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The Export Licensing Process for Chemical and Biological Commodities is Generally Working Well, But Some Issues Need Resolution

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

MAR 31 2005

MEMORANDUM FOR: Peter Lichtenbaum
Acting Under Secretary for Industry and Security

Mark Foulon
Deputy Under Secretary for Industry and Security

FROM: Johnnie E. Frazier

SUBJECT: Final Report: *The Export Licensing Process for Chemical and Biological Commodities is Generally Working Well, But Some Issues Need Resolution* (IPE-16946)

As a follow-up to our March 16, 2005, draft report, attached is a final copy of our sixth report as required by the National Defense Authorization Act for Fiscal Year 2000, as amended. As you know, the act mandates that 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 by March 30 of each year through 2007. This year's report focuses on the export licensing process for chemical and biological commodities.

Our review indicates that the licensing process for chemical and biological commodities is working reasonably well. At the same time, we offer a number of specific recommendations, summarized on pages 48-49, that we believe will improve that process. We are pleased to note that BIS, in its written response to our draft report, indicated agreement with all of our recommendations. We request that you provide us with an action plan addressing the status of the recommendations in our report within 60 calendar days.

We want to thank you and other members of the BIS staff for your assistance and courtesies extended to us during our review. If you would like to discuss this report or the requested action plan, please call 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

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 (NDAA) for Fiscal Year 2000 to conduct an 8-year 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 NDAA mandates that the Inspectors General report to the Congress no later than March 30 of each year, until 2007.

The United States controls the export of sensitive goods and technologies for national security, foreign policy, antiterrorism, and nonproliferation reasons under the authority of several different laws. The primary legislative authority is the Export Administration Act of 1979, as amended.[1] Under the Act, the Commerce Department's Bureau of Industry and Security (BIS) administers the Export Administration Regulations (EAR) by developing export control policies, issuing export licenses, and enforcing the laws and regulations for dual-use exports.[2] The EAR contains the Commerce Control List (CCL), which identifies the specific dual-use items subject to control, and the conditions under which those items may be exported. Under Executive Order 12981, as amended, several other agencies—the departments of Defense, State, and Energy—have the authority to review all export license applications and render approval or denial opinions. The Central Intelligence Agency also provides intelligence related to the end-users listed on the license applications.

Of the 15,506 export license applications received by BIS in FY 2004, 2,801 were for chemical and biological commodities listed on the CCL. Most of these items are also subject to controls emanating from the United States' membership in the Australia Group (AG), a multilateral regime dedicated to curbing the proliferation of chemical and biological weapons. The United States is one of 38 member countries and the European Commission[3] that make up the Australia Group, which was established in 1985. AG members have adopted controls on chemical weapons precursors; dual-use chemical manufacturing facilities and equipment; biological agents used against humans, animals, and plants; and dual-use biological equipment.

To comply with the NDAA's FY 2005 requirement, the Offices of Inspector General[4] agreed to evaluate the U.S. export licensing process for chemical and biological commodities to determine whether current practices and procedures help deter the proliferation of chemical and biological weapons. Within Commerce, we specifically sought to evaluate BIS' licensing process for chemical and biological commodities to determine whether the process is timely, complies with statutory and regulatory requirements, and takes the cumulative effect of prior technology transfers to end users into consideration during the review of license applications. We also

[1] Although the Act last expired on August 20, 2001, the President extended existing export regulations under Executive Order 13222, dated August 17, 2001, invoking emergency authority under the International Emergency Economic Powers Act.
[2] Dual-use commodities are goods and technology determined to have both military and commercial uses.
[3] The European Commission is the executive body of the European Union—consisting of 25 European countries—whose role is to propose legislation, administer and implement policies, enforce commission law, and negotiate international agreements relating to trade and cooperation.
[4] This year's review also included the participation of the Offices of Inspector General from the Departments of Agriculture, Health and Human Services, and Homeland Security.

assessed whether data and information are properly shared between the various agencies involved in the export license review process and whether the dispute resolution process between the agencies works. Finally, we looked at BIS' interaction with the AG and its procedures for placing newly controlled items on the CCL. We did not evaluate the overall outcome of the licensing process and whether countries or entities were able to illegally acquire biological or chemical commodities by circumventing the licensing process altogether. Our specific observations are as follows:

Licensing Process for Chemical and Biological Commodities Generally Resulted in Timely Decisions in FY 2003, but Some Improvements Are Needed. We took a sample of 90 of the 1,803 chemical and biological license applications submitted in FY 2003 and compared them against BIS' guidance for reviewing and processing applications. We found that the licensing process is generally resulting in timely decisions. For example, the average time to process a license application was 43.7 days. This is slightly higher than the 40-day BIS standard or internal goal for processing license applications, but we noted that 26 of the 82 applications in our revised sample had review times of 44 days or more.[5] In addition, Defense, State, and Energy all completed their review of license applications within the 30-day period allowed, but CIA took more than 30 days to return 17 of the 56 cases referred to it in FY 2003. It should be noted, however, that the 30-day period specified for interagency review in Executive Order 12981, as amended, does not apply to the CIA.

Further, license processing times could potentially be improved if BIS set internal timeframes for closing out applications that do not need to be escalated to the interagency dispute resolution process. While neither Executive Order 12981 nor the EAR explicitly set time requirements for the issuance of license applications following the conclusion of the interagency review process where there is no escalation, internal BIS processing timeframes could encourage more timely disposition of such license applications.

In addition to focusing on the timeliness of the licensing process, licensing officers need to follow appropriate policies and procedures in order to ensure proper analysis of export license applications. However, we found that the guidance BIS provides is an assortment of memos and documents issued over an 11-year period, and all are housed in different places within BIS, not readily accessible to the licensing officers. In addition, some of the guidance routinely used by BIS is not very clear. For example, licensing officers are directed to "characterize the end user" on a license application, but the guidance does not provide instruction on what should be included in such descriptions or how the licensing officer should acquire and use this information. BIS should develop and maintain updated, consolidated written guidance, or an internal operations handbook, to formalize current license application review practices. This guidance or handbook should be made accessible to all employees involved in the licensing process (see page 11).

Review of License Applications by the SHIELD Works Reasonably Well, But the Operating Committee Needs to Sustain Recent Improvements in Timeliness. License applications for chemical and biological commodities undergo an additional level of review by

[5] 8 of the 90 license applications in our sample ultimately could not be included in our analysis for various reasons, as listed in Figure 5 on page 12.

the Chemical and Biological Weapons Control Group, an interagency body also known as SHIELD.[6] At SHIELD meetings, the member agencies share viewpoints, intelligence information, and clarifications on statutory and regulatory authority to resolve differences on specific license applications. The SHIELD review helps ensure that the applications escalated for dispute resolution are the result of true disagreement between the agencies. Should SHIELD not resolve interagency differences, applications are normally escalated for dispute resolution. Executive Order 12981 states that the Operating Committee—the first of three possible levels of review or appeal in the dispute resolution process—has 14 days to reach a decision once an application is escalated. The Operating Committee has improved its time to render decisions in recent years, but still rarely meets the 14-day requirement. In FY 2003, the average number of days for the committee to reach a decision on chemical and biological license applications was 51. According to BIS, that number was reduced to 22 days for all license applications escalated to the OC in FY 2004. This improvement in the timeliness of OC decisions should be sustained (see page 21).

Cumulative Effect Reviews Are Not Being Performed for Chemical and Biological Export Licenses. Cumulative effect reviews examine the impact of proposed exports when added to other past exports to countries and entities of concern. Approval of a single export license may not result in a significant increase in strategic capability of a country or entity of concern, but approval of multiple licenses combined with diversion of strategic items from other countries, the provision of items not requiring a license, and/or legitimate shipments from foreign suppliers could substantially enhance a country's ability to build a weapon of mass destruction.

BIS may not have sufficient intelligence information to know other commodities acquired by end users, but it could track exports of items controlled by BIS. However, we found that BIS lacks the systems and resources to analyze the cumulative effect of prior technology transfers made to the end users listed on chemical and biological license applications. In addition, BIS does not receive such assessments from other agencies, including the CIA, during the interagency export license application review process. Congress has been concerned for many years that the interagency licensing community lacks an integrated mechanism to conduct cumulative effect analyses of U.S. technology transfers. To address this continuing concern, we reiterate the recommendation from our 1999 report,[7] that BIS work with the intelligence community, including the CIA, Defense, Energy, and State, to develop a method to analyze and track the cumulative effect of dual-use exports to specific countries and regions. No action has been taken on that earlier recommendation (see page 25).

Recent Improvements in the Timeliness of Changes to the Commerce Control List Need to Be Maintained. The AG generally recommends new chemical and biological items for control on an annual basis. However, BIS, in cooperation with the other U.S. licensing agencies, takes many months to include these newly regulated items on the CCL. During the last 7 years, BIS has taken an average of 10 months to get newly regulated chemical and biological items published on the CCL. BIS and the other licensing agencies cannot disclose such items to U.S. companies and cannot prevent newly regulated items from being exported until the items are published on the CCL. Changes from the AG's June 2004 meeting were published on the CCL

[6] The SHIELD is made up of working-level representatives from State, Commerce (BIS), DOD, CIA, and Energy.
[7] U.S. Department of Commerce Office of Inspector General, *Bureau of Export Administration: Improvements Are Needed to Meet the Export Licensing Requirements of the 21st Century*, IPE-11488, June 18, 1999.

in just 6 months. We recommend that BIS take appropriate actions to sustain the recent improvements in the timeliness of U.S. publication of AG guidelines and rule changes that impact the CCL (see page 31).

Denial Notification to the Australia Group Needs to Be More Transparent. One of the obligations of AG membership is the submittal of license denials to the group so that potential proliferators cannot "shop around" for items from one country to another. AG members have also adopted a "no undercut policy" in which members agree not to approve an identical sale without first consulting with the member that first denied an export license. The Department of State, as the lead U.S. representative to the AG, is responsible for submitting license denials to the AG. For various reasons, State is not currently submitting all denials to the AG, which means the AG's no undercut policy is not always triggered. For example, State only submits denials that involve exports to non-AG countries.

State's rationale for this "policy" is not documented in any way, which leads to confusion. Since August 2002, Commerce and State have disagreed about the U.S. policy for submitting denials to the AG. Unfortunately, the AG's policy on the reporting of denials is not detailed, so State interprets the policy one way and Commerce another. Commerce proposes three changes in State's current practice: (1) send all denials to the AG to ensure that the no undercut policy is always triggered, (2) send the denials to the AG at the time that BIS issues its "intent to deny" letter rather than after the mandatory 45-day period during which BIS will consider any additional information provided by the exporter to rebut BIS' decision to deny the application, and (3) do not unilaterally rescind prior denials sent to the AG. We recommend that BIS ask the State Department to seek a ruling from the AG Chair on which denials should be sent to the AG and based on the response, work with all the licensing referral agencies to develop and implement a written policy and procedures for handling the AG denial notification process (see page 37).

BIS Outreach Efforts are Mainly Targeted to the Biological Exporting Community and Could Be Expanded. Outreach to the exporting community is a critical component of BIS' mission to build awareness of and compliance with export controls. BIS has a reasonably robust outreach program to the biological exporting community, but outreach specific to the chemical exporting community has been limited. The only recent outreach dedicated to the chemical exporting community was done by BIS enforcement agents after the September 11th terrorist attacks, when the agents were instructed to visit all chemical manufacturers within their respective regions to inform them of their responsibility to comply with the EAR. Given resource constraints, BIS should explore alternative ways to increase its outreach to the chemical community, such as setting up briefings in Washington, mailings, or piggybacking on outreach done in connection with the Chemical Weapons Convention compliance activities conducted by BIS' Treaty Compliance Division. BIS should also seize opportunities to conduct outreach to the entities registered with the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) and the U.S. Department of Health and Human Services' Centers for Disease Control and Prevention (CDC). Registered entities work with select agents and toxins controlled by APHIS and CDC, many of which are also contained on the CCL (see page 42).

BIS' Export Enforcement Office Needs to Act on the Treaty Compliance Division's Investigative Referrals. The Treaty Compliance Division (TCD) is the BIS office that helps

ensure U.S. industry compliance with the Chemical Weapons Convention (CWC), among other international treaties. CWC, which took effect on April 29, 1997, affects companies involved in the production, processing, consumption, import, and export of a range of commercial chemicals and precursors. One of the CWC requirements imposed on industry is the submittal of end-use certificates, within 7 days of the date of export, that state the types and quantities of chemicals being exported, the intended end-use for the chemicals, and a certification that the chemicals will be used only for purposes not prohibited by the CWC. Between FY 2002 and 2004, TCD identified 13 instances where companies did not submit the end-use certificates to BIS, as required. TCD staff referred all of the cases of non-compliance to BIS' Office of Export Enforcement (OEE) for investigation and appropriate action. However, TCD told us at the start of our review that to date, no action had been taken against offenders, and it feared that some exporters have gotten the impression that BIS does not enforce the end-use certificate requirement.

We found that OEE had opened 9 investigations on the 12 cases of non-compliance referred by TCD.[8] OEE had no record of one referral and the referral of two companies in FY 2003 was rolled into open investigations of the same two companies for the same infraction in FY 2002. After closely analyzing the investigations upon our request, OEE officials determined that three cases were closed and of those, two were closed prematurely and would be reopened. For the remaining six cases, no final action had been taken and the cases were still open. OEE should inform TCD of the outcome of investigations, and TCD should track its referrals to OEE so it can follow up if it has not received status reports on investigations after a specified period of time. This information is necessary to help show the other CWC member countries that the U.S. consistently enforces the treaty within its borders (see page 46).

On page 48, we offer specific recommendations to address our concerns.

In a March 30, 2005, written response to our draft report, the Acting Under Secretary for Industry and Security agreed with all our recommendations and provided us with specific comments on the text of the draft report to ensure its accuracy. Where appropriate, we have made changes to the report and recommendations in response to BIS' comments. In addition, we discuss pertinent aspects of the bureau's response after each recommendation in the report. We have asked BIS to provide an action plan, within 60 calendar days, addressing the status of its actions taken to implement the recommendations in our report. The complete response from BIS is included as an appendix to this report (see page 53).

[8] The 13th referral—for a case of non-compliance in FY 2004—had just been made to OEE at the time of our review, thus OEE had not yet had time to open a case or take any action.

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 technology determined to have both civilian and military uses. The primary legislative authority for controlling the export of dual-use commodities is the Export Administration Act (EAA) of 1979, as amended.[9]

Under the Act, the Department of Commerce's Bureau of Industry and Security (BIS) administers the Export Administration Regulations (EAR) by developing export control policies, issuing export licenses, and enforcing the laws and regulations for dual-use exports. BIS was established in 1987 as a separate regulatory agency within the Commerce Department to control dual-use exports. Prior to 1987, the agency was an operating component of Commerce's International Trade Administration. In FY 2004, BIS had 371 employees and an appropriation of $69 million.

BIS organizational structure

BIS has two principal operating units: Export Administration (EA) and Export Enforcement (EE). Within EA, there are two offices with responsibility for processing export license applications—the Office of Nonproliferation and Treaty Compliance and the Office of National Security and Technology Transfer Controls. Under the Office of Nonproliferation and Treaty Compliance is the Chemical and Biological Controls Division (CBCD), which processes export license applications pertaining to chemical and biological commodities, equipment, and software. Our review focused on the activities of CBCD, which generally handles license applications for items controlled on the Commerce Control List (CCL) in 14 different commodity categories. Most of these items are also subject to controls emanating from the United States' membership in the Australia Group (AG), a multilateral assemblage of countries dedicated to curbing the proliferation of chemical and biological weapons. A description of how the CCL is derived can be found on page 4.

The Australia Group

The AG, established in 1985, is a forum of industrialized countries that cooperate in trying to prevent the proliferation of chemical and biological weapons, by coordinating export controls, exchanging information, and performing other diplomatic actions (see Appendix B for list of member countries). The 39 AG members have adopted controls on chemical weapon precursors; dual-use chemical manufacturing facilities and equipment; biological agents used against humans, animals, and plants; and dual-use biological manufacturing facilities and equipment.

The AG operates by consensus, with members agreeing to develop or amend guidelines, procedures, and control lists. The group is not based on treaty obligations, so its members,

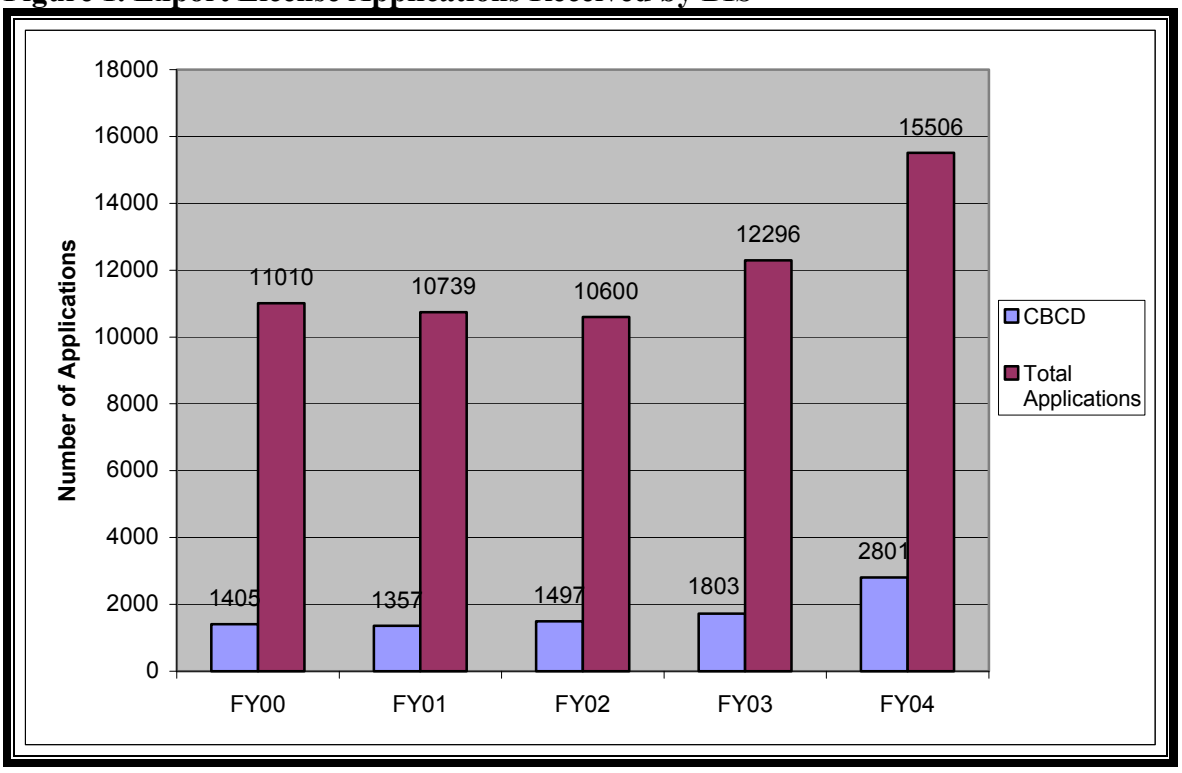
[9] Export Administration Act of 1979, as amended, sec. 3; 50 U.S.C app. sec. 2402(2). Although the Act expired on August 20, 2001, the Congress agreed to the President's request to extend existing export regulations under Executive Order 13222, dated August 17, 2001, thereby invoking emergency authority under the International Emergency Economic Powers Act.

including the United States, are not bound by international law to abide by its guidelines. Instead, the AG operates under the principle of national discretion, with each member deciding how it will carry out membership obligations. One of the guidelines that members have agreed to is an AG denial notification procedure, whereby members notify the group when a license for a controlled item is denied. AG members have also agreed to a "No Undercut Policy," whereby members agree not to approve an identical export sale without first consulting with the member issuing the denial notification.

