

June 1989

# EXPORT CONTROLS

## Extent of DOD Influence on Licensing Decisions



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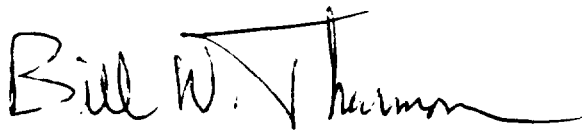
The Honorable Les AuCoin  
House of Representatives

Dear Mr. AuCoin:

As requested in your letter of February 9, 1988, we reviewed the export licensing process and the Departments of Commerce's and Defense's roles in that process. This report also contains information on each agencies' export control budget, staffing, and license volume.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from its issue date. At that time, we will send copies to interested committees and other Members of Congress; the Secretaries of Commerce and Defense; and the Director, Office of Management and Budget. Copies will also be made available to other parties upon request.

Sincerely yours,

*for*   
Frank C. Conahan  
Assistant Comptroller General

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# Executive Summary

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## Purpose

The United States controls the export of dual use products—commercial products which could also have a military use—to Soviet bloc countries and the People's Republic of China. Access by these countries' to controlled dual use products and technologies is restricted through an export licensing system administered by the Department of Commerce. The Department of Defense also plays a role in the system. Dual use exports are controlled to virtually all countries in order to try to prevent their diversion to proscribed countries—Soviet bloc countries and the People's Republic of China.

Representative Les AuCoin asked GAO to examine the roles of the Departments of Commerce and Defense (DOD) in export licensing.

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## Background

The export control system has three principal functions: (1) identify products and technologies that need to be controlled, (2) review and evaluate export license applications, and (3) enforce export controls. An exporter wishing to sell controlled dual use products anywhere in the world, except Canada, in most cases must request Commerce's permission through an export license application. If Commerce approves the application it issues a license to permit the proposed export.

Under authority of the Export Administration Act of 1979, as amended, DOD reviews some of the license applications that Commerce receives and makes recommendations on how to respond to them. Through the end of 1984, DOD generally reviewed applications for proposed exports to the proscribed countries. In January 1985, the President issued a directive expanding DOD's role to include reviews of proposed exports to selected free world countries.

The exact scope and nature of DOD's review responsibilities has been a matter of contention between it and Commerce. In addition, the Department of Energy reviews certain license applications for products that can be used to develop nuclear weapons.

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## Results in Brief

Commerce and DOD generally agree on how to respond to license applications that they have reviewed. DOD's recommendations significantly influenced about one-third of Commerce's licensing decisions involving proposed exports to proscribed countries but only about 4 percent of Commerce's licensing decisions for exports to free world countries. However, Commerce also denies licenses because of concerns about potential

diversion or unacceptable nuclear uses that DOD recommends be approved.

DOD's input to the review of free world license applications is principally based on its interpretation of the information contained on the license application rather than on unique information in its possession. Therefore its review brings a second opinion rather than a unique perspective to the licensing process. Whether this second opinion merits DOD's continued involvement in free world licensing is a policy decision for the administration and the Congress.

Many of DOD's recommendations to approve applications are conditioned on the exporters or consignees meeting certain restrictions such as no reexport, no resale, or no transfer. The no reexport conditions duplicate requirements prescribed in Export Administration Regulations. Provisions for the use of the no resale and no transfer conditions are not included in the regulations. These conditions are not consistently applied and sometimes are not correctly applied. Consequently, Commerce needs to clarify its policies regarding the use of conditions in license approval.

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## Principal Findings

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### Commerce and DOD Generally Agree on Licensing Decisions

On the majority of export applications, DOD's recommended action generally agrees with Commerce's ultimate licensing decision following inter-agency review. A comparison of DOD recommendations and Commerce licensing actions for cases completed between June 1987 and June 1988 shows that Commerce and DOD agreed on 9,356, or 90 percent, of the 10,380 actions. However, in about half of the cases where there was agreement, DOD recommended conditional approval, and Commerce conditionally approved the license. DOD also recommended that 71 applications be approved; however, Commerce denied these based on its own concern about diversion or Department of Energy concerns about unacceptable nuclear uses.

### DOD Influences Commerce's Licensing Decisions

DOD has a significant influence on Commerce's decisions regarding proposed exports to the proscribed countries. DOD's review was the basis for Commerce changing its initial licensing decision on 36 percent of the applications it reviewed. In an almost equal number of cases, DOD

reviews resulted in certain restrictions being placed on the exports as opposed to changing the licensing decisions, while in the balance of cases, it produced no change. DOD's reviews and recommendations on proposed exports of dual use products to free world countries had much less of an influence on Commerce's licensing decisions, changing Commerce's decision on about 4 percent of the applications. In about half the free world cases, DOD's influence was limited to reminders on the products use or disposition, while in the balance it produced no change.

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### Use of Conditions Needs to Be Clarified

For the period June 1987 to June 1988, DOD's recommendations to approve applications were often conditioned on the exporters or consignees meeting certain restrictions regarding the products. DOD recommended conditional approval in 56 percent of the cases for proscribed countries, and those restrictions primarily related to product capability. It recommended conditional approval in 49 percent of the free world cases, and these were primarily procedural in nature, such as notifying the foreign purchasers of certain restrictions on reexport, resale, or transfer of the products.

"No reexport", "no resale", and "no transfer" are frequently cited as conditions for license approval. Reexport involves sale from one foreign destination to another; resale involves sale within a country; and transfer involves any other disposition. The Export Administration Regulations require prior U.S. government approval to reexport U.S. controlled products but do not address U.S. government authority to control resale or transfer.

Commerce applied the no reexport, no resale or no transfer conditions in 43 instances in the 66 free world cases GAO reviewed; however, the conditions restated regulatory requirements or commitments made by the consignee in the export application documentation. GAO found that the no reexport condition, which applied to all the exports it reviewed, was not consistently considered necessary by DOD nor applied by Commerce. GAO also found that Commerce sometimes applied the no reexport and/or no resale condition when the no transfer condition was intended. Since the no transfer condition is more restrictive than the other two, failure to apply it correctly could allow transfers not intended by Commerce. Both Departments agree that lack of consistent application of conditions could be confusing to the export community.

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## Recommendations

GAO recommends that the Secretary of Commerce direct the Under Secretary for Export Administration, in consultation with the Departments of Defense and Energy, to review the desirability of applying procedural conditions and, if they are determined to be necessary, (1) amend the Export Administration Regulations to clearly state U.S. policy and prescribe procedures on the use of commonly used conditions for approving export licenses, especially no resale and no transfer, and (2) prescribe guidelines to ensure that conditions are consistently and correctly applied.

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## Agency Comments

The Departments of Commerce and Defense concurred with GAO's recommendation. DOD generally concurred with GAO's conclusions. Commerce agreed with GAO's conclusions that DOD plays an important role in reviewing export applications for proscribed countries but influences the outcome of less than 5 percent of free world cases. Commerce, however, believes that DOD does not add substantive improvements to free world licensing analyses. DOD, on the other hand, believes that its role in free world licensing has been highly successful.

Commerce believes that GAO should have addressed such issues as congressional intent regarding DOD's role in free world licensing, DOD's use of its research laboratories in reviewing exports to proscribed countries, and the reasons for the disparity in pay levels at the two agencies. DOD has reservations regarding GAO's characterization of DOD workload. These comments as well as each Department's detailed comments are discussed in the body and appendices of GAO's report.

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**Abbreviations**

BXA	Bureau of Export Administration
CCL	Commodity Control List
DOD	Department of Defense
DTSA	Defense Technology Security Administration
GAO	General Accounting Office
IVL	Individual Validated License
OSD	Office of the Secretary of Defense
RWA	Return Without Action



# Introduction

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The United States controls the export of dual use products—commercial products which could also have a military use—through licenses issued by the Department of Commerce. These controls are applied most strictly to proposed exports to Soviet bloc countries and the People's Republic of China, known as the proscribed countries. Under authority of the Export Administration Act of 1979, as amended, the Department of Commerce reviews requests to export dual use products. If the requests are approved, Commerce issues export licenses. The Department of Defense (DOD) also reviews some of the applications.

The exact scope and nature of DOD's review responsibilities has been a matter of contention between the Departments of Commerce and Defense. Through the end of 1984, DOD generally reviewed only those license applications concerning dual use products destined for the proscribed countries. In January 1985, the President issued a directive expanding DOD's review responsibilities to applications involving specific product categories destined for selected free world countries.

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## The Export Control System

The Export Administration Act of 1979, as amended, states that it is the policy of the United States to encourage trade with all countries with which it has diplomatic or trading relations, except those countries where the President has determined that such trade is against the national interest. The Act also states that it is U.S. policy to restrict the export of goods and technologies that would make a significant contribution to the military potential of any country or combination of countries that would prove detrimental to U.S. national security.

Accordingly, the Department of Commerce, in consultation with DOD, is required to establish export controls and a list of controlled goods and technologies subject to export controls. To this end, the Secretary of Commerce developed and maintains the commodity control list (CCL)<sup>1</sup> to identify controlled dual use items and established the Bureau of Export Administration to administer the export control system. The Secretary of Defense advises the Secretary of Commerce on products and/or technologies for inclusion on the control list and established the Defense Technology Security Administration as the DOD agency responsible for DOD's participation in export control matters.

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<sup>1</sup>This is a list of product categories, not specific commercial products. Products are considered militarily significant if they meet certain performance characteristics.

The United States established its export control system primarily to protect the national security. Export controls are intended to make it difficult for proscribed countries to obtain dual use products and technologies. The export control system has three principal functions: (1) identify technologies and products that need to be controlled, (2) review and evaluate export license applications, and (3) enforce export controls. Most products are controlled by the coordinated action of the United States, Japan, Australia, and the NATO countries (except Iceland), comprising an informal organization known as the Coordinating Committee, or COCOM.

The United States established a licensing system to control exports of dual use products. A U.S. exporter wishing to sell controlled products anywhere in the world, except Canada, must submit an export license application to Commerce. One kind of license is the individual validated license (IVL) which, as a general rule, authorizes shipments of specifically named controlled items to specified end users for specified end uses. The other types of validated licenses are the (1) project license, (2) distribution license, and (3) service supply license. In addition, the least sophisticated controlled commodities and technical data can be exported to many free world countries under a general license, which is an authorization permitting exports without the necessity of applying for a license document.

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## DOD's Role Under the Export Administration Act

The Act authorizes the Secretary of Defense to review any proposed export of any goods or technology to any country to which exports are controlled for national security purposes. Whenever the Secretary determines that these exports would make a significant contribution to the military potential of any such country to the detriment of U.S. national security, he shall recommend disapproval. However, the Act did not specify the countries "to which exports are controlled for national security purposes;" consequently, the Departments of Commerce and Defense interpret DOD's responsibilities under the Act differently.

In mid-1981, DOD asserted that it had the authority to review export license applications to free world destinations and was responsible for (1) monitoring the potential for diversion from such countries, (2) evaluating the diversion potential of an end user, and (3) assessing the validity of an applicant's statement certifying to the end use of the product. The Commerce Department, on the other hand, had a different interpretation of the scope and nature of DOD's responsibilities under the Act. At that time, Commerce asserted that DOD had the authority to review

license applications only to the proscribed countries and therefore it was not appropriate for DOD to assess the diversion potential of end users in free world countries as part of the licensing process.

