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***BUREAU OF EXPORT
ADMINISTRATION***

*Annual Follow-Up Report on Previous
Export Control Recommendations, as
Mandated by the National Defense
Authorization Act for Fiscal Year 2000*

Final Inspection Report No. IPE-14246-1/March 2001

Office of Inspections and Program Evaluations





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

March 30, 2001

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

FROM:

Johnnie E. Frazier

SUBJECT:

*Annual Follow-Up Report on Previous Export Control
Recommendations, as Mandated by the National Defense
Authorization Act for Fiscal Year 2000 (IPE-14246-1)*

This is our report on the status of recommendations from our March 2000 report, *Improvements Are Needed in Programs Designed to Protect Against the Transfer of Sensitive Technologies to Countries of Concern* (IPE-12454-1). This follow-up report is required by the National Defense Authorization Act for Fiscal Year 2000, as amended. The act requires us to report to the Congress annually on the status of recommendations made in earlier reports submitted in accordance with the act.

We are pleased to report that the Bureau of Export Administration is either in the process of taking corrective actions to implement our recommendations or has completed corrective actions necessary to meet the intent of our recommendations. However, we believe that some of the agency's planned actions may not fully address certain recommendations, particularly in the deemed export control area (recommendations 3(c), 4, and 5). As such, we request that BXA officials provide an updated response within 60 calendar days for those recommendations that we still consider as open.

In addition, the status of our March 2000 recommendations is also included as an appendix to the interagency OIG report, *Interagency Review of the Commerce Control List and the U.S. Munitions List* (Report No. D-2001-092), March 2001. If you would like to discuss this follow-up report's contents, please call me at (202) 482-4661 or Jill Gross, Assistant Inspector General for Inspections and Program Evaluations, at (202) 482-2754.

INTRODUCTION

The House and Senate Armed Services Committees, through the National Defense Authorization Act for Fiscal Year 2000, as amended, directed the Inspectors General of the Departments of Commerce, Defense, Energy, State, and the Treasury, and the Central Intelligence Agency, in consultation with the Federal Bureau of Investigation, to conduct an annual 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.¹ In addition, the legislation requires the Offices of Inspectors General (OIGs) to include in their annual report the status or disposition of recommendations made in earlier reports submitted in accordance with the act. Finally, the legislation mandates that the OIGs report to the Congress no later than March 30 of each year from 2000 to 2007. This report presents the status of recommendations made in our March 2000 report.

Inspections are special reviews that the OIG undertakes to provide agency managers with information about operational issues. One of the main goals of an inspection is to eliminate waste in federal government programs by encouraging effective and efficient operations. By asking questions, identifying problems, and suggesting solutions, the OIG hopes to help managers move quickly to address problems identified during the inspection. Inspections may also highlight effective programs or operations, particularly if they may be useful or adaptable for agency managers or program operations elsewhere.

This inspection was conducted in accordance with the *Quality Standards for Inspections* issued by the President's Council on Integrity and Efficiency, and was performed under the authority of the Inspector General Act of 1978, as amended, and Department Organization Order 10-13, dated May 22, 1980, as amended.

OBJECTIVES, SCOPE, AND METHODOLOGY

The primary objective of our review was to follow up on actions taken by BXA, and other applicable Commerce bureaus, to implement the recommendations contained in our March 2000 report. To meet our objective, we spoke with various BXA officials, including senior managers, licensing officials, and enforcement agents, as well as officials of the other bureaus, including the National Institute of Standards and Technology and the National Oceanic and Atmospheric Administration. We also reviewed supporting documentation to verify that the actions reportedly taken by BXA and the other bureaus were sufficient to implement our recommendations.

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. The primary legislative authority for controlling the export of dual-use commodities is the Export Administration Act of 1979, as amended. Under the act, BXA administers the Export Administration Regulations (EAR) by developing export control policies, issuing export licenses, and enforcing the laws and regulations for dual-use exports.

¹Public Law 106-65, October 5, 1999.