BIS export license application review process for chemical and biological commodities

During FY 2004, BIS received 2,801 chemical and biological export license applications, most of which were reviewed and processed by CBCD.[10] Figure 1 (below) illustrates the total number of export license applications received by BIS from FY 2000 through 2004 and the subset processed by CBCD.

Figure 1. Export License Applications Received by BIS



Source: Bureau of Industry and Security

When BIS receives a license application, either manually or electronically, it is entered into the Export Control Automated Support System (ECASS).[11] ECASS screens all new applications to determine whether the listed parties have (1) registration numbers in ECASS or need numbers assigned and (2) any "flags" that require the application to be referred to the Office of Export

[10] In FY 2003, a few chemical and biological export license applications were processed by another BIS licensing division. The vast majority, however, were processed by CBCD.

[11] ECASS is an unclassified system that processes and stores dual-use export licensing information for BIS headquarters and field offices, the Central Intelligence Agency, and the Departments of Defense, Energy, State, and the Treasury.

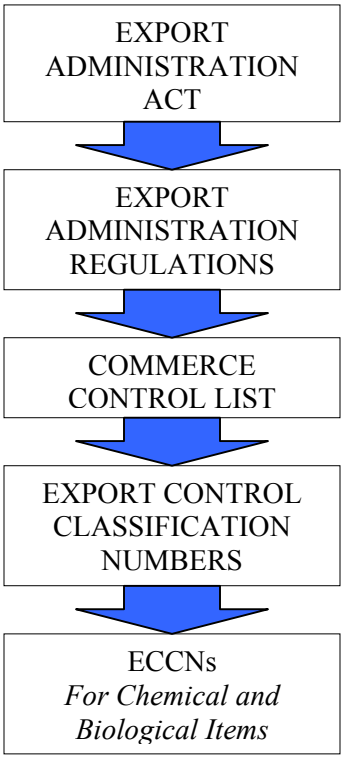
Enforcement (OEE).[12] Applications flagged by the system are simultaneously referred to OEE and the licensing officers (LOs) in EA. Unflagged applications are referred only to the LOs for processing.

According to Executive Order 12981,[13] BIS has 9 days to conduct its initial review. During this review, the LO first verifies the export control classification number (ECCN) the applicant obtained from the CCL. The CCL lists 487 ECCNs for commodities, software, and technology, 14 of which are numbers for chemical and biological commodities (see Figure 2). Each ECCN contains a brief description of the item(s). Some items are subject to the EAR but not specified on the CCL. These are designated as "EAR99."[14]

After verifying the ECCN, the LO reviews the license requirements and license exceptions for that ECCN. The LO then (1) determines the reasonableness of the end use specified by the exporter, (2) documents the licensing history of the exporter, (3) documents the licensing history of the ultimate consignee or end user(s), (4) documents the reason(s) for not referring a license application to the other agencies (if applicable), and (5) provides a written recommendation on whether to approve or deny the application. After the LO's review is completed, the application is referred to the Departments of Defense, Energy, and State. BIS also provides the Central Intelligence Agency with the application for review at the same time as the other agencies.

[12] Generally, applications referred to OEE are those involving parties on BIS' watchlist, as they have been identified as warranting increased scrutiny for export license purposes. OEE agents may also put flags on certain parties that they are interested in seeing, such as parties involved in an ongoing investigation.
[13] Executive Order 12981, as amended—*Administration of Export Controls*, December 5, 1995.
[14] 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.

Figure 2. Export Control Classification Numbers for Chemical and Biological Items



The Export Administration Act of 1979, as amended, is the primary legislative authority for controlling the export of goods and technologies that have both civilian and military uses. The Act expired on August 20, 2001, but the President extended existing export regulations with Executive Order 13222, dated August 17, 2001, thereby invoking emergency authority under the International Emergency Economic Powers Act.

The Export Administration Regulations control the export and re-export of specific commercial or dual-use items that have both civilian and military uses.

The Commerce Control List includes commodities, software, and technology subject to control under the EAR, grouped by type of commodity in 10 broad categories, including nuclear materials, facilities, and equipment. Each category is further subdivided into five product groups.

Items within each of the 10 categories are identified by an alphanumeric ECCN. There are 487 ECCNs on the CCL and each describes a particular item or type of item, and shows the controls placed on that item. (See Supplement No. 1 to part 774 of the EAR.)

The CCL includes 14 ECCNs for chemical or biological items.

ECCN	Description
1C350	Chemicals that may be used as precursors for toxic chemical agents
1C351	Human and zoonotic pathogens and "toxins"
1C352	Animal pathogens
1C353	Genetic elements and genetically-modified organisms
1C354	Plant pathogens
1C395	Mixtures and medical, analytical, diagnostic, and food testing kits not controlled by ECCN 1C350
1C991	Vaccines, immunotoxins, medical products, diagnostic and food testing kits
1D390	"Software" for process control that is specifically configured to control or initiate "production" of chemicals controlled by ECCN 1C350
1E350	"Technology" according to the "General Technology Note" for facilities designed or intended to produce chemicals controlled by ECCN 1C350
1E351	"Technology" according to the "General Technology Note" for the disposal of chemicals or microbiological materials controlled by ECCNs 1C350, 1C351, 1C352, 1C353, or 1C354
2B350	Chemical manufacturing facilities and equipment, except valves controlled by 2A226 or 2A292
2B351	Toxic gas monitoring systems that operate on-line and dedicated detectors therefor
2B352	Equipment capable of use in handling biological materials
2E301	"Technology" according to the "General Technology Note" for "use" of items controlled by ECCNs 2B350, 2B351, and 2B352

Source: BIS and Office of Inspector General

Referral of export license applications to other agencies

The Export Administration Act of 1979, as amended, authorizes the Secretary of Commerce to issue rules and procedures for processing dual-use export license applications. The Act requires that a determination concerning an export license application be made by the Secretary of Commerce, without referral to any other government department or agency, to the maximum extent possible. However, in December 1995, in response to the need for more transparency in the dual-use export license process, the President issued Executive Order 12981. Specifically, it authorized the Departments of Defense, Energy, and State and the Arms Control and Disarmament Agency[15] to each review any license application received by Commerce. In addition, Executive Order 12981 established mandatory escalation procedures to be followed, when the reviewing agencies disagreed about dual-use export license applications, and defined the time frames for this escalation process. (See Figure 3).

Currently, the Departments of Defense, Energy, and State review all export license applications except applications for which those departments have delegated decision authority to Commerce.[16] BIS also sends all chemical and biological license applications to the Central Intelligence Agency's Weapons Intelligence, Nonproliferation, and Arms Control Center (WINPAC) for an end user review.[17]

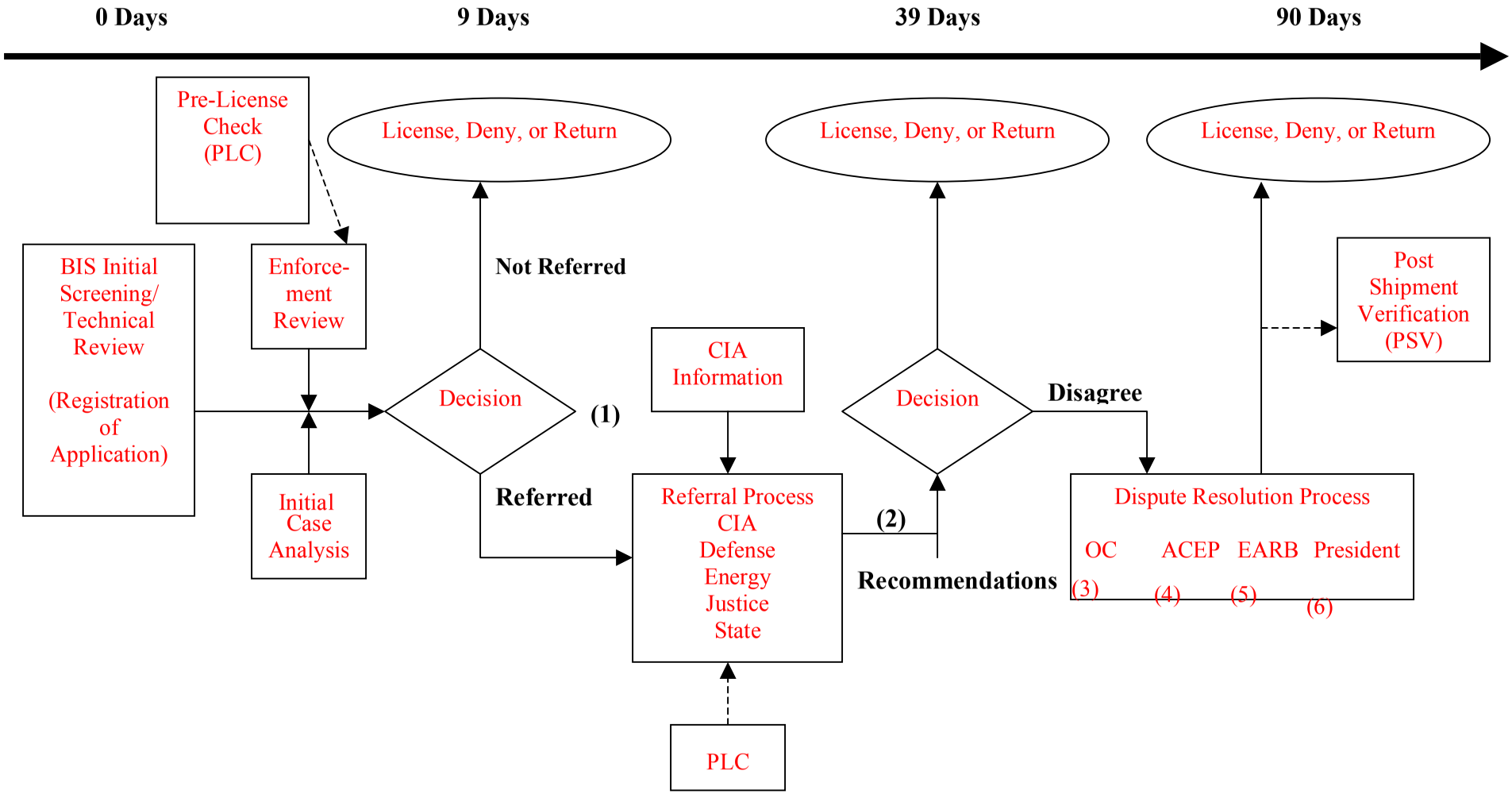
Under the Executive Order, the referral agencies (Defense, Energy, and State) must provide a recommendation to approve or deny the license application to the Secretary of Commerce within 30 days of receipt of the referral and all related required information. To deny an application, the referral agency is required to cite both the statutory and regulatory basis for denial, consistent with the provisions of the EAA and the EAR. An agency that fails to provide a recommendation within 30 days is deemed to agree with the decision of the Secretary of Commerce.

Most export licenses are issued with conditions that require the exporter to abide by certain restrictions. The conditions are primarily used to control proliferation of the commodity by limiting the end use or restricting access to the commodity to specific end users. There are 55 standard conditions that BIS can place on an export license. When BIS refers the export license application to the other agencies, it attaches a list of recommended conditions for the agency to review. The referral agencies can also recommend additional conditions be placed on the export license before it is issued. If the reviewing agencies disagree on the license application, the application goes to the Operating Committee for resolution.

Before an application for a chemical and biological export license application is escalated, any of the reviewing agencies may choose to address a potential proliferation concern on a particular application by discussing the application at the SHIELD interagency working group, which is

[15] The U.S. Arms Control and Disarmament Agency was dissolved on April 1, 1999. Its licensing review function was moved to the State Department.
[16] Energy did not review chemical and biological export license applications until April 2003. It had previously provided BIS with a delegation of authority to review any such applications on its behalf. That delegation of authority was rescinded on April 15, 2003, after the agency added more LOs and decided it had the ability to review all chemical and biological license applications.
[17] In FY 2003, WINPAC did not review all license applications, only those for which an intelligence report on the end user(s) had not been generated for a specific period of time.

Figure 3. Dual-Use Export Licensing Process



(1) On or before day 9 of registration, BIS must refer the application or issue, deny, or return without action (RWA) the license.
(2) On or before day 39 of registration, the referral agencies must provide BIS with a recommendation.
(3) On or before day 40 of registration, the application can be referred to the Operating Committee, which has 14 days to make a recommendation.
(4) On or before day 59 of registration, the application can be referred to the Advisory Committee on Export Policy, which has 11 days to make a decision.
(5) On or before day 75 of registration, the application can be sent to the Export Administration Review Board, which has 11 days to make a decision.
(6) On or before day 90 of registration, the application can be escalated to the President.

Executive Order 12981 provides several circumstances for stopping these time frames, such as obtaining additional information from the applicant.

Source: Office of Inspector General

chaired by the Department of State, and has working-level representatives from Commerce (BIS), DOD, CIA, and Energy.[18] The SHIELD group reviews dual-use export license applications related to the possible proliferation of chemical or biological weapons with the goal of resolving differences between agencies and thereby precluding the need to escalate license applications into the formal dispute resolution process.

Dispute resolution process

If there is disagreement on whether or not to approve a pending license application after the 30-day review period, the application is referred to a higher-level interagency working group called the Operating Committee (OC). Under Executive Order 12981, the OC has representatives from the Departments of Commerce, Defense, Energy, and State. Non-voting members of the OC include appropriate representatives of WINPAC and the Joint Chiefs of Staff. The OC meets weekly. The Secretary of Commerce appoints the OC chairman who considers the recommendations of the reviewing departments before making a decision. The OC chair's decision does not have to be based on a majority vote.[19]

Within 5 days of the OC chair's decision, a reviewing department may appeal or escalate the decision to the Advisory Committee on Export Policy (ACEP). The ACEP meets monthly if there are applications to decide and is chaired by the Commerce Assistant Secretary for Export Administration, and includes Assistant Secretary-level representatives from the Departments of Defense, Energy, and State. The ACEP also includes non-voting representatives from WINPAC and the Joint Chiefs of Staff. The ACEP's decision is based on a majority vote.

Within 5 days of an ACEP decision, any dissenting department or agency may appeal the majority decision to the Export Administration Review Board (EARB). The Secretary of Commerce chairs the EARB, and its members include the Secretaries of Defense, Energy, and State. The Chairman of the Joint Chiefs of Staff and the Director of the Central Intelligence Agency are non-voting members of the EARB. The EARB's decision is based on a majority vote. Finally, within 5 days of this decision, any dissenting agency may make a final appeal to the President.

End use checks

End use checks are an important component of the export licensing process. They help determine if the end users or intermediary consignees are suitable to receive sensitive U.S. items and technology and will likely comply with appropriate end use conditions and retransfer restrictions. End use checks consist of pre-license checks (PLCs), which are conducted to obtain information about a foreign end user or intermediary consignee before the approval of a license application, and post shipment verifications (PSVs), which are conducted after goods have been shipped. PSVs help determine whether the licensed item or technology was received and is

[18] SHIELD does not serve as an acronym for any phrase. The group uses all capital letters for its name, which is why it is presented as such in this report.

[19] Per Executive Order 12981, as amended, one exception to this rule involves ". . .license applications concerning commercial communication satellites and hot-section technologies for the development, production, and overhaul of commercial aircraft engines. . . " For these applications, the chair of the OC is to report the "majority vote decision of the OC" rather than his/her decision.

being used appropriately by the party named on the license or shipper's export declaration (SED) or whether it was diverted to an unauthorized end user.

End-use checks (PLCs and PSVs) are conducted by BIS export control attachés (stationed in Hong Kong, Abu Dhabi, Beijing, Moscow, and New Delhi), by BIS special agents traveling in two-person Sentinel Teams,[20] or where these options are not available or not economical, by U.S. Commercial Service or State personnel stationed in the country where the end-use check is conducted. Any of the departments (Commerce, Defense, Energy, or State) authorized under Executive Order 12981, as amended, to make recommendations on export license applications can request an end-use check.

Chemical Weapons Convention and the Treaty Compliance Division

The U.S. is party to several international arms control, disarmament, and nonproliferation agreements, including the Chemical Weapons Convention (CWC), an international treaty that bans the development, production, stockpiling, or use of chemical weapons by its signatories and provides a verification regime to ensure compliance with its nonproliferation terms. The treaty affects companies involved in the production, processing, consumption, import, and/or export of a range of commercial chemicals and precursors. The CWC entered into force on April 29, 1997, and currently 167 countries are state parties to the convention. Of the 50 chemicals on the CCL that are subject to AG controls, 30 are CWC chemicals.

For these 30 chemicals, there are additional requirements placed on exporters to ensure compliance with the CWC. For example, in addition to obtaining an export license for a chemical, the CWC might also require the exporter to file an end-use certificate—a document provided by the country of destination stating what the chemical will be used for, who the end-user is, and certifying that it will be used only for purposes not prohibited by the CWC. The additional obligations on exporters, as required by the CWC, vary depending on the chemical and the country to which it is being exported. BIS' Treaty Compliance Division (TCD) is responsible for ensuring that U.S. industry is in compliance with the CWC. As such, TCD assists U.S. companies in (1) submitting annual declarations, end-use certificates, and other reports to both BIS and the Organization for the Prohibition of Chemical Weapons,[21] (2) preparing for on-site inspections, and (3) making determinations on whether chemicals are subject to CWC reporting requirements.