In January 1985, the President issued a directive to resolve this matter. The Presidential directive expanded the scope of DOD's review responsibilities. In addition to reviewing all applications to Soviet bloc and People's Republic of China destinations, DOD was given responsibility for reviewing all applications for exports falling within 8 product categories and destined for any of 15 free world countries. As of May 1988, seven of the countries had enhanced their export controls; therefore, DOD's review is no longer directed for these countries. DOD also reviews export license applications for munitions items in support of the Department of State's munitions licensing.

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## Objectives, Scope, and Methodology

In a letter dated February 9, 1988, Representative Les AuCoin asked us to examine the role of the offices within the Departments of Commerce and Defense responsible for reviewing U.S. export licenses. He also asked us to provide answers to the following specific questions.

- How many people have been employed and contracted by the Bureau of Export Administration (BXA) and the Defense Technology Security Administration (DTSA) since DTSA's inception to process export licenses, and how much money has been appropriated to these offices each year?
- Are the resources given to each office equitable and could DOD's budget be reduced without endangering national security?
- Is Commerce at a disadvantage in hiring experienced engineers to review licenses since DOD is apparently able to pay its engineers more money?
- How many licenses are processed each year on products destined for Western countries (west/west licenses) and Eastern countries (west/east licenses) and what kind of license analyses do Commerce and Defense perform?

As agreed with Representative AuCoin's office, we provided an interim report on license volume on May 13, 1988.<sup>2</sup> This report provides updated license volume data and responds to the remaining questions.

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<sup>2</sup>EXPORT LICENSING: Number of Applications Reviewed by the Defense Department (GAO/NSIAD-88-176 FS, May 13, 1988)

In 1987, the Commerce Department reorganized its export control function by establishing BXA, which elevated export licensing, technology, and policy analysis to the Under Secretary level. DTSA is responsible for reviewing export license applications within DOD. We requested and analyzed staffing, budget, and license volume data from BXA and DTSA. We obtained data on total staffing at each agency and the number of staff working in BXA's Individual Validated Licensing Division and DTSA's Strategic Trade group for fiscal years 1986, 1987, and 1988. Because DOD did not begin reviewing export licenses to certain free world destinations until January 1985 and DTSA was not established until May 1985, we did not report data for fiscal year 1985. We obtained data on contract expenditures for fiscal years 1987 and 1988 in lieu of the number of people because data on the number of people were limited and often unavailable. We limited expenditure data to these fiscal years because data were not available for fiscal year 1986. We also obtained budget data for fiscal years 1986 through 1988.

We did not draw any conclusions on the equity of the resources given to DTSA and BXA or on whether DTSA's budget could be cut. First, budgets for BXA and DTSA are not readily comparable because DTSA budget data are not broken down to the level of the units involved in export licensing. Second, although a comparison of the number of licenses reviewed by these two agencies can be made, it is difficult to determine the appropriateness of staffing based on license workload. DTSA has a variety of export control responsibilities, only one of which involves licensing, so we limited our conclusions in this area to our assessment of the contribution DTSA makes to license application review.

To respond to the question concerning whether DTSA can pay its engineers more than BXA, we obtained and compared data on the pay grades of each agency's engineers. Because DTSA engineers in the licensing unit have other non-license related duties that are handled at BXA organizations other than the licensing unit, we also obtained data on engineer pay levels in these units.

To describe the nature of the license application review process, we met with BXA and DTSA senior licensing officials as well as licensing officers to obtain detailed step-by-step descriptions of the process. To determine the types of reviews performed, we examined a random sample of cases and held discussions with officials at BXA and DTSA. Our analysis of the case files and the Export Administration Regulations and our discussions provided a basis for our conclusions and recommendations. Our sampling and case file analysis methodology is described below.

To develop a profile of licensing activity, we obtained the computer files for the 10,380 cases listing country destinations which were reviewed by DTSA and completed during the most recent year—June 1987 to June 1988. To examine the recommendations and the basis for them, we identified each case for which DTSA initially recommended denial, return without action, conditional approval, or requested further information. These 7,724 cases required further review and allowed us to examine the licensing process in detail. We excluded from our sample selection the 2,656 cases for which DOD immediately recommended approval and Commerce approved the licenses because both agencies were in agreement on these cases from the outset.

We divided the 7,724 cases by destination—5,164 free world (west/west) cases and 2,560 Soviet bloc/People's Republic of China (west/east) cases. We drew statistically random samples from each group and obtained agency case files for our sample. From our review of these files, we determined what actions were recommended and the bases for the recommendations. The characteristics of the sample and our projections for free world and Soviet bloc applications were as follows.

From the 5,164 west/west cases, we drew a statistically random sample of 66. From the 2,560 west/east cases, we drew a statistically random sample of 71. We drew a larger sample of west/east cases to respond to DOD's concern that we review a broad cross section of these cases. Based on our calculations of statistical probability, we are 95 percent confident that the estimate and percentages we report about both groups are within 13 percentage points of the actual figures unless otherwise noted.

We made our review between March 1988 and January 1989 in accordance with generally accepted government auditing standards.

# The Licensing Review Process and Required Resources

The licensing review process at Commerce and DOD is essentially the same. It begins when an exporter submits an application containing information on the product, country of destination, consignee/user of the goods, and end use. Licensing personnel review this information to assess product capability, applicant and end user reliability, and application completeness and consistency. However, because the export licensing review process is more an art than a science and requires judgment, assessments of the same information can differ.

## The Export Licensing Review Process

Reviewing export license applications for national security controlled products and technologies basically consists of three kinds of technical evaluations. Reviewers must determine (1) a specific commercial product's potential military significance, (2) the diversion potential of the end user, and (3) the appropriateness of the product's stated end use. In addition to referring applications to DOD for review, Commerce also refers some of them, depending on their characteristics, to other agencies such as the Department of Energy for review.

For proposed exports to proscribed destinations, the potential military significance of a product is the most relevant evaluation made. The prudent assumption for west/east applications is that in proscribed countries the military has unrestricted access to imported products, regardless of whether the stated end user is a civilian customer and the stated end use is commercial.

For proposed exports to free world destinations, reviewers focus on the potential for diversion to the proscribed countries by an end user, looking at information about a firm or individual and comparing the stated end use with the technical capabilities of the proposed export to determine the risk of diversion.

## Review of West/East Applications

Proposed exports to the proscribed countries are reviewed by BXA and DTSA, except for the least sophisticated of the controlled products which are not referred to DOD unless they are destined for the Soviet Union. Commerce initially receives the application and refers a hard copy to DOD or other appropriate agencies within 7 days, usually after an initial screen indicates the license is approvable.

In reviewing west/east license applications, engineers in both BXA and DOD offices are primarily concerned with making a technical review of the product to establish (1) its technology level and military significance

in relation to the CCL and (2) its appropriateness for its stated end use. If a product is too powerful for its stated end use (e.g., a small laundry buying a large computerized system), it suggests that the purchaser possibly has another use in mind. DTSA is particularly suited to assessing the military significance of a proposed export, since it can draw upon the armed services research laboratories to assess product capabilities. In practice, it relies primarily on its own expertise, sending only 2 or 3 percent of all applications to the labs for review. According to BXA officials, DTSA's assessment of military significance is its most important contribution to the licensing process.

Since these applications involve exports to proscribed countries, product or technology diversion is not an issue between DTSA and BXA. In addition to establishing the technology level, military significance and appropriateness of end use, the reviewer assesses whether the consignee has ties to the military. To this end, the review process requires checks of the end user to assess its reliability. Both BXA and DTSA screen customer identification data (company names and owners) against their respective intelligence files to ascertain whether there are known ties to the country's military or intelligence community.

DOD screens end users through an intelligence data base it has developed; BXA coordinates with the intelligence community and uses information obtained from it. In addition, both offices screen all parties to the transactions (exporter, intermediary, and consignee) against their respective lists of persons or organizations suspected of diverting products to unauthorized end users. Because names are placed on the list largely on the basis of unproven suspicions, the license application is not automatically denied if a party to a transaction is found to be on these lists, but it does receive more careful scrutiny.

Both DTSA and BXA make a number of administrative checks for each application to assess it for completeness and internal consistency. An application that is incomplete is either returned to the applicant without action or held until the applicant provides any requested information. Applications are also reviewed to ensure that (1) the dollar value of the proposed export is consistent with the quantity and (2) the model number of the product is consistent with the technical information. Inconsistencies raise concern about the transaction and prompt further review. BXA also determines whether an application requires referral to other agencies for their review and recommendation. DTSA, to a lesser extent, will also recommend referral to agencies outside DOD.

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## Review of West/West Applications

Exports of controlled products to Western countries are licensed principally to prevent their diversion to the proscribed countries. West/west applications are received at Commerce and, if appropriate, electronically referred to DOD or physically delivered to other cognizant agencies. BXA and DTSA simultaneously review these license applications and make administrative checks to ensure the applications are complete and the data are consistent, i.e., that dollar amounts and quantities agree.

The review process for west/east and west/west export licenses is similar; however, reviews of west/west applications, especially technical reviews, place a greater emphasis on whether the product's capability is consistent with its stated end use. There is, however, an important difference in perspective between BXA and DTSA in comparing product capability and end use. In the absence of any information suggesting that the parties to an export transaction are suspect, senior Commerce licensing officials advised us that Commerce favors licensing an export where a foreign customer is purchasing a product that appears to be too powerful for its needs; DOD favors persuading the exporter to substitute a less capable product. As in west/east reviews, both offices screen all parties named in the application against a series of lists containing the names of persons and organizations suspected of engaging in trade diversion. In fact, however, according to DOD and Commerce officials, only a small proportion of the applications containing names on the lists are ultimately denied.

While west/west licensing is primarily concerned with preventing diversions, technical reviews also include a comparison of the product's capability with U.S. policy regarding the technology levels allowed for export to certain Western countries. Technology limits to selected countries are set out in BXA's licensing manual, an internal licensing guide, or in informal, often unwritten, DOD policy. DOD often takes the position that its recommendations on any given license application are not precedent-setting, resulting in ad hoc decisionmaking.

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## Commerce and DOD Resources and License Activity

In addition to describing how export applications are reviewed, we were asked to provide budget, staffing, and export license workload data for the groups involved in Commerce and DOD reviews of export licenses. As explained earlier, due to reorganizations and limited availability of DTSA budget data on some organizational subunits, we were not able to obtain all of the requested information. The data we were able to obtain is discussed below.



Budget Data

In BXA, the Office of Export Licensing issues licenses and within that Office, the Individual Validated Licensing Division reviews IVL applications. In DTSA, the Strategic Trade group reviews IVLS sent to DOD and participates in determining what technologies should be controlled. Table 2.1 presents budget data for BXA and DTSA.

**Table 2.1: Comparison of BXA and DTSA Budgets, Fiscal Years 1986-88<sup>a</sup>**

Organization	Fiscal year		
	1986	1987	1988
BXA	\$31.20	\$33.40	\$37.47
DTSA <sup>b</sup>	7.00	10.72	9.78

<sup>a</sup>Because DOD's appropriations legislation does not specifically identify DTSA, data represents DOD's budget allocation for DTSA. BXA was part of the International Trade Administration until fiscal year 1988 and appropriations for it were not separately identified before that fiscal year. Therefore data represent BXA estimates of its portion of the International Trade Administration appropriation in fiscal years 1986 and 1987.

