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Review of the U.S. Munitions List and the Commodity Jurisdiction Process

Memorandum Report 01-FP-M-027, March 2001

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OFFICE OF INSPECTOR GENERAL
MEMORANDUM REPORT 01-FP-M-027
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EXECUTIVE SUMMARY

The National Defense Authorization Act for FY 2000, Public Law 106-65, Title XIV, Section 1402, Annual Report on Transfers of Militarily Sensitive Technology to Countries and Entities of Concern, requires the Inspectors General of the Departments of Commerce, Defense, Energy, and State to audit the U.S. Government policies and procedures for export of technologies and technical information to countries and entities of concern. The law specifies that these Inspectors General submit an annual report due March 31 of each year beginning in 2000 and ending in 2007. During FY 2001, the Department of State Office of Inspector General (OIG) assessed the export licensing process to determine whether the policies and procedures for developing, maintaining, and revising the U.S. Munitions List (USML) were adequately protecting the export of militarily sensitive technologies. As part of this objective, we also assessed the policies and procedures in place at the Office of Defense Trade Controls (DTC) for processing commodity jurisdiction cases in a timely and transparent manner. Through the commodity jurisdiction process, DTC advises exporters on whether an item is subject to the USML.

OIG found that the policies and procedures for developing, maintaining, and revising the USML were adequately protecting the export of militarily sensitive technologies. Our review of selected commodity jurisdiction cases indicated that the Department of State (the Department) consistently gave deference to the views of the national security agencies in making a commodity jurisdiction determination. Additionally, DTC concurred with recommendations made by a defense or intelligence agency. We found, however, that the policies and procedures for the commodity jurisdiction process needed improvement. The process took too long and was not always transparent. OIG also found that DTC had not performed a comprehensive review of the USML since 1993. OIG believes that Defense Trade Security Initiative (DTSI) number 17, which calls for a multiyear review of all USML categories, is a good way to revise and potentially improve the wording and descriptions of certain USML categories and commodities.

SCOPE OF REVIEW

The primary objective of this review was to evaluate the process for placing items on the USML and the policies and procedures for considering amendments and revisions to it. We also assessed the policies and procedures in place at DTC for processing commodity jurisdiction cases in a timely and transparent manner. In conducting this review, we interviewed Department officials and reviewed documents at DTC, including the International Traffic in Arms...
Regulations (ITAR) and commodity jurisdiction files and records. In addition, we discussed the USML and the commodity jurisdiction process with exporters and a Washington, DC, think tank. We also spoke with officials from the Departments of Commerce, Defense, and Energy. The work was performed between October 2000 and January 2001. Major contributors to this report were Max Aguilar, Herbert Harvell, and Bryan Tenney.

BACKGROUND

The U.S. Munitions List

The United States controls the export of certain goods and technologies for national security, foreign policy, or nonproliferation reasons under the authority of several laws. The principal legislation for controlling the export of goods and technologies with military capabilities is the Arms Export Control Act of 1976. Under the Arms Export Control Act, the President has primary responsibility for designating items on the USML as defense articles or services. In Executive Order 11958, the President delegated this authority to the Secretary of State. Within the Department, the Bureau of Political-Military Affairs, DTC, licenses U.S. companies that export munitions commodities. Munitions commodities are items that only have military uses, such as long range missiles. DTC uses the ITAR to administer its authority under the Arms Export Control Act. The ITAR contains regulations that companies must follow to submit a license. The ITAR also contains the USML, which identifies those items, technologies, and services that have been specifically designed, developed, configured, adapted, or modified for a military application, and could, if exported, jeopardize national security or foreign policy interests of the United States. The USML has 21 categories.

The Commodity Jurisdiction Process

If an exporter is uncertain whether an article or service is covered by the USML, DTC provides a determination using commodity jurisdiction procedures. An exporter’s commodity jurisdiction request identifies the product, article, or services in question and includes a history of the product’s design. The determination process entails consulting among the Departments of Commerce, Defense, and State, and other government agencies and industry in appropriate cases. The Departments of Commerce and Defense provide the technical analysis on the request and send their recommendations to DTC. DTC then analyzes the recommendations and makes a decision on whether the commodity is a USML item. A DTC official stated that the commodity jurisdiction process was developed to help the exporter.