TCD is also responsible for strengthening international cooperation with the Biological Weapons Convention (BWC), which prohibits developing, producing, stockpiling, or otherwise acquiring or retaining biological agents or toxins for non-peaceful purposes. The BWC entered into force in 1975 and 153 countries are state parties to the convention.

[20] Prior to late 2004, the BIS end use check program was called the Safeguard Verification Program.
[21] The Organization for the Prohibition of Chemical Weapons is the international body created to implement the CWC.

OBJECTIVES, SCOPE, AND METHODOLOGY

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 (NDAA) for Fiscal Year 2000, to conduct eight annual assessments of the adequacy of current export controls and counterintelligence measures to protect against the acquisition of sensitive U.S. technology and technical information by countries and entities of concern.[22] This is the sixth review under the NDAA requirement.[23] The Commerce Office of Inspector General (OIG) conducted this program evaluation in accordance with the *Quality Standards for Inspections* issued by the President's Council on Integrity and Efficiency in 1993, and under authority of the Inspector General Act of 1978, as amended, and Department Organization Order 10-13, dated May 22, 1980, as amended.

Our objectives were to review the adequacy of BIS' export licensing process to determine whether it helps deter the proliferation of chemical and biological weapons and prevents the acquisition of sensitive U.S. technology or technical information by countries or entities of concern. We did not evaluate the overall outcome of the licensing process and whether countries or entities were able to illegally acquire biological or chemical commodities by circumventing the licensing process altogether.

Our scope included determining whether BIS (1) reviews license applications within regulatory timeframes; (2) properly submits license applications to the other licensing agencies; (3) adequately manages the interagency dispute resolution process; (4) processes each license application using information from PLCs and records of exporter compliance with prior license conditions, and analyzing the cumulative effect of proposed and prior chemical and biological technology transfers; (5) properly submits denied applications to the AG; (6) incorporates new AG regulations into the CCL in a timely manner; and (7) performs outreach about export controls for chemical and biological commodities to the exporting community. Our methodology included the following:

- **Statistical analysis.** We evaluated three types of license applications submitted to BIS in FY 2003 to accomplish the tasks listed above: (1) a statistically valid sample of 90 regular chemical and biological applications (out of 1,803), (2) all 17 license applications escalated to the OC, and (3) the 23 denied license applications in FY 2003.

- **Interviews.** To determine the effectiveness of the current export license process and obtain their suggestions for improving the process, we spoke with BIS personnel from the following groups: (1) Office of Nonproliferation and Treaty Compliance, including the Chemical and Biological Controls Division, (2) Regulatory Policy Division, (3) Office of Enforcement Analysis, (4) Office of Exporter Services, and (5) the Operating Committee Chair. We also spoke with representatives of other organizations, including (1) the Chairman of the SHIELD[24] at the Department of State about how chemical and

[22] The Offices of Inspector General from the Departments of Agriculture, Health and Human Services, and Homeland Security also participated in this review.
[23] See Appendix C for a list of the reports resulting from the five previous reviews.
[24] The SHIELD is discussed on pages 5 and 21.

biological applications are reviewed and (2) Department of Agriculture officials about chemical and biological items controlled by Agriculture but not listed on the CCL.

- **Literature review.** We evaluated specific literature during our review including (1) prior Government Accountability Office (GAO), Commerce OIG, and interagency OIG reports, (2) the BIS FY 2003 and 2004 Annual Reports, (3) the BIS FY 2003 Foreign Policy Report, (4) BIS procedures for processing license applications, and (5) relevant laws and regulations.

In addition, we followed up on our recommendations from prior Commerce OIG reports related to the export licensing process and/or export controls for biological agents.[25]

To coordinate the review of interagency issues and determine the work to be performed by each OIG team, the eight OIGs involved in this year's review formed an interagency working group and held monthly meetings during the review. The eight OIGs decided that each would issue a report on the findings of its agency review, and all eight would contribute to and approve a consolidated report on crosscutting issues. We conducted our review from August 12, 2004, through January 21, 2005. On March 9, 2005, we conducted an exit conference with the Acting Under Secretary for Industry and Security and other senior BIS officials to discuss the contents of this report.

[25] U.S. Department of Commerce Office of Inspector General, *Bureau of Export Administration: Assessing the Effectiveness of Export Controls for Dual-Use Biological Agents*, RM-6686, September 1995, and U.S. Department of Commerce Office of Inspector General, *Bureau of Export Administration: Improvements Are Needed to Meet the Export Licensing Requirements of the 21st Century*, IPE-11488, June 18, 1999.

OBSERVATIONS AND CONCLUSIONS

I. Licensing Process for Chemical and Biological Commodities Generally Resulted in Timely Decisions in FY 2003, but Some Improvements Are Needed

Proper analysis of individual export license applications is critical to ensure that appropriate export policies and procedures are followed. We looked at a sample of chemical and biological license applications submitted in FY 2003 and found that the licensing process is generally resulting in timely decisions. We found that while Executive Order 12981 and the EAR provide specific time limits for interagency processing and resolution of disputes involving dual use license applications, they do not explicitly address a time requirement for the completion of a license application that is approved by the interagency group and not escalated. At present, LOs have no time requirement—and could take up to the 90 days allowed under the Executive Order—for processing license applications once they are returned from interagency review. With no objection from the interagency group, the license application may be returned to BIS on the 40th day after registration of the completed license application, with no Executive Order required action for another 50 days.

Finally, license processing guidance should be consolidated and readily accessible to LOs. The guidance for reviewing export license applications cited by LOs and BIS management was an assortment of memos and documents issued over an 11-year period. This guidance is housed in different places within BIS and not readily accessible to the LOs. In addition, the guidance that is routinely used by BIS is not always detailed enough to provide specific steps for reviewing a license application. Clear, complete, and consolidated guidance is needed to formalize current license application review practices and ensure that they are consistently applied.

A. Review of FY 2003 license applications shows the licensing process is working reasonably well

Based on information received from BIS, 1,803 license applications were processed for chemical and biological commodities in FY 2003. We reviewed a statistical sample of 5 percent of those cases, or a total of 90 license applications. In addition, we requested information on the 17 escalated license applications referred to the OC in FY 2003 and the 23 denied applications in FY 2003 for a total of 130 license applications reviewed.

As shown in Figure 4, we divided the license applications into four categories: (1) "Vanilla"[26] when they appeared to be complete with few, if any, questions from the interagency group, (2) "Outliers", a term we used to describe the applications that were returned without action, pending at the time of our sample selection, or incorrectly included in our sample, (3) "Escalated" when the applications were referred to the OC due to interagency disagreement, and (4) "Denied" when the applications were denied. The escalated applications are discussed in more detail in Chapter II of this report (see page 21). With regard to the denied applications, we determined that BIS and the other licensing agencies had appropriately denied the applications, in accordance with the criteria set forth in the EAR. Also, BIS was generally timely in its issuance of the final denial decisions after the applicants' mandatory 45-day appeal period had

[26] Vanilla is a term used by BIS and the other licensing agencies to describe a straightforward license application.

concluded. We found no significant problems with the denied applications and, in fact, these applications indicate that the export licensing process for chemical and biological commodities is working as intended.

Figure 4. License Applications Reviewed

Type of application	Number of applications	Percent of total
Vanilla	82	63%
Outliers	8	6%
Escalated	17	13%
Denied	23	18%
Total	130	100%

Source: OIG

Figure 5 explains why the 8 outlier applications noted above were excluded from our analysis.

Figure 5. Outlier License Applications Excluded from Analysis

Description	Number	Reason
Returned without action (RWA)[27]	6	Average days to process 26; no data available for comparative purposes other than total days from BIS receipt to RWA issuance.
Pending	1	Application was in pending status at time of sample selection.
Handcuffs to Norway	1	Was not a chemical or biological commodity and was incorrectly included in the list of applications from which the sample was selected.
Total	8	

Source: OIG

Our in-depth analysis of the remaining 82 license applications identified some issues that require BIS' overall attention.

Analysis of license applications found most were processed in a timely manner

Our calculation of the total days to process a license application was based on information contained in the referral history section of BIS license applications. Total days were calculated from the date of receipt of the license application until the day reviewing staff completed final signoff. Total days were then adjusted for the number of days a license application was placed in hold without action (HWA) status, if any.[28] In our review of the 82 license applications, we

[27] RWA is used to return a license application to the applicant if the applicant has failed within 20 days to provide additional information that BIS has requested in order to process the application. RWA can also be used if (1) during initial evaluation of an application, an LO determines that a license is not required, (2) the applicant requests the application be returned, or (3) the items are not under Department of Commerce jurisdiction.

[28] License applications can be put on HWA when BIS is (1) waiting on information from an exporter, (2) at the direction of a division or office director, or (3) in accordance with Executive Order 12981.

found the average time to refer the application to the interagency group was 3.6 days with only one case taking longer than the 9-day requirement.

The average time to process these license applications from receipt to the completion of interagency review was 43.7 days. Although this average time was reasonably close to the 40-day BIS standard or internal goal for processing license applications, we found that 34 cases, or 41 percent, took longer than 40 days. Eight of those license applications took between 41 and 43 days to process. We did not assess these further since they were within 1-3 days of meeting the BIS standard or internal goal. However, Figure 6 provides a breakdown of the reasons for delay in the remaining 26 license applications (32 percent) with review times of 44 days or more.

Figure 6. Reasons for License Processing Times That Exceeded 44 Days[29]

Reason for delay	Total license applications
Waiting for CIA information	13
Delayed in CBCD 11-34 days after interagency approval	7
Waiting for CIA and OEE information	3
Waiting for OEE information	3
Total	26

Source: OIG

Interagency and OEE processing of license applications is generally timely

In our review of the 82 license applications, we found that all interagency referrals to the departments of Defense, State, and Energy were returned to BIS within the 30-day requirement. It took 23.3 days on average for information on 56 cases referred to the CIA during FY 2003 to be returned to BIS. A total of 17 of those license applications sent to CIA, or 30 percent, took longer than the 30-day requirement.[30]

In applications referred to OEE, the total days to receive OEE's comments averaged 10.3 days, although 14 applications, or 27 percent, were greater than OEE's self-imposed 6-day requirement[31] for reviewing license applications. A summary chart follows on the next page.

[29] License processing times ranged from 45 to 112 days after HWA time was deducted.
[30] Defense, State, and Energy each have 30 days, concurrently, to review referred licenses. While Executive Order 12981 does not specifically provide a time requirement for CIA's review of referred licenses, BIS and CIA have agreed to aim for a 30-day turnaround for CIA's input. The time requirement for OEE review is 6 days. The goal for completing the initial overall review is 39 days (9 days to interagency referral and 30 days for interagency [including CIA]) review.
[31] The 6-day requirement was contained in the performance plans of OEE analysts, but was not drawn from any overall BIS guidance or by direction of the Executive Order. This 6-day requirement is different, and preceded, the new requirement put in place in July 2004 and discussed in detail on pages 14-15.

Figure 7. Review of License Applications

Reviewer	Total applications reviewed	Average actual days to review	Applications over review time requirement	Percent of total over review time requirement
Defense	82	7.2	0	0
State	82	20.3	0	0
Energy	34	26.8	0	0
CIA	56	23.3	17	30%
OEE	52	10.3	14	27%

Source: OIG

Changes in WINPAC management and subsequent enhancements resulted in improved processing time

We found the processing time of license applications referred to CIA improved noticeably in the latter half of FY 2003. According to the CIA OIG, there was a change in WINPAC management in April 2003. A system was subsequently established allowing management to track applications through the review process and to identify and deal with any delays. [redacted]

Time allotted for OEE review of applications has changed recently

OEE reviewed 52 of the license applications in our sample. As noted in Figure 7 above, 14 of those applications took longer than OEE's self-imposed 6-day requirement to review, ranging from 7 to 62 days. According to OEE, reasons for delay included:

Figure 8: Reasons For OEE Delay

Completion of PLCs
Countersigning cases[32]
Completion of PSVs
Pending PSV
Balancing routine cases against more difficult cases in the docket
Investigating applicant and/or consignee

Source: OIG

BIS' Under Secretary determined in July 2004[33] that a new process for reviewing license applications was needed to reduce or eliminate the delays cited above. As a result, he required EA and OEE to reach a unified BIS position on license applications within the 9-day Executive Order timeframe before referring applications to the other agencies. Specifically, OEE must now

[32] All license applications are reviewed for accuracy and countersigned by a senior manager before final approval.
[33] Memorandum from Kenneth I. Juster to Peter Lichtenbaum and Julie Myers, *Process for Reaching a Unified BIS Position on Licensing Applications*, July 16, 2004.

submit its recommendations to EA within 6 days of receiving applications, including the reason why PLCs or other actions are warranted. If OEE and EA disagree on an application, the EE and EA directors or the Under Secretary must resolve the disagreement before the 9-day requirement and referral to the other licensing agencies. If OEE requests a PLC for an application, the Under Secretary has established a certain number of days for the foreign posts and/or BIS attaché to complete the PLC.[34] In addition, a pending PLC or other OEE flag on an application could delay actual issuance of a license after interagency approval.

Delays in CBCD processing of license applications were not always easily explained

Seven license applications, or 8 percent, were delayed by CBCD from 11 to 30 days after interagency approval, as shown in Figure 9.

Figure 9. Delays in CBCD after interagency approval

Application No.	Total Days to Approval	Days in CBCD
1	70	20
2	58	30
3	52	20
4	51	23
5	47	15
6	45	13
7	45	11

Source: OIG

We asked CBCD management to explain the delays. However, it was difficult for CBCD management to explain all seven cases, as some of the LOs that processed these applications have since left BIS and the records in ECASS are not detailed enough to always reconstruct what happened in the processing of an application. As a general explanation for delays, CBCD management noted that in very rare cases a license application might remain in the countersigner's queue for more than a week. Occasionally, they reported, the countersigner may need to send the license applications back to the LO for clarification of conditions, insertion of inadvertently excluded caveats, or for correction. In other cases, a policy change may make it impossible to countersign an application until CBCD senior management and/or BIS senior management take action—this was definitely the case for two of the seven applications above and, according to CBCD officials, possibly for another two as well. For example, after a meeting between Commerce and Defense, CBCD agreed to include a condition on all CBCD export licenses limiting the end-use to that stated on the license application. This agreement necessitated halting all approvals until the proper language could be worked out.

One senior LO emphasized that sometimes BIS will hold onto an application for a few days past an application's return from the 30-day review by the referral agencies in hopes that the case can be resolved rather than having to refer it to the OC. The senior LO noted that LOs are given the

[34] BIS' Under Secretary specified the following three timeframes for PLCs: (1) most PLCs would be completed in 14 days or less, (2) PLCs in countries without a BIS attaché would be completed in 28 days or less, and (3) PLCs in China would be completed in 60 days or less. BIS management will intervene if these timeframes are exceeded.

leeway to use their professional judgment if a case is close to being resolved and permission for extension is not requested from BIS management. The OC Chair said that he prefers that LOs and division directors try to work out issues with their counterparts at the referral agencies before escalating a license application. He said it helps avoid unnecessary escalations even if this means taking a few extra days.

B. Ninety-day time frame does not provide for prompt processing of "non-escalated" license applications

Although Executive Order 12981 and the EAR specify time requirements for the initial license application review, interagency review, and a total processing time for *escalated* license applications, neither includes a specific time requirement for completing a license application that is *approved* by the interagency group during the initial interagency review process.

The 90-calendar day timeframe for the review of license applications from their receipt in BIS is realistic if referral is made to the Operating Committee (OC), Advisory Committee on Export Policy (ACEP), and Export Administration Review Board (EARB), but no guidance is provided to LOs to encourage the timely disposition of license applications that are approved without escalation to the OC. In fact, if these applications are received back from the referral agencies on the 40th day after receipt of a license application, BIS has an additional 50 calendar days to review and sign off on the license application, and finally to notify the applicant, without violating the requirements of the EAR. This could result in unnecessary expense to the exporter and possibly the end user since the shipment of the affected goods would be delayed pending receipt of the approved license.

CBCD staff and other BIS officials agree that Executive Order 12981 and the EAR do not specifically address timeframes for the processing of applications with interagency agreement. However, they say their mandate is to process applications as quickly as possible after interagency agreement is reached and that BIS would never take an additional 50 calendar days to review and sign off on a license application. As mentioned previously, in most cases, BIS is processing applications in a timely manner. The average for vanilla cases was 43.7 days in FY 2003, meaning that CBCD took just a few days after interagency agreement to finalize applications. But, as noted in Figure 9, seven license applications were delayed in CBCD between 11-30 days after interagency approval until final sign off. Even though all seven cases were completed within the overall specified 90-day timeframe, it is difficult to determine whether CBCD was timely in the processing of these applications because there is no specific criteria to use to judge their performance.

Recommendation

BIS should establish specific timeframes for reviewing and signing off on license applications after approval by the referral agencies.

BIS, in its response to our draft report, agreed with this recommendation.

C. License processing guidance should be consolidated and readily accessible to licensing officers

During our review, we asked the five current LOs in CBCD what criteria they use to process, place an application in HWA status, and/or eventually approve or deny chemical and biological commodity applications. All five LOs referred us to an 8-point analysis memorandum. In addition, BIS management referred us to this same memorandum as the criteria used in the review of license applications. This one-page memorandum issued by the Director of the BIS Office of Exporter Services, dated April 20, 1994, outlines information that should be provided in the LO's analysis, prior to referral to the interagency group. (See Figure 10).

Figure 10. Criteria Used in the Review of Export License Applications

UNITED STATES DEPARTMENT OF COMMERCE
Bureau of Export Administration
Washington, D.C. 20230

APR 20 1994

MEMORANDUM FOR ALL LICENSING OFFICERS

FROM: [redacted]

SUBJECT: Case Analysis

[redacted]

Accordingly, in order to ensure sufficient analysis is evidenced for all applications, effective immediately, Licensing Officers will be required to address each of the following points in every LOA case file:

1. Recommendation.
2. Reiteration of the ECCNs with the subparagraph when necessary, and the applicable reason(s) for control, clearly identifying the items requested, and any General License eligibility, if applicable.
3. Characterization of the end user(s) including type and relationship with applicant, if any (e.g., motel, bank, U.S. subsidiary, etc.).
4. Specify the number of end users, and highlight any data of particular importance, especially the reasonableness of the end-use(s).
5. State whether or not the application of conditions is appropriate, and if so, identify the specific conditions the Department of Commerce would suggest.
6. Brief background statement, highlighting licensing history involving the applicant and/or item, previous working group consultations (e.g., MTEC, Shield, SNEC, OC) issues of interest, and any precedent setting aspects of the proposed transaction.
7. Identify why a particular referral was not made (e.g., in instances where the entry is controlled for more than one reason, but the particular item is not). Agencies must be able to discern why another agency was not consulted.
8. Licensing Officer, telephone, and facsimile numbers.

