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DEPARTMENT OF ENERGY

BEFORE THE

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Mr. Chairman and members of the Committee, I am pleased to be here today to respond to your request to testify on the review conducted by the Office of Inspector General of the Department of Energy's (Energy's) export licensing process for dual-use and munitions commodities. Our review was part of an interagency effort involving the Inspectors General of the Departments of Commerce, Defense, Energy, State, and Treasury and the Central Intelligence Agency. The interagency review was initiated following receipt of an August 26, 1998, letter from the Chairman, requesting that the Inspectors General update and expand on a 1993 interagency report concerning the export licensing process for dual-use and munitions commodities.

I will address our findings relating to Energy's export license review process, the corrective actions taken by the Department based on our 1993 report, and our concerns with the "deemed export" licensing process.

AUTHORITIES GOVERNING EXPORT LICENSE PROCESS

Several laws, Executive Orders, and regulations control the export of certain commodities and technologies. The authorities include the Export Administration Act of 1979. The requirements of the Act, which expired in 1994, were continued by Executive Order 12924 under the authority of the International Emergency Economic Powers Act. Other implementing authorities include the Export Administration Regulations; and Executive Order 12981, which authorizes Energy to review any export license applications submitted to the Department of Commerce (Commerce). Executive Order 12981 also provides Energy the authority to enter into Delegations of Authority

with Commerce regarding certain applications that Energy does not need to review. In addition, Executive Order 12981 establishes the interagency dispute resolution process. The Arms Export Control Act authorizes the President to control the export and import of munitions on the U.S. Munitions List. Department of State (State) administers export controls on all munitions through the International Traffic in Arms Regulations, and consults with Energy on export license applications for certain munitions.

Certain commodities and technologies are designated as “dual-use,” that is, commodities and technologies that have both civilian and military application. Some dual-use commodities are designated as “nuclear dual-use” -- items controlled for nuclear nonproliferation purposes. An example of a nuclear dual-use item is fiber and filamentary material, such as carbon fibers. Carbon fibers are used in the manufacture of tennis rackets, golf clubs and fishing poles. Carbon fibers are also used in the manufacture of centrifuges for uranium enrichment activities. In 1998, Energy received about 2,200 export license applications from Commerce, mostly involving dual-use commodities.

Another group of controlled commodities is designated as munitions, which are goods and technologies that have solely military uses. High explosives are an example of a munitions commodity. In 1997 and 1998, Energy received a total of 10 munitions cases from State.¹

¹ Subsequent to the release of our report, we learned that an additional munitions application had been referred to Energy during 1998.

Based on our analysis of Energy's process for reviewing nuclear dual-use and munitions license applications, we determined that, for the most part, Energy's process appears adequate. However, we identified several concerns. These include:

- Lack of regulatory guidance for processing munitions cases referred to Energy by State.
- Inability of Energy to obtain complete information on the final disposition of export cases.
- Non-referral of some applications by Commerce under Energy's Delegations of Authority.

Further, our review identified indicators of possible problems with the export licensing process for deemed exports.

ENERGY EXPORT LICENSE REVIEW PROCESS

The Nuclear Transfer and Supplier Policy Division in the Office of Nonproliferation and National Security is responsible for the review of export license applications. Based on this review, Energy recommends to Commerce or State either approval or disapproval of the license application, or approval with certain conditions. Procedures for processing dual-use license applications submitted to Commerce are clearly articulated in relevant regulations. There is no equivalent process for reviewing munitions cases referred by State.

Sample of 60 Cases Referred By Commerce

As part of the interagency review, Commerce provided a statistically-based sample of 60 export license applications that it had referred to Energy in the first six months of 1998. We determined that all of the 60 cases in the sample were appropriately referred by Commerce. Executive Order 12981 requires that, within 30 days of receipt of a referral, Energy will provide Commerce with a recommendation either to approve or deny a license application. Of the 60 cases referred to Energy, only two did not meet the 30-day timeframe, but were processed within 33 days of the referral.

We did not attempt to determine the appropriateness of Energy's license application recommendations for the 60 cases referred by Commerce. Rather, our analysis of the 60 cases was designed to determine the completeness, accuracy, consistency, and security of the Energy database that supports Energy's export license review process. This analysis did not identify problems with the Energy database. Energy's database, which is the Proliferation Information Network System, or PINS, contains the required records concerning the factual and analytical bases for Energy's advice, recommendations and decisions on the 60 referred cases. Also, Energy has established detailed procedures to limit access to the Energy database and to protect the information contained in the database. In addition, the Energy database retains considerable information on each export case and, therefore, provides a reliable audit trail regarding Energy's processing of the case.