<sup>b</sup>Excludes 14 people who worked in DTSA but were paid by the Office of the Secretary of Defense (OSD), including the Deputy Undersecretary for Trade Security Policy; their budget is not separable from the OSD budget. DTSA's budget includes funds allocated to it within DOD and personnel costs paid by the military services for military personnel assigned to DTSA, which currently comprises one-third of DTSA's staff.

Both offices contract for various licensing related services, such as data processing. Table 2.2 shows the separate contracting costs for these services for both offices for fiscal years 1987 and 1988.

**Table 2.2: Contracting Costs<sup>a</sup> for Licensing Related Services, Fiscal Years 1987-88**

Organization	Fiscal year	
	1987	1988
BXA	\$3,946	\$3,842
DTSA <sup>b</sup>	1,303	1,189

<sup>a</sup>The budget data in table 2.1 include these costs.

<sup>b</sup>DTSA could not identify the annual allocations of an \$807,790 contract spanning fiscal years 1987 and 1988. We therefore attributed half of the cost to each year to allow inclusion of the data in the table as it consisted of more than half of all DTSA contracting costs in each of those years.

Staffing of Export License Processing

We were able to obtain staffing data down to the subunit level. Total staffing for both offices and the units included in the licensing process are shown in table 2.3. We have also included staffing data for BXA's Office of Technology Analysis, Technology Analysis Division, which reviews license applications referred by the IVL Division, participates in CCL review, and represents Commerce at COCOM and interagency meetings.

**Chapter 2  
The Licensing Review Process and  
Required Resources**

**Table 2.3: Total Staffing for Units Involved in Licensing Process, Fiscal Years 1986-88**

Organization	Fiscal year		
	1986	1987	1988
<b>BXA:</b>	464	458	469
IVL Division, Office of Export Licensing	117	119	108
Technology Analysis Division, Office of Technology and Policy Analysis	23	22	25
<b>DTSA:<sup>a</sup></b>	104	128	128
Strategic Trade	37	41	38

<sup>a</sup>Excludes 14 OSD staff who perform DTSA duties yet are not included in DTSA staffing ceilings.

The numbers and pay grades of only the engineers and non-engineers directly involved in the export licensing process are provided in table 2.4.

**Table 2.4: Comparison of Pay Grades of Personnel Directly Involved in Export Licensing**

Organization	Number in Pay Grade									Total
	7	8	9	11	12	13	14	15		
<b>Engineers</b>										
BXA:										
IVL Division	•	•	1	2	4	12	3	•		<b>22</b>
DTSA: <sup>a</sup>										
Strategic Trade	•	•	1	1	•	•	•	10		<b>12</b>
<b>Non-engineers</b>										
BXA:										
IVL Division	2	•	21	2	2	1	1	•		<b>29</b>
DTSA: <sup>a</sup>										
Strategic Trade	•	•	•	•	•	1	4	5		<b>10</b>

<sup>a</sup>Includes military officers shown at equivalent civilian grade.

As shown, grade 13 was the predominant grade for engineers in the IVL Division and 15 for the Strategic Trade group. Strategic Trade engineers perform other duties that IVL Division engineers do not perform or that are performed by higher graded individuals in other BXA organizational units. For example, Strategic Trade engineers review and propose revisions to the CCL. Engineers in BXA's Office of Technology and Policy Analysis perform a similar function and it had 19 engineers—7 grade 15s, 8 grade 14s, and 5 grade 13s.

For non-engineers, the predominant grades at the IVL Division and Strategic Trade were 9 and 14/15, respectively. The 14/15 non-engineer positions at Strategic Trade include several military personnel whose

rank is equivalent to this pay level. BXA non-engineers are involved solely in license review and licensing-related matters. Strategic Trade non-engineers have additional responsibilities including reviewing export control policy and representing DOD at interagency and COCOM meetings, which are the key determinants of their pay level.

Export Licensing  
 Workload

BXA maintains data on the number of license applications it receives and the number it refers to DOD for review. Table 2.5 provides this data for fiscal years 1986 to 1988.

**Table 2.5: Number of Applications Received by Commerce and Referred to DOD, Fiscal Years 1986-88**

Applications	Fiscal year		
	1986	1987	1988
<b>Received:</b>			
West/west	103,125	92,387	86,021
West/east	12,843	11,901	11,429
<b>Total</b>	<b>115,968</b>	<b>104,288</b>	<b>97,450</b>
<b>Referred to DOD:</b>			
West/west	16,881	10,737	7,172
West/east	3,656	3,659	3,632
<b>Total</b>	<b>20,537</b>	<b>14,396</b>	<b>10,804</b>

Source: Department of Commerce

As shown, the number of licenses received and referred since fiscal year 1986, the first full year that DOD was directed to review certain free world applications, has declined. The overall decline in west/west applications reflects the increased use of general, or paperless, licenses for exports of less sophisticated technology to many free world destinations. The decline in referrals to DOD reflects the reduced number of free world countries (down to 8 from 15) included in DOD's review responsibilities. DOD also maintains data on referrals. Although DOD data show more referrals than Commerce's, they are similar to Commerce in that a declining trend developed in the number of applications reviewed from 1986 to 1988—18,951, 14,181, and 13,842 reviewed respectively. DOD officials could not reconcile the disparity with Commerce data.

To compare the licensing workload, we calculated the number of licenses processed per person for the IVL Division and Strategic Trade group. For the IVL Division, the calculation was simply the ratio of total licenses received to total number of Division engineers and non-engineers directly involved in licensing plus an estimate of the time spent on

licensing by engineers in the Office of Technology and Policy Analysis. In computing the same ratio for Strategic Trade, we used DOD's data on applications reviewed. Table 2.6 presents the workload analysis.

**Table 2.6: Analysis of License Application Workload—Applications Per Professional Staff**

Organization	Fiscal year	
	1987	1988
<b>BXA:</b> IVL Division <sup>a</sup>	1,871	1,750
<b>DTSA:</b> Strategic Trade <sup>b</sup>	1,266	1,236

<sup>a</sup>Assumes professional staff of 55.75 in fiscal years 1987 and 1988. This is the sum of the IVL Division's 22 engineers, the 29 non-engineers and 4.75 full-time equivalent staff years spent by BXA's Office of Technology and Policy Analysis on licensing matters.

<sup>b</sup>Assumes full-time equivalent professional staff of 11.2 in fiscal years 1987 and 1988 based on DTSA licensing data and its estimate of the portion of time each of its personnel spend on licensing.

Table 2.6 shows that BXA personnel processed about 50 percent more license applications per person than DOD personnel. Although this appears to be a significant difference, it should be noted that in addition to the applications reviewed by both Commerce and DOD, Commerce reviews include applications such as those for COCOM countries, which require less time and more routine analysis. Of the 97,450 applications Commerce reviewed in fiscal year 1988, 34,850 were applications to COCOM countries, with an average processing time of 5 days versus an average of 46 days for all west/west applications referred to other agencies and 86 days for west/east applications referred to other agencies.

## Agency Comments and Our Evaluation

Commerce believes that we should have addressed congressional intent regarding DOD's role in free world licensing, DOD's use of its research laboratories in reviewing exports to proscribed countries, and the reasons for the disparity in pay levels at the two agencies. Our report describes Commerce's and DOD's roles in free world licensing and the difference in views between the two agencies regarding the exact nature and scope of DOD's responsibilities. As discussed in the next chapter, however, DOD's role is a policy matter for the administration and the Congress. Regarding DOD's use of its labs, DTSA feels that for the most part it can rely on its own expertise as opposed to tasking the armed service research labs. Concerning the pay level disparity, the report discusses the non-licensing responsibilities of DTSA personnel, which are important determinants of their grades. However, we did not determine whether each agency's personnel were appropriately graded.

Commerce also believes that DOD's role in free world licensing is limited to reviewing the potential for diversion to proscribed countries, which it describes as essentially an intelligence function regarding reliability of the parties to the transaction. We agree that the principal purpose of free world licensing is to assess the potential for diversion, but believe that assessing diversion potential involves more than judging the reliability of the parties to the transaction. In describing the review of free world licensing we note that in addition to screening all parties named in the application against lists of suspect persons and organizations Commerce and DOD also assess whether product capability is consistent with stated end use and whether the data on the application are consistent. We also note that according to DOD and Commerce officials only a small proportion of the applications containing names on the lists of suspect parties are ultimately denied.

DOD generally agreed with our description of the licensing process and our data on budget, staffing, and licensing volume. However, DOD believes that our data on staffing and workload should be clarified to better reflect Commerce and DOD relative workloads. We made several revisions to our staffing and workload discussion to reflect DOD's comments.

# Commerce Needs to Clearly Define Conditions for License Approval

For the majority of export applications, following interagency review DOD's recommended actions generally agreed with Commerce's ultimate licensing decisions. DOD has a definite influence on Commerce's decisions regarding proposed exports to proscribed countries. However, DOD had much less of an influence on Commerce's decisions on export applications for free world destinations. Many of DOD's recommendations to approve applications are conditioned on the exporter or consignee meeting certain restrictions. The conditions, however, in many instances restate regulatory requirements or commitments made by the exporter or consignee. These conditions are not applied consistently and sometimes are not applied correctly. Additionally, policies regarding the use of some conditions are not clearly specified in the regulations.

## Extent of Agreement Between Commerce and DOD

Commerce and DOD generally agree on the approval of most export applications. If the applicant's information raises sufficient doubt, the application may be conditionally approved, returned without action (RWA) because it is incomplete in some way, or denied.

Between June 1987 and June 1988, DOD and Commerce completed action on about 10,380 license applications involving dual use products. About 70 percent, or 7,238, of these cases were west/west, and the remaining 3,142 were west/east.

Comparing DOD's recommendations with Commerce's licensing actions for the cases reviewed and completed in our 1988 sample timeframe shows the extent of agreement between Commerce and DOD, as set forth in table 3.1

**Table 3.1: Comparison of DOD Licensing Recommendations and Commerce Licensing Actions on Applications Closed Between June 1987 and June 1988**

DOD Recommendation	Total	Commerce Licensing Action		
		Approved	RWA	Denied
Approve	3,563	3,329 <sup>a</sup>	213 <sup>b</sup>	21 <sup>b</sup>
Approve with conditions	5,278	4,949 <sup>a</sup>	279 <sup>b</sup>	50 <sup>b</sup>
RWA	407	59 <sup>b</sup>	343 <sup>a</sup>	5 <sup>a</sup>
Deny	840	110 <sup>b</sup>	389 <sup>a</sup>	341 <sup>a</sup>
Other	292	195	95	2
<b>Total</b>	<b>10,380</b>	<b>8,642</b>	<b>1,319</b>	<b>419</b>

<sup>a</sup>Decisions in which Commerce and DOD agreed.

<sup>b</sup>Decisions in which Commerce and DOD disagreed.

Commerce and DOD agreed on 9,356, or 90 percent of the 10,380 actions where agreement was characterized as either Commerce's licensing decision paralleling DOD's recommendation (e.g., Commerce approving applications that DOD recommended be approved) or Commerce's licensing decision generally having the same impact as DOD's recommended action (e.g., Commerce denying an application DOD recommended be RWA). Generally, RWA cases have the same effect on an exporter of a controlled item as a denial, because the exporter cannot export a controlled item without an approved license. Cases are returned because the applicant does not provide requested information or the applicant requests return because the sale has been lost or the application is about to be denied. However, an application can also be returned because a license is not required for export. Commerce returned 492 applications that DOD recommended be approved and approved 59 applications that DOD recommended be returned.

