problem in this area, we have no plans to draft elaborate new procedures.

**Page 27**

The State Department responsibility for sharing license applications as part of the NSC directive should also be noted here.

**Pages 28 - 29**

As BXA informed the OIG, when BXA receives classification requests for items that are clearly United States Munitions List (USML), BXA returns those requests to the requester noting that they are USML items. BXA informed the OIG on November 1, 2000, that a sample of classification requests processed between May and August of 2000 showed that BXA returned 32 such requests to the requesters.

The IG bases its conclusions technical analysis by the Department of Defense. We continue to disagree. As it has previously, BXA continues to object to the implication in the report that a difference in the conclusions reached by the Departments of Defense and Commerce means that Defense is right and Commerce is wrong. BXA disagreed with the Defense position on two of the items being controlled by State. On the CCL items, BXA disagreed with the Defense classification on two of the three items. The OIG has provided no support for the conclusion that Commerce's classifications are incorrect beyond the opinion of the Department of Defense, which hardly constitutes proof. On the one CCL item where Commerce agreed that a misclassification had occurred, Commerce had classified the item at a higher level, and the revised classification did not change the license requirements for the item in question.

**Page 29**

The conclusion drawn by the OIG is not supportable by facts. To conclude that because only 13 of the 2,049 were referred indicates that there are more that should have been referred both ignores the 32 additional applications that BXA returned to the applicant with advice that the item was subject to the USML and is speculative. The report ignores the possibility that most applications are correctly sent to BXA. Given BXA's a very extensive outreach program, it is reasonable to conclude that many applicants can correctly discern which list applies to their items. BXA conducts 1-2 seminars a month. A significant part of the seminar covers defining the scope of the Export Administration Regulations and how to classify one's product. It is reasonable that the vast majority of the classifications that are received by Commerce fall within the scope of the EAR. In addition, as noted earlier, the OIG had the information on the number of the classifications that were processed in FY 2000 by BXA in September. Any time after that a request could have been made for a data run for the IG to conduct the review.

BXA believes that the report incorrectly and unfairly implies that BXA was withholding data from the OIG. BXA delivered information containing the results of a sampling of classifications from May 3, 2000, to August 11, 2000. This information revealed that 32 of a total 1,195 classifications processed during this time frame were returned to the exporter without action instructing them to seek a license or commodity jurisdiction determination from the State Department. In response to a request made on March 14, BXA has delivered copies of the 32 classifications.

**Page 30**

Final CCATS determinations should be shared with State

As noted in the report State has never requested these from BXA. BXA will be glad to provide copies of the closed CCATS if State requests them.

**Page 34**

In the 2nd paragraph, 2nd sentence, the report concludes that "BXA's position appears to be given due consideration by DTC... as there was just one case in fiscal year 2000 where BXA disagreed with DTC's final decision on a CI request." This statement is misleading and inaccurate. State and Commerce disagreed on more than one case during FY 2000; however, it appears from DTC's analysis that only one of these cases of disagreement was actually closed out. The report states that an additional 109 CI determination requests initiated during FY 2000 had not been completed. BXA believes that there are a number of these remaining case on which the agencies do not agree; indeed, that is often why they have not been completed.

**Page 35**

The proposal to automate the CI process may be a good one. However, the Department of State administers this process. When requested to do so by State, BXA will work with DTC and Defense to improve the process. However the recommendation to automate the process would be better placed in the State Department OIG report.

**Page 38**

Paragraph 2, line 2, should read "...16 categories of space qualified items..."

In the penultimate sentence of the second paragraph, "May" should be changed to "April."

**Pages 39-40**

The paragraph at the bottom of page 39 and the top of page 40 contains information about a specific export license application. Such information is subject to the restrictions on disclosure found in section 12(e) of the Export Administration Act. The paragraph should be deleted or revised to read "a company in a NATO country" rather than the specific country name and "in a recent year" rather than the specific year.

**Page 42**

"May" needs to be changed to "April" in the last sentence in the first paragraph.

#### **Appendix B**

There are now 32 members of the Australia Group. The chart should be revised to indicate Turkey and Cyprus are members.

#### **Transmittal memo**

BXA believes that the statement that it has taken "actions to control information provided to the OIG" is incorrect. BXA has attempted to keep track of the voluminous requests for information and interviews of BXA personnel to ensure its resources are properly managed to continue its required day-to-day work on export control matters. The OIG's insistence on obtaining information without BXA review effectively subverted that process and has made it difficult for BXA to make timely comments on some of the OIG assertions. BXA attempted to facilitate dedicated channels of communication intended to forestall the kind of miscommunications that occurred in this study. BXA continues to believe that these miscommunications could have been minimized or avoided by having program managers review the data that the OIG obtained from BXA employees or contractors. In addition, Under Secretary Reinsch's December 15, 2000, e-mail to all BXA employees on complying fully and expeditiously to all OIG requests should be noted by the OIG in this report.