[redacted]

Source: BIS, Office of Export Administration.

While providing a basic framework for analysis, the 8-point memorandum was written prior to the issuance of Executive Order 12981 on December 5, 1995. In addition, since Export Administration Act discussions were still underway on the date of the memorandum's issuance, it speculates on the final changes to be made in the Act and their subsequent impact on the LO's review of license applications. These are the appropriate areas that LOs should focus on during reviews, but guidance on how to accomplish these objectives is lacking. For instance, the third item tells the LO to "characterize the end user," but it does not say how the LO should acquire the information beyond what was submitted by the applicant (e.g., researching the entity on the Internet) or what types of questions the LO should ask exporters or end users in specific markets. The fifth item tells LOs to identify any special conditions that Commerce suggests should be placed on a license, but it does not indicate the criteria the LO should use in making that decision. Such information would be especially helpful to the referral agencies as they do their own license reviews.

Additional guidance was found, but is not being used

To supplement the 8-point analysis memorandum, CBCD issued specific guidance for LOs as a reference for reviewing export license applications for biological and chemical commodities. CBCD's guidance provides some additional instructions to that in the 1994 memorandum. For example, the guidance states that "university" is not a complete description of an end user unless the LO specifies the school or laboratory within the university. CBCD's guidance also requires that LO notes[35] include supporting documentation for any decision made as a result of contacts with various individuals and organizations. CBCD also created a "Commodity Classification and License Determination Guide" to assist LOs in determining the appropriate ECCN for items controlled for chemical and biological weapon proliferation reasons. In the absence of comprehensive policies and procedures for all LOs, we compliment CBCD for creating useful reference materials for LOs to use during their license application analysis. However, we are not sure if LOs are using this guidance since when we asked them for the criteria used for their review of license applications, LOs did not make reference to it. We knew about the CBCD guidance only because it was discussed in our 1999 report.[36] When we asked for a copy of the CBCD guidelines, one LO stated that it was saved in an old version of word processing software and was not accessible to him.

On March 31, 1999, EA officials implemented new procedures that emphasized the importance of obtaining sufficient information before processing a license application and identified the types of facts and details that must be documented in LO notes. Once again, however, when asked for the criteria used to review license applications, LOs did not refer to this newer guidance. We knew to ask for a copy only because it was mentioned in our 1999 report.

The Licensing Officers Operating Manual has been discontinued and planned electronic library has not been developed

In our 1999 report, we noted that the policy and procedures used by LOs varied. At that point, we noted that the Licensing Officers Operating Manual (LOOM), dated October 1, 1995, had

[35] The electronic data file for license applications includes a section for the LO to include comments and notes of importance for additional consideration by reviewers.
[36] U.S. Department of Commerce Office of Inspector General, *Bureau of Export Administration: Improvements Are Needed to Meet the Export Licensing Requirements of the 21st Century*, IPE-11488, June 18, 1999.

become an assortment of outdated or superceded documents and was not user friendly. We also reported that the contents of individual LOs' operating manuals varied.[37] EA officials said after the LOOM was modified, in 1995, per Executive Order 12981, it was not updated again for almost a year-and-a-half because of resource constraints. Subsequent to our 1999 review, the LOOM was discontinued.

BIS officials also told us in 1999 they would explore the creation of an electronic library to store new policies and procedures. The library was envisioned to include an on-line LO manual and policies and procedures for commodity classifications, license application analysis, license determinations, country-specific policies, referral policies, and record keeping. During this review, we learned from EA staff that the electronic library was only partially developed, and a lack of funding and resources prevented its actual implementation.

Conclusions

According to our interviews with LOs in CBCD, they primarily rely on the April 1994 8-point analysis memorandum to review export license applications. During our review we found that there is other BIS guidance, such as the CBCD specific guidelines, the March 1999 additional guidance, and the criteria for when HWA/RWA can be applied, which LOs clearly are not aware of and/or are not using. Given how difficult it was for us to find the official BIS guidance (beyond the 8-point analysis memorandum) for the review of export license applications, it certainly cannot be easy for busy LOs to find it either. Furthermore, the project that would have centralized such guidance in an electronic library was not completed and the handbook that previously kept all guidance in one place, the LOOM, is outdated and no longer in use.

Given BIS' important regulatory role as the licensing agency for dual-use exports, guidance for the processing of license applications should be better managed. To ensure that all LOs, including new ones, have clear and complete guidance for processing cases, BIS should develop and maintain updated, consolidated, and comprehensive written guidance or an internal operations handbook, to formalize license application review practices. This guidance or handbook should be readily accessible to all employees involved in the licensing process. EA should also develop a long-term plan for maintaining the guidance and/or handbook, including responsibility for ensuring it is kept up-to-date.

[37] The OIG team conducting the 1999 review also had difficulty getting a complete up-to-date LO manual. On November 20, 1998, we were provided a copy of the operating manual from the Director of the Office of Exporter Services, who informed us that it was a complete and updated copy. However, in March 1999, we learned that several key sections of the operating manual, such as case analysis, were missing from our copy. On March 25, 1999, the Office of Exporter Services provided us with the missing sections.

Recommendation

Develop and maintain clear, consolidated, and up-to-date guidance, or an internal operations handbook, to strengthen current license application review practices and help ensure that they are consistently applied.

In responding to our draft report, BIS stated that it agreed with this recommendation.

II. Review of License Applications by the SHIELD Works Reasonably Well, But the Operating Committee Needs to Sustain Recent Improvements in Timeliness

License applications for chemical and biological commodities have the benefit of an additional level of review by the Chemical and Biological Weapons Control Group, an interagency working group also known as SHIELD. At the SHIELD meetings, the member agencies share viewpoints, intelligence information, and clarifications on statutory and regulatory authority to help resolve differences and prevent the need to escalate applications to the OC. SHIELD helps ensure that applications are escalated to the OC only because of true disagreement between the agencies. We found that OC was not timely in its decisions on FY 2003 escalated chemical and biological license applications. Specifically, there were 17 applications escalated in FY 2003, and the average time to reach a decision was 51 days in the OC. Times for the current OC Chair to make a decision on escalated applications reportedly improved in FY 2004. This improvement in the timeliness of OC decisions should be sustained.

A. The SHIELD review process ensures that chemical and biological license applications are appropriately vetted before escalation to the Operating Committee

SHIELD is chaired by a Department of State employee in State's Office of Chemical, Biological, and Missile Nonproliferation. Currently, the group meets weekly and is made up of working-level representatives from State, Commerce (BIS), DOD, CIA, and Energy. Each week, SHIELD reviews chemical and biological license applications that are between 16 and 22 days old[38] to help ensure that U.S. exports do not contribute to chemical and biological weapon programs of concern. Because of the volume of chemical and biological license applications, SHIELD does not discuss all applications at its meetings. However, all applications are available to be discussed should an agency want to. Generally, applications that do not involve concern or disagreement are not put on the SHIELD agenda. Applications that are difficult to decide or that lack consensus among the member agencies are put on the agenda for a more intense review and discussion.

When reviewing chemical and biological license applications, SHIELD (1) attempts to determine the legitimacy of the end user through intelligence reports; (2) reviews the end user's web site and other information to determine the bona fides of the end user; (3) identifies and may review previously approved licenses to the same end user; (4) determines that the item and end use match; (5) evaluates other agency recommendations, and (6) requests either a PLC or PSV, if necessary. The dialogue and information sharing between the agencies usually result in a consensus opinion either to approve (with conditions) or deny an application. Each agency puts its opinion into ECASS, and BIS proceeds to either issue or deny the license application. In cases where agencies have differing recommendations, the application is escalated to the OC.

During FY 2003, SHIELD met once every three weeks and was chaired by a different State employee than the current chair. By meeting every three weeks, SHIELD was not able to review all of the applications—only those that a member agency asked to be put on the agenda were

[38] Between 16 and 22 days since the applications were referred by BIS to the other agencies. The benefit of this timeframe is that by 16 days, agencies have had an opportunity to review the application and determine which applications might need to be reviewed/discussed in depth. Additionally, if an application is 22 days old and requires discussion at a second SHIELD meeting, there is still time to do so before the 30-calendar day requirement for interagency review has been reached.

discussed. Further, because of the 30-day deadline for interagency review and the occasional timing issues in scheduling SHIELD meetings, such as holidays or other conflicts, some applications that might have benefited from the interagency discussion at SHIELD were not reviewed by the working group. As a result, some applications were escalated to the OC unnecessarily because the 30-day time limit had been reached before the case made it to SHIELD. The current OC chair said he saw applications escalated in 2003 that did not involve meaningful interagency disagreement and that could have been resolved through a discussion between agencies or by obtaining additional documentation from the exporter.

The current SHIELD chairman took over in July 2003, but he did not change to weekly meetings until March 2004, after it had become clear that more frequent meetings were necessary for all applications to be appropriately vetted. The OC chair said he has seen an improvement in the types of escalated chemical and biological cases since SHIELD started reviewing all applications. Applications being escalated now center on true disagreement between the agencies and are appropriate for the OC.

B. Recent Operating Committee changes should result in more timely decisions

The OC has representatives from State, Commerce, DOD, and Energy, all of whom are empowered to vote and make decisions of behalf of their respective agencies. The CIA is a non-voting member of the OC and provides necessary intelligence information to the committee. The OC meets once a week the first three weeks of each month. The Advisory Committee on Export Policy (ACEP) meets once during the last week of the month, but only when it has applications that have been escalated to it. Per Executive Order 12981, the OC Chair has 14 calendar days to consider the positions of the agencies and render a decision. Should any agency disagree with the OC Chair's decision, it has 5 calendar days to appeal the decision to the ACEP.[39]

OC was not timely in its decisions on FY 2003 escalated chemical and biological license applications

In FY 2003, 17 chemical and biological export license applications, or approximately 1 percent of the 1,803 license applications submitted, were escalated to the OC for resolution. Many of the escalated applications involved chemicals being exported for use by the Chinese semiconductor industry. There is a concern among some of the agencies that such chemicals are at risk of diversion to chemical and biological weapons programs. The OC Chair speculates that there might be fewer chemical and biological export license applications escalated in the future because of the understanding on end-use visit cooperation between the U.S. Department of Commerce and the Ministry of Commerce of the People's Republic of China. Under the new understanding reached in April 2004, end-use checks should be easier to conduct, and as a result, the U.S. government should get increased insight into where chemicals being exported to China are ending up and what they are being used for. Assuming the end-use checks do not raise further questions about the end users and end use, fewer such applications may need to be escalated in the future.

BIS officials told us the new understanding is working and end-use checks are being conducted without the delays and problems previously encountered. One of the FY 2003 applications

[39] For background information on the escalation process, the OC, and the ACEP, see pages 5-7.

escalated to and approved by the OC Chair, contingent on a favorable PLC, did not result in a license being issued shortly after the OC Chair's decision, as is the usual course of events. Instead, it was pending from August 2003 until December 2004, when a PLC of the end-user in China was finally completed as a direct result of the new understanding. The license was finally issued in December 2004.

All 17 of the escalated applications were ultimately approved by the OC Chair, and none of the agencies chose to appeal the OC Chair's decisions. Thus, the ACEP did not review any chemical and biological export license applications in FY 2003. In assessing the timeliness of the OC's work, we found the OC's 14-calendar day deadline was not met for any of the 17 escalated applications. The average time for the 17 applications was 51 days in the OC, with 5 applications taking more than 100 days to adjudicate. In 3 of these 5 extreme cases, the documentation shows the then OC Chair took no action for an extended period of time. For the other 2 applications, the OC was waiting on a PLC and did not use the HWA option to stop the clock.

The 14-calendar day requirement appears to be quite difficult to meet. An OC decision could be reached in 10 days as long as the OC Chair and the members have all the information needed to make a decision at the first meeting where the application appears on the agenda. But frequently a second meeting is necessary to discuss the application and in FY 2003, the former OC Chair routinely did not ask for agency votes or make decisions until the second meeting that an application was on the OC agenda. Should an application be escalated around the time of the ACEP meeting (the week the OC does not meet), it could be 14 days before it is even put on the OC agenda for discussion. We believe a more realistic standard is 21 days for the OC Chair to render a decision.[40] However, in FY 2003, even using our revised standard, OC decisions were still not close to being timely—51 days versus our more realistic standard of 21.

Changes made by the current OC Chair should improve timeliness

The current OC Chair has implemented some changes to help reach the Executive Order requirement of 14 days. The former OC Chair left the position effective April 1, 2003. The current OC Chair assumed the position on November 1, 2003, after a 7-month period with two successive interim chairs. The changes the current chair has instituted were put in place after the period of our review. Thus, we did not review the data to verify recent reported gains in timeliness.

The current OC Chair's first change was to require agencies to come to the OC meetings ready to discuss in depth and vote on an application the first time it was on the agenda—making it theoretically possible to meet the 14-day requirement for an OC decision. If the members have enough information, they can vote and the OC Chair can make a decision immediately. Previously, applications were not routinely voted on until the second meeting they were on the agenda. The new chair also has declared he will not wait longer than three weeks to obtain documentation needed from an exporter. Should an exporter not submit the documentation by the time the three weeks are up, the chair will RWA the application. According to the current

[40] Making a change from 14 days to 21 for the OC to reach a decision would require a change to the Executive Order. Given the intricacies involved in taking such an action, we do not advocate BIS pursuing a change in the Executive Order for this reason alone.

chair, the former chair was more lenient in waiting for documentation before using the RWA option.

We did not evaluate OC timeliness for escalated chemical and biological applications after FY 2003 (the period of our review), but timeliness has reportedly improved. For example, according to the BIS FY 2004 Annual Report, the average time to reach a decision on all escalated applications in FY 2004 was 22 days. In FY 2003, with 6 months under the former OC Chair and 6 months with interim chairs, this average was reportedly 45 days.[41] BIS should work to sustain this significant improvement in the timeliness of OC decisions through continuing attention to fine tuning the process and implementing improvements such as those put in place by the current OC Chair.

[41] Both averages include all escalated applications, not just chemical and biological applications.

III. Cumulative Effect Reviews Are Not Being Performed for Chemical and Biological Export Licenses

Cumulative effect reviews look at the impact of proposed exports when added to other past exports to countries and entities of concern. Approval of a single export license may not result in a significant increase in strategic capability of a country or entity of concern, but approval of multiple licenses combined with diversion of strategic items from other countries, the provision of unlicensed items, and/or legitimate shipments from foreign suppliers could improve a country's ability to build a weapon of mass destruction. BIS may not have sufficient intelligence data to know all commodities acquired by end users, but it should trace historical patterns and exports of items it controls.

BIS had seven LOs reviewing 1,803 chemical and biological license applications in FY 2003.[42] These LOs never determined the cumulative effect of prior technology transfers made to the end-users listed on those license applications. LOs said their long-term institutional knowledge of goods and technologies exported to end-users must substitute for cumulative effect analyses, because BIS lacks the systems and resources to perform such reviews. Additionally, BIS does not receive cumulative effect assessments from other agencies during the interagency license application review process.

A. Congress and others have emphasized the importance of cumulative effect analyses

In numerous reports and Congressional hearings, members of Congress and others have shown interest in the use of cumulative effect analysis to enhance the export control process.

- In June 1999, Inspectors General from the Departments of Commerce, Defense, Energy, State, and the Treasury, and the CIA, testified that additional cumulative effect analyses would improve the license application process.[43] The Deputy Inspector General for the Department of State said assessment of the cumulative effect issue required resources and coordination from various federal export licensing departments and agencies and congressional direction. To date, no such assessment has been conducted. The Department of Commerce IG recommended in June 1999 that BIS work with the intelligence community, including CIA, Defense, and Energy, to develop a method to analyze and track the cumulative effect of dual-use exports to specific countries and regions. As of March 2005, this mechanism had not been developed.

- In April 2001, a congressionally funded study[44] recommended that the Bush Administration employ a shared information management system for processing license applications that would be responsive to current business cycles and allow analysis of cross-cutting issues and cumulative effects. The study group, chaired by four members of Congress,[45] recommended: (1) increasing appropriations for U.S. intelligence services

[42] There were seven LOs in CBCD FY 2003. Three have since left, but, according to BIS, only one has been replaced to date due to budget constraints. As a result, there are currently only 5 LOs in CBCD.
[43] Hearing Before the Committee on Governmental Affairs, United States Senate, June 23, 1999.
[44] The Henry L. Stimson Center and the Europe Program of the Center for Strategic and International Studies, *Study Group on Enhancing Multilateral Export Controls For U.S. National Security, Final Report,* April 2001.
[45] The Study Group was chaired by four members of Congress: Senator Michael B. Enzi (R-WY), Senator Jeff Bingaman (D-NM), Congressman Christopher Cox (R-CA), and Congressman Howard L. Berman (D-CA).

to enhance monitoring and analysis of technology transfers and (2) enhancing intra-industry cooperation to manage and share information on compliance measures, suspect end-users, and patterns of technology transfer.

- In February 2002, the GAO found that the Executive Branch does not have a sound analytical basis for justifying the current export controls on semiconductor manufacturing equipment to China. Specifically, it said that U.S. agencies had not assessed the foreign availability and cumulative effects on U.S. national security interests of exporting such equipment to China.[46] GAO recommended that the Departments of Commerce, Defense, and State complete this analysis and update policy and develop new controls, if appropriate, for protecting U.S. security interests.

In addition, Congress has been concerned for many years that the interagency licensing community lacks an integrated mechanism to conduct cumulative effect analyses of dual-use and/or munitions technology transfers. Despite a recommendation from the Commerce OIG in 1999[47] and a National Defense Authorization Act for Fiscal Year 2000 requirement that the Secretary of Defense assess the cumulative impact of licenses granted by the U.S. for exports to countries and entities of concern, neither BIS nor any of the other licensing agencies has determined how cumulative effect reviews can be performed in an effective and efficient manner. Until this happens, cumulative effect information cannot be factored into the export license review process for chemical and biological commodities.