In 732 actions, 7 percent of the total, Commerce's licensing decisions were at variance with DOD's recommendations, with Commerce approving applications DOD recommended be denied or returned or denying or returning without action applications DOD recommended be approved. In the remaining 292 actions, 3 percent of the total, DOD did not make explicit recommendations and Commerce made its licensing decisions independent of DOD's review.

In 71 of the actions in which Commerce and DOD disagreed, Commerce denied applications DOD had recommended be approved. It denied these applications for a variety of reasons, including unfavorable information about the foreign customer or, at the Department of Energy's recommendation, because of unacceptable nuclear end uses.

In 53 percent of the cases where Commerce and DOD agreed, DOD recommended conditional approval and Commerce approved the license. While BXA's data base does not include information on whether the condition was made part of the license, we were able to determine from our statistical sample of licensing decisions that in most instances they were made part of the licenses.

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## DOD's Impact on Commerce Licensing Decisions

After completion of the interagency review process, Commerce and Defense were in agreement as to the disposition of most license applications. To fully assess the licensing process, however, we examined the extent to which Commerce's licensing action changed as a result of DOD's review. We did this by reviewing a statistical sample of 137 cases—71

involving proposed west/east exports and 66 involving proposed west/west exports. (Chapter 1 contains a discussion of our sampling methodology.) We found that DOD's review influenced Commerce's licensing decision in various ways. Table 3.2 summarizes our determinations based on our case study of DTSA's recommendations, BXA's final licensing decisions, and the basis for these recommendations and decisions.

**Table 3.2: Impact of DOD's Licensing Review on Commerce's Final Licensing Decision**

GAO assessment of review's impact	(Number of sample cases)	
	West/East	West/West
Changed outcome of licensing decision	31	7 <sup>a</sup>
Resulted in clarification of what could be exported	18	2
Had limited influence on decision but gave DOD greater confidence in permitting the export	11	32
Produced no change in licensing decision	11	25
<b>Total</b>	<b>71</b>	<b>66</b>

<sup>a</sup>Commerce stated it would have changed its initial decision in 3 of these cases independent of DOD review. Because of the simultaneous nature of west/west license application review it is not possible to establish Commerce's action independent of DOD. To be conservative in assessing DOD's impact, we have included these 3 cases in this table.

### Review Impact on West/East Applications

For west/east cases, we found that DOD's review had a definite impact on 44 percent of Commerce's decisions—Commerce changed its licensing action in 31 of our 71 sample cases. In these cases, Commerce denied or returned without action applications it initially intended to approve or materially limited the capability of the products to be exported as a result of DOD review. When our sample is adjusted to take into account those cases that were excluded from sample selection because DOD recommended unconditional approval and Commerce approved the license application, we estimated that DOD influences the outcome of Commerce's licensing decision and the export in about 36 percent of the west/east cases it reviews.

Below are examples of how these decisions were affected.

- In 8 cases, BXA denied applications it was initially inclined to approve because DTSA's review indicated a military application of the products or technology. For example, one case involved the proposed export of radiation hardened equipment which the Strategic Trade group recommended be denied because of its military implications.
- In 8 cases, BXA decided to return applications without action even though it was initially inclined to approve them. In 5 of these cases, the



applicants requested the RWA disposition after learning that BXA intended to deny the applications based on DOD's concerns.

- In 15 cases, BXA modified its initial approval to incorporate DOD's recommended conditions that (1) limited the capability of the product, (2) substituted a less capable product for the one originally proposed for export, or (3) deleted a product from a multiproduct application.

DOD's review had a limited impact in another 29 sample cases. In 18 cases, Commerce placed technical restrictions on the products based on DOD recommendations clarifying what could be exported. Commerce officials advised us that these clarifications did not affect the export because the applicant never intended to provide the technical capability that was the subject of the restriction. DOD officials agreed that their recommendations in these cases did not have as much influence as in the 31 cases where it changed the licensing outcome but they noted that they made an important contribution in clarifying what could and could not be exported.

In 11 of the 29 cases, Commerce (1) applied restrictions proposed by DOD or the Department of Energy on the product's use or disposition that usually reiterated commitments made by the consignee or (2) received an approval recommendation from DOD with a condition that was, in fact, a reminder to Commerce to make specified further reviews of the applications. We did not consider these last two categories as affecting Commerce's licensing decisions because the imposed restrictions restated commitments made by the exporter and/or did not affect the product to be exported. Commerce licensing officials advised us that they apply such restrictions because they are acceptable to the exporter and they expedite licensing. DOD officials agreed that these conditions gave them greater confidence in permitting the export by either reminding the exporter or Commerce of certain requirements associated with the export.

In the remaining 11 cases, Commerce licensing decisions were unchanged by DOD's review and sometimes disagreed with DOD recommendations. DOD officials told us that they believed their review contributed to a better decision because in conjunction with Commerce's review, it provided for a more detailed examination of the applications. In 7 of these cases Commerce allowed exports despite DOD's recommendation to deny, return without action, or place conditions on the license. In 4 of these 7 cases Commerce concluded that a license was not required for export and so advised the exporter. In 3 others it rejected

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DOD's denial recommendation and unconditionally approved export licenses.

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## Review Impact on West/ West Applications

For west/west cases, we found that DOD's review had a definite impact on 6 percent of Commerce's licensing decisions—Commerce changed its licensing action in a way that materially modified the export in 4 of our 66 sample cases. Although we identified 7 cases where Commerce changed its decision, Commerce maintains that in 3 cases it would have changed its decision independent of DOD's review. Because DOD and Commerce simultaneously review the application, it is impossible to establish whether or not Commerce's final action was independent of DOD's review. When our sample is adjusted to take into account those cases that were excluded from sample selection because DOD immediately recommended unconditional approval and Commerce approved the license application we estimate that DOD influences the outcome of Commerce's licensing decision and the export in about 4 percent of the west/west cases it reviews.<sup>1</sup>

For cases we reviewed, DOD's input to the review of the free world license applications was principally based on its interpretation of the information contained on the license application rather than on unique information in its possession. Below are examples of how DOD affected Commerce's licensing decisions.

- In one case, denial recommendations by the Department of State and DOD influenced BXA's decision to deny an application it originally intended to approve. DOD's recommendation was based on its analysis of information in the license application that the product could be used in a manner contrary to U.S. security interests; State's was based on foreign policy grounds.
- In another case involving the export of 80,000 computer chips for subsequent resale, DTSA recommended denial because it concluded from reviewing the license application that a few items exceeded resale guidelines. BXA referred this case to its Office of Technology and Policy Analysis for policy guidance. This office recommended approval with deletion of the items exceeding resale guidelines. BXA could not explain why it disregarded this recommendation and instead denied the entire application.

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<sup>1</sup>Based on sampling statistics, we are 95 percent confident that DOD influences between 2 and 15 percent of all west/west cases. In chapter 1 we stated the general confidence interval within 13 percent. To provide precise statistics for this specific situation, we calculated exact probabilities.

- In another case, BXA returned without action an application it initially intended to approve. DTSA requested additional technical specifications for the product. BXA returned the application when the data were not provided.
- In a fourth case, DTSA recommended conditional approval based on the exporter's deleting a specific product on a multiproduct application and BXA incorporated the condition in the license.

In three west/west cases in which DTSA recommended that the licenses be conditionally approved or returned, Commerce advised us that it would have taken the same action regardless of DOD's review. In one of these cases BXA returned the application when information requested on the product's end users was not provided. In the other two cases, products were deleted from multiproduct applications because of insufficient information on their end uses. Because of the simultaneous nature of west/west reviews, we could not independently assess the extent to which DOD influenced Commerce in these three cases.

In 34 additional sample cases, Commerce (1) applied restrictions proposed by DOD or the Department of Energy on the product's use or disposition that usually reiterated commitments made by the consignee, (2) received an approved recommendation from DOD subject to ensuring specific documentation accompanied the application, or (3) clarified what could be exported in two of these cases as recommended by DOD. As in our review of west/east cases we did not consider these cases as substantively affecting Commerce's licensing decisions. In addition, because west/west cases are simultaneously reviewed by Commerce and DOD, Commerce officials maintain that they would have independently taken the same actions.

In the remaining 25 cases Commerce's licensing decisions were unchanged by DOD's review, which sometimes disagreed with DOD's recommendations. In 2 of these cases, Commerce approved cases that DOD recommended be denied and in a third case it declined to attach DOD's recommended conditions.

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## Use of Conditions Needs to Be Clarified

For the June 1987 to June 1988 timeframe, we found that 51 percent of DOD's recommendations were conditioned on the exporters or consignees meeting certain restrictions regarding the products. In west/east cases, these restrictions primarily involved product capability. In west/west cases conditions were primarily procedural, i.e., notify the consignee of certain restrictions involving reexport, resale, or transfer of the product.

Many of these conditions are not clearly specified in the regulations; others are sometimes redundant or seem superfluous. DOD officials said that they recommend conditions for several reasons, including expediting license application review when they believe the application is not clear as to exactly what is to be exported, to raise their comfort level with a specific application, and to remind the exporter of export administration requirements.

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## Types of Conditions

Conditions generally place restrictions on the products to be exported. In the one-year universe of cases we examined, the most frequent DTSA recommendation was to approve with conditions—5,278 of the 10,380 applications reviewed. For west/west cases, conditional approvals represented 49 percent of the cases; in west/east cases, they made up 56 percent.

We found that conditions generally fell into three categories—technical, internal, and procedural. Technical conditions are intended to limit product capability by deleting a product from a multiproduct application or substituting a less capable product for the proposed export. Internal conditions serve as DTSA reminders to BXA to check that the paperwork is in order and do not affect any party to the export. Procedural conditions restrict the future sale or use of the product and include

- “no reexport,” which precludes sale of the product from the consignee to another foreign country without prior U.S. government approval;
- “no resale,” which precludes resale of the product within the same country without prior U.S. government approval; and
- “no transfer,” which precludes any other disposition of the product within the same country without prior U.S. government approval.

Other procedural conditions included reminders to return products temporarily exported and restrictions on the use of the products for purposes such as nuclear weapons development. Although procedural conditions were frequently applied, they usually restated commitments made in the documentation supporting the applications.

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## Conditions Applied to West/East Licenses

In west/east cases, the most commonly recommended conditions were technical in nature. Commerce issued conditional approval on 44 of the 71 west/east cases we reviewed. DTSA recommended technical conditions

for 34 of these cases; however, even though BXA usually applied the conditions, it felt they related directly to the export in only about half the cases. As discussed earlier, DOD officials agreed that in a number of cases they use technical conditions to clarify what can be exported. They said that to expedite license application review when they feel the application is ambiguous about what is to be exported and to make them feel more comfortable about recommending approval, they do recommend conditions that may not directly relate to an export but instead establish limits as to what can be exported.

DTSA also recommended that procedural conditions be applied in five sample cases, four involving temporary exports. The Export Administration Regulations require that an application for temporary export contain a specific statement that the product will be returned or otherwise disposed of as authorized by the Department of Commerce. The applications in our sample contained these assurances; however, DTSA recommended these restrictions as a condition for approval. This condition was applied to each license. DTSA officials advised us that they recommend this condition because products exported under temporary license in the past were not returned; therefore, they felt the condition is a necessary reminder to exporters. BXA officials noted that this condition restates what is already contained in the application and required by the regulations.