National Security Council Guidelines

In April 1996, the National Security Council (NSC) issued guidelines on how the State Department commodity jurisdiction and Commerce Department commodity classification processes are supposed to work. An NSC official stated that the 1996 guidance was the result of interagency coordination at the Assistant Secretary and Deputy Assistant Secretary levels at the Departments of Commerce, Defense, and State. The guidance was created because of a great
deal of disagreement between Commerce and State about the way commodity jurisdictions and classifications were being granted at those Departments.

The NSC commodity jurisdiction guidelines specify that a decision will be made within a 95-calendar-day cumulative timeline (starting from the date DTC receives a complete commodity jurisdiction request). The time is allocated as follows:

**Routine Determination (up to 60 days)**

- Referral by DTC of commodity jurisdiction applications to other agencies: 5 days
- Departments submit recommendations to Director of DTC
  (Departments may request 10 additional days to submit recommendations for extraordinary cases): 35 days
- Decision by Director of DTC: 10 days

**First escalation period (up to 15 days)**

- Escalation period for the Department(s) contesting the DTC decision: 5 days
- Decision by Department of State Assistant Secretary for Political-Military Affairs: 10 days

**Second escalation period (up to 15 days)**

- Escalation period for the Department(s) contesting the Assistant Secretary’s decision: 5 days
- Decision by Department of State Under Secretary/Secretary: 10 days

**Third escalation period (up to 5 days)**

- Escalation period for the Department(s) contesting the Under Secretary’s/Secretary’s decision: 5 days
- Right of escalation up to the President of the United States:

**Previous Work**

In June 1999, OIG issued a report entitled *Export Licensing* (99-CI-018). This audit found that, overall, the export licensing process is working as intended and that the Department consistently executed its export licensing responsibilities in accordance with established policies and procedures. However, OIG found that the end-use monitoring (Blue Lantern program)
process used in munitions licensing could be improved by: 1) placing more emphasis on the selection criteria used to initiate Blue Lantern checks, 2) closely monitoring the requests that overseas posts are tasked to complete, and 3) ensuring overseas posts have the technical expertise to conduct the checks. OIG also found that supervisory reviews of routine license processing and additional training opportunities for licensing officers was needed. OIG concluded that these needs were symptomatic of a larger problem at DTC – insufficient resources to meet its expanding mandate. Overall, OIG made 11 recommendations to DTC. DTC agreed with 9 of the 11 recommendations and took appropriate steps to comply with the 9. Of the 11 OIG recommendations, 7 are closed, and 4 require additional work to be closed.

In March 2000, OIG issued a report entitled *Department of State Controls Over the Transfer of Militarily Sensitive Technologies to Foreign Nationals from Countries and Entities of Concern* (00-CI-008). OIG found that DTC did not systematically track foreign nationals listed on export licenses, but instead relied heavily on self-policing by U.S. companies supplemented by a few selected compliance reviews. Therefore, although licensing agreements may have been in place requiring adherence to policies and procedures protecting sensitive information, the risk of unauthorized release persisted. OIG recommended that DTC improve the Department’s ability to monitor the transfer of technical information to foreign nationals and inform responsible parties of applicable licensing requirements. Overall, OIG made three recommendations to DTC. DTC agreed with all three. Of the three recommendations, one is closed, and two require additional work to be closed.

**RESULTS OF REVIEW**

**The U.S. Munitions List**

OIG found that the policies and procedures for developing, maintaining, and revising the USML were adequately protecting the export of militarily sensitive technologies. However, DTC had not performed a comprehensive review of the USML since 1993. OIG believes that the DTSIs, especially number 17, which calls for a multiyear review of USML categories, are a good way to revise and potentially improve the wording and descriptions of certain USML categories and the commodities controlled on the USML.

**USML Revisions**

There are very few revisions to the USML. DTC officials stated that changes to the USML occur infrequently because of the nature of the commodities controlled. DTC cannot unilaterally recommend placing items on the USML because the office neither develops military sensitive technology, nor has the technical capacity to make such decisions. The Department of Defense research labs, for example, can recommend that a new technology be added to the USML. Congress and the President can also make changes to the USML. The most recent addition to the USML was made when Congress gave the satellite category back to the Department of State (from the Department of Commerce) in March 1999. All changes to the USML are reported in the *Federal Register* and the Department must submit a report to Congress at least 30 days before any item is removed from the USML.
During our review, we found that some in the export community believed that the U.S. Government is controlling too many commodities on the USML. For example, a major Washington, DC, think tank, the Center for Strategic and International Studies, conducted a study on the U.S. military export control system and summarized that:

The U.S. export control system for military equipment that has evolved over the past 40 years is viewed as increasingly counterproductive. Controls on military exports were designed to protect American technology and serve as a tool of foreign policy. The current architecture of export controls was developed in the 1970s, but business practices have evolved substantially since that time. Rather than protecting technology, the system now causes larger security problems. Export controls are driving a wedge between the United States and its allies and causing other countries to avoid American technology and components because of frustrations with the export licensing process. Interoperability between U.S. and allied forces in the field will suffer.