B. BIS lacks the systems and resources to perform cumulative effect analyses

The seven LOs in CBCD reviewed the 90 applications in our sample of FY 2003 chemical and biological export license applications, in accordance with BIS' 8-point analysis memorandum (see page 17). The 8-point memorandum, the CBCD LOs' analysis of the bona fides and licensing history of individual end-users and the appropriateness of the end-uses, and input from the intelligence community provide the primary information on likelihood of proper use or diversion. Cumulative effect analysis can supplement this information. The current five LOs[48] told us they do not consider the cumulative effect of prior and proposed exports to individual foreign countries and end users because: (1) BIS' current licensing process does not require LOs to perform cumulative effect reviews, (2) BIS' licensing system cannot input or receive information to perform cumulative effect reviews, and (3) BIS' LOs have not been trained to perform cumulative effect reviews.

BIS licensing process does not require cumulative effect reviews

Current procedures do not require BIS LOs to consider the cumulative effect of prior and proposed exports to individual foreign countries and end users. We found that the five LOs were following the 1994 8-point analysis memorandum. LOs said that the 8-point analysis requirements and the license review process, as a whole, are designed to process many

[46] The General Accounting Office, *Export Controls, Issues to Consider in Authorizing a New Export Administration Act*, February 28, 2002.
[47] U.S. Department of Commerce Office of Inspector General, *Bureau of Export Administration: Improvements Are Needed to Meet the Export Licensing Requirements of the 21st Century*, IPE-11488, June 18, 1999.
[48] BIS lost three LOs in FY 2003, but recently hired a fifth LO to process chemical and biological applications.

applications in a limited time period and not to perform cumulative effect analyses or determine if multiple exports to any one country or countries could result in weapons of mass destruction.

The 8-points do not require LOs to analyze an applicant's entire licensing history. The guidance states that LOs should prepare a "brief background statement, highlighting licensing history involving the applicant, and/or item, previous working group consultations, and any precedent setting aspects of the proposed transaction." LOs typically identify some prior licenses for an applicant, but they primarily consider diversion issues including the bona fides of consignees and end users. They sometimes identify all prior licenses for an exporter, consignee, and/or end user, but only to document how many licenses have been approved. Although BIS expanded its license application guidance in 1999, the new guidance still does not require LOs to perform cumulative effect analyses. LOs include only the previous licensing history of approvals/denials for item(s) and/or consignees as appropriate.

Even if the five LOs wanted to perform cumulative effect analyses, it is unlikely that they would have the time to do so because CBCD receives too many applications to perform such reviews under current circumstances. From FY 2001 to 2004, the number of chemical and biological license applications was 1,357, 1,497, 1,803, and 2,801 respectively. In addition, the division has received an increasing number of commodity classifications[49] from FY 2001 to 2004: 160, 991, 488, and 903 respectively. Because of the application and commodity classifications increases, the division is now sending approximately 20 percent of applications it receives to two other BIS divisions for processing. And, with only five LOs in the division, no meaningful cumulative effect analyses can be done.

BIS licensing system cannot input or receive cumulative effect information

BIS currently uses ECASS, which was developed in 1984, to process applications, but it is not suited for the current era of license processing. Today's licensing systems need advanced query capabilities, expanded text capabilities, modern interfaces, online access to exporter technical specifications, and access to outside commercial databases. ECASS lacks all of these functions. One LO emphasized the need for databases of foreign end-users, such as the international Dun and Bradstreet database. But, ECASS cannot read or download such databases. Thus, LOs must search information and databases off-line.

LOs also complain about ECASS containing multiple codes for some exporters, consignees, and end users, making it difficult to ensure that all prior licensing history is available. Specifically, over the years, BIS has created multiple ECASS codes for some applicants, consignees, and end users. For example, "ABC Corp." may also be coded as "ABC Corporation," forcing LOs to spend precious time searching and analyzing multiple codes and licenses. Unless LOs perform time-consuming analyses of prior licenses, they cannot determine how much of each commodity has been exported to specific consignees and end users.

One LO also said a sophisticated licensing system should include access to the actual shipments of dual-use chemical and biological commodities, as well as shipments of chemical and biological commodities on the U.S. Munitions List and foreign military and third-country sales. Currently, LOs do not have access to such information. For example, export licenses are valid

[49] BIS receives requests from companies to classify commodities, technology, or software included on the CCL.

for two years, but LOs do not know whether items listed on a license have ever actually been shipped. Currently, BIS does not request shipment information from exporters, consignees, and/or end-users unless specifically requested in license conditions.

The U.S. Customs and Border Protection (CBP) collects information on shipments made under munitions licenses issued by the State Department, but it does not do so on dual-use licenses issued by the Commerce Department. To receive such information, CBP would have to continually determine what dual-use commodities have been shipped to foreign countries under Commerce licenses. However, BIS does not require CBP to continually monitor the activity under Commerce licenses. BIS holds exporters responsible for keeping track of controlled shipments and ensuring that license limits are not exceeded during the two-year life of the license. LOs emphasized that if better shipment information and software were available, they could perform trend analyses of technology transfers.

The lack of information on actual shipments is not a new problem. For many years, federal agencies responsible for enforcing U.S. export laws and compiling U.S. trade statistics could not obtain accurate and timely data on exports. In 1999, in an attempt to correct the problem, the U.S. Customs Service, predecessor to CBP, and the Bureau of the Census established the Automated Export System (AES) to allow exporting companies to electronically enter data on shipments and provide information to help detect export violations. In 2002, BIS had discussions with CBP and Census, about providing shipment information to BIS and other interagency personnel. CBP and Census told BIS in 2002 that shipment information could be provided, but that software development and resources from all parties would be required to provide such information. More recently, in 2004, BIS enforcement personnel have obtained access to CBP's Automated Targeting System (ATS), which now allows them the capability to search AES for shipments to specific countries. This is a major improvement for enforcement of license applications, but it could also help LOs in their review of license applications by providing them with information on previous shipments. Therefore, we recommend that BIS assess the feasibility of providing LOs with the information housed in ATS and AES.

BIS LOs are not trained to perform cumulative effect analyses

The LOs in CBCD said even if they had more time per application and a sophisticated licensing system, they would need comprehensive training to perform cumulative effect reviews. They noted that CIA/WINPAC has a training school that teaches comprehensive license application review techniques. The LOs told us that they would benefit from such training. CIA/WINPAC officials agree that BIS LOs could benefit from selected training such as trend analyses, but they said BIS would need to obtain top-secret clearances for its five LOs to attend CIA training. A BIS official said that under current fiscal restraints, such clearances would be prohibitively costly.

Recommendation

Assess the feasibility of providing LOs with the information housed in the Automated Targeting System and Automated Export System for use in their review of license applications.

In the Acting Under Secretary's March 30, 2005, response to our draft report, the bureau stated that it agreed with this recommendation. BIS also said that, to date, the bureau has not been appropriated funds by Congress to conduct cumulative effect analyses.

C. Licensing referral agencies are not performing cumulative effect analyses

During congressional testimony on June 23, 1999, both the Chairman and Ranking Minority Member of the Senate Committee on Governmental Affairs expressed grave concern that the licensing community does not consider the cumulative effect of all technology transfers and identify a country or purchaser seeking components for a weapon of mass destruction, though each commodity might be benign by itself.[50] However, BIS and CIA have emphasized that such analyses are not currently feasible because all the available data sources cannot be quickly consolidated or are not available when processing chemical and biological export license applications. Although one licensing agency performs limited cumulative effect analyses of some chemical and biological license applications, the federal government lacks an integrated capability to analyze all license applications and exports to different countries.

Licensing agencies perform limited cumulative effect analyses

Probably the agency considered most likely to perform cumulative effect analyses is CIA/WINPAC, which is charged with collecting and analyzing intelligence information. However, in practice, CIA simply screens all chemical and biological export license applications and only provides intelligence on those applications that might have some proliferation concerns. CIA officials told us that their role is to provide intelligence and not to perform cumulative effect analyses.

The Department of Energy does perform some limited cumulative effect analyses. Energy's seven laboratories conduct limited cumulative effect assessments for nuclear dual-use exports, but there is no coordinated effort to conduct such assessments for all commodities. The Department of Defense has a congressionally mandated requirement to perform annual assessments of the total effect of transfers of goods, munitions, services, and technology on U.S. security, but it has yet to perform such reviews.[51] Notwithstanding the lack of comprehensive cumulative effect analyses, both BIS and CIA officials stated that all chemical and biological license applications are thoroughly reviewed, including the bona fides of all end users, and that current intelligence is brought to bear on all applications.

[50] Hearing Before the Committee on Governmental Affairs, United States Senate, *The Inspectors General Report on the Export-Control Process for Dual-Use and Munitions List Commodities*, June 23, 1999.
[51] National Defense Authorization Act for Fiscal Year 2000, section 1402.

A major factor hindering cumulative effect analyses by the licensing agencies is outdated automated systems. In a March 2002 report, the interagency OIG team found that the dual-use export licensing process involves multiple automated systems owned and operated by different federal licensing agencies.[52] Many of those systems are ineffective for the present era of export license processing because they have varying security standards and rely on cumbersome manual and paper-based processes. There is no comprehensive database of export information to help federal agencies assess the cumulative effect of multiple exports. Thus, we must reiterate our recommendation, first offered in our 1999 report, that BIS work with the intelligence community, including CIA, Defense, State, and Energy, to develop a method to analyze and track the cumulative effect of dual-use exports to specific countries and regions of concern.

Recommendation

Work with the intelligence community to develop a method to analyze and track the cumulative effect of dual-use exports to countries and entities of concern.

BIS, in its response to our draft report, agreed with this recommendation. The bureau also stated that chemical and biological license applications are thoroughly reviewed, including the bona fides of all end users, and that current intelligence is brought to bear on all applications, notwithstanding the lack of comprehensive cumulative effect analyses.

[52] *Interagency Review of Federal Automated Export Licensing Systems*, prepared by the Offices of Inspector General of the Departments of Commerce, Defense, Energy, State, and Treasury, March 29, 2002.

IV. Recent Improvements in the Timeliness of Changes to the Commerce Control List Need to Be Maintained

The Australia Group annually recommends new chemical and biological items for control, but it takes months for BIS and the other U.S. licensing agencies to place newly regulated items on the CCL. As a member of multilateral organizations, the U.S. is obligated to implement decisions in a reasonable time period. However, BIS and the other licensing agencies cannot disclose newly regulated items to U.S. companies or prevent them from being exported until the new regulations are issued.

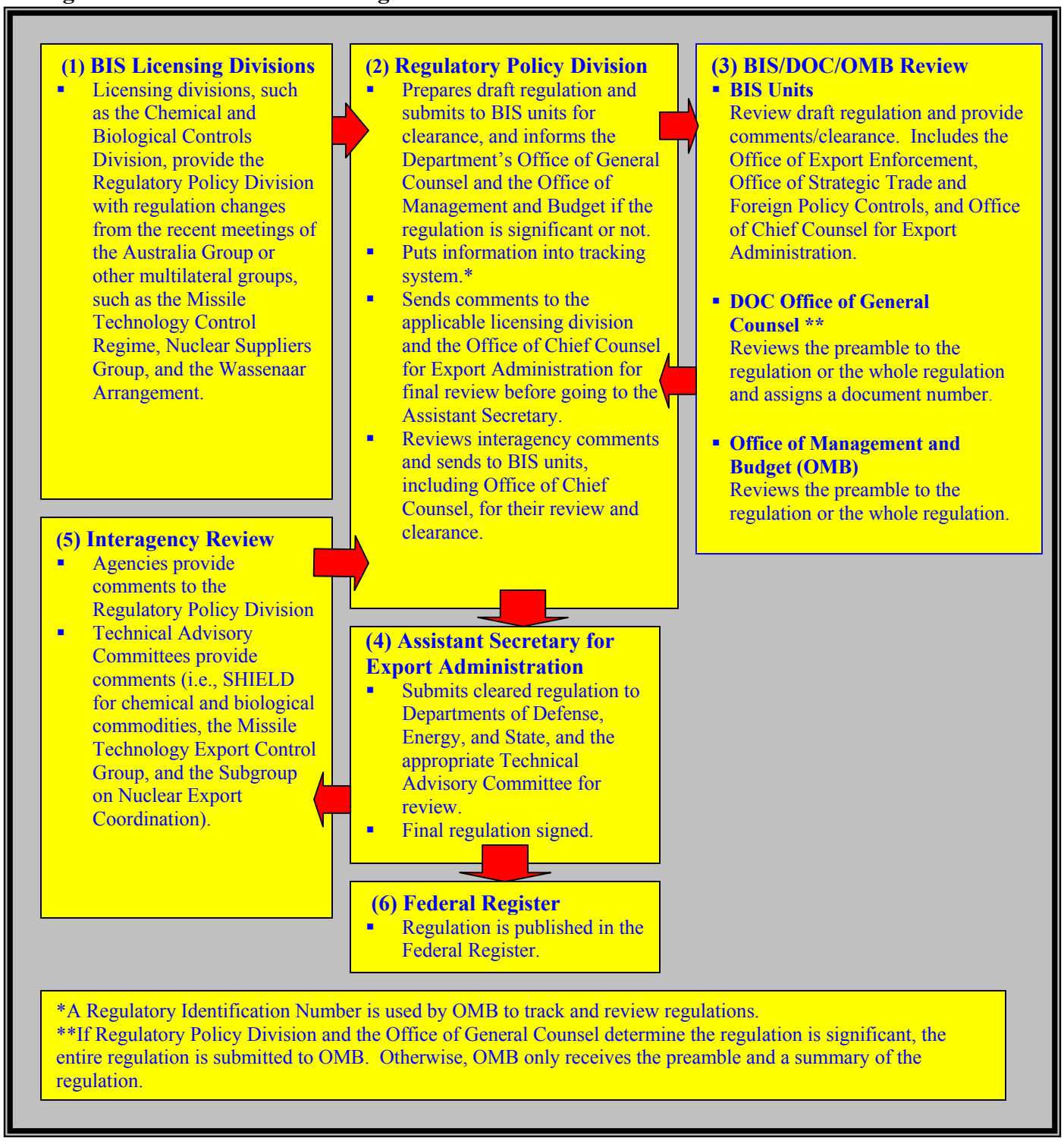
In March 2001, we recommended that BIS review its clearance process and work with the other licensing agencies to publish new regulations faster.[53] The Under Secretary for Export Administration agreed with our recommendation. BIS completed an evaluation of its regulatory review process in late 2001, creating an internal database to track regulations still under review. BIS now sends a follow-up memorandum to a licensing agency if its response regarding regulations referred for interagency review is overdue. BIS officials believed the 2001 changes would expedite the review of regulations, including those implementing the AG changes. Although these changes did not impact the amount of time taken to publish the 2002 and 2003 changes, in 2004 the changes took only 6 months to publish. Specifically, prior to 2004, U.S. agencies averaged 11 months to get items newly regulated by the AG published in the CCL. However, changes from the AG's June 2004 meeting only took six months to get published in the CCL, bringing the average down to 10 months.[54] In the future, BIS should build on its 2004 performance and continue to publish the AG changes more quickly.

A. Updating the CCL with chemical and biological items is too time consuming

Each year after the annual meeting of the AG, U.S. licensing agencies meet to decide how to implement any new control changes. For example, if a new control is added to the AG list, the U.S. must decide whether it wants to control the item as a dual-use or munitions item. The Department of Commerce is responsible for making changes on the CCL for dual-use items, and the Department of State is responsible for making changes on the U.S. Munitions List (USML) for munitions items. Figure 11 on the next page documents the process used by BIS to implement control regulation changes to the CCL.

[53] U.S. Department of Commerce Office of Inspector General, *Management of the Commerce Control List and Related Processes Should be Improved*, IPE-13744, March 23, 2001.
[54] The AG held its annual meeting from June 7-10, 2004, and the new regulations were published on December 29, 2004.

Figure 11: BIS Process for Changes to the Commerce Control List



Source: OIG, based on information from BIS' Regulatory Policy Division

There is no deadline to publish annual AG changes other than the timeframe listed by BIS' Regulatory Policy Division, which allows 3 months to issue draft regulations to the interagency licensing groups after AG changes are received. However, the publication of new AG regulations has averaged just over 10 months for the last seven years. On three occasions in the

last 7 years, the U.S. Government failed to publish new AG regulations before the next annual AG meeting (1999, 2000, and 2003).

Publication of new AG regulations takes time because of the regulatory process and the need for interagency review

BIS officials cited several reasons for the time it takes to publish new AG regulations. First, time may elapse between the end of the AG plenary and the official posting of the control list changes. This will delay the beginning of the process for formal interagency clearance of the implementing regulation. Second, according to BIS, the U.S. regulatory process is more comprehensive than that of other members. U.S. regulatory requirements to make changes to the CCL, such as the need to publish Federal Register notices, are simply much more complicated and time consuming than those of other countries.

The U.S. interagency process requires that multiple parties must approve changes before they can be published. All the licensing agencies participate in the AG annual sessions, so they are aware of control changes agreed to by the U.S. before BIS provides them with the draft regulations to review. But, BIS officials said the current process is time consuming because other agencies (State and Defense) are allowed to review and comment on the changes. The need for these agencies to be involved increases the amount of time it takes to get changes published. Finally, all comments and changes from the licensing agencies, OMB, or other BIS offices need to be incorporated by the Regulatory Policy Division and again reviewed by CBCD and the Office of Chief Counsel before the changes can be published.

B. Delays in publishing Australia Group guidelines could cause problems

Delays in publishing the latest AG guidelines could cause problems for the U.S. government. In an October 2002 report, GAO recommended agreed-upon changes to control lists should be adopted by all AG members at the same time. If not, proliferators could exploit time lags to obtain sensitive technologies by focusing on AG members slowest to incorporate the changes.[55] While agreement on timing for implementation among AG members would be ideal, it is unlikely due to members' national discretion in undertaking AG commitments.

Until an item is listed on the CCL, BIS cannot reveal to exporters that it may soon be controlled. The information contained in the reporting cable prepared after AG meetings is classified, so the very mention to an exporter that an item is soon to be controlled could be perceived as improperly revealing classified information. Changes are not considered public information until they are listed on the AG web site.

Even then, BIS has little ability to stop items from being exported until they are added to the CCL. In most cases, the newly regulated items do not require a license and can be shipped at will until they are listed on the CCL. For example, in 2003, AG members agreed to add 12 new viruses to the list of AG-controlled human and zoonotic pathogens described in ECCN 1C351. BIS did not add them to the CCL until 9 ½ months later, during which time U.S. exporters could have legally shipped these items without a license. Because exporters were not required to have

[55] The United States General Accounting Office, *Nonproliferation: Strategy Needed to Strengthen Multilateral Export Control Regimes,* GAO-03-43, October 2002.

an export license to ship the items, BIS has no way of knowing whether any shipments were made.