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### Conditions Applied to West/West Licenses

The conditions applied in west/west cases were primarily procedural or internal. Commerce issued conditional approvals on 36 of the 66 sample cases we reviewed. Because multiple conditions can be applied to a license, the 36 licenses contained 74 conditions—67 procedural and 5 technical. The remaining 2 could not be identified from the case files although the files indicate that a condition was applied. These conditions were recommended by BXA, DOD, and the Department of Energy. Energy reviews applications for products that could be used to develop nuclear weapons. Both DOD and Energy routinely recommend conditions. In addition, 15 internal conditions were recommended by DOD, which would not appear on the licenses because they serve as reminders to Commerce rather than to any party to the export transaction.

“No reexport”, “no resale”, and “no transfer” are frequently cited as conditions for license approval. They made up 43 of the 74 conditions applied. The Export Administration Regulations require prior U.S. government approval to reexport U.S. controlled products but do not

address U.S. government authority to control resale or transfer. However, the end user statement that frequently accompanies the license application contains the foreign party's certification not to reexport, resell, or otherwise dispose of a product without prior U.S. government approval.

The regulatory restriction on reexports applies to most countries, including all free world countries whose license applications are reviewed by DOD. We found the no reexport condition applied in 19 instances in the 66 cases we reviewed, restating the regulatory requirement. This condition was not consistently considered necessary by DOD and not applied to all licenses by Commerce, although all were covered by the no reexport regulation. As with the temporary export condition discussed earlier, DOD contends that it recommends this condition as a reminder to the exporter and consignee. Both Commerce and DOD agree that the lack of consistent application of this condition could be confusing to exporters and that the "no reexport" condition should probably be printed on the export license. However, Commerce officials noted that many other regulatory requirements apply to an export and the no reexport requirement could be unduly highlighted at the expense of the other requirements. Exporters are expected to be familiar with and to comply with all regulatory requirements.

Concern that controlled products may be diverted through resale or transfer to other than the ultimate end user, i.e., controls over the distributor, has been a continuing matter of debate between the two agencies, predating DOD's involvement in west/west licensing reviews. In April 1985, DOD was recommending that applications involving resale to customers unknown to U.S. licensing authorities be denied, but Commerce was approving such licenses without resale restrictions. DOD did not believe that distributors should be considered the same as end users. By March 1986, the agencies agreed to require applicants to identify distributors' customers, especially for proposed exports of sensitive items. For other, less sensitive products, distributors were required to maintain special records of their transactions. There were no special provisions for the least sensitive items. As of November 1988, the agencies have agreed on a number of technologies to be included in or excluded from export applications involving potential resale.

"No transfer" is the most restrictive condition placed on consignees' ability to dispose of U.S. controlled technology in that it prevents not only resale or reexport but also lease and interagency transfer within a foreign government. In 6 of our sample cases, the Department of Energy

recommended no transfer, but Commerce applied the less restrictive no reexport and/or no resale condition. There is nothing in the case files to suggest that Commerce rejected Energy's recommended condition. It appears, rather, that Commerce's licensing officer used the wrong stamp. (These three conditions were rubber stamped on the license). Commerce subsequently advised us that its automation program now prints out the appropriate condition, to avoid such human errors.

The use of internal conditions primarily involved proposed exports to one country where special statements are required to be included with the application. DOD recommended this condition in 15 of our sample cases as a reminder to Commerce to ensure that the applications included the statement. Commerce licensing officials routinely check to ensure that all necessary documentation is present and complete in each export application package.

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## Conclusions

The majority of export applications for dual use products are approved, and, for the most part, Commerce and DOD decisions agree regarding the proposed export of these products following interagency reviews. DOD's recommendations significantly influenced about one-third of Commerce's licensing decisions involving proposed exports to proscribed countries but only about 4 percent of Commerce's licensing decisions for exports to free world countries. Although Commerce approves most applications, these approvals are often conditioned on DOD's recommendation that the exporters or consignees meet certain restrictions. Many of these conditions are not clearly specified in the regulations; others are sometimes redundant or seem superfluous. However, DOD also recommends approval of license applications that Commerce denies because of diversion concerns or unacceptable nuclear end uses.

DOD's input to the review of free world license applications brings a second opinion rather than new information to the licensing process. Whether DOD's contribution merits its continued involvement is a policy decision for the administration and the Congress. It could be argued that DOD's limited influence—it affected the outcome of only about 4 percent of the free world cases it reviewed—does not warrant the resources and additional licensing time. Judging DOD's contribution to the national security in free world licensing is difficult for several reasons. One is that it is difficult to establish whether an export opposed by DOD would in fact have been diverted. A second is that if a diversion had occurred, it may either never become known or may not become known for years. The third is that even if a diversion did occur, it would be difficult to

establish whether the diverted product would have been used in a manner detrimental to U.S. national security.

The “no reexport” condition is clearly defined in the Export Administration Regulations. “No resale” and “no transfer” are conditions that are also used frequently in approving export licenses; however, their use is not clearly prescribed in the regulations.

In west/east licensing decisions, conditions are primarily technical in nature; in west/west decisions they are mainly procedural. Virtually all procedural conditions either restate regulatory requirements or commitments made by the consignee in the export application’s required documentation. DOD recommends procedural conditions as well as internal conditions to remind the exporter or Commerce of certain requirements associated with the export. These procedural conditions, however, are not consistently applied, and sometimes are incorrectly applied, creating the potential for confusion among licensing authorities and the export community.

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## Recommendations

We recommend that the Secretary of Commerce direct the Under Secretary for Export Administration, in consultation with the Departments of Defense and Energy, to review the necessity of applying procedural conditions and, if they are determined to be necessary, (1) amend the Export Administration Regulations to clearly state U.S. policy and prescribe procedures for the use of commonly used conditions for approving export licenses, especially no resale and no transfer, and (2) prescribe guidelines to ensure that conditions are consistently and correctly applied.

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## Agency Comments and Our Evaluation

Commerce and DOD agreed with our recommendation. Commerce also agreed with our conclusions that DOD plays an important role in reviewing export applications for proscribed countries but influences the outcome of less than 5 percent of free world cases. Commerce, however, believes that DOD does not add substantive improvements to free world licensing analyses. DOD generally agreed with our conclusions but takes exception to the inference that it has limited influence on west/west license review and maintains that its role has been a success. (See apps. I and II.)

We believe that these opposing views on DOD’s contribution to free world licensing illustrate the continuing contentiousness of this matter and



reinforce our conclusion that whether DOD's contribution merits its continued involvement is a matter of judgment necessitating a policy decision by the administration or the Congress. We have, however, expanded our discussion to include our belief that DOD's input to free world licensing is based on its interpretation of the information contained on the export license application rather than on unique information in its possession. We make no judgment on the merits of DOD's input.

Commerce's comments also expressed the belief that we tacitly give greater credence to DOD's recommendation over its evaluation. In conducting our work, we carefully reviewed both Commerce's and DOD's files on each case to determine Commerce's initial licensing position, DOD's recommendation, and Commerce's final licensing decision and the basis for these recommendations and decisions. We also discussed many of the individual cases with Commerce and DOD, particularly those where Commerce revised its licensing position, to determine the factors that influenced their positions.

Commerce also stated that our report contradicted itself because it states in many places that DOD has a definite influence on licensing decisions but states elsewhere that because of the simultaneous nature of Commerce and DOD review it is impossible to establish whether Commerce's final action was independent of DOD's review. We do not agree with this characterization. Commerce's comment does not distinguish between our analysis of proscribed country and free world licensing. For proscribed country licensing the process is sequential. Commerce initially reviews and makes a preliminary determination on each application before sending it to DOD. Consequently, those cases in which Commerce changed its licensing position are readily identifiable. For free world licensing the review process is simultaneous and so we worked closely with Commerce to properly characterize its initial position and review those cases where DOD review appeared to change its initial position. We were also careful to identify in the report instances where the simultaneous nature of free world licensing limited our analysis, and we did not consider these cases as having been substantively influenced by DOD.



# Comments From the Department of Commerce

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



**UNITED STATES DEPARTMENT OF COMMERCE**  
**The Assistant Secretary for Administration**  
Washington D C 20230

MAY 9 1989

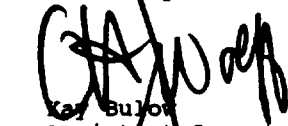
Mr. Frank C. Conahan  
Assistant Comptroller General  
National Security and International  
Affairs Division  
U.S. General Accounting Office  
Washington, D.C. 20548

Dear Mr. Conahan:

This is in reply to GAO's letter of April 20, 1989, requesting comments on the draft report entitled "Export Controls: Extent of DOD Influence on Licensing Decisions."

We have reviewed the enclosed comments of the Under Secretary for Export Administration and believe they are responsive to the matters discussed in the report.

Sincerely,

  
Kay Bulow  
Assistant Secretary  
for Administration

Enclosure

Appendix I  
Comments From the Department  
of Commerce



UNITED STATES DEPARTMENT OF COMMERCE  
The Under Secretary for Export Administration  
Washington DC 20230

May 1, 1989

Mr. Frank C. Conahan  
Assistant Comptroller General  
General Accounting Office  
Washington, D.C. 20548

Dear Mr. Conahan:

This letter provides EXA's comments on the GAO draft report entitled Export Controls: Extent of DOD Influence on Licensing Decisions.

We agree with the study's first recommendation to amend the Export Administration Regulations relating to commonly used conditions for export licenses.

We note that we have discussed the issue of conditions with the Departments of Defense and Energy. Therefore, we believe that the study's recommendation that we further consult with those agencies to determine procedural conditions and to establish guidelines is a good one. We will certainly do so.

We are concerned, however, that the report fails to factor in Congressional intent with respect to DOD review of Free World license applications. Specifically, DOD's role is limited to reviewing the potential for diversion to proscribed countries. The study also does not address whether DOD's role in West/West licensing conforms with other Export Administration Act (EAA) directives specifically Sections 3(2)(a) and 10(e).

The report states that DOD non-technical licensing officers are graded at the GS-14/15 level as opposed to their counterparts at DOC who are GS-9s (see page 27). The report notes that the reasons for this disparity are (1) DOD's use of military personnel whose grade is determined by their rank, and (2) the fact that their jobs include "additional responsibilities including reviewing export control policy and representing DOD at interagency and COCOM meetings." However, DOC licensing officers also have a wide range of "additional responsibilities," including attending interagency meetings and drafting staff papers for senior officials on sensitive export licensing transactions. They also have the ultimate responsibility for licensing cases while DOD staff only provide advisory opinions. The study should clarify which of the two factors identified by the GAO justifies DOD's higher grade levels.

We agree with the conclusion that DOD plays an important role in reviewing export applications for proscribed destinations. The primary reason for export controls to the Soviet Bloc and the People's Republic of China (PRC) is to prevent the flow of high-technology and equipment for use in their military systems. The expertise to make that determination is with the DOD laboratories and the services arm, which can provide that analysis. However, the report notes that DTSA makes use of the

Appendix I  
Comments From the Department  
of Commerce

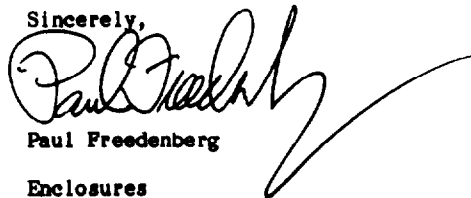
- 2 -

armed services research laboratories for only two or three percent of all applications (page 11). Did the GAO determine that DTSA has the necessary expertise in-house to determine the potential use of proposed exports in Bloc and PRC military systems? Because of Section 3(2)(a) of the EAA, we question the report's statement that "...if DOD influenced the outcome of even one case, its review justifies the additional time and resources" (page 47). Ignoring the law that Commerce administers, the report tacitly gives greater credence to the DOD recommendation over EXA's evaluation. The report also contradicts itself by saying in many places (i.e., West/East license review) that DOD had a definite influence on EXA's licensing decisions. Elsewhere, it states that "Because DOD and Commerce simultaneously review the application, it is impossible to establish whether or not Commerce's final action was independent of DOD's review."