Part of the frustration expressed by the Center for Strategic and International Studies stems from the fact that the USML is not examined periodically to ensure that it is still meeting its objectives under the Arms Export Control Act. DTC did not have a mechanism for periodic reviews of the USML and for determining whether commodities currently controlled still merited being on the USML. DTC officials last performed a comprehensive “scrub” of the USML at the beginning of 1993 at the directive of the President. Department of Defense officials were consulted, and the results of the review were reported in a Federal Register notice dated July 22, 1993. The DTC official that worked on the 1993 review indicated that a few categories in the USML could still be revised to clarify wording and commodity descriptions.

A September 1999 Department of Defense White Paper on Arms and Technology Transfer concluded, “The USML should be reviewed to identify items and technologies that should no longer be controlled either because they represent low-risk transactions, or because of their widespread availability, are no longer controllable.” Because no entity has done a comprehensive analysis of all USML categories in approximately 8 years to determine whether the commodities controlled on it are in accord with current day realities, a detailed, thorough review of the list is needed. As this report was being written, the Department of Defense, under DTSI 17, was undertaking just such a review.

**Defense Trade Security Initiative Number 17**

In May 2000, a series of DTSIs were announced by the Secretary of State. The objective of those initiatives is to improve export controls. One initiative, number 17, calls for a periodic review of the USML. In response to DTSI 17, Defense drafted a plan for reviews of approximately one-quarter of the USML per year. The plan lists four goals of the reviews: identification of USML items that are more properly controlled on the Commerce Control List (CCL); identification of items that should no longer be controlled on either the USML or the CCL; identification of additions to the USML, primarily because of new technological developments; and clarification of USML language to ensure that users of the list can easily
identify the items requiring export licenses. The five USML categories that are currently under review by the Department of Defense are firearms, explosives, aircraft, toxicological agents, and nuclear weapons. After Defense develops its specific recommendations pertaining to the USML, it will consult with DTC about the findings. The director of DTC agreed that the USML should be reviewed periodically. However, he stated that it would only be useful if the review updated and clarified relevant categories, but not if it were used merely to accomplish the objective of “dumbing down” the USML to make it better resemble the CCL through removal of military parts and components from the USML to the benefit of the international gray arms market and other criminal elements.

The Department of Defense White paper, the findings of the Center for Strategic and International Studies, and the DTSI, illustrate that there is a strong body of thought that reviewing the USML periodically is beneficial. OIG believes that the planned review of the USML is a good plan of action. If commodities controlled on the USML no longer present national security or foreign policy dangers, then the items should be removed from the list. Therefore, we concluded that DTSI 17 is needed and the cycle of USML category reviews begun in May 2000 should be continued into the future.

Commodity Jurisdiction Process

Annually, DTC receives 200-400 commodity jurisdiction requests. During the course of our review, we audited the FY 2000 commodity jurisdiction cases processed at DTC. In FY 2000, DTC received 220 commodity jurisdiction requests. As of November 2000, of the 220 requests, DTC had issued jurisdictional rulings for only 103 of those items; 117 items were still awaiting a determination by DTC. Of the 103 jurisdictional rulings, 56 were determined to be CCL jurisdictional items, 29 were USML jurisdictional items, 7 were split jurisdictions (both CCL and USML), 8 were returned without action for lack of information, and 3 were withdrawn by the exporter. OIG selected a judgmental sample of 20 commodity jurisdiction cases from the 103 jurisdictional rulings for FY 2000.

The sample of 20 cases OIG examined included the following:

- all 7 cases where split jurisdiction was recommended by DTC,
- 6 cases where DTC ruled USML jurisdiction after receiving conflicting recommendations from Defense and Commerce,
- 2 cases where the jurisdictional request had not been referred to Defense and Commerce, and
- 5 randomly selected cases from the remaining 88 rulings that had been completed by DTC in FY 2000.