To comply with the first year requirement of the National Defense Authorization Act for Fiscal Year 2000, the OIGs agreed to conduct an interagency review of (1) federal agencies' (including research facilities') compliance with the "deemed export"² regulations and (2) U.S. government efforts to help prevent the illicit transfer of U.S. technology and technical information through select intelligence, counterintelligence, foreign investment reporting, and enforcement activities.³ The objectives of our March 2000 report were to (1) examine the deemed export regulations, including their implementation and enforcement by BXA, as well as compliance with the regulations by industry and other federal agencies; (2) determine the effectiveness of BXA's Visa Application Review Program in preventing the illicit transfer of U.S. technology to countries and entities of concern; and (3) survey selected aspects of the efforts of the Committee on Foreign Investment in the United States (CFIUS). Our review identified a number of problems that hampered both BXA's and the U.S. government's efforts to more effectively prevent the transfer of sensitive U.S. technology to countries and entities of concern. While BXA generally agreed with our review findings, it cited budget shortfalls that would inhibit its ability to take some of the recommended actions. Our specific observations and conclusions from that review are as follows:

Deemed Exports

The U.S. government controls not only the export of products, but also of technical data. Technology or software can be released for export through:⁴

- C visual inspection by foreign nationals of U.S.-origin equipment and facilities;
- C oral exchanges of information in the United States or abroad; or
- C the application to situations abroad of personal knowledge or technical experience acquired in the United States.

²According to the EAR, any release to a foreign national of technology or software subject to the regulations is deemed to be an export to the home country of the foreign national. These exports are commonly referred to as "deemed exports," and may involve the transfer of sensitive technology to foreign visitors or workers at U.S. research laboratories and private companies.

³Because the National Defense Authorization Act was not enacted until October 1999, we were not able to conduct a comprehensive assessment of BXA's export enforcement activities by the March 30, 2000, deadline. However, as a part of the interagency multi-year plan, we anticipate conducting this assessment in fiscal year 2002.

⁴Per 15 C.F.R. 734.2(b)(2)(ii), this deemed export rule does not apply to persons lawfully admitted for permanent residence in the United States or to persons who are protected individuals (e.g., a person admitted as a political refugee) under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)).

Items not subject to the EAR include publicly available technology and software that (1) are already published or will be published, (2) arise during or result from fundamental research, (3) are educational, or (4) are included in certain patent applications. In addition, based on encryption export control regulations issued in January 2000, foreign employees of U.S. companies working in the United States no longer need an export license to work on encryption.

It should be noted that it is the responsibility of the U.S. entity that is employing or sponsoring the foreign national to submit a deemed export license application to BXA for review. Of the 12,650 export license applications BXA received during fiscal year 1999, approximately 783 (6 percent) were for deemed exports.

As part of our March 2000 export control report, we concluded (as we did in our June 1999 export licensing report)⁵ that not only were the deemed export control policy and regulations ill-defined and poorly understood by many, but the implementation of the regulations and compliance with them by federal and private research facilities and companies appeared lax. As we previously have highlighted, the lack of understanding by industry and federal agencies regarding the applicability and requirements of deemed export control regulations could result in a loss of sensitive technology to inappropriate end users. While BXA did not disagree with our observations that the regulations for deemed exports are ambiguous or that U.S. companies and other federal agencies may not be compliant with the regulations, it had taken little action to correct these problems since issuance of our June 1999 report. As a result, our March 2000 report stated that these same problems still existed with regard to deemed exports.

Our report also emphasized that some of the noncompliance with the deemed export rule stemmed from the ambiguity in the policy and the regulations. For example, the term “fundamental research” needs to be better defined so that U.S. entities are not given the excuse, or the opportunity, to broadly interpret the meaning in order to avoid compliance with the regulations. In addition, we reported that some of the exemptions under the regulations could potentially affect national security and, therefore, needed to be further examined by policymakers.

Moreover, we reported that BXA needed to be more proactive in “getting the word out” to high technology companies and industry associations it believed to be more likely to need deemed export licenses. Finally, our report raised concerns as to whether some federal agencies and research facilities, including the Departments of Commerce, Defense, and Transportation, were in full compliance with the deemed export regulations. For instance, based on a limited sample of 16 foreign nationals working on projects at NIST, BXA licensing officials made a preliminary determination that 3 of them may have

⁵*Improvements Are Needed to Meet the Export Licensing Requirements of the 21st Century*, U.S. Department of Commerce Office of Inspector General, IPE-11488, June 1999.

required deemed export licenses. In addition, we found that only two federal agencies, the Department of Energy and the National Aeronautics and Space Administration, submitted a total of five deemed export license applications during fiscal year 1999. Given the recognized number of foreign visitors and workers at these agencies' research facilities that might have access to export-controlled technology or software there, we thought this number may have been low.