We also agree with the conclusion that DOD influences the outcome of less than five percent of West/West cases. However, it should be noted that DOC sometimes accepts DOD conditions with which it does not agree, or which is sometimes inapplicable to a proposed transaction so it does not really affect the items involved. We do this in order to enable the exporter to consummate the export transaction. Therefore, we would not support a conclusion that DOD adds substantive improvements to licensing analysis of West/West cases, even in these few instances. The only basis for DOD reviews of West/West cases is to assess risks of diversion to proscribed countries as I mentioned earlier. This is essentially an intelligence function regarding reliability of the parties to the transaction. DOD is required by the EAA to provide its intelligence data to DOC, which therefore makes their role in West/West cases redundant. If they are not sharing that information, then they are not following the law. The study fails to address these points.

I am enclosing page-by-page comments (see Enclosure ) which I hope will be helpful in finalizing the report. Should you have any questions regarding the above comments, please feel free to contact me or EXA's GAO liaison person, Ted Zois on 377-5653.

Sincerely,



Paul Freedenberg

Enclosures

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Enclosure

Page 8

See comment 1 and p. 8.

The second line needs to be clarified; not all items controlled have a significant military use. Fact is, "significance" factor varies considerably. That is why we have AEN levels. Also, it is applicable to your finding of page 18 first paragraph of Review of East/West Applications.

Missing is:

See comment 2.

DOD's review of West/West applications is only with respect to potential for diversion to Bloc countries (see attached floor colloquy between Senator Proxmire, Chairman of the Export Control Oversight Committee, and Senator Baucus).

Page 11

See comment 3 and p. 9.

Lines four and five state that the EAA did not specify the countries "to which exports are controlled for national security purposes." The rule is:

Where the law does not specify precisely, the courts turn to the legislative history for guidance. This history shows that countries "to which...etc." have traditionally been the Warsaw Pact and other Communist countries (see attached floor colloquy between Senators Proxmire and Baucus).

See comment 4.

It is also important to note that the only way to detect diversions is intelligence information, so DTSA, as well as Commerce, must seek intelligence information. Section 10(e) of the EAA, however, requires DOD to submit such information to DOC -- therefore, their use of this information is redundant, or if they don't share it with DOC, they are not complying with the law.

Page 12

See comment 5 and p. 10.

Fourth line -- DOD's review of the designated Free World application is directed by the MacFarlane memorandum -- it is not mandated.

Page 14

See comment 6 and p. 11.

It would appear by the second paragraph that GAO failed to answer one of the fundamental questions raised by Congressman AuCoin. Secondly, Commerce did specifically provide budget figures (see Attachment 1) -- the report says GAO could not breakdown Commerce's budget to the level of units involved in export licensing, which is incorrect.

Pages 15-16

See comment 7 and pp. 12  
-13 and 25.

The sample size is too small to provide reliable results. We also note that the four percent of DOD influence found by GAO is less than the 13 percent statistical range of confidence cited.

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Page 17

See comment 8 and pp. 13-15.

The first paragraph is very unclear. The license review for West/West and East/West cases is very different. In East/West cases, the technical review is to weigh the military value of a proposed export. In West/West cases, the review is principally whether there is a chance of diversion to the proscribed countries. No such distinction is made here. Moreover, line seven of the first paragraph is misleading. Commerce has Licensing Officer handbooks and extremely specific regulations to assure license review consistency and conformity. Certainly, some judgment flexibility is accommodated, but this sentence makes it seem that it is primarily subjective and ad hoc.

See comment 9 and p. 13.

Second paragraph, third line is also not totally accurate by the use of the term "non-policy-oriented." Everything is driven by policy -- the technical control parameters used by the Government are set by policy. The Government's policies are reflected in the regulations, and the regulations provide the necessary guidance to industry on the Government's export control policies. Therefore, to say that purely technical evaluations are "non-policy-oriented" is incorrect.

Page 19

See comment 10 and p. 14.

First paragraph indicates that DTSA relies primarily on its own expertise, sending only two or three percent of cases to the labs. The Research and Engineering side of DOD has the technical expertise -- not DTSA. Shouldn't some review be given to that fact?

See comment 11 and p. 14.

Second paragraph is a little misleading -- there really is no such thing as a "bona fide civilian customer" in the Soviet Union. Therefore, licenses are reviewed as if they were destined for the Soviet Government/military, since there is little we could do to prevent in-country transfers of the items being exported. If we have no concerns about the possible diversion to Soviet military use, then the export would be viewed more favorably. With respect to the last sentence, this review is clearly redundant and/or contrary to Section 10(c) of the EAA. This same is true of the first sentence in paragraph 3 on page 19.

Page 20

See comment 12.

Second paragraph -- refers to DTSA duplication of administrative checks unrelated to the assessment of risk of diversion.

We also note a major omission under the West/East section of the GAO report: GAO investigators failed to review the minutes and other records of the Operating Committee (chaired by Commerce) to determine if DTSA engaged in any delaying tactics or made capricious denial recommendations.

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Page 21

See comment 13 and p. 15.

Second paragraph, line five -- Does this refer to non-technical staff for both EXA and DTSA? With respect to EXA's non-technical personnel, only West/West, non-referred cases do not require review and countersignatures by technical staff. All others do.

See comment 14 and p. 15.

The second half of paragraph two has a serious negative implication that is unwarranted and incorrect. It states that Commerce (presumably acting capriciously) favors licensing items "that appear to be too powerful" for the consignee, while DTSA "favors persuading" the exporter to substitute a less capable product. The fact is that Commerce can and does institute pre-license and post-shipment checks to verify the current and future needs of the consignee for the equipment, and to verify that, once shipped, the equipment is on-site. In addition, Commerce may (and does) apply conditions upon the U.S. exporter in the nature of visitation and servicing requirements that are an effective means to assure that the licensed equipment is not diverted.

Page 22

See comment 15 and p. 15.

First paragraph, last line notes only in passing that DTSA uses an informal, often unwritten policy in their review of license applications. This is precisely the problem and should be given far greater review by GAO. This means DTSA can treat cases in an ad hoc fashion, regardless of the statutory standards of the EAA. This confuses and frustrates the business community which is trying to conduct legitimate trade within the parameters of the export regulations. This practice by DTSA is contrary to the intent of Congress (see Section 3(2)(a) of EAA).

See comment 16 and p. 15.

Second paragraph. As noted earlier on page 14, EXA did provide detailed budgetary information (see Attachment 1).

Page 27

See comment 17 and pp.  
17 and 18.

Line five says that EXA non-engineers are "solely involved in license review," which is incorrect. In fact, our non-engineers also have a wide range of "additional responsibilities" including attending interagency meetings, drafting staff papers for senior officials on sensitive export licensing transactions, conduct extensive public seminars, and are the principal contact with the U.S. exporting community. They also have the ultimate responsibility for licensing cases, while DTSA staff only provides advisory opinions. Finally, the higher GS level for DTSA non-engineers is not predicated on importance of their function but, rather, on their existing military rank. EXA is constrained by OPM classification standards that set the GS levels.



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See comment 18 and pp.  
21, 24, 26, and 28-31.

**Page 30**

Paragraph one -- First, it ignores the fact that DTSA often requires numerous restrictions be applied to license applications, many of which are unnecessary in EXA's judgment. In some instances, they have also been inapplicable to the proposed export. Negotiating those conditions can be very time-consuming. Often, therefore, EXA reluctantly accepts the recommended conditions in order to avoid time delays and the attendant risk of the U.S. exporter losing the sale (this point is also applicable to page 47 of GAO report). In the overall report, we object to the implication with respect to conditions/restrictions applied to applications that DTSA's recommendations were always correct as compared to EXA.

See comment 19 and p. 30

Second, we would request that the paragraph be updated to reflect EXA's automation program which automatically prints out the appropriate conditions, thus reducing human error (also noted on page 46 of GAO report).

See comment 20 and pp.  
28 and 29.

**Page 44**

Unclear what GAO means in last paragraph of page 43 and first paragraph of page 44. All conditions applied to West/West cases are to ensure items are not diverted or used in ways expressly prohibited. This includes EXA "internal conditions" which we presume is the term GAO has coined for EXA reminders to ourselves on certain cases, e.g., to request unannounced post-shipment verification checks from time to time to ensure equipment is still in place, or is being used as authorized.

Last sentence of second paragraph is incorrect; it is not a redundant requirement: In the Western Hemisphere, no end-user statement is required, nor is it required for countries that issue import certificates. In addition, some license applications request reexport, transfer, or resale as part of the transaction and for various reasons that portion of the request may not be approved.

See comment 21 and pp.  
30 and 31.

**Page 47**

The last paragraph is highly opinionated and subjective. Nowhere does the report make an assessment of whether the "influence" of DTSA is positive or negative. GAO's opinion that if DTSA "influenced the outcome of even one case, its review justifies the additional time and resources."

The real question is whether the intent of Congress under Section 3 of the EAA is being given adequate weight in the GAO report.

See comment 22 and pp.  
30 and 31.

Finally, in this paragraph is a reference to the Toshiba machine tool sale to the USSR, which is unwarranted and inflammatory. Another country's failings has nothing to do with the United States' export control system.

S 10046

CONGRESSIONAL RECORD — SENATE

July 15, 1987

Committee and Foreign Relations Committee.

With that, this completes all work on those titles, except the two amendments that pertain to these titles. I thought the majority leader would like to know that.

In any event, I agree with the Senator from Pennsylvania in saying to the majority leader that it was an amazing accomplishment this evening that we reached a unanimous-consent agreement which guarantees that by 6 o'clock on Tuesday, there will be a final vote on the passage of this trade bill.

Mr. BYRD. Mr. President, I thank my friend, the Senator from Maryland.

I observe that he has been a very active and able member of the special committee which has been conducting hearings today, and hearings over the past several days, into the Iran-Contra matter.

I have been proud of my choice of him and the others whom I placed on that committee. I never felt that my faith was in vain. Notwithstanding that, he has been able to be on the floor this afternoon and discuss very complicated amendments. I admire his skill, and I thank him for his never-ending reasonableness and always his kind and sympathetic support of the majority leader in the efforts to have the Senate do its work. He always has been most kind to me. My words are inadequate, but nevertheless my thanks are heartfelt.

Mr. President, I had indicated in getting the agreement earlier that amendments would alternate from side to side. I did not include that in the agreement. However, that was the understanding that in order that Republicans and Democrats could have an equal chance to call up their amendments we would alternate and the Chair would alternate and I ask unanimous consent that insofar as is possible and under the circumstances appropriate that that be done on the part of the Chair.