BIS does sometimes attempt to legally stall the export of items in the "lag time" between being newly controlled by the AG and inclusion on the CCL. For example, BIS received an application in FY 2003 for a biological item that the AG had marked for control but was not yet listed on the CCL. The exporter submitted an application on February 6, 2003, and the item was not listed on the CCL until June 10, 2003. If BIS had not received the application, the item would have been shipped because a license was not required.[56] But, because the exporter applied for a license, BIS was able to assess the end-user and it found negative information. Because of the derogatory information on the end-user, BIS placed the application on HWA pending publication of the new AG rules in June 2003 in order to obtain and issue a regime-based denial so that the AG no undercut obligations would be implemented on a multilateral basis. Denials based on unilateral controls do not invoke such obligations. The reviewing agencies ultimately rejected the application after the new regulations were published. Such lucky occurrences are rare, though, and BIS officials are concerned about items that have been exported pending the publication of new regulations.

Catch-all controls may prevent unlisted chemical and biological items from being exported

As stated above, the "lag time" between when the AG newly controls items and when those same items are actually published on the CCL can be lengthy. One mechanism to potentially mitigate this problem is "catch-all" controls. In December 1990, the U.S. government announced the Enhanced Proliferation Control Initiative (EPCI) to implement catch-all controls to prevent common use items, such as test equipment, decontrolled machine tools, certain steels, and electronic parts from being exported to foreign countries that want to acquire the capability to develop, produce, stockpile, deliver, or use nuclear, missile, chemical, or biological weapons.[57]

The EAR requires exporters to obtain an export license for all items, even those not on the CCL, when the exporter "knows" or "is informed" that the goods and technology will be used in connection with WMD activities. To help exporters with the first criterion—knowledge that an item is being sought for proliferation reasons—BIS established guidelines to help exporters "know" or "have reason to know" whether an item will be used directly or indirectly in a nuclear, missile, chemical, or biological weapons program and whether "catch-all" controls are applicable. Specifically, BIS' "Know Your Customer" and "Red Flags" guidelines[58] provide tips to help exporters scrutinize the parties and proposed end use listed on an application. This may include looking for signs that the consignee may not be legitimate, such as an order placed for a high performance computer going to a small bakery.

For the second criterion, the EAR requires an exporter to obtain a license if the exporter "is informed" by the Department of Commerce that there is a serious risk of diversion. The Department informs exporters through letters in response to exporter requests for information about the end-use or end-user associated with a proposed transaction. The Department also

[56] According to BIS officials, exporters often file applications for items that are not controlled "just to be safe."
[57] Statement by White House Press Secretary Fitzwater on the President's Export Control Initiatives, December 13, 1990. EPCI continued controls set up by Executive Order 12735, *Chemical and Biological Weapons Proliferation*, November 16, 1990.
[58] Export Administration Regulations, Part 732, Supplement No. 3.

informs exporters through a list of entities and items considered to be at serious risk for diversion. The Department publishes the names, items, and restrictions placed on entities in the Federal Register and the EAR. The Department requires exporters to assess the nature and activities of their potential customers, and they are advised to contact the Department if they have any concern with the identity or activities of end-users.

GAO and BIS are concerned that the catch-all controls are not consistently implemented and not easily enforced. GAO found in 2002 that countries implement catch-all controls differently, possibly impacting the controls' effectiveness in stopping proliferation.[59] Specifically, GAO stated that some countries must show that an exporter had absolute knowledge that an export would support proliferation activities before they can require a license or prosecute a violation of law. As a result, some exporters may have had a reason to know about certain end uses or end users, but not absolute knowledge, and exported goods without a license that might have been used in connection with WMD activities. However, the U.S. needs to show only that an exporter knew or suspected that an export would support proliferation activities to require a license or to prosecute a violation of law. As for BIS, it stated in a 2001 report that different countries' standards complicate detecting, investigating, and prosecuting cases under the "knowing" standard set by the EPCI catch-all provision.[60]

Conclusions

During our review, BIS personnel were adamant that the bureau had made all feasible changes to the process of publishing new AG regulations and that the time could not be further reduced. The average time to publish new AG regulations has been 10 months for the last 7 years, but BIS managed to publish the latest round of changes in 2004 in only 6 months, which demonstrates that the time can be reduced.[61] We hope such a change is not an anomaly and can be replicated. BIS told us it only took 6 months because it needed to quickly restore certain notes covering license requirements that had been inadvertently removed by a BIS rule on July 30, 2004.[62] The urgent need to get these notes restored apparently motivated both BIS and the other agencies to move much more quickly than they usually do.

BIS says publishing changes from the April 2005 AG meeting in the CCL will depend on (1) how quickly BIS receives official notice of the changes, (2) the complexity of the changes, (3) whether there is an effort to add unrelated revisions to the rule, and (4) how quickly Commerce, Defense, and State resolve any comments on the rule.

[59] The United States General Accounting Office, *Nonproliferation: Strategy Needed to Strengthen Multilateral Export Control Regimes,* October 2002, page 19-20.
[60] U.S. Department of Commerce, *Foreign Policy Report*, 2001.
[61] For the six years prior to the June 2004 annual AG meeting, the U.S. licensing agencies had taken an average of 11 months to publish the new AG regulations in the Federal Register.
[62] BIS wanted to quickly restore these notes in the Federal Register because they contained critical guidance concerning the license requirements for ECCNs 1C355, 1C395, and 1C995. Only one of these ECCNs (1C395) is for chemical or biological commodities.

Recommendation

Take appropriate actions to sustain recent improvements in the timeliness of U.S. publication of Australia Group guidelines and rule changes that impact the Commerce Control List.

The bureau's response to our draft report stated agreement with this recommendation. Further, BIS stated that its FY 2005 Regulations Calendar has the AG changes (resulting from the April 2005 AG plenary) scheduled to be sent for interagency review one month after official notification of the regime list changes. BIS notes that the regulation will need to be cleared by State and Defense and, prior to publication, OMB must approve the regulation.

V. Denial Notification to the Australia Group Needs to Be More Transparent

One of the obligations of AG membership is the submittal of license denials to the group so that potential proliferators cannot "shop around" from one country to another for items. AG members have also adopted a "no undercut" policy in which members agree not to approve an identical sale without first consulting with the member that first issued the license denial.

Since August 2002, Commerce and the State Department have disagreed about the U.S. policy and practices for submitting denials to the AG. State, as the lead representative to the AG, is responsible for submitting the U.S.'s denials to the AG. BIS believes three changes would be useful to make the denial notification process more effective and transparent. First, BIS would like all denials sent to the AG to ensure that the no undercut policy is always triggered. The Department of State now subjectively determines which denials are submitted. Second, BIS believes that State should send denials to the AG at the time that BIS issues its "intent to deny" letter to applicants, rather than after the mandatory 45-day period during which BIS will consider any additional information provided by the exporter to rebut BIS' decision to deny the application.[63] Finally, BIS believes that State should not unilaterally rescind prior denials to the AG. Unfortunately, the AG's policy on the reporting of denials is not explicit, so State and Commerce have different views on how it should be implemented. The process of submitting U.S. export license denials to the AG should be more transparent and written policies and procedures are needed for the process.

BIS wants all denials sent to the Australia Group

When one of the 39 AG members denies a license for an AG-controlled item, the other 38 members have agreed not to approve essentially identical applications without consulting the member that issued the original denial. The AG's "no undercut" policy, which includes the reporting of denials, helps identify end users who shop from country to country for chemical and biological commodities. The "no undercut" policy was established in 1993 to promote compliance with regime commitments, provide members with information on questionable license applications, and help better monitor export trends.

The policy depends on the cooperation of AG members to be effective.[64] However, the AG Handbook implies, but does not specifically state, that members should submit all denials in a timely manner, which allows members to interpret the policy as they wish. The AG Handbook does provide specific criteria and a format for denials, but adopting the policy is a matter of national choice by each AG member.

As the lead U.S. representative to the AG, the State Department is responsible for submitting license denials to the AG. Yet, State does not currently submit all denials to the AG. Instead, it examines each denial on a case-by-case basis and determines whether to send the denial to the AG. For example, State only submits denials that involve exports to non-AG countries. State's

[63] According to 15 CFR 750.6, an applicant has 20 days after the date of the intent to deny letter to rebut BIS' decision and provide additional information showing why the application should be approved. Unless BIS advises the applicant that the bureau has reversed its opinion, the denial becomes final 45 days after the date of the intent to deny letter. The applicant then has 45 days from the date of the final denial to appeal the decision, as outlined in Part 756 of the EAR.

[64] AG members are not legally bound to comply with AG policies.

rationale for this "policy" is not documented in any way. Since August 2002, Commerce and State have disagreed about the U.S. policy for submitting denials to the AG. This disagreement over the interpretation of AG policy has prevented development of a consistent and transparent U.S. process for ensuring American compliance with the AG's nonproliferation goals.

BIS acknowledges that the AG Handbook does not specifically state that all denials should be sent to the AG, but it also does not state that some denials can be kept from the AG, depending on a member country's preference. We agree that the AG Handbook is somewhat ambiguous. BIS' position is all denials, including denials to companies in AG member countries, should be submitted to the AG. Specifically, AG member countries should be alerted to end users in their countries who shop from country to country for chemical and biological commodities. Thus, while BIS does not challenge State's authority to make such decisions, it disagrees with State's application of that authority.

To better understand State's position on the denial notification process, we spoke to officials in State's Office of Chemical, Biological, and Missile Nonproliferation. They said the process is better than it was in 2002, when State was criticized by GAO for not providing any denials to the AG between 1996 and 2001.[65] State officials center their position around their belief that AG policy language allows member countries to submit denials at their discretion, including whether to submit (1) all denials, (2) denials for companies in AG member countries, and (3) denials while end users are under review. State stated that it did not send 10 of the 23 denials for chemical and biological commodities in FY 2003 to the AG for these reasons.

On the other hand, BIS told us that State should have sent 6 of the 10 denials it did not send in FY 2003 to the AG and 1 to the Missile Technology Control Regime, another international export control consortium devoted to stemming the proliferation of delivery systems for nuclear, chemical, and biological weapons. BIS officials agree that State did not need to send the other three denials to the AG, because two were to end users already under investigation by BIS[66] and the third was an application returned to the applicant. Figure 12 shows the specific details for the 6 denials Commerce believes State should have sent to the AG.

Figure 12: 6 Additional Denials That BIS Believes Should Have Been Sent to the AG in FY 2003

1. Three Cases—State unilaterally and incorrectly (according to BIS) classified three cases as non-chemical and/or biological proliferation related denials and did not send the denials.
2. Two Cases—Two cases involved companies (end users) in AG member countries, which State told us they do not send to the AG.[67] BIS officials disagree with this policy.
3. One Case— In the final case, State declined to send the denial based on high-level intelligence. BIS officials contend the denial still should have been sent to the AG.

Source: OIG and BIS

[65] General Accounting Office, *Nonproliferation: Strategy Needed to Strengthen Multilateral Export Control Regimes,* October 2002 (GAO-03-43). GAO was recently renamed the Government Accountability Office.
[66] The licensing agencies decided to not send multiple notifications for the same denied end user.
[67] State believes it is AG policy not to send to the AG any denials involving companies in AG member countries. We could find no support for State's assertion.

BIS wants all denials sent to the Australia Group at the time applicants are informed

BIS also believes that State should send denials to the AG at the time BIS issues an intent to deny and not after the expiration of the 45-day period during which BIS will consider any additional information provided by the exporter to rebut BIS' decision to deny the application. Currently, State sends denials after the 45 days has elapsed. In August 2002, Commerce's Assistant Secretary for Export Administration wrote to his counterpart at State asserting that license application denials should be provided to three[68] of the four multilateral organizations when Commerce issues its intent to deny letter to an applicant.[69]

The Assistant Secretary's letter stated that the AG's no undercut policy is negated if AG member countries are not aware of U.S. denials shortly after the denial decision has been made, and U.S. business interests suffer if end users approach foreign competitors to purchase commodities that the U.S. declined to license for export. Commerce's position is that companies in all member countries should compete for international sales on a fair and equal basis. Furthermore, if the U.S. had serious concerns about proliferation and decided to deny a license, other AG members should know about the U.S.'s denial before they are approached by the same foreign buyer. If the U.S. waits 45 days to notify AG members, it may be too late to prevent a sale from another source.

In September 2002, State's Acting Assistant Secretary for Nonproliferation responded to Commerce's August 2002 letter and outlined a three-step process to improve U.S. implementation of the AG's no undercut policy. Figure 13 describes the three steps proposed by State.

Figure 13: Department of State's Proposed Steps to Improve the No Undercut Policy

1. If exporters relinquish their appeal rights—As part of the Intent to Deny process, exporters could relinquish their appeal rights to denials so that the international organizations are promptly notified, companies in member countries compete equally for international sales, and the negative consequences of denials overturned on appeal are avoided.
2. If exporters do not relinquish their appeal rights—State would promptly issue a "denial based on inquiry" notification to export control organizations and follow-up with a full denial when the denial goes final. (State officials said "denials based on inquiry" are not subject to the no undercut policy, but the prompt issuance of such tentative export license denials would allow member countries to get information sooner. They believe few member countries would permit an essentially identical transfer, even though they are not compelled to deny it "based on inquiry.")
3. Reserve the right to issue intent to deny letters—State would submit license application denials to member countries at the intent to deny stage in cases with compelling reasons or those cases not addressed by steps 1 and 2.

Source: Department of State letter to BIS, September 23, 2002.

As of March 2005, neither State nor Commerce had implemented State's proposed procedure. BIS officials rejected Step 1 because they believe the appeal process cannot be legally waived, but BIS officials never formally communicated this to the State Department. More than two

[68] The Australia Group, the Missile Technology Control Regime, and the Nuclear Suppliers Group have a no undercut policy while the Wassenaar Arrangement does not.
[69] GAO recommended in its October 2002 report that the Secretary of State report U.S. denials of all export licenses when the exporter is issued the intent to deny letter.

years have passed with no resolution of this interagency impasse. Commerce and State need to immediately reopen discussion on this policy and reach agreement on when denials and notices of "denial based on inquiry" or appeal will be sent to the AG.

BIS wants State to not unilaterally rescind prior denial notices to the AG

BIS officials assert it is also inappropriate for State to unilaterally reverse a license denial decision, without first obtaining the concurrence of the agencies involved in the application review process. BIS officials say that State essentially rescinded a prior denial in 2004 without Commerce clearance. A U.S. company had applied for a license to export to a company in a non-AG country, but was denied the license.[70] State followed AG policy and notified the AG Chair of the denial. But, in accordance with the no undercut policy, an AG member country contacted the U.S. (State) to discuss the denial and ask for information on the company in the non-AG country. This AG member country reportedly wanted to abide by the no undercut policy, because one of its companies had applied for a license for the same goods to the same company in the same non-AG country.

After being asked for its opinion on the company in the non-AG country, State decided that the company in the non-AG country did not pose any proliferation concerns. Despite the fact that licensing agencies, including State,[71] had denied a U.S. export license for goods being sent to this company, BIS told us that the company in the AG member country would be allowed to export goods to the company in the non-AG country because of State's unilateral decision not to object. Because of State's reversal, BIS personnel contacted the U.S. company that had originally been denied the license and suggested that the company could reapply, if interested.

We asked both BIS and State for any written procedures for rescinding prior denial notices to the AG. Neither agency was able to provide any documentation. State officials said that the agency controls the rescinding of prior denials to the AG for "foreign policy" reasons. Neither the AG guidelines nor the EAR addresses the issue of rescinding prior denials to the AG. We note further that State would have the opportunity to approve or vote to deny an export for foreign policy reasons during the regular interagency license approval process. In addition, BIS and State disagreed on whether this AG denial notification process is linked to the formal escalation process for export licenses, as outlined in Executive Order 12981. While State believes that CBCD can escalate any State decision to rescind a prior denial to upper BIS management for discussion with their counterparts at State, CBCD believes escalation is difficult without a documented process.

With regard to the case discussed above, State personnel said that the decision was discussed with BIS, DOD, and Energy. However, because there was a quick turnaround placed on the inquiry from the other country, State moved quickly to reply. Thus, while BIS was informed both verbally and in writing of State's decision, there was reportedly little time to debate the decision. State said that BIS did verbally disagree with State's decision to rescind the denial notification, but that it received nothing in writing from BIS before or after it released its formal reply on this case. State remarked that CBCD also did not escalate the issue to upper BIS

[70] The license was not denied simply because the company was located in a non-AG country, but because there were concerns about the company listed as the end-user.
[71] State had denied the license "due to risk of diversion to end-users/programs of concern."

management. To avoid similar disagreements in the future, BIS and State and the other referral agencies should jointly develop written procedures on the handling of such notices.

Recommendation

Work with the State Department, and the other licensing referral agencies, to develop and implement written procedures for handling the AG denial notification process. The procedures should cover, at a minimum:

- the U.S. policy on submitting denials to the AG,
- when U.S. denial notifications will be sent to the AG—either when the intent to deny letter is sent or after the 45-day rebuttal period has lapsed, and
- how U.S. decisions to rescind prior denial notifications to the AG will be made. This should specify how State will exercise its representation authority and how the other licensing agencies will be involved in the decision making process.

BIS, in responding to our draft report, stated that it agreed with this recommendation.

VI. BIS Outreach Efforts Are Mainly Targeted to the Biological Exporting Community and Could Be Expanded

A critical component of BIS' mission is outreach to the exporting community to build awareness and compliance with the EAR. BIS holds an annual Update Conference on Export Controls and Policy each October to educate exporters about new policy initiatives and to provide information on export controls through small group sessions that focus on a wide array of topics. The Update Conference is complemented by numerous BIS export control seminars held around the country throughout the year. Often it is necessary to target outreach to specific business and technology sectors. We found BIS has expanded its efforts to reach the biological exporting community, but it has not been as successful in reaching the chemical exporting community. In addition, BIS has an opportunity to reach out to the 318 entities registered with the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) and the U.S. Department of Health and Human Services' Centers for Disease Control and Prevention (CDC). These entities work with select agents and toxins that pose a severe threat to livestock, plants, and/or public health, many of which are also listed on the CCL.