Visa Application Review Program

BXA created the Visa Application Review Program to help prevent unauthorized access to controlled technology or technical data by foreign nationals visiting the United States. In 1998, BXA restructured this program to better target those incoming visa applications for individuals who may be involved with products and technologies most often needed for weapons of mass destruction. Based on our review of a sample of 74 visa application referrals, we reported that the program had shown potential for helping achieve the agency's export enforcement mission. For example, some referrals to the Office of Export Enforcement (OEE) resulted in investigations aimed at the prevention of the illegal export of dual-use technologies, and one referral to the State Department resulted in a visa being denied. However, our report also indicated that the program's efficiency and effectiveness could be further improved. For example, the process for reviewing the visa applications would be enhanced by having more complete reference materials and checklists for BXA's analysts to use. In addition, while the process for referring problematic visa applications to OEE for investigation was working, we believed it would have been more efficient if certain changes were made to the enforcement database and the way in which referrals were routed to the BXA field offices. We also suggested a few changes to improve operations, including the timely referrals of potential visa fraud cases to the State Department so that appropriate action could be taken.

Given the relatively recent restructuring of the Visa Application Review Program at the time of our review, we determined that a full and fair assessment of the program's performance was not yet possible. Nonetheless, we recommended that BXA develop performance measures to monitor the program's progression and results.

Finally, BXA's Visa Application Review Program is a part of the larger U.S. government review of visa applications under the State Department's Visas Mantis program. The latter program focuses on preventing foreign nationals from countries or entities of concern from gaining access to U.S. high technology. The program's defining feature is that it allows various federal government agencies to review a visa application before a visa is issued by State. However, based on discussions with the other OIGs involved in our March 2000 review, as well as some of the agencies themselves, we reported that some of the agencies that received the Visas Mantis cables had curtailed their review of the cables because of resource shortages and limited results on their referrals to State. In addition, the agencies acknowledged that there was little coordination with regard to what each agency was doing

under the program, leading to some confusion about their responsibilities related to the review of these visa applications. Furthermore, we reported that State officials claimed to be limited in their ability to deny visas under the Visas Mantis program because the section of the Immigration and Nationality Act dealing with technology concerns was vague about the circumstances under which a visa may be denied. Also, we found that State was not providing feedback to the agencies involved in the program as to what actions were being taken on their referrals. Therefore, we recommended that BXA work with the other involved agencies to formalize the Visas Mantis review program in a memorandum of understanding, as well as to establish criteria for denials, and develop a process for feedback from the State Department so that the agencies are kept apprised of the impact of their comments on visa referrals.

Foreign Investment in the United States

To prevent the loss of domestic defense production capability, and to further counter the loss of highly advanced technology and processes that are important to national security, the Congress passed the Exon-Florio provision in the Omnibus Trade and Competitiveness Act of 1988. This provision focused on such losses through foreign acquisitions of or investments in U.S. companies. Exon-Florio authorizes the President to suspend or prohibit any foreign acquisition, merger, or takeover of a U.S. company that is determined to threaten national security.⁶ It was not intended to provide a comprehensive screening mechanism for all foreign investments. In fact, one of the major assumptions behind the legislation was that the U.S. government already had at its disposal a number of other tools to protect national security, such as export control laws.

The President, pursuant to Executive Order 12661, *Implementing the Omnibus Trade and Competitiveness Act of 1988 and Related International Trade Matters*, dated December 27, 1988, delegated his responsibilities under the Exon-Florio provision to CFIUS.⁷ CFIUS is an interagency group composed of representatives from 11 agencies and government entities, including senior officials from the Departments of the Treasury (which chairs the Committee), Commerce, Defense, Justice, and State, and the Office of Management and Budget, as well as the U.S. Trade Representative, the Director of the Office of Science and Technology Policy, the Chairman of the Council of Economic Advisers, the Assistant to the President for Economic Policy, and the Assistant to the President for National Security Affairs.

⁶The Exon-Florio provision does not provide a precise definition of national security. Rather it gives the U.S. government the ability to redefine that term to address threats to national security as they arise and to keep pace with technological and political developments.

⁷CFIUS was originally established by Executive Order 11858, *Foreign Investment in the United States*, dated May 7, 1975, to mainly monitor and evaluate the impact of foreign investment in the United States.