Based on reviewing the files for the sample cases, we found that the policies and procedures for the commodity jurisdiction process were adequate; however, two components of
the process need improvement. OIG found that the process took far too long and was not always transparent.

**Timeliness of the Commodity Jurisdiction Process Needs Improvement**

As highlighted in the background section of this report, routine commodity determination should take no more than 60 calendar days. The commodity jurisdiction process at DTC, however, took an excessive amount of time. The average processing time for the 20 cases in our sample was 196 calendar days, or almost 6 1/2 months. However, in two cases, the request was not properly referred out per the NSC guidelines, which significantly decreased the amount of time to grant a determination. If these cases are not included in the calculation, the average processing time increases to 214 days, or a little over 7 months. Also, in one case, a company was applying for small technical modifications to a prior determination and not an actual commodity jurisdiction ruling. This case was only referred to Defense. Because the company was not asking for reconsideration on the jurisdiction, Defense replied in only 19 calendar days and the answer was sent out by DTC in 35 calendar days. If this case is also taken out of the calculation, the average increases to 224 calendar days, or 7 1/2 months. This amount of processing time is far too long, especially taking into account that many of the exporters making the requests work in fast-paced environments where decisions have to be made quickly. OIG believes that DTC should make every effort to process the cases within the NSC 60-day guidance.

There are two reasons why the commodity jurisdiction process took so long at DTC. First, the Departments of Commerce and Defense have been extremely slow to respond to DTC’s referrals. In one case in our sample, it took Commerce 289 calendar days to respond to DTC. In other cases in our sample, it took Commerce 180, 163, and 155 calendar days to respond. Also, in all FY 2000 commodity jurisdiction requests DTC received, there were several other cases (not in our sample) that were at Defense and Commerce for more than 200 calendar days, and 95 cases as those agencies for than 100 days. Overall, in the 20 cases in the FY 2000 sample, Commerce averaged 110 calendar days to respond to commodity jurisdiction requests, and Defense averaged 88 calendar days to respond. For all FY 2000 cases closed at DTC, Defense averaged 76 calendar days to respond, and Commerce averaged 117 calendar days. Using the NSC guidelines, Commerce and Defense should return their recommendations to DTC in 35 days, except in an extraordinary case. In that case, the agencies are granted another 10 days.

DTC did not impose or enforce deadlines on Commerce or Defense. OIG believes that a DTC notification process of sending letters to Commerce and Defense when a deadline is approaching and when a deadline has passed would help ensure that Commerce and Defense get their recommendations to DTC within the NSC time guidelines and, as a byproduct, improve responsiveness to exporters.

**Recommendation 1:** We recommend that the Office of Defense Trade Controls develop procedures to regularly notify the Departments of Commerce and Defense of deadlines for specific cases, in order to conform with the National Security Council time guidelines.
DTC agreed with this recommendation and will enforce systematic deadlines on the other agencies.

The second reason for the long processing time of commodity jurisdiction requests at DTC is because even in the cases where Defense and Commerce responded in a relatively timely fashion, in many instances, DTC still took months to issue a determination. For example, in one case, it took the exporter 10 months to get an answer from DTC, even though Commerce and Defense returned their recommendations to DTC within 3 1/2 months. In another case, it took an exporter almost 11 months to get a response from DTC, although DTC had received the Commerce and Defense recommendations within 3 1/2 months. DTC officials stated that this case involved interagency dispute, and a meeting was held with the company, at their request, prior to DTC’s issuance of the final letter. The slow processing time at DTC contradicts the NSC guidance, which states that the process is supposed to take no more than 60 calendar days from start to finish. In our sample, we found that commodity jurisdiction cases took an average of 195 calendar days. This abnormally long processing time does not present the general public with a positive image of dealing with the U.S. Government.

**Recommendation 2:** In coordination with recommendation 1, we recommend that the Office of Defense Trade Controls develop and implement a plan to improve its commodity jurisdiction procedures in order to meet the National Security Council time guidelines.

DTC agreed with this recommendation and will try to improve its own deadlines. DTC plans to deploy additional resources to accomplish this.