A. BIS outreach efforts to the chemical community need to be expanded

In recent years, CBCD has concentrated its outreach on the biological exporting community. Since 2002, staff members in CBCD have given presentations at the annual meetings of the American Biological Safety Association, the Biotechnology Industry Organization, the American Society for Microbiology, the Federal Laboratory Consortium for Technology Transfer, and the Animal Health Institute—Biologics Section. In May 2004, CBCD hosted an in-house presentation for biological exporters covering nonproliferation controls on biological commodities. Outreach to the chemical exporting community has been in conjunction with outreach to the biological exporting community, such as a presentation at the Licensing Executives Society Meeting in December 2003 and an in-house seminar for other federal agencies covering nonproliferation controls on biological and chemical items in April 2003. We should note that after the September 11, 2001, terrorist attacks, agents from OEE were instructed to visit all chemical manufacturers within their respective regions to inform them of their responsibility to comply with the EAR. However, this type of outreach has not been duplicated since.

The director of the Office of Nonproliferation and Treaty Compliance said there is a reason for the disparity between outreach done to the biological exporting community and outreach done to the chemical community. The biological exporting community usually exports small, financially insignificant amounts that are not typically viewed by the exporters as commercial transactions and not regarded as subject to export controls. But according to this BIS official, chemical exporters tend to be large companies with significant experience in exporting. These firms usually have offices or staff that regularly handle export control and compliance matters because the industry is so heavily regulated. The director feels that scarce resources for outreach efforts need to be directed where the greatest need lies, which he believes is in the biological community. Another licensing official also emphasized that BIS gives extra attention to the biological community because of greater proliferation concerns involving biological commodities, which can be readily reproduced and diverted.

CBCD staff mentioned scarce resources several times as the reason why outreach to the chemical community is limited. For example, one of the LOs in CBCD was invited to speak about export controls at the American Chemical Society's annual meeting in 2004, but he could not attend because BIS did not make funding available for him to attend. The director of the Office of Nonproliferation and Treaty Compliance told us that even if sufficient budgetary resources were available to pay for travel expenses to do outreach, right now he cannot send CBCD staff out of the office for outreach activities because export license applications will sit unprocessed for the period of time that they are gone. As it is, 20 percent of incoming chemical and biological license applications are being reviewed and processed by other divisions because of staffing shortages in CBCD.[72]

According to BIS' director of administration, the agency has $68.779 million to spend on its programs in FY 2005. This was a small decrease of $240,000 from FY 2004, when available funding was $69.019 million. Funding in FY 2003 was $72.189 million, so BIS's budget was reduced by $3.170 million between FY 2003 and FY 2004. While BIS has experienced a series of declining budgets, BIS management has not arranged the budgetary resources it does have to fund more outreach to the chemical exporting community. While outreach to the biological exporting community is probably a higher priority, outreach done with the chemical community in recent years has been limited, except for OEE's outreach after the September 11th terrorist attacks and outreach done by the Treaty Compliance Division on the Chemical Weapons Convention. Lower cost options to extend BIS' outreach to the chemical community are possible.

Recommendation

Explore ways to do more outreach to the chemical exporting community, including lower cost outreach alternatives, such as setting up briefings in Washington, mailings, or piggybacking on outreach done in connection with CWC compliance activities conducted by BIS' Treaty Compliance Division.

BIS, in its response to our draft report, agreed with this recommendation. Specifically, BIS said it will explore ways to increase outreach to the chemical exporting community consistent with available resources and chemical licensing and policy matters requiring attention. BIS also stated that it has an extensive general outreach program in which the chemical industry can participate.

B. There is an opportunity for focused outreach to registered entities

APHIS and the CDC jointly maintain a list of select agents and toxins that pose a severe threat to livestock, plants, and/or public health.[73] Currently, all but 25 of the items on the Select Agent List are also controlled under the EAR and are on the CCL. In October 2004, staff in CBCD, based on discussions with CDC and APHIS officials, decided to draft an AG proposal to put the remaining 25 items from the Select Agent List on the AG control list and then the CCL.

[72] In FY 2004, CBCD lost 3 LOs. One was replaced in October 2004, however there are still two vacancies.
[73] See http://www.aphis.usda.gov/programs/ag_selectagent/ag_bioterr_toxinslist.html for the Select Agent List.

CBCD staff shared this proposal with the Materials Technical Advisory Committee at its February 2005 meeting. After interagency review and concurrence, State submitted this proposal for consideration at the April 2005 AG plenary. If this proposal is made to the AG, but not adopted, BIS will evaluate whether to unilaterally place these 25 items on the CCL.

Note that even without the 25 items on the CCL, there still is a high level of overlap between the Select Agent List and the CCL. APHIS and CDC are responsible for tracking U.S. entities that deal in the agents and toxins on the Select Agent List. The Public Health Security and Bioterrorism Preparedness Response Act of 2002, P.L. 107-188, which was signed into law by the President on June 12, 2002, requires that entities, such as private, state, and federal research laboratories, universities, and vaccine companies, that possess, use, or transfer agents or toxins on the Select Agent List register with the appropriate federal agency (APHIS for livestock and plant pathogens or toxins and CDC for agents or toxins deemed a severe threat to public health). Currently, 318 entities are registered with APHIS and/or CDC. The registered entities fall in the following general categories:

Figure 14. Registered Entities

31%	State and Local Government
30%	Academia
17%	Federal Government
11%	Commercial (For Profit)
10%	Private (Non Profit)
1%	Other

Source: HHS OIG, January 2005

Discussions with officials at APHIS, as well as work done by the OIGs at the U.S. Department of Agriculture and U.S. Department of Health and Human Services, reveal that APHIS and CDC may not be adequately educating the registered entities about the need to obtain export licenses for select agents subject to the CCL and shipped outside the United States. The OIG at Agriculture found two instances of a registered entity shipping a CCL-controlled item to Hong Kong without an export license. They also found that APHIS does not tell its registered entities about export license requirements unless specifically asked. In such cases, APHIS does refer the entities to BIS. The OIG at Health and Human Services did not do an in-depth inspection of registered entities, but it did note that guidance provided by CDC to the entities lacks information about exporting requirements and how to obtain an export license from BIS.

Given both the overlap between the Select Agent List and the CCL, and the "ready made" list of users of select agents and toxins in the hands of APHIS and CDC, this appears to be an excellent group for BIS to reach and educate with minimal effort. BIS should work with APHIS and the CDC to obtain a list of their registered entities and develop a way to inform each entity of (1) the need to comply with the EAR, (2) how to apply for an export license, and (3) contact information for BIS staff should the letter recipients have questions about export licensing requirements.

Recommendations

Pursue multilateral controls on the 25 items now on the HHS/APHIS Select Agent List that are not currently controlled for export. If agreement cannot be reached multilaterally, evaluate putting the 25 items on the CCL unilaterally.

Inform APHIS and CDC registered entities in writing of the need to comply with the EAR and how to apply for an export license if they plan to export controlled items.

In the Acting Under Secretary's March 30, 2005, response to our draft report, the bureau stated that it agreed with these recommendations. For the first recommendation, BIS suggested a modification to reflect the bureau's plan to first petition the AG to control the 25 agents on the Select Agent List that are not currently on the CCL. If the AG does not add the items to its control list, BIS will consider imposing unilateral controls. The recommendation was changed in accordance with BIS' suggestion. For the second recommendation, BIS stated that it has already contacted both APHIS and CDC in order to begin the outreach process to their registered entities. Additionally, BIS stated that CDC's Select Agent website now cites Commerce's export controls on biological agents and APHIS recently requested, and was provided, website citations for BIS to use on its website.

VII. BIS' Export Enforcement Office Needs to Act on the Treaty Compliance Division's Investigative Referrals

BIS' Treaty Compliance Division (TCD) is responsible for assisting U.S. industry in complying with international arms control, disarmament, and non-proliferation agreements and helping to ensure industry compliance. One of the primary agreements the division administers is the Chemical Weapons Convention (CWC), an international treaty that affects companies involved in the production, processing, consumption, import, and export of a range of commercial chemicals and precursors. TCD has referred 13 instances of non-compliance with CWC requirements to OEE for investigation in FYs 2002 through 2004. However, to date, TCD has received no feedback from OEE regarding the referrals, nor has any action been taken against the alleged offenders.

The CWC took effect on April 29, 1997. Currently, 167 countries are state parties to the convention. The CWC contains several requirements for U.S. industry,[74] such as submitting annual declarations to TCD for certain activities related to chemicals controlled by the CWC. In addition, export licenses may be required to export certain CWC-controlled chemicals, particularly to countries that are not parties to the CWC. In some cases, an end-use certificate is required. End-use certificates are issued directly or approved by the government of the importing destination. When required, end-use certificates must be submitted to BIS within 7 days of the date of export and must state:

- the types and quantities of chemicals being exported;
- their specific end-use(s);
- that the chemicals will be used only for purposes not prohibited by the CWC;
- the name(s) and complete address(es) of end-user(s); and
- that the chemicals will not be transferred to other end-user(s) or end-use(s).

According to TCD, 10 companies did not submit the required end-use certificates in FY 2002. There were two instances of non-compliance with the end-use certificate requirement in FY 2003 and one in FY 2004. TCD staff referred all of the cases of non-compliance to OEE for investigation and appropriate action. However, to date, BIS has taken no action against any of the alleged non-compliant companies. TCD is concerned that this has created the impression among exporters that BIS does not enforce the end-use certificate requirements.

TCD officials are troubled that no sanctions have been applied against any of the companies that did not submit end-use certificates because it reflects poorly on the U.S.'s commitment to enforce CWC provisions. TCD officials noted that the U.S. had worked closely with the Organization for the Prohibition of Chemical Weapons, the international body created to implement the CWC, to set up compliance programs for other CWC members and TCD has worked diligently to be a model for compliance itself. TCD officials are concerned that even though industry compliance has improved, if exporters believe that there is no consequence to not filing the end-use certificates, they may be more lax in the future.

[74] These requirements are contained in the CWC Provisions of the EAR. http://www.cwc.gov/Regulations/cwc_ear_provisions_html

We reviewed the 12 referrals TCD made to OEE in FYs 2002 and 2003[75] and found that OEE had actually initiated nine investigations. OEE had no record of one referral and the referral of two companies in FY 2003 was rolled into open investigations of the same two companies for the same infraction in FY 2002. Six of the nine investigations were still underway, and three were closed without action. Our inquiry into the status of the investigations spurred OEE to take a closer look at the closed referrals, and after examination, OEE officials decided to reopen two of the three closed cases. In addition, OEE has taken further action on the open investigations, including site visits to two companies in December 2004 and January 2005. Given the time intensive nature of the investigations, OEE officials do not have estimates of when these cases will be concluded, but criminal charges will not be filed in the cases because of the nature of the alleged infractions. The more likely penalty would either be a warning letter or an administrative charge that might include a civil fine.

Regardless of the penalties ultimately handed out to companies who have not filed the required end-use certificates, TCD should be informed of any final enforcement actions taken on its referrals so it can (1) educate industry about the consequences of failing to file end-use certificates and (2) demonstrate to the Organization for the Prohibition of Chemical Weapons that the United States has a robust compliance program that includes enforcing CWC requirements through punitive measures. This can be done without publicly disclosing any company-specific or sensitive information. Additionally, TCD should also track its referrals of non-compliant companies so it can follow up with OEE should TCD not be informed in a timely manner of the outcome of the investigations opened as a result of the division's referrals.

Recommendations

Direct OEE to inform TCD of the outcome of the CWC-related investigations upon completion so information can be shared with the chemical exporting community and the Organization for the Prohibition of Chemical Weapons.

Ensure that TCD builds a system to track CWC investigative referrals so it can follow up if OEE has not provided the status of the investigations in a specified period of time.

BIS' response to our draft report stated agreement with these recommendations. For the first recommendation, BIS stated that OEE has designated a senior Special Agent as program manager for CWC-related enforcement. The program manager will forward referrals from TCD to the field for action and share case results with TCD at the appropriate point in OEE's investigation. For the second recommendation, BIS pointed out that the number of referrals is small, an observation with which we agree. However, we still believe that TCD could benefit from tracking its referrals to OEE to ensure the division obtains feedback on the status of the investigations.

[75] The referral for FY 2004 had just been made to OEE at the time of our review, thus OEE had not yet had time to take any action.

SUMMARY OF RECOMMENDATIONS

We recommend that the Acting Under Secretary for Industry and Security ensure that the following actions are taken:

1. Establish specific timeframes for reviewing and signing off on license applications after approval by the referral agencies (see page 11).

2. Develop and maintain clear, consolidated, and up-to-date guidance, or an internal operations handbook, to strengthen current license application review practices and help ensure that they are consistently applied (see page 11).

3. Assess the feasibility of providing LOs with the information housed in the Automated Targeting System and Automated Export System for use in their review of license applications (see page 25).

4. Work with the intelligence community to develop a method to analyze and track the cumulative effect of dual-use exports to countries and entities of concern (see page 25).

5. Take appropriate actions to sustain recent improvements in the timeliness of U.S. publication of Australia Group guidelines and rule changes that impact the Commerce Control List (see page 31).

6. Work with the State Department, and the other licensing referral agencies, to develop and implement written procedures for handling the AG denial notification process. The procedures should cover, at a minimum:
   - the U.S. policy on submitting denials to the AG,
   - when U.S. denial notifications will be sent to the AG—either when the intent to deny letter is sent or after the 45-day rebuttal period has lapsed, and
   - how U.S. decisions to rescind prior denial notifications to the AG will be made. This should specify how State will exercise its representation authority and how the other licensing agencies will be involved in the decision making process (see page 37).

7. Explore ways to do more outreach to the chemical exporting community, including lower cost outreach alternatives, such as setting up briefings in Washington, mailings, or piggybacking on outreach done in connection with CWC compliance activities conducted by BIS' Treaty Compliance Division (see page 42).

8. Pursue multilateral controls on the 25 items now on the HHS/APHIS Select Agent List that are not currently controlled for export. If agreement cannot be reached multilaterally, evaluate putting the 25 items on the CCL unilaterally (see page 42).

9. Inform APHIS and CDC registered entities in writing of the need to comply with the EAR and how to apply for an export license if they plan to export controlled items (see page 42).

10. Direct OEE to inform TCD of the outcome of the CWC-related investigations upon completion so information can be shared with the chemical exporting community and the Organization for the Prohibition of Chemical Weapons (see page 46).

11. Ensure that TCD builds a system to track CWC investigative referrals so it can follow up if OEE has not provided the status of the investigations in a specified period of time (see page 46).

APPENDIXES

Appendix A

List of Acronyms

ACEP	Advisory Committee on Export Policy
AES	Automated Export System
AG	Australia Group
APHIS	Animal and Plant Health Inspection Service
BIS	Bureau of Industry and Security
BWC	Biological Weapons Convention
CBCD	Chemical and Biological Controls Division
CCL	Commerce Control List
CDC	Centers for Disease Control and Prevention
CIA	Central Intelligence Agency
CBP	U.S. Customs and Border Protection
CWC	Chemical Weapons Convention
EA	Export Administration
EAA	Export Administration Act
EAR	Export Administration Regulations
EARB	Export Administration Review Board
ECASS	Export Control Automated Support System
ECCN	Export Control Classification Number
EE	Export Enforcement
FY	Fiscal Year
GAO	Government Accountability Office
HWA	Hold Without Action
LO	Licensing Officer
LOOM	Licensing Officers Operating Manual
MTCR	Missile Technology Control Regime
MTEC	Missile Technology Export Control Group
NDAA	National Defense Authorization Act
NSG	Nuclear Suppliers Group
OC	Operating Committee
OEE	Office of Export Enforcement
OIG	Office of Inspector General
OMB	Office of Management and Budget
PLC	Pre-License Check
PSV	Post Shipment Verification
RWA	Return Without Action
SED	Shipper's Export Declaration
TCD	Treaty Compliance Division
US&FCS	United States and Foreign Commercial Service
WINPAC	Weapons Intelligence, Nonproliferation, and Arms Control Center

Appendix B

Australia Group Members

Argentina	European Commission	Republic of Korea	Romania
Australia	Finland	Latvia	Slovak Republic
Austria	France	Lithuania	Slovenia
Belgium	Germany	Luxembourg	Spain
Bulgaria	Greece	Malta	Sweden
Canada	Hungary	Netherlands	Switzerland
Republic of Cyprus	Iceland	New Zealand	Republic of Turkey
Czech Republic	Ireland	Norway	United Kingdom
Denmark	Italy	Poland	United States
Estonia	Japan	Portugal	

Appendix C

List of Previous Commerce and Interagency Office of Inspector General Reports, Completed Pursuant to the National Defense Authorization Act For 2000

March 2000—(1) *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, (2) *Interagency Inspector General Assessment of Measures to Protect Against the Illicit Transfer of Sensitive Technology*, conducted by the Offices of Inspector General at the Departments of Commerce, Defense, Energy, State, and the Treasury, and the Central Intelligence Agency, 00-OIR-06, and (3) *Interagency Review of the Export Licensing Process for Foreign National Visitors*, conducted by the Offices of Inspector General at the Departments of Commerce, Defense, Energy, and State, D-2000-109.

March 2001—(1) *Management of Commerce Control List and Related Processes Should be Improved*, U.S. Department of Commerce Office of Inspector General, IPE-13744 and (2) *Interagency Review of the Commerce Control List and the U.S. Munitions List*, conducted by the Offices of Inspector General at the Departments of Commerce, Defense, Energy, and State, D-2001-092.

February 2002— *BXA Needs to Strengthen Its ECASS Modernization Efforts to Ensure Long-Term Success of the Project*, U.S. Department of Commerce Office of Inspector General, IPE-14270.

March 2002—*Interagency Review of Federal Automated Export Licensing Systems*, conducted by the Offices of Inspector General at the Departments of Commerce, Defense, Energy, State, and the Treasury, D-2002-074.

March 2003— *Improvements Are Needed to Better Enforce Dual-Use Export Control Laws,* U.S. Department of Commerce Office of Inspector General, IPE-15155.

April 2003—*Interagency Review of Federal Export Enforcement Efforts*, conducted by the Offices of Inspector General at the Departments of Commerce, Defense, State, and the Treasury, and the Central Intelligence Agency and the U.S. Postal Service, D-2003-069.

March 2004—*Deemed Export Controls May Not Stop the Transfer of Sensitive Technology to Foreign Nationals in the U.S.*, U.S. Department of Commerce Office of Inspector General, IPE-16176.

April 2004—*Interagency Review of Foreign National Access to Export-Controlled Technology in the United States*, conducted by the Offices of Inspector General at the Departments of Commerce, Defense, Energy, Homeland Security, and State, and the Central Intelligence Agency, D-2004-062.