Based on limited survey work, our March 2000 report raised concerns about the effectiveness of CFIUS's monitoring of foreign investments for national security reasons, including the (1) lack of mandatory foreign investment reporting, (2) low number of investigations conducted on company filings, and (3) potential conflict of interest or appearance thereof by the Treasury office charged with overseeing CFIUS with its dual responsibilities to "promote" foreign investment as well as "prevent" such investment when it could result in the loss of sensitive technology or a critical reduction in the defense industrial base. Therefore, we suggested that the interagency OIG review team, including the Departments of Commerce, Defense, and the Treasury, as a part of its responsibilities under the National Defense Authorization Act for Fiscal Year 2000, undertake a study to (1) determine the scope of the problem regarding foreign investment in U.S. companies with sensitive technologies by countries and entities of concern and (2) review the overall effectiveness of CFIUS and recommend improvements, as necessary, to the way the U.S. government monitors foreign investment in these companies. The Inspectors General of the Departments of Defense and the Treasury concurred with our suggestion.

Our report also highlighted some issues involving the Department of Commerce's process for reviewing CFIUS filings that warrant management's review. For example, we questioned whether Commerce's lead responsibility for this program should remain in the International Trade Administration, the Department's primary trade promotion agency, or be moved to BXA, the Department's primary national security agency. When CFIUS was created, the Department's export control functions were performed by ITA. However, in 1987, the Congress decided to split the Department's trade promotion responsibilities from its export control and enforcement functions. Thus, BXA was created as an independent Commerce bureau to handle the latter trade administration functions. While ITA's focus remained on trade promotion, it also retained its role as Commerce's representative on CFIUS. However, with the passage of the Exon-Florio provision in 1988, CFIUS's main focus was shifted from monitoring overall foreign investment in the United States to determining the effects on national security of foreign mergers, acquisitions, and takeovers of U.S. companies. Thus, while senior officials in both agencies informed us that the CFIUS review process in Commerce was working well, we maintained that BXA may be the more appropriate and better equipped entity to represent Commerce on this committee.

In addition, our report raised concerns about the fact that BXA's export enforcement and export licensing units did not routinely review CFIUS notifications. While BXA's Office of Strategic Industries and Economic Security appeared to be conducting a fairly comprehensive review of CFIUS notifications it received from ITA, we believed that it would be prudent for all CFIUS filings, and in particular those involving entities from countries of concern, to be reviewed by BXA's export enforcement and export licensing units.

MOST RECOMMENDATIONS FROM MARCH 2000 EXPORT CONTROLS REPORT ARE BEING IMPLEMENTED

Our March 2000 export control report on programs designed to protect against the transfer of sensitive technologies to countries of concern contained a number of recommendations to several Commerce bureaus to help the government's efforts in protecting against illicit technology transfer. Specifically, our recommendations focused on three activities that Commerce, in particular BXA, carries out or participates in to help prevent the illicit transfer of sensitive U.S. technology: (1) deemed export control activities, (2) the Visa Application Review Program, and (3) efforts in support of CFIUS. We are pleased to note that the actions planned or taken for 16 of our previous recommendations⁸ meet the intent of our recommendations. However, we believe that BXA's actions for the remaining eight do not adequately address our recommendations (see the attachment for a detailed description of the status of our March 2000 recommendations). BXA will have to coordinate with officials of NOAA to resolve one of these open recommendations. Given BXA's central role in administering the dual-use export control process, we believe that action should be taken to implement the open recommendations as expeditiously as possible.

Attachment

cc: Scott Gudes, Acting Under Secretary for Oceans and Atmosphere
Timothy J. Hauser, Acting Under Secretary for International Trade
Karen Brown, Acting Under Secretary for Technology

⁸Some of the original recommendations are broken down into specific action items. Thus, the total number of open and closed recommendations equals 24 not 20.

STATUS OF RECOMMENDATIONS

Recommendations for the Bureau of Export Administration

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

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

In addition to these outreach activities, the Office of Export Enforcement (OEE), through its Project Outreach program, meets with employees of businesses, officials of other federal agencies, and university officials to make them aware of their export control compliance responsibilities under the EAR. According to OEE officials, such guidance includes making these individuals aware of the deemed export provisions of the EAR.