DTC officials provided several explanations on why it took so long to process commodity jurisdiction requests. First, DTC cited a continuing staffing problem. As a result, for up to 6 months during FY 2000, an officer at DTC was not assigned to cover the commodity jurisdiction process. During this time, the commodity jurisdiction portfolio was given to a manager who was already heavily burdened and did not give his full attention to the commodity jurisdiction process. Second, a DTC official stated that the office has higher priorities than the commodity jurisdiction process; its highest priority is to process approximately 44,000 export licenses annually. Third, DTC officials believe that some exporters have distorted the intent of the commodity jurisdiction process, which was originally supposed to be a vehicle to help the exporter. Because some companies submit the same request multiple times without submitting new data, DTC officials believe that, in some cases, the process has evolved beyond its original intent and that some exporters are attempting to get DTC to take their particular commodity off the USML. Last, a DTC official stated that in some cases the delays were due to the type of commodities and their complexity.

In OIG’s 1999 audit report on export licensing, we found that inadequate resources had made it increasingly difficult for DTC to meet its broadening mandate. During discussions with the director of DTC for this review, OIG learned that the resource authorization situation has been alleviated, due to an early decision by Secretary Powell to approve recruitment and full staffing of DTC at authorized full-time equivalent (FTE) levels and expedited security
clearances. As of March 11, 2001, DTC has 71 FTE authorized and 55 full-time State employees on board. The office has also enlarged its staff of military officers on detail from the Pentagon from four to eight, drawing on funds made available by Congress in the FY 1999 National Defense Authorization Act. In order to provide an appropriate career path and be consistent with “notwithstanding” provisions related to grade structure enacted in the Foreign Relations Authorization Act for FY 2000 and 2001, six new GS-14 positions and three new GS-15 positions have been established within the authorized personnel ceiling. Full staffing is expected by the Summer of 2001. OIG believes that when DTC staffing initiatives have been completed, this should help it accomplish its mandated workload within NSC guidelines.

**Better Transparency is Needed in the Commodity Jurisdiction Process**

The ITAR requires that all commodity jurisdiction cases be sent to Commerce and Defense. DTC, however, was not referring all commodity jurisdiction requests to Commerce and Defense, thus calling into question the transparency of the process. In our sample, there were two cases that were not staffed out to Commerce and Defense. In the first case, a DTC official stated that it was obvious that the commodity (F-16 Aircraft Hydraulic Speed Brake Values) was a USML item, so DTC did not go through the formal procedures of asking Commerce and Defense for their recommendations. DTC did send Commerce a fax informing it of what it had done with the case. Commerce then sent a fax back agreeing with DTC’s action. Overall, DTC processed this case in just 7 calendar days. In the second case, the item was also obviously a USML item (Technical Drawings and Blueprints Created for the U.S. Air Force Entitled: “BLU-109/B Bomb, 2000 lb., Penetrator Explosive;” Created by Lockheed Missiles & Space Company, Inc;). Therefore, DTC did not refer it out, although it did fax Commerce and Defense its intentions – Defense concurred, and Commerce did not contest it.

As stated above, the ITAR states that DTC shall notify Commerce and Defense of the initiation of each case. When cases are not referred to Commerce and Defense, those agencies have no way to recommend whether the commodity is a USML or a CCL item. It also sheds doubt upon why DTC was not referring all cases to Commerce and Defense. Consequently, in the future, all commodity jurisdiction cases should be properly referred to Commerce and Defense, both the initiation and the resolution of the case.

**Recommendation 3:** We recommend that the Office of Defense Trade Controls inform the relevant agencies of all the commodity jurisdiction requests it receives and inform relevant agencies of its decision on each jurisdiction request.

DTC disagreed with the recommendation. DTC believes that the premise of OIG’s recommendation is that the relevant agencies are not being informed of all commodity jurisdiction requests and all decisions taken on them. They stated that the crux of OIG’s recommendation relates to two cases where, in fact, the agencies were informed of both requests and both decisions, but after DTC made an initial ruling. They also stated that OIG cites two cases out of hundreds available to it.
OIG disagrees with DTC’s response on two counts. First, there were not “hundreds” of cases, because DTC only processed 103 of 220 cases they received in FY 2000. Of that 103, OIG sampled 20, where we found 2 cases (10 percent) that were not properly referred to the other agencies according to both the ITAR and the NSC guidelines. Second, despite the fact that OIG recognized that these were “obviously” USML items, DTC still did not follow the ITAR and NSC guidelines, which clearly state that DTC shall notify Commerce and Defense of the initiation of each case.