### Comments on OIG CCL Report Recommendations

#### Commerce Control List

**Recommendation 1:** Review BXA's internal clearance process and procedures for implementing agreed-upon multilateral changes to the CCL and work with the other licensing agencies, including Defense, Energy, and State, to determine whether the current process for updating the CCL can be adjusted in order to publish regulations more expeditiously. In addition, immediately implement the regulatory changes resulting from the May 1999 NSG plenary session and the October 1999 MTCR plenary session.

- The regulatory changes resulting from the May 1999 NSG Plenary and the October 1999 MTCR Plenary are already in process. BXA concurs that the internal regulatory review process should be streamlined, and supports efforts to expedite interagency review. BXA has already begun a weekly regulations priority meeting to discuss the status of all pending regulations and to work to make changes in a more timely manner. At the same time, it should be emphasized that many difficulties in clearance issues relate to resource limitations (including available personnel) and varying priorities within BXA program offices and the interagency community. Establishing time frames would be useful, but unless the underlying issue of available resources is addressed, staying within such time frames would be difficult, as has proven to be the case with commodity classifications and jurisdictions.

**Recommendation 2:** In conjunction with Defense and State, review the national security controlled items that have been decontrolled by the Wassenaar Arrangement to (a) determine whether the goods should continue to be controlled under the CCL, and if so (b) replace the national security control for these goods with the appropriate foreign policy control.

- BXA agrees that any items that are not appropriately controlled for national security reasons should be reviewed and the controls revised as necessary. However, it is not necessary to replace the national security control with a foreign policy control as these items are already controlled for antiterrorist reasons, which means that the goods are appropriately controlled under the CCL and with a foreign policy control. BXA has attempted to initiate discussions with the State Department to undertake this review and revision and recommends that the IG encourage the State Department to agree to this effort.

**Recommendation 3:** Convene a working group of business and government representatives, under the auspices of the Regulations and Procedures Technical Advisory Committee, to improve the user-friendliness of the CCL. In addition, work with State to (1) eliminate the current overlap of items and make sure that it is very clear on which list an item falls, and (2)

create a user-friendly consolidated index of the items on the CCL and USML. To ensure that this happens, work with the applicable congressional committees that are considering new legislation for dual-use exports, to ensure that any new Export Administration Act or similar legislation includes a requirement that the agencies eliminate the overlap and create such an index for both the CCL and the USML. Finally, ensure that the annual scrubs of the CCL also take into account any corrections or changes that would help to make the CCL easier for exporters to use.

- BXA already works through the RPTAC and other advisory committees when making changes to the CCL. Given the number of regulatory changes that are made on an annual basis and the work-in-progress nature of such changes, the CCL undergoes a continuous "scrub." Note that the CCL already contains several indices. BXA would welcome the availability of a USML item-specific index or indices which could be made available with the CCL indices. Past discussions with State on eliminating overlap between items on the CCL and items on the USML, have not consistently been productive. BXA suggests revising this recommendation to request the National Security Council to chair such a review.

#### **Commodity Classifications**

**Recommendation 4:** Review Export Administration priorities and staffing levels and make adjustments to improve BXA's timeliness on CCATS requests.

- BXA agrees with this recommendation in principle but believes it is unrealistic in practice. For example, in calendar year 2000 the Strategic Trade Division of the Office of Strategic Trade and Foreign Policy Controls processed 56 percent of all commodity classifications. Excluding the encryption CCATS (as the OIG has done in its report), this percentage rises to 92 percent. The same employees in the same division processed 96 percent of all commodity jurisdiction requests. Only if staffing levels and related funding for specific technical functions are increased can BXA simultaneously improve its ability to meet the deadlines for the processing of license applications, commodity classifications, and commodity jurisdiction requests. BXA cannot consider implementing this recommendation unless it is coupled with a recommendation to the requisite budget authorities in the Congress to provide the necessary resources.

**Recommendation 5:** Program ECASS to allow for the "hold without action" feature to help Export Administration managers keep better track of licensing officers performance on CCATS.

- BXA intends to implement this recommendation as part of its ECASS redesign project. We are reluctant to interrupt that project to move this single item to the top of the list of many IT adjustments we will have to make. Doing so will simply ensure that other high priority items are delayed. We believe that a greater benefit in the long run will inure

from the many improvements to be included in the redesigned ECASS than what we would obtain by diverting resources to this one feature.

**Recommendation 6:** Develop policies and procedures for the intra-agency review of CCATS.

- Our preliminary conclusion is that we are not convinced that the data cited are evidence of a problem. BXA will, nevertheless, remind its engineers of the need to refer CCATS to others when the engineer who is receives the CCATS is not the proper officer to review that item. However, until we see evidence of a significant problem in this area, we have no plans to draft elaborate new procedures.