I see that with the understanding that we may be in a situation in which in order for the Senate to move ahead a Senator on one side may not be here or prepared to call up an amendment and in order that the Senate might not be held up in its work I would want the Chair to use its discretion in that situation and certainly with the help and assistance of both leaders we will try at all times to protect the Chair in its decision in this matter of alternating. It will be done fairly on the part of the Chair and insofar as possible the Chair will then alternate in this situation between the two sides.

The PRESIDING OFFICER. Without objection, it is so ordered.

TRADE COMPETITIVENESS ASSISTANCE

Mr. BOTE. I want to highlight one point about the import fee of up to 1 percent ad valorem, which will fund the expanded trade competitiveness assistance program for workers added

by title II, subtitle B, of the bill. It is my view that we should allow for refunds of the import fee for goods reexported after processing in the United States.

Refunds under such circumstances would be akin to duty drawback, which has long been accepted by the International Trading Community as a legitimate practice, and which enhances our ability to export. Refund of the fee on reexport would help to make U.S.-made products more competitive in world markets, so that we can prevent job losses in this country. This refund should be subject to the same time limitation as duty drawback and application for this refund should take place concomitant with application for drawback.

Mr. BAUCUS. Mr. President, I have a series of questions for the distinguished Senator from Wisconsin concerning his interpretation of the Export Administration Act, specifically those provisions addressing national security export controls.

As I understand it, the Export Administration Act authorizes the control of U.S. exports for national security purposes, to further the foreign policy of the United States, and to prevent the depletion of critical materials in short supply. The act provides separate statutory authority and criteria for imposing controls to further each of these separate interests. In the area of national security, the act authorizes the control of exports of dual-use goods and technology to deny—or at least delay—the Soviet Union and its Warsaw Pact allies access to state-of-the-art Western technology that would permit them to (BRADY). Are there any other Senators who are listing gap in military systems. Is this consistent with the Senator's understanding of the intent of Congress when it enacted the Export Administration Act?

Mr. PROXMIRE. The Senator is correct. Section 5 of the act provides the statutory authority for controlling militarily critical exports for national security purposes. That section provides that exports to the Soviet Union and other controlled countries are to be revised for the contribution those exports would make to the military potential of the Soviet Union or any other controlled country.

Mr. BAUCUS. Section 5 also authorizes the control of militarily critical exports to countries other than controlled countries, that is to all free world countries. However, since the object of those controls is to prevent our goods and technology from reaching the hand of the Soviets or any other adversary, I interpret section 5 to mean that exports to countries other than controlled countries are to be reviewed only for the potential that those exports would be diverted to the Soviet Union or to any other controlled country. Is this consistent with the Senator's understanding of the intent of Congress when it enacted section 5?

Mr. PROXMIRE. The Senator is correct. Section 5 authorizes the control of exports to noncontrolled countries for the purpose of preventing their diversion to the Soviet Union or to any other controlled country.

Mr. BAUCUS. As the Senator is aware, the Department of Defense is authorized, pursuant to a Presidential directive, to review exports to a limited number of noncontrolled countries. I have been informed that the Department of Defense frequently delays processing of export license applications, or recommends their denial, for reasons that have nothing to do with the risk that the goods will be diverted to the Soviet Union. Apparently, Defense is attempting to use the authority given in the President's directive to change U.S. foreign policy, particularly as it relates to trade embargoes. Am I correct in stating that such an attempt to influence foreign policy is inconsistent with the legislative authorization for national security controls contained in the act?

Mr. PROXMIRE. The Senator is correct. Section 5 of the act does not authorize the delay or denial of exports to noncontrolled countries for reasons of foreign policy. Section 6 of the act authorizes export controls for foreign policy purposes, not section 5.

Mr. BAUCUS. In that case, does the Banking Committee intend to exercise its oversight authority to see if the Department of Defense is conducting its review of export licenses in a manner that is inconsistent with the limitations prescribed in the President's directive?

Mr. PROXMIRE. The Senator should be assured that the committee will look into this matter in the context of our reauthorization of the Export Administration Act in 1989.

Mr. BAUCUS. As a final matter, am I also correct that the imposition of foreign policy trade embargoes against countries other than controlled countries is only authorized under section 6 of the Act relating to foreign policy controls?

Mr. PROXMIRE. Yes; the Senator is correct.

ROLLCALL VOTE NO. 193

Mr. RUDMAN. Mr. President, last night, July 14, 1987, Senate Rollcall Vote Number 193 was taken. By that vote, the Senate rejected a motion to table a motion to recommit S. 142 to the Omnibus Trade and Competitiveness Act, to the Senate Finance Committee with instructions. At that time I inadvertently voted to reject that motion to table the motion to recommit the bill. In fact, however, I intended to vote in favor of the motion to table the motion to recommit S. 142. I wish to note this fact for the record. Furthermore, it should be noted that had I voted in favor of the motion to table the motion to recommit the bill, it would not have changed the outcome of the vote as the motion

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## GAO Comments

1. We have deleted the word "significant".
2. We have described the decade-long debate on the exact scope and nature of DOD's export license application review responsibilities. Commerce's characterization of why west/west applications are reviewed is the basic rationale for such licensing.
3. Commerce apparently does not disagree with the statement in the report but rather is providing its interpretation of the statute.
4. The use of intelligence in detecting diversions is an enforcement rather than a licensing matter. The use of intelligence in the license application review process is discussed in chapter 2.
5. The report has been revised to reflect Commerce's comment.
6. As agreed with the Congressman's office and discussed in the objectives, scope, and methodology section of chapter 1, we did not draw any conclusions on the equity of the resources given to BXA and DTSA or whether DTSA's budget could be cut for the reasons cited at this point in the report. We have revised the report, however, to state that DTSA's budget data were not broken down to the export licensing level. Commerce did provide us with budget data for its licensing unit.
7. The sample is a statistically valid random sample. The appropriate definition of the universe from which the sample was drawn and our sampling technique were discussed with senior Commerce and DOD licensing officials before the sample was drawn and their comments were taken into account in defining the universe. With regard to the 4 percent of west/west cases we counted as influenced by DOD, we have added language to clarify that it is also statistically valid.
8. The referenced paragraph is a summary one stating that the review process is essentially the same at both agencies. We agree with Commerce's characterization about the differences between west/east and west/west license application review. We discuss license application review procedures for west/east and west/west applications at Commerce and DOD in detail on the pages immediately following this paragraph.
9. We have deleted this phrase.

10. Commerce agrees with our conclusion that DOD plays an important role in reviewing export applications for proscribed destinations. As noted in the referenced paragraph, in reviewing export license applications DTSA feels that for the most part it can rely on its own expertise as opposed to tasking the armed services research labs.

11. This paragraph has been revised to clarify that applications are screened to assess whether the consignees have ties to the military. Regarding Commerce's comment that DTSA's screening is redundant, as we note at the beginning of this chapter the review process at both agencies is essentially the same. Regarding Commerce's reference to section 10(c) of the Export Administration Act, that section relates to license applications that are not referred to DOD, whereas this report involves applications that are referred to DOD.

12. Although we discussed reviewing the Operating Committee minutes and records with senior licensing officials during the course of our work, Commerce declined to make them available. We did not pursue the matter because as our work progressed we concluded that while they would shed light on Commerce/DOD interaction they were not necessary to assess how DOD's review affected Commerce licensing decisions.

13. We have revised this paragraph to reflect Commerce's comment.

14. This difference in philosophy was brought to our attention by senior Commerce licensing officials. It is important to note that the difference pertains to license applications for which there is no basis to believe that there is a risk of diversion. Based on our work, we believe that it is a valid and useful observation.

15. Commerce's observation is consistent with our case analysis. We have expanded our discussion to reflect this information.

16. We have revised this paragraph to reflect Commerce's comment.

17. We have clarified this paragraph to indicate that BXA non-engineers are involved in licensing related matters as well as license review. As discussed in the report, however, DTSA non-engineers have responsibilities that include reviewing export control policy and representing DOD at COCOM meetings. Most of DTSA's non-engineers—6 of 10—at the time of our work were civilians. The Office of Personnel Management has final authority over classification decisions; we did not address whether each agency's personnel are appropriately graded.

18. Chapter 3 of our report deals with the use of conditions at length. The discussion of DOD's impact on west/east application review notes that in a number of cases DOD recommended conditions that clarified what could be exported but that Commerce advised us that these clarifications did not affect the export because the exporter never intended to provide the technical capability that was the subject of the restriction. We further note in our discussion of DOD's impact on licensing decisions and the use of conditions that many conditions restate regulatory requirements or commitments made by the exporter or consignee. We also note that Commerce officials advised us that they apply DOD-recommended conditions because they are acceptable to the exporter and expedite licensing. We believe that the extensive discussion in the report makes it clear that many conditions do not relate directly to the export and that Commerce recognizes this but agrees to their use to expedite licensing.

19. We have added this information to our discussion on the use of conditions later in chapter 3.

20. We have clarified our discussion to make clear that internal conditions are DTSA reminders to BXA to check that the paperwork is in order. We have also revised our discussion on end-user statements to reflect Commerce's statements.

21. We found that DOD's review influenced the outcome of some free world licensing cases, a point which Commerce does not dispute in its comments. This finding is an analytical, not a value, judgement and should not be interpreted as a GAO conclusion that DOD's influence is either beneficial or harmful. The opposing views on the value of DOD's role stated by Commerce and DOD in their respective comments on this report as well as our discussion in chapter 1 of the long-standing difference of views as to whether DOD should have a role in free world licensing emphasizes the continuing contentiousness of this matter. We believe, as we state in our conclusions, that the resolution to this matter is a policy decision for the administration and the Congress.

22. We have deleted this sentence from the report.

# Comments From the Department of Defense

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



POLICY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON D C 20301-2000

01 MAY 1989

Mr. Frank C. Conahan  
Assistant Comptroller General  
National Security and  
International Affairs Division  
U.S. General Accounting Office  
Washington, D.C. 20854-0001


Dear Mr. Conahan:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report, "EXPORT CONTROLS: Extent of DoD Influence on Licensing Decisions," dated April 20, 1989 (OSD Case 7890-A/GAO Code 483488).

The DoD generally concurs with the GAO findings and recommendations. The report notes that the DoD is particularly suited to assessing applications with military significance, and that the DoD and the Department of Commerce generally agreed on how to respond to licensing applications they reviewed. In addition, the report points out that Defense has a definite influence on Commerce decisions regarding proposed exports to proscribed countries. The DoD does have reservations, however, concerning GAO conclusions regarding DoD workload and influence on West/West case processing.

Detailed DoD comments on the GAO findings are provided in the enclosure. The Department appreciates the opportunity to comment on the draft report.