Another transparency-related issue in the commodity jurisdiction process is that Commerce and Defense were unable to see each other’s positions on a case unless they specifically asked for it. Consequently, Commerce and Defense did not know whom the other agency recommended as the jurisdictional authority. The system also relied on both Commerce and Defense sending couriers to pick up each individual commodity jurisdiction package, and signed and dated commodity jurisdiction letters. Each commodity jurisdiction package contains background information submitted by the exporter on the particular commodity. This arrangement has also resulted in problems because, according to the DTC commodity jurisdiction officer, occasionally Commerce claimed a specific commodity jurisdiction case was not included in a package months after it was picked up.

DTC did not have a computer interface with the other agencies involved in the commodity jurisdiction process. DTC did not even have an external, unclassified e-mail system. Therefore, if agencies had questions pertaining to the status of a specific case, they had to call DTC. Also, because no computer interface existed for commodity jurisdiction cases, history on specific types of commodities was unavailable to Commerce or Defense. A computer database providing historical knowledge to all agencies involved in this process would be useful for several reasons. First, it could be helpful in reviewing commodity jurisdiction resubmissions from the same company or for like products. Second, it would be favorable if the situation arises again where DTC does not have an officer covering the commodity jurisdiction process full-time. The person temporarily covering the process could access the database and obtain historical data on the particular commodity. Third, a computer database could also improve timeliness by electronically warning Commerce and Defense when they are approaching a deadline.

Overall, OIG believes that automation of the commodity jurisdiction process would be an excellent method to improve interagency communication and solve the problems related to timeliness and transparency noted above. OIG believes that a secure system interface between the Departments of Commerce, Defense, and State is technologically feasible. Relying on manual, paper processes in the modern day world is outdated. Because there is no system interfaces between the agencies involved in the commodity jurisdiction process, the process is inhibited from running as smoothly as it could. Improved transparency and timeliness in the commodity jurisdiction process could be achieved through automation of the process, whether through the use of a database accessible by Commerce and Defense, or at the least, e-mail connectivity.
**Recommendation 4:** We recommend that the Office of Defense Trade Controls create a more efficient and transparent commodity jurisdiction process by coordinating with the Departments of Commerce and Defense to obtain a secure automated system for processing, referring, and storing historical data on commodity jurisdiction cases.

**Recommendation 5:** We recommend that the Office of Defense Trade Controls coordinate with the Bureau of Information Resource Management and establish an e-mail system.

DTC requested that the consideration of these recommendations be deferred until the next congressionally mandated audit, which will examine the information technology systems at each of the agencies involved in the export licensing process and their compatibility. This audit is scheduled to begin in the spring of 2001.

Because the next joint-OIG audit will examine the information technology systems at each of the agencies involved in the export licensing process and their compatibility, OIG agrees to defer these issues until the next report, with the caveat that these recommendations be fully examined and potentially implemented then.

**Unresolved Jurisdiction Issues Concerning Night-Vision Technology**

Night-vision technology-related commodities are an example of where the USML and CCL must be clarified. Since 1998, Commerce and State have disputed which agency has jurisdictional authority for certain night-vision technologies. In 1992, a classified memorandum of understanding (MOU) was signed between the Departments of Commerce, Defense, and State concerning night-vision technology. A Department of State official in the Bureau of Nonproliferation (NP) indicated that the MOU worked fine until 1998. Then, however, controversy ensued because the MOU was ignored, partially due to rapid changes in night-vision technology. It became unclear where certain night-vision commodities should be licensed, at DTC under the USML or at Commerce under the CCL. The NP official explained that the controversy was exacerbated because Defense began sending recommendations on night-vision commodities to Commerce that sometimes recommended USML and sometimes did not.

Concurrently, the political pendulum started to shift toward procontrol views with the report by the Cox Committee. Simultaneously, a case pertaining to one of the disputed night-vision commodities had been escalated to the NSC by Commerce. The NSC, however, has not yet ruled on the case.

OIG was informed that a dialogue started in the fall of 1999 related to the night-vision commodities in dispute. Attempts to resolve the controversy failed and the dispute continued to fester among the agencies. According to an NP official, it was evident that there were enormous problems defining a system versus a component related to certain night-vision technologies, and Defense was unwilling to decide whether these commodities were CCL or USML. An interagency meeting hosted by Defense convened in April 2000. Defense, five industry representatives, Commerce, and a State Department NP official attended the meeting. DTC was invited, but was unable to attend. The meeting's goal was to come to some consensus on the
night-vision commodities in dispute. However, even after the meeting, the NP official felt that the controversy was not resolved. The NP official commented in November 2000:

> The exporter is in real limbo. This has been a 15-to-16-month process. A policy of comity on these commodities has been suspended. We are killing the manufacturers of sensor equipment (a night-vision technology) because of arbitrariness. The overwhelming impression is that we are doing this to the export community because we can. We have to have a real determination on some of these things (as to whether they are USML or CCL).