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

- 2. Develop a link on BXA’s main Internet web site specifically dedicated to deemed exports as was done for the Chemical Weapons program.**

Status: Closed. On March 15, 2000, a deemed export web site link was established on the main BXA web site. The web site includes a comprehensive list of questions and answers

covering what the deemed export rule is, who is considered a foreign national, what the licensing requirements for foreign nationals are, and what technologies are subject to control. BXA's actions meet the intent of our recommendation.

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

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

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

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

Status: Closed. According to BXA, licensing officials held consultations with NIST and determined that the three cases in question were instances of "fundamental research" and, as such, no deemed export license was required. BXA's actions meet the intent of our recommendation (see page 11 for details on NIST's efforts to develop an export compliance program).

- (c) **Engage in discussions with the NOAA Administrator, as well as the Assistant Administrators of its line offices and in particular NESDIS, to discuss deemed export regulations and their potential applicability to NOAA.**

Status: Open. According to BXA, in June 2000, BXA's Deemed Export Program Director offered to conduct a briefing for appropriate NOAA officials regarding the deemed export license requirement, but no follow-up was sought by NOAA. As a follow-up measure, BXA stated that it will send a memo to NOAA extending the offer

for a deemed export briefing when the new NOAA Administrator has been appointed. However, during fiscal year 2000, OEE visited NOAA's facility in Boulder, Colorado, to meet with attorneys in its Office of Chief Counsel. According to OEE officials, the presentation was focused primarily on deemed exports. While BXA's action partially meets the intent of our recommendation, we reaffirm our original recommendation for BXA to engage in discussions with senior NOAA officials across all of its line offices.

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

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

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

~ **Department of Energy.** In April 2000, BXA provided speakers and training material on the subject of deemed exports at the Energy Department's Export Control Coordinators Organization conference. This organization is the coordinating body for those who deal with export controls at the various Energy laboratories. Furthermore, as a result of a recent administrative settlement with Energy's National Laboratories related to alleged violations of the EAR, BXA is currently hosting officials from Energy units for short-term details. During their stay in BXA, the Energy personnel gain comprehensive insight into BXA's priorities with respect to licensing and enforcement concerns. Furthermore, in March 2001, OEE hosted an Export Control Seminar for Energy personnel at the Los Alamos and Lawrence Livermore National Laboratories. In addition to discussing traditional export control concerns, the Director of OEE

delivered a presentation on compliance with deemed exports to the Energy personnel. Since March 2000, OEE special agents have also participated in Project Outreach visits and BXA Export Seminars at Energy facilities, including the National Renewable Energy Laboratory, the Thomas Jefferson National Accelerator Laboratory, and the Oak Ridge National Laboratory.

- ~ **Department of Defense.** In October 2000, OEE made a presentation at the Defense Logistics Agency's annual agent training in Battle Creek, Michigan, during which deemed exports and traditional export control matters were discussed. OEE is also involved in interagency working groups in Milwaukee and Detroit that focus on, among other things, deemed exports.
- ~ **National Aeronautics and Space Administration.** According to OEE, several of National Aeronautics and Space Administration's (NASA) operating units throughout the United States have been visited by OEE special agents in the last three years. Specifically, OEE reported that it has visited NASA's Dryden Flight Research Center, Johnson Space Center, Langley Research Center, and Jet Propulsion Laboratory. According to OEE, the visits focused primarily on the deemed export of technology controlled under the EAR to visiting foreign scientists. OEE special agents have also taken part in annual NASA training at its Ames Research Center.

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

Status: Open. While BXA generally concurred with this recommendation in its response to our draft March 2000 report, in its June 2000 action plan, BXA stated that narrowing the definition of fundamental research would not only impair the relationship between industry and the academic community but also hinder new technology development. BXA's action plan also stated that any efforts to clarify this term in the regulations would involve a lengthy process so, as an interim measure, BXA tried to clarify this term in its "Questions and Answers" page posted on its deemed exports web site established in March 2000. While we believe the deemed export web site is a valuable tool for exporters, the explanation provided for fundamental research is essentially a restatement of how the EAR defines this term. As such, we still maintain that U.S. entities could misuse this exemption by broadly defining fundamental research in order not to comply with deemed export controls. Therefore, we do not believe that BXA's actions fully meet the intent of our recommendation.