Sincerely,

  
Robert L. Mullen  
Deputy Under Secretary  
Trade Security Policy

Enclosure  
As stated

GAO DRAFT REPORT - DATED APRIL 20, 1989  
(GAO CODE 483488) OSD CASE 7690-A

"EXPORT CONTROLS: EXTENT OF DOD INFLUENCE ON  
LICENSING DECISIONS"

DEPARTMENT OF THE GAO DEFENSE COMMENTS

\* \* \* \* \*

FINDINGS

- **FINDING A: Export Control System For Dual-Use Products.** The GAO reported the U.S. controls the export of dual-use products--i.e., commercial products that could also have a significant military use. The GAO found that the Department of Commerce administers licensing of these products but, under the authority of the Export Administration Act of 1979, the DoD also reviews some of the license applications that Commerce receives. The GAO further reported that, in January 1985, the President issued a directive expanding the DoD role to include reviews of proposed exports to selected free world countries. (pp. 1-2, pp. 8-13/GAO Draft Report)

**DoD RESPONSE:** Concur.

- **FINDING B: The Licensing Review Process And Required Resources.** The GAO reported that the licensing review process at the Department of Commerce and at the DoD is essentially the same. The GAO found that, in reviewing West/East license applications, engineers are concerned primarily with reviewing the technology level and military significance of a product, as well as its appropriateness for the stated use. The GAO noted that the Department of Defense is particularly suited to assessing the military significance of a product. The GAO observed that, in the Department of Commerce Bureau of Export Administration, the Office of Export Licensing issues licenses; within that Office, the Individual Validated Licensing Division reviews individual validated license applications. The GAO further observed that, in the DoD Defense Technology Security Administration, the Strategic Trade group reviews these applications, as well as participates in determining what technologies should be controlled.

ENCLOSURE

- **Budget Data.** The GAO displayed the budgets for the Bureau of Export Administration and the Defense Technology Security Administration for the period FY 1986 through FY 1988. For FY 1988, the budget for the former was \$37.47 million; for the latter, \$9.78 million. The GAO also displayed contract costs for licensing-related services in FY 1987 and FY 1988, with the FY 1988 costs being \$3.84 million and \$1.19 million for the Commerce Bureau of Export Administration and the Defense Technology Security Administration, respectively.
- **Staffing.** The GAO also listed organization staffing for FY 1986 through FY 1988, with the FY 1988 staffing shown as follows:
  - Bureau of Export Licensing, 469;
  - Individual Validated Licensing Division, 108;
  - Defense Technology Security Administration, 128; and
  - Strategic Trade group, 38.

In listing the pay grades of engineers and non-engineers directly involved in export licensing, the GAO noted that the predominant grade for the Department of Commerce engineers was 13, while in the Department of Defense it was 15. The GAO observed, however, that the Strategic Trade Division engineers perform other duties that are carried out by higher graded personnel in the Department of Commerce Office of Technology and Policy Analysis. For non-engineers, the GAO found that the predominant grade at the Commerce Individual Validated Licensing Division was 9, while at the Defense Strategic Trade group, it was 14/15. The GAO noted that the latter have additional responsibilities, including export control policy and representing the DoD at interagency and Coordinating Committee meetings, which are the key determinants of their pay level. (The GAO explained that the Coordinating Committee, or the COCOM, is an informal group for controlling exports, comprised of a number of western nations.)

- **Export Licensing Workload.** The GAO provided data on the number of licenses received and the number referred to the DoD for review for FY 1986 through FY 1988. For FY 1988, these figures were 97,450 and 10,804, respectively. The GAO also listed figures showing license application workload per person, indicating that Commerce personnel processed about 50 percent more applications per person that did the DoD staff. The



GAO commented that Commerce personnel reviewed license applications for COCOM countries (which did not require DoD review) and that these required less time. (The GAO also noted that the figures for DoD personnel were based upon DoD data, which counted each application and subsequent follow-up action as a separate referral.)

The GAO did not draw any conclusions (1) as to the equity of the resources given to the Defense Technology Security Administration or the Bureau of Export Administration or (2) whether the budget of the former could be reduced. (pp. 13-14, pp. 17-29/GAO Draft Report)

**DoD RESPONSE:** Partially Concur.

See comment 1 and p. 16.

- **Staffing.** The non-engineers in the Department of Commerce, Office of Technology and Policy Analysis, have duties similar to the non-engineers in the Defense Strategic Trade Group. The DoD suggests that the report list staffing of the Office of Technology and Policy Analysis to show a balance between DoD and Commerce groups that perform similar work.

See comment 2 and p. 19.

- **Export Licensing Workload.** The GAO figures for Defense represent the number of applications, not a combination of applications and referrals. Therefore, the reference to inflated Defense figures is inappropriate. In comparing processing time, the DoD processing time for West/East applications is 10 days: for West/West applications, it is under 2 days for 73 percent of the applications and within 7 days for the remainder.

- **FINDING C: Extent of Agreement Between Commerce And DoD.** The GAO reported that the Department of Commerce and the DoD generally agreed on how to respond to the licensing applications they reviewed. The GAO comparison of DoD recommendations and Commerce licensing actions, between June 1987 and June 1988, showed that Commerce and DoD agreed on about 90 percent of the cases. The GAO noted, however, that in about half of the cases where there was agreement, the DoD had recommended conditional approval.

The GAO concluded that the DoD has a definite influence on Department of Commerce decisions regarding proposed exports to the proscribed countries (the Soviet bloc countries and the Peoples Republic of China). The GAO estimated that the DoD review was the basis for Commerce changing its initial licensing decision on 36 percent of the applications that the DoD reviewed. The GAO also found that, in an almost equal number of cases, the DoD review resulted in certain restrictions being placed on the export.

The GAO further concluded, however, that DoD reviews of dual-use products to free world countries had much less influence on Commerce licensing decisions. The GAO found that the DoD review changed the Commerce decision only on about 4 percent of the dual-use products going to free world countries. The GAO also noted that, in about half of the free world cases, the DoD influence was limited to reminders on the product's use or disposition. The GAO observed, however, that Commerce approvals of applications were often conditioned on a DoD recommendation that the exporter or consignee meet certain restrictions. (pp. 3-4, pp. 30-39, pp. 46-48/GAO Draft Report)

**DoD RESPONSE:** Partially Concur. The DoD does not agree with the inference that it has made a limited contribution on Department of Commerce West/West applications.

- The Defense recommendations on licenses have resulted in denial of license applications to known diverters in Pacific Basin countries, at an estimated value of approximately \$200 million.
- Commerce has agreed to more effective controls on individual validated and bulk licenses for resale.
- "Resale" procedures have been adopted between the departments to allow for immediate licensing of articles below certain thresholds of technology.
- Defense has been able to provide Commerce with more effective technical intelligence and policy analysis on sensitive cases, as part of a process that is being constantly improved.

- **FINDING D: DoD Contribution to Free World Licensing.** The GAO also observed that, while it could be argued that the limited DoD influence West/West licenses (i.e., 4 percent on the free world cases it reviewed) does not warrant the resources and additional licensing time, because national security is involved, the outcome of just one case could justify the time and resources. In summary, the GAO concluded that judging the DoD contribution is difficult to determine because:

- it is difficult to assess whether an export would have, in fact, been diverted;
- a diversion may never be known or may take many years to become known; and
- it is difficult to establish whether the diverted product would have been used in a manner detrimental to U.S. national security.

See comment 3 and pp. 29-31.

In summary, the GAO concluded that, whether the DoD contribution to free world licensing merits its continued involvement, is a policy decision for the Administration and the Congress. (pp. 3-4, pp. 30-39, pp.46-48/GAO Draft Report)

See comment 4 and pp. 30-31.

**DoD RESPONSE:** Partially Concur. The DoD does not agree that there is a question as to the benefit of continued DoD involvement in reviewing West/West application. The Presidential Directive authorizing Department of Defense review of a maximum of 15 "free world" countries was conceived to tighten up on West/West technology security controls. The West/West effort has been highly successful and is an integral part of the U.S. technology security program.

- Through West/West Review, Defense has identified potential diversions to Far East and Middle East destinations.
- The DoD has also contributed to U.S. initiatives with non-COCOM countries on regimes for more effective control of strategic commodities.

West/West review provides the export control community with an effective management tool. The maintenance of a rolling list of 15 countries will encourage these countries to tighten up on their controls. The data obtained from this review provides information in support of effective policy making in negotiating memoranda of agreements, etc. Participating countries that take steps to control U.S. technology can be removed from the Defense Review List, as in the case of certain Far Eastern and neutral European nations. The program has been a success. It has not only influenced Commerce licensing decisions, but also how administration of the export control program is conducted.

- **FINDING E: Use Of Conditions Needs To Be Clarified.** The GAO reported that "no export," "no resale," and "no transfer" are procedural conditions frequently cited for license approval. The GAO observed that, in many instances, the conditions restate regulatory requirements or commitments made by the exporter or consignee. The GAO found that the Export Administration regulations require prior U.S. Government approval to re-export controlled products, but do not address U.S. Government authority to control resale or transfer. In the 66 free world cases the GAO reviewed, the GAO found that the Commerce Department applied one of these conditions in 43 instances. The GAO observed that, although procedural conditions were frequently applied, they usually restated regulations or commitments made in the documentation supporting the applications. The GAO noted that the regulatory restriction on re-export applies to most countries, including all free

world countries whose licensing applications are reviewed by the DoD. The GAO found, however, that this restriction was not consistently applied and noted that both Commerce and DoD officials agreed that the lack of consistent application of this condition could confuse exporters. In summary, the GAO concluded that procedural conditions are not consistently applied, or sometimes are incorrectly applied, creating the potential for confusion among licensing authorities and the export community. (pp.3-5, p. 30, pp. 40-48/GAO Draft Report)

**DoD RESPONSE:** Concur.

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#### RECOMMENDATIONS

- **RECOMMENDATION 1:** The GAO recommended that the Secretary of Commerce direct the Under Secretary for Export Administration, in consultation with the Departments of Defense and Energy, to review the necessity of applying procedural conditions and, if they are determined to be necessary--
  - amend the Export Administration /regulations to clearly state U.S. policy; and
  - prescribe procedures for the use of commonly used conditions for approving export licenses, especially no resale and no transfer. (p. 49/GAO Draft Report)

**DoD RESPONSE:** Concur. The DoD is ready to participate in such a review.

- **RECOMMENDATION 2:** The GAO recommended that, if procedural conditions are determined to be necessary, the Secretary of Commerce direct the Under Secretary for Export Administration to prescribe guidelines to ensure that conditions are consistently and correctly applied. (p. 49/GAO Draft Report)

**DoD RESPONSE:** Concur. The DoD offers its assistance and coordination in developing such guidelines.

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## GAO Comments

1. We have revised the report to include BXA's Office of Technology and Policy Analysis' Technology Analysis Division, which reviews license applications at the IVL Division's request. This group also participates in CCL review and represents Commerce at COCOM and interagency meetings. These functions most closely correspond to DTSA's Strategic Trade Group's non-licensing responsibilities.
2. We have revised the report to reflect DOD's views on the number of applications it reviews. Regarding processing times, the data we report in chapter 2 illustrate some of the differences between applications Commerce reviews without referral to other agencies and those that involve referral.
3. We reported the results of our case analysis, which estimates that DOD review influenced the outcome of Commerce's licensing decisions in about 4 percent of the west/west cases it reviewed and placed reminder on the product's use or disposition in about half the cases. The report also discusses the resale issue in chapter 3, including DOD's early concerns and the subsequent evolution of resale policy. As indicated in the conclusion to chapter 3, whether DOD's contribution to free world licensing merits its continued involvement is a matter of judgment.
4. DOD, in justifying its involvement in free world licensing, stated that its west/west license review has been a success, including contributing to various countries steps to control U.S. technology. We reported in May 1988 (EXPORT LICENSING: Number of Applications Reviewed by the Defense Department, GAO/NSIAD-88-176) that the number of countries for which DOD review is required declined from 15 to 8 countries as the other 7 countries enhanced their export control systems. We also note the decline in chapter 2 of this report. As indicated in the conclusion to chapter 3 and in comment 3 above, whether DOD's contribution to free world licensing merits its continued involvement is a matter of judgment.

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