Appendix D

Agency Response to Draft Report

UNITED STATES DEPARTMENT OF COMMERCE
Under Secretary for Industry and Security
Washington, D.C. 20230

March 30, 2005

MEMORANDUM FOR JILL GROSS
OFFICE OF INSPECTOR GENERAL

FROM: Peter Lichtenbaum, Acting

SUBJECT: Audit Report No. IPE-116946/March 2005

Draft Report Date: March 16, 2005

Audited Entity: Bureau of Industry and Security

Attached are the Bureau of Industry and Security's comments on the Office of Inspector General's draft report entitled: The Export Licensing Process for Chemical and Biological Commodities is Generally Working Well, But Some Issues Need Resolution, Report No. IPE-16946, March 2005. We appreciate the work you and your staff put into this report.

If you have any questions regarding our submission, please call me at (202) 482-5491.

Attachment
BIS Comments to IG Draft Report

BUREAU OF INDUSTRY AND SECURITY COMMENTS:
The Export Licensing Process for Chemical and Biological Commodities is Generally Working Well, But Some Issues Need Resolution, Report No. IPE-16946, March 2005.

Part I contains BIS's comments on specific recommendations in the report. Part II contains comments on the text of the report to ensure its accuracy.

Part I – Response to IG Recommendations

Recommendation 1: "*Establish specific timeframes for reviewing and signing off on license applications after approval by the referral agencies (see page 11).*"

Response: Agree.

Recommendation 2: "*Develop and maintain clear, consolidated, and up-to-date guidance, or an internal operations handbook, to strengthen current license application review practices and help ensure that they are consistently applied (see page 11).*"

Response: Agree.

Recommendation 3: "*Assess the feasibility of providing LOs with the information housed in the Automated Targeting System and Automated Export System for use in their review of license applications (see page 24).*"

Response: Agree.

Recommendation 4: "*Work with the intelligence community to develop a method to analyze and track the cumulative effect of dual-use exports to countries and entities of concern (see page 24).*"

Response: Agree.

Recommendation 5: "*Take appropriate actions to sustain recent improvements in the timeliness of U.S. publication of Australia Group guidelines and rule changes that impact the Commerce Control List (see page 29).*"

Response: Agree. BIS's Fiscal Year 2005 Regulations Calendar has the Australia Group regulation scheduled to be sent for interagency review one month after official notification of the regime list changes. It should be noted, however, that the regulation will need to be cleared by the Departments of State and Defense and, prior to publication, the Office of Management and Budget must approve the regulation.

Recommendation 6: "*Work with the State Department, and the other licensing referral agencies to develop and implement written procedures for handling the AG denial notification process. The procedures should cover, at a minimum:*

- *the U.S. policy on submitting denials to the AG,*
- *when U.S. denial notifications are sent to the AG – either when the intent to deny letter is sent or after the 45-day rebuttal period has lapsed, and*
- *how U.S. decisions to rescind prior denial notifications to the AG will be made. This should specify how State will exercise its representation authority and how the other licensing agencies will be involved in the decision making process (see page 34).*"

Response: Agree.

Recommendation 7: "*Explore ways to do more outreach to the chemical exporting community, including lower cost outreach alternatives, such as setting up briefings in Washington, mailings, or piggybacking on outreach done in connection with CWC compliance activities conducted by BIS' Treaty Compliance Division (see page 39).*"

Response: Agree. BIS will explore ways to increase outreach to the chemical exporting community consistent with available resources and chemical licensing and policy matters requiring attention.

Recommendation 8: "*Modify the CCL to add the 25 items now on the HHS/APHIS Select Agent List that are not currently controlled for export (see page 39).*"

Response: Agree but suggest modifying the recommendation to read: "*Modify the CCL to add the 25 items now on the HHS/APHIS Select Agent List that are not currently controlled for export following addition of these items to the AG control list. If the AG does not agree to control these items at the 2005 plenary, consider imposing unilateral controls on them (see page 39).*" The United States has proposed that the AG control these agents. If the AG does not add these items to its control list, BIS will consider imposing unilateral controls.

Recommendation 9: "*Inform APHIS and CDC registered entities in writing of the need to comply with the EAR and how to apply for an export license if they plan to export controlled items (see page 39).*"

Response: Agree. BIS has already contacted these agencies in order to begin the outreach process to their registered entities regarding the regulation and control of the export of their commodities. CDC's Select Agent website currently references to Commerce's export controls on biological agents. APHIS also recently requested, and received, website citations for Commerce's export controls on biological agents.

2

Recommendation 10: "*Direct OEE to inform TCD of the outcome of the CWC-related investigations upon completion so information can be shared with the chemical exporting community and the Organization for the Prohibition of Chemical Weapons (see page 43.)*"

Response: Agree. OEE has designated a senior Special Agent as program manager for CWC-related enforcement. The Program Manager will forward referrals from TCD to the field for action and share case results with TCD at the appropriate point in OEE's investigation.

Recommendation 11: "*Ensure that TCD builds a system to track CWC investigative referrals so it can follow up if OEE has not provided the status of the investigations in a specified period of time (see page 43.)*"

Response: Agree. We note that the number of these referrals is small.

3

Part II – Comments on the Report Text

Page i, 2nd full para., revise 4th sentence to read: "*The EAR contains the Commerce Control List (CCL), which identifies the specific dual-use items subject to control, and specifies the conditions under which those items may be exported.*"

Page i, 2nd full para., revise 2nd to last sentence to read: "*Under Executive Order 12981, as amended, several other agencies . . . "*

Page ii, carryover paragraph. The portion of the paragraph carried from page i beginning with "Although Congress is interested in whether . . ." should be deleted or revised.
Comment: As noted in the beginning of the paragraph on page i, the review focused on various aspects of export licensing process (timeliness, adherence to statutory and regulatory requirements, etc.) for items controlled for chemical and biological (CB) weapons proliferation reasons. The review did not seek to actually evaluate the outcome of that licensing process. Thus, the scope of the review selected by the Office of Inspector General (OIG) could not have provided a definitive assessment of whether the export licensing process is helping to prevent the acquisition of sensitive U.S. technology by countries or entities of concern. Given this, the report should not state ". . . we were unable to make a definitive assessment on that point [whether the export licensing process is helping prevent illicit procurement of sensitive technologies] from this review." The second part of this paragraph – from "Although Congress . . ." through ". . . by circumventing that process altogether." should either be deleted or revised to note that the review did not seek to evaluate whether the export licensing process is helping to deter illicit acquisition of items controlled for chemical and biological (CB) weapons proliferation reasons.

Page ii, 1st full para., after 5th sentence: "*In addition, Defense, State, and Energy all completed . . .*" add the following sentence: "*The 30-day period specified for interagency review in Executive Order 12981, as amended does not apply to the CIA.*"

Page ii, 1st full para., revise 6th through 9th sentences to read follows: "*License processing times could potentially be improved somewhat if BIS set internal time frames for the closing out license applications that do not need to be escalated to interagency dispute resolution process because neither Executive Order 12981 nor the EAR explicitly set time requirements for the issuance of license applications following conclusion of the interagency review process where there is no escalation.*"
Comment: The report does not provide the analysis to demonstrate that this is a systemic problem causing significant delays in the issuance of CB license applications.

Page iii, 3rd full para., in 2nd to last sentence, revise to read: "*To address this continuing concern, we reiterate the recommendation from our 1999 report, that BIS work with the intelligence community, including CIA, Defense, Energy, and State to develop a method to analyze and track the cumulative effect of dual-use exports to specific countries and regions.*"
Add "*State*" to list of agencies that should participate in this effort.

4

Page iv, carryover paragraph, last two sentences, delete "a new record" from the second to the last sentence and revise the last sentence to read: "*BIS has told us it will continue its efforts to publish regulations implementing multilateral regime changes, including AG changes, in shorter time frames and we recommend . . .*"

Page iv, 2nd full para., in 3rd sentence, item 2, revise to read: "*Commerce proposes three changes in State's current practice: . . . (2) send the denials to the AG at the time that BIS issues its "intent to deny" letter rather than at the end of the 45-day appeal period, . . .*"
Comment: Exporters may "rebut" an Intent to Deny letter and "appeal" a final denial.

Page iv, last para., 2nd sentence, revise to read: "*BIS has a reasonably robust . . ., but outreach specific to the chemical exporting community has been limited.*"
Comment: BIS has an extensive general outreach program in which the chemical industry can participate. The OIG did not review the number of chemical companies participating in BIS's general seminars.

Page 1, 2nd para., 1st sentence, revise to read: "*Currently, the Departments of Defense, Energy, and State review all export license applications except applications for which those departments have delegated decision authority to Commerce.*

Page 1, 2nd para., last sentence, revise to read: *"In FY 2004, BIS had 371 employees and an appropriation of $69 million."*

Page 5, 3rd full para., 1st sentence, revise to read: "*Under the Executive Order, the referral departments (Defense, Energy, and State) must provide a recommendation to approve or deny the license application to the Secretary of Commerce within 30 days of receipt of the referral and all related required information.*"

Page 5, 4th para., 3rd sentence, revise to read: "*There are 55 standard conditions that BIS can place on an export license.*"

Page 5, 4th para., last sentence, revise to read: "*If the reviewing agencies disagree on the license application, the application goes to the Operating Committee for resolution."*

Page 5, last para., 1st sentence, revise to read: "*Before an application for a chemical and biological export license is escalated, any of the reviewing agencies may choose to address a potential proliferation concern on a particular application by discussing the application at the SHIELD interagency working group, which is [continued to page 6] chaired by State, and has working-level representatives from Commerce (BIS), Defense, CIA, and Energy.*"

Page 6, chart, add note to read: "*Executive Order 12981 provides several circumstances for stopping these time frames, such as obtaining additional information from the applicant."*

5

Page 7, 2nd full paragraph, 2nd sentence, revise to read: "*The ACEP meets monthly if there are applications to decide and is chaired by . . . "*

Page 8, 1st full para., revise to read: "*End-use checks (PLCs and PSVs) are conducted by BIS export control attaches (stationed in Abu Dhabi, Beijing, Hong Kong, Moscow, and New Delhi), by BIS special agents traveling in two-person Sentinel Teams, or where these options are not available or not economical, by Commercial Service or State personnel stationed in the country where the end-use check is conducted. Any of the departments (Commerce, Defense, Energy, or State) authorized under Executive Order 12981, as amended, to make recommendations on export license applications can request an end-use check."*

Page 8, 3rd full para., last sentence, revise to read: "*As such, TCD assists U.S. companies in (1) submitting annual declarations, end-use certificates, and other reports to both BIS and the Organization for the Prohibition of Chemical Weapons, (2) preparing for on-site inspections, and (3) making determinations on whether chemicals are subject to CWC reporting requirements.*"
Comment: All chemicals are subject to Article 1 of the CWC if used to develop chemical weapons. TCD's responsibility here, however, is not in making determinations on what chemicals are subject to the CWC, rather in making determinations on what chemicals are subject to CWC reporting requirements.

Page 9, 2nd para., portion beginning with "However, while did review . . .", delete or revise as noted above.

Page 9, last bullet,"*Interviews", revise to read*. *To determine the effectiveness of the current export license process and obtain their suggestions for improving the process, we spoke with BIS personnel from the following groups: (1) Office of Nonproliferation and Treaty Compliance, including the Chemical and Biological Controls Division, (2) Regulatory Policy Division, (3) Office of* [continued on page 10] *Enforcement Analysis, (4) Office of Exporter Services, and (5) the Operating Committee Chair.*"

Page 12, first sentence after Figure 5, revise to read as follows: "*Our in-depth analysis of the remaining 82 license applications identified some issues that require BIS's overall attention.*
Comment: The findings identified procedural issues.

Page 12, footnote 28, revise to read: "*License applications can be put on HWA in accordance with Executive Order 12981."*
Comment: Executive Order 12981 sets forth the circumstances for HWA of applications sent to the reviewing departments (Defense, Energy, and State) for recommendations.

Page 13, footnote 30, last sentence, revise to read: "*The goal for completing the initial overall review is 39 days (9 days to refer interagency and 30 days for interagency (including CIA)) review."*

6

Page 15, 1st full paragraph, add new last sentence to read: *"In addition, a pending PLC or other EE flag on an application could delay actual issuance of a license after interagency approval."*

Page 16, 3rd full para., last sentence, revise to read: "*Even though all seven cases were completed within the overall specified 90 day time frame, it is difficult to determine whether CBCD was timely in the processing of these applications because there was no specific data on the delays to review and no specific criteria to use to judge their performance.*"

Page 18, last paragraph, delete.
Comment: This paragraph should be deleted because it overlooks the fundamental issue – that the Export Administration Regulations (EAR) set forth the circumstances for holding a license application without action (HWA) or returning a license application without action (RWA). As stated in the definition of Hold Without Action in Part 772 of the EAR, Section 750.4 describes the circumstances under which license applications may be put on HWA. The definition of Return Without Action in Part 772 enumerates the circumstances for returning a license application without action. The OIG did not attempt to determine whether the licensing officers apply the criteria set forth in the EAR.

Page 20, 3rd full para., last sentence, revise to read: "*In cases where agencies have differing recommendations, the application is escalated to the OC.*"
Comment: As previously noted, BIS is the escalating party when cases are referred to the OC.

Page 21, last para., 4th and 6th sentences, revise to read: "*The OC Chair speculates that there might be fewer chemical and biological export license applications escalated in the future because of the understanding on end-use visit cooperation between the U.S. Department of Commerce and the Ministry of Commerce of the People's Republic of China. Under the new understanding reached in April 2004, . . .*"

Page 22, carryover para., replace "agreement" with "understanding."

Page 24 - 25, subpart A, revise to note: *"Congress has not appropriated funds to BIS to conduct cumulative effect analysis."*

Page 24, footnote 42, second sentence, revise to read: "*Three have since left, but only one has been replaced to date due to budget constraints."*

Page 25, subpart B, 1st para., add after the 1st sentence: "*The 8-point memorandum, the CBCD LOs' analyses of the bona fides and licensing history of individual end-users and the appropriateness of the end-uses, and input from the intelligence community provides the primary information on likelihood of proper use or diversion. Cumulative effect analysis can supplement this information.*"
Comment: CBC LOs provide to the interagency application reviewing community an analysis of

7

the bona fides and licensing history of individual end-users as well as an analysis of the appropriateness of the commodity's proposed end-use.

Page 27, 3rd para., last sentence, revise to read: "*A BIS official said that under current fiscal restraints such clearances would be prohibitively costly given the isolated training for which they would be needed. BIS would welcome the resources in order to allow its staff to procure such clearances to gain such CIA/WINPAC training opportunities, as well as the resources necessary to develop additional related in-house tools such as secure databases.*"

Page 28, 2nd para., last sentence, revise to read: "*Both BIS and CIA officials stated that all chemical and biological license applications are thoroughly reviewed, including the bona fides of all end users, and that current intelligence is brought to bear on all applications, notwithstanding the lack of comprehensive cumulative effect analyses.*"

Page 29, 2nd para., 5th sentence, revise to read: "*BIS officials believed that the 2001 changes would expedite the review of regulations, including those implementing the AG changes. Although these changes did not impact the amount of time needed to publish the 2002 and 2003 changes, in 2004 the changes took only 6 months to publish. In the future, . . . BIS officials reported that they plan to send the regulation implementing the 2005 AG changes for interagency review within one month of receiving official notification of the regime changes.*"
Comment: The revision more precisely reflects the current situation and planned 2005 schedule.

Page 31, 1st full para., revise to read: "*BIS officials cited several reasons for the time it takes to publish new AG regulations. First, time may elapse between the end of the AG plenary and the official posting of the control list changes. This will delay the beginning of the process for formal interagency clearance of the implementing regulation. Second, according to BIS, the U.S. regulatory process . . .*"

Page 31, 2nd para., 3rd sentence, revise by striking Energy and CIA from parenthetical.
Comment: Energy and CIA do not review AG regulations.

Page 31, subpart B, 1st para., add after last sentence: "*While agreement on timing for implementation among AG members would be ideal, it is unlikely due to members' national discretion in undertaking AG commitments.*"
Comment: It would be difficult for the State Department, as U.S. delegation chair to the Australia Group (AG), to request this type of simultaneous implementation from the AG, as each member will want to retain the right to implement AG guidelines at their national discretion. BIS will continue efforts to expedite implementation of regulations incorporating AG guidelines.

Page 32, 1st para., 6th sentence, revise to read: "*Because of the derogatory information on the end-user, BIS placed the application on HWA pending publication of the new AG rules in June 2003 in order to obtain and issue a regime-based denial so that the AG no undercut obligations would be implemented on a multilateral basis. Denials based on unilateral controls do not*

8

invoke such obligations."

Page 33, Conclusions, 1st para., 1st sentence: This does not reflect the view of BIS management. BIS's 2005 Regulations Calendar, circulated to the reviewing departments in December 2004, has scheduled interagency review of the regulation implementing the 2005 AG changes one month after receiving official notification of the changes.

Page 33, Conclusions, 2nd para., revise to read: *"BIS says publishing changes . . .will depend on (1) how quickly BIS receives the official notice of the changes, (2) the complexity of the changes, (3) whether there is an effort to add unrelated revisions to the rule, and (4) how quickly Commerce, Defense, and State resolve any comments on the rule.*

Page 34, 2nd para., 3rd sentence, revise to read: *"BIS believes three changes would be useful to make the denial notification process more effective and transparent."*

Page 34, 2nd para., 2nd to last sentence, revise to read: *"Unfortunately, the AG's policy on the reporting of denials is not explicit, so State and Commerce have different views on how it should be implemented."*

Page 35, 1st full para., last sentence, delete.
Comment: BIS has not challenged the Department of State's authority to make such decisions, although we disagree with State's application of that authority.

Page 37, 3rd full para., 4th sentence, revise to read: "*Neither the AG guidelines nor the EAR address the issue of rescinding prior denials to the AG.*

Pages 40, last para., pages 40 -41, revise to read: "*In October 2004, staff in CBCD based on discussions with CDC and APHIS officials, decided to draft an AG proposal to put the remaining 25 items from the Select Agent List on the AG control list and then the CCL.*"

Page 40, para. continuing onto the top of page 41: Strike the paragraph on unilateral controls.

Page 41, 1st para., revise to read: "*CBCD shared this proposal with the Materials Technical Advisory Committee at its February 2005 meeting. After interagency review and concurrence, State submitted this proposal for consideration at the April AG plenary. If this proposal is made to the AG but not adopted, BIS will evaluate whether to place unilateral controls on these items."*

Page 42, Recommendations, revise to read: "*Pursue multilateral controls on the 25 items now on the HHS/APHIS Select Agent List that are not currently controlled for export.*

Inform APHIS and CDC . . .

9

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