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

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

6. **Track the number of visa application cables reviewed by the Director of OEA's Export License Review and Compliance Division, as well as those that are distributed to the analysts for an in-depth review.**

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

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

Status: Closed. According to BXA's estimates, the Director of OEA's Export License Review and Compliance Division reviewed between 15,000 and 20,000 of the 47,000 visa application cables received from the Department's Telecommunications Center in fiscal year 1999. According to BXA managers, they reexamined the cable profile for visa application cables to determine whether they could reduce the number of cables reviewed. That review determined that both the number and type of cables being reviewed by OEA is appropriate given current resource levels. Therefore, BXA believes there is no need to decrease the number of visa application cables that it reviews annually. BXA's actions meet the intent of our recommendation.

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

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

Therefore, we request that BXA again contact State to put out better guidance on what information is needed in the visa application cables.

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

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

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

Status: Open. Although BXA stated that it would implement this recommendation by September 2000, no action has been taken. According to BXA managers, all information technology efforts are being directed to developing the replacement program for the Export Control Automated Support System. Improvements to the old program, including the Enforce

module, are being given a low priority and are effectively not being done. BXA has not met the intent of our recommendation.

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

Status: Closed. On May 8, 2000, the Director of OEE Intel was designated as the point of contact in OEE for the receipt and review of all visa referrals. In addition, a change was made to the Enforce database so that incoming visa referrals from OEA now appear in the OEE Intel Director's "tickler" file, which enhances their visibility and enables the director to review and refer them to the field offices more quickly. Both the Director of OEA's Export License Review and Compliance Division and the Director of OEE Intel have seen a vast improvement in the timeliness of visa application referrals being made to the OEE field offices. BXA has also agreed to review the new procedure as part of the periodic assessment of the overall Visa Application Review Program (see recommendation 15 below). BXA's actions meet the intent of our recommendation.

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

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

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

Status: Closed. On May 12, 2000, OEA sent guidance to the analysts who review the visa application cables instructing them that if, during their review of a visa application cable, they discover apparent or possible visa fraud, they are to report the information to the State Department immediately (via fax) and prior to further review or referral elsewhere. According to the Director of OEA's Export License Review and Compliance Division, no referrals for visa

fraud have been made since we made this recommendation. BXA's actions meet the intent of our recommendation.

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

Status: Closed. Effective April 1, 2000, OEA stopped making visa application referrals to the State Department for entities listed on BXA's Entity List.⁹ Such referrals are now only made to OEE for appropriate action. BXA's actions meet the intent of our recommendation.

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

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

⁹A published listing of foreign end users involved in proliferation activities.

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

Status: Closed. The State Department formalized the review of visa applications under the Visas Mantis program in an August 9, 2000, memorandum of understanding, which does contain criteria for visa denials. However, State has not developed a process for feedback to keep the participating agencies apprised of the results of their referrals. However, according to the Director of OEA's Export License Review and Compliance Division, since our report was issued, communication between State and BXA has improved significantly. In addition, meetings between BXA, State, and the other participating agencies are being held more frequently. However, BXA would still like to obtain formal feedback on referrals it makes to State, and it has requested such feedback. State has not responded to BXA's request, and it may be because BXA has made just a few visa application referrals to State in the past year. Thus, creating a system to provide feedback on the disposition of those few referrals may not be a high priority for State at this time. State OIG, which made a similar recommendation in its 2000 report, will follow up to determine why State has not implemented the feedback portion of this recommendation. BXA's actions meet the intent of our recommendation.

- 17. Ensure that all future CFIUS filings, especially those involving countries of concern, are forwarded to both Export Enforcement and Export Administration's appropriate licensing office for review. In addition, make certain that any referral and recommendations are documented in the CFIUS case file.**

Status: Open. Of the 76 CFIUS cases filed with the U.S. government since March 2000, only 4 were from countries of concern. Although BXA reported to us that both Export Enforcement and the appropriate Export Administration licensing division review CFIUS filings from countries of concern, BXA could only provide us with documentation supporting this fact for two of the four cases it has reviewed since March 2000. Thus, we would again encourage BXA to ensure that all future filings, especially those involving countries of concern, are reviewed by both Export Enforcement and Export Administration's appropriate licensing office and that the referral notations and subsequent recommendations are recorded in the case file. BXA's actions do not fully meet the intent of our recommendation.