**Recommendation 7:** Request that NSC form a working group (including Defense and State) to (a) review the 1996 CCATS guidance, (b) revise it if necessary, and (c) develop specific criteria and procedures to ensure that the referral of munitions related commodity classifications to Defense and State is handled in a timely, transparent, and appropriate manner by all agencies involved.

- BXA concurred with this same recommendation in its response to the IG's 1999 report, but we suggest that before the NSC forms a working group to review CCATS guidance -- a process that is not broken -- it should focus on the commodity jurisdiction process, which is neither timely nor effective.
- BXA would also point out, however, that the apparent intent of this recommendation -- broader referral of CCATS -- is inconsistent with recommendation 4, as implementing it will result in longer processing times, rather than shorter. In addition, we do not believe it will assist in the timeliness or quality of the CCATS process. BXA has procedures in place to refer those CCATS that should be referred. As explained in the exit conference and elaborated on in our comments on page 29 of the OIG report above, the low number of CCATS referred -- 13 -- involved instances where it was not clear whether the item(s) were controlled by Commerce or State, so the requests were appropriately referred to the State Department. In many other instances, items that are clearly not under Commerce jurisdiction are returned without action and the applicant advised to contact the State Department.

BXA also wishes to note, however, that the OIG's determination to collect information in an uncoordinated fashion directly from BXA employees without program managers' review contributes to the OIG's inability to reconcile various data elements or use them in analysis in a timely fashion.

**Recommendation 8:** Provide State with a copy of the final determinations for any CCATS it reviews.

- BXA is willing to provide this information when the State Department requests it.

#### **Commodity Jurisdictions**

**Recommendation 9:** Review Export Administration priorities and staffing levels, as appropriate, and make adjustments to improve BXA's timeliness on CJ determination requests.

- BXA agrees with this recommendation in principle but believes it is unrealistic in practice. For example, in calendar year 2000 the Strategic Trade Division of the Office of Strategic Trade and Foreign Policy Controls processed 56 percent of all commodity classifications. Excluding the encryption CCATS (as the OIG has done in its report), this percentage rises to 92 percent. The same employees in the same division processed 96 percent of all commodity jurisdiction requests. Only if staffing levels and related funding for specific technical functions are increased can BXA simultaneously improve its ability to meet the deadlines for the processing of license applications, commodity classifications, and commodity jurisdiction requests. BXA cannot consider implementing this recommendation unless it is coupled with a recommendation to the requisite budget authorities in the Congress to provide the necessary resources.

**Recommendation 10:** Work with State's DTC and Defense, or include as part of the current system redesign efforts, an automated system for referring and processing CJ cases, similar to the current automated licensing system.

- Administration of the CJ process is the responsibility of the Department of State. It would be inappropriate for BXA to include such a process in its ECASS redesign. This recommendation is better directed to the State Department. In addition, BXA does not have resources to implement this recommendation, even if it were directed to us.

**Recommendation 11:** Request that State's DTC consult with BXA and Defense on *all* CJ requests and cease its practice of making some CJ determinations without first consulting with those agencies, as required by the 1996 NSC guidance.

- BXA concurs with this recommendation but believes it does not go far enough. The entire process of determining commodity jurisdiction should be overhauled -- see our response to recommendation 7, above.

#### **Licensing of Night Vision Technology**

**Recommendation 12:** Request that the NSC provide guidance on how DTC, Defense, and BXA should process government jurisdictions, similar to the guidance it issued for CJs.

- BXA does not regard "government jurisdiction" decisions as a legitimate process validated by law, regulation or executive order. Rather than providing guidance on their processing, we would prefer that the concept be abandoned.

**Recommendation 13:** Bring the jurisdictional issues regarding night vision equipment and technology to the attention of the new head of the NSC as soon as possible and push for resolution.

- BXA has already contacted the National Security Advisor and staff, both in writing and orally, on the night vision matter on numerous occasions. It is BXA's understanding from conversations with NSC staff that the NSC is well aware of this issue and BXA's interest in its rapid resolution and is, in fact, taking steps to bring it to closure. We do not believe further letters from BXA would be conducive to resolving the matter more quickly.

We would also note that the night vision and space qualified jurisdictional disputes have been public, so the OIG's choice of wording that it "discovered" these problems is misleading.

#### **Licensing of Space Qualified Items**

**Recommendation 14:** Bring the jurisdictional issues regarding the 16 space-qualified items to the attention of the new head of the NSC as soon as possible and push for resolution.

- BXA has already contacted the National Security Advisor and staff, both in writing and orally, on the space qualified matter on numerous occasions. It is BXA's understanding from conversations with NSC staff that the NSC is well aware of this issue and BXA's interest in its rapid resolution and is, in fact, taking steps to bring it to closure. We do not believe further letters from BXA would be conducive to resolving the matter more quickly.