The dispute over which agency, the Department of Commerce or the Department of State or both, should have jurisdiction over night-vision commodities must be resolved. If the Commerce, Defense, and State Departments renegotiated the 1992 night-vision commodities MOU, it could provide the framework for delineating future commodity, system, and component licensing procedures. Additionally, OIG believes that the DTSI 17 process for 2002 could provide a review of the USML category that covers night-vision technology and aid interagency cooperation on this intricate commodity.

**Recommendation 6:** We recommend that the Office of Defense Trade Controls coordinate with the Departments of Commerce and Defense in updating the 1992 memorandum of understanding on night-vision commodities and request that the Department of Defense add the U.S. Munitions List category for night-vision commodities to the DTSI Number 17 review for 2002.

DTC disagrees with this recommendation. They stated that responsibility for renegotiating the MOU resides with the Department’s Bureau of Nonproliferation, Office of Export Controls and Conventional Arms Nonproliferation Policy. Concerning the second part of the recommendation, DTC proposed that night-vision technologies and space-qualified items be part of the first year review by Defense under DTSI 17. Because their proposal was not agreed upon, DTC has already initiated the process to bring about resolutions to the current cases identified by OIG.

OIG’s recommendation is that the agencies involved in this dispute resolve the problem. OIG will close this recommendation when DTC, as the Department’s jurisdiction authority, in coordination with the Departments of Defense and Commerce, has resolved the issue.

**No Written Guide for the Government Jurisdiction Process**

Because of the interagency impasse on the night-vision commodities, the Office of Export Control and Conventional Arms Nonproliferation Policy initiated the government jurisdiction process. The government jurisdiction process is supposed to work in a manner similar to DTC’s commodity jurisdiction process, except in this case, it is a government agency that is initiating the request, rather than an exporter. OIG notes that DTC is in charge of the government jurisdiction process and opened 14 government jurisdiction requests in FY 2000. Of the 14 requests, DTC issued two rulings. Out of the 14 government jurisdiction cases opened by

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DTC in FY 2000, 6 were initiated by the Department of Defense, 7 by the U.S. Customs Service, and 1 by the Department of Energy.

To resolve the night-vision technology deadlock, the Office of Export Control and Conventional Arms Nonproliferation Policy sent a memo to DTC on June 28, 2000, requesting government jurisdiction rulings for 33 night-vision commodities. The memo states that “the appropriate method for determining jurisdiction, the commodity jurisdiction process described in ITAR 120.4, has been largely ignored for certain products, according to our information.” Separately, throughout the summer and fall of 2000, DTC received technical arguments on about 28 thermal imaging/night-vision technologies from Defense. Almost 6 months later, as of December 2000, the Director of DTC established his position that the commodity jurisdiction process was the proper vehicle for these cases and informed OIG in February 2001 that letters will be sent by DTC to the affected exporters.

The government jurisdiction process failed to solve the night-vision technology controversy because there is confusion as to how the process is supposed to operate. The Director of DTC believed that the government jurisdiction process is designed to support law enforcement agencies, such as Customs. OIG believes that the confusion stems from the lack of official, written guidance for the process. Even though DTC had opened other government jurisdiction cases in FY 2000, in this instance, DTC decided that the commodity jurisdiction route was the proper way to proceed. Because this process is supposed to work in a manner similar to the commodity jurisdiction process and DTC opened 14 government jurisdiction cases in FY 2000, we believe DTC should consult with the NSC and other relevant government agencies and then write policies and procedures for the government jurisdiction process. The procedures should make it clear how the process will operate, when government agencies should use it, and the timeframes for the process.

**Recommendation 7:** We recommend that the Office of Defense Trade Controls establish written policies and procedures for the government jurisdiction process in coordination with all government agencies involved in the commodity jurisdiction process.

DTC partially agreed with the intent of the recommendation. They will remind other agencies and other State offices through a written notice that jurisdictional questions involving U.S. exporters must be resolved through the commodity jurisdiction procedures, while the government jurisdiction process is normally reserved for law enforcement purposes or instances in which a Federal agency seeks clarification as to equipment it has developed or owns.