We found minor discrepancies between information in the Energy and Commerce databases. One data field in the Energy database did not contain all of the Commerce comments because the comments were “truncated” when electronically sent to Energy. We understand this problem has been corrected.

Consistent with the Chairman’s request, we examined the adequacy of the training provided to Energy analysts, the adequacy of the interagency “escalation” process for appealing disputed recommendations, and whether the analysts were improperly pressured by their supervisors regarding their recommendations on license applications. We determined that the analysts are provided an adequate level of training. Also, the escalation process for resolving agency disagreements regarding approval or disapproval of specific license applications appears to be satisfactory. Finally, we found no evidence that Energy analysts are being pressured improperly by their superiors to issue or change specific recommendations on license applications.

Energy’s process includes a review for proliferation concerns. Energy analysts have access to classified intelligence information on end-users and suppliers, and export case information on cases that were reviewed by Energy as far back as 1978. Energy analysts use this information to assess the proliferation potential of the destination country of the export.

60 Cases Not Referred By Commerce

In order to determine whether Commerce was appropriately referring cases to Energy, an analysis was conducted of an additional random sample of 60 cases provided by Commerce. These cases had not been previously referred to Energy.

Of the 60 cases that had not been referred to Energy, a Nuclear Transfer and Supplier Policy Division analyst concluded that one case should have been referred. He reached this conclusion based on the involvement of a nuclear end-user for the commodity. However, Commerce maintains that a license application was not required for the commodity and, therefore, it did not need to refer the case to Energy.

Delegations of Authority

Certain commodities controlled for nuclear proliferation purposes comprise the Nuclear Referral List. Some commodities on the Nuclear Referral List are not intended for nuclear end-use or a nuclear end-user. For these commodities, Energy has provided Commerce with Delegations of Authority, which allow Commerce to process these commodities without referring the cases to Energy.

Energy officials in the Nuclear Transfer and Supplier Division independently reviewed a sample of cases covered by the Delegations of Authority to Commerce. Approximately 1,000 to 1,500

cases per year are covered by these Delegations. Based on Energy's review of a sample of these cases, Energy officials determined that approximately one percent should have been referred, but were not. Energy officials plan to rescind the Delegations of Authority to Commerce and determine whether they should be continued.

Munitions Cases From State

The International Traffic in Arms Regulations, implemented by State, include the U. S. Munitions List which identifies munitions commodities that are subject to export controls. Examples of such munitions commodities of interest to Energy include items that could be used in the design, development, or fabrication of nuclear weapons or nuclear explosive devices. These regulations do not require State to refer license applications for munitions commodities to other agencies for review and there is no formalized system for escalating and resolving differences among agencies. As a result, Energy's role in reviewing munitions license applications is not clear.

Historically, State has received few requests for the export of nuclear-related commodities. However, when received, State will, as a matter of practice, refer munitions license applications for such commodities to Energy for review. Energy processes munitions license applications in the same manner as dual-use applications referred from Commerce. In addition to the cases referred to Energy during 1997 and 1998, State and Energy periodically consult to determine whether Energy should review other munitions license applications.

Corrective Actions Required By Other Agencies

Our review disclosed several issues that would best be addressed by other agencies or an interagency task force. For example, there is no process for interagency meetings on munitions cases or for escalation of disagreements over munitions cases. Also, Commerce officials were concerned that several agencies, including Energy, did not always send an Assistant Secretary-level representative to meetings of the Advisory Committee on Export Policy, which is responsible for resolving interagency concerns and differences over export license applications. The Advisory Committee is chaired by the Assistant Secretary of Commerce for Export Administration and has as its members Assistant Secretary-level or equivalent representatives of State, Defense, Energy, and the former Arms Control and Disarmament Agency. At Energy, an Assistant Secretary for Nonproliferation and National Security was recently appointed. We have been advised by the Department that the Assistant Secretary will attend Committee meetings involving extremely sensitive export cases.