Recommendation for the National Institute of Standards and Technology

- 1. Ensure that NIST's CRADA agreements or any other agreements NIST may have with the private sector include a statement specifying its private sector partners' need to comply with export control laws, such as obtaining a deemed export license for their foreign national employees, if applicable, before working on NIST research projects.**

Status: Closed. The terms and conditions of the standard NIST CRADA¹⁰ document were modified to include a clause on the export of technical data. According to NIST, all new CRADAs executed by NIST after April 7, 2000, include the new clause. Existing CRADAs that are extended or amended for any reason will also include the clause as part of the extension or amendment. In addition, NIST is currently examining its other agreements with the private sector to determine on a case-by-case basis whether those agreements should also contain an export control clause. As a part of this exercise, we would encourage NIST to examine its existing CRADAs that may not come up for an extension or amendment to determine if they also need to be amended to include the export clause. NIST's actions meet the intent of our recommendation.

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

- 1. Establish procedures to ensure that technical information or know-how released to foreign nationals is in compliance with federal export licensing requirements. At a minimum:**
 - (a) Develop guidance regarding when a visit, assignment, or collaborative relationship of a foreign national to a NIST or NOAA facility requires a deemed export license.**
 - (b) Clearly state policies, procedures, and responsibilities of NIST and NOAA hosts for determining whether a deemed export license is required.**

¹⁰A cooperative research and development agreement, or CRADA, is one means that the U.S. government uses for technology transfer to the private sector. CRADAs are used when research being conducted jointly by federal laboratories and nonfederal parties is more likely to result in the development of an invention and would generally increase the possibility that deemed export licenses could be required.

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

NIST

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

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

Subsequently, a June 2000 memorandum from the Director of the NIST Program Office was sent to all division chiefs informing them of U.S. export control laws and regulations governing the sharing of information with foreign nationals. The memorandum also requested that each chief provide the name, country of origin, and a detailed description of the research being conducted by each guest worker currently visiting NIST (as well as in the future) who comes from one of the countries listed on the restricted countries list contained in the International

Traffic in Arms Regulations (ITAR).¹¹ According to the memorandum, this information is to be forwarded to the Office of International and Academic Affairs. Finally, the memorandum designates the Office of NIST Counsel as the focal point for export control guidance, including questions and clearances.

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

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

NOAA

Status: Open. In its action plan, NOAA stated that its National Environmental Satellite, Data, and Information Service is prepared to work with BXA to improve its policies and procedures concerning deemed export controls, as needed. It also noted that NOAA will canvass its other line offices to determine whether additional efforts need to be taken to ensure that technical information or know-how released to foreign nationals is in compliance with federal export licensing requirements. NOAA also pointed out that implementation of any export control policies and procedures would be predicated upon clarifications to the EAR by BXA, including whether a facility is an “appropriate research facility.” As indicated earlier in recommendation 3(c), BXA reported to us that it tried to engage NOAA in a discussion on deemed export

¹¹The ITAR list includes BXA embargoed countries. When we questioned NIST as to why it used the ITAR list as a baseline for its division chiefs to follow, NIST informed us that the original intent of the memorandum was for NIST to identify research being conducted by foreign guest workers from countries of concern (such as those from China, India, and Pakistan). However, NIST pointed out that it is aware of BXA’s Entity List and Denied Persons List as indicated by the fact that it applied for two deemed export license applications for individuals coming from an entity that appears on BXA’s Entity List. NIST stated that any future instruction on this issue will include references to not only the ITAR-restricted list, but also BXA’s Entity and Denied Persons Lists.

controls but NOAA did not respond. Therefore, we would strongly encourage NOAA to contact BXA to discuss deemed export regulations and their potential applicability to NOAA. NOAA's actions have not fully met the intent of our recommendations.

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

- 1. Determine whether ITA or BXA is the appropriate Commerce organization to take the lead on CFIUS.**

Status: Closed. BXA and the International Trade Administration agree that the Department's responsibilities for coordinating CFIUS matters should continue to reside in ITA, since neither party believes that a transfer of administrative responsibilities would enhance the effectiveness of Commerce's CFIUS review process.

However, neither agency could provide a justification as to why ITA is the more appropriate Commerce organization to take the lead on CFIUS. Regardless, the two bureaus agreed to work closely together, as well as with other interested departmental units, to ensure that all CFIUS cases are reviewed thoroughly. BXA's and ITA's actions meet the intent of our recommendation.