In addition, the Commerce database was unable to electronically transmit large diagrams and other oversized documents that support export license applications. Thus, Energy must often either request from Commerce the required documents or contact the applicant directly. The current process used by Commerce to provide supporting documents to Energy might, therefore, adversely impact the timeliness of Energy's review process and should be improved.

1993 Report Recommendations

Our 1993 report on Energy's export licensing process contained 11 recommendations for corrective actions. Although we found that Energy had, for the most part, implemented the corrective actions within its control, several recommendations require additional review and action.

Five recommendations involved matters concerning records retention and the need to document the factual and analytical bases for Energy's recommendations to Commerce on export cases. These recommendations were resolved as a result of the implementation of PINS. A sixth recommendation was addressed by the development of new procedural manuals for use by Energy's export control analysts when processing export cases.

Of the five remaining recommendations, two still require corrective action by Energy. An assessment is required by Energy of the adequacy of the staffing level for the Nuclear Transfer and Supplier Policy Division. This Division has assumed additional responsibilities and may not be adequately staffed. Also, actions are required by Energy to ensure that the Department's intelligence capabilities are being fully utilized in the processing of export cases. Although Energy analysts were generally satisfied with the level of support provided by Energy's Office of Intelligence, one analyst was concerned that intelligence analysts were only providing abstracts of intelligence data and not the actual "raw data."

The remaining three recommendations in our 1993 report will require interagency coordination to assure appropriate implementation of corrective actions. Two recommendations require Energy to coordinate with Commerce to obtain information regarding the shipment of commodities. Although Commerce provides Energy information regarding whether a license application was approved or disapproved, Commerce does not inform Energy whether the commodity was actually shipped. The remaining recommendation requires Energy to coordinate with State to obtain information regarding whether a license application was approved by State for a munitions commodity and whether the commodity was actually shipped. This type of information from both Commerce and State would assist Energy analysts in their review of license applications for possible proliferation concerns.

“Deemed Export” License Process

During our review, there were indicators that Energy laboratories were not seeking export licenses for foreign nationals having access to unclassified information. According to the Export Administration Regulations, any release to a foreign national of technology or software that is subject to those regulations is “deemed to be an export” to the home country of the foreign national. We reviewed the export license process to determine whether hosts should have acquired deemed export licenses for foreign nationals having access to unclassified information or technology.

Our sample included foreign national assignees from China, India, Iran, Iraq, and Russia, who were involved for more than 30 days in unclassified activities at four Energy laboratories: Lawrence Livermore National Laboratory, Los Alamos National Laboratory, Oak Ridge National Laboratory, and Sandia National Laboratories.

We also looked at a sample of projects at the Energy laboratories in which these assignees had participated. The purpose of this sample was to determine whether there were any export concerns regarding the assignments.

During our visits to the four Energy laboratories, we found that guidance was not clear regarding when a deemed export license would be required for an assignment involving a foreign national. This apparently was largely due to the fact that the Export Administration Regulations, the relevant Energy order, and internal Energy guidelines did not clearly explain when a deemed export license may be required.

In addition, we found that the processes at the laboratories for reviewing assignments of foreign nationals generally rely on the hosts of the foreign national assignees to determine whether there are export concerns associated with the assignment. Hosts are required to be Energy or Energy contractor employees. We found several hosts who were not aware of, or did not understand, the requirements for deemed export licenses, and several hosts who did not appear to exercise appropriately their host responsibilities.

The following examples illustrate our concerns with the deemed export process.

- A security specialist at Los Alamos National Laboratory said that they rely on the host to determine if a deemed export license is required for a foreign national assignee. However, nine of the 14 hosts we interviewed contended they were not responsible for making this determination.
- At Oak Ridge National Laboratory, the form used for approval of assignments involving foreign nationals requires the host to indicate whether the assignment will result in the disclosure of technical data that may be subject to export controls. However, 13 of 17 hosts said that they were not responsible for this determination. Also, five of the hosts acknowledged that the foreign nationals they were hosting were affiliated with a nuclear facility or nuclear end-user in their home countries. The Energy analysts we consulted as part of our review, informed us that at least two export licenses might have been required for the assignees because of their nuclear affiliation. In addition, one scientist, who was the host of record, said that although he was listed as the host for a Chinese foreign national assignee, another Chinese foreign national assignee was the actual host.

Our review also disclosed that there is no organization within Energy that has management responsibility for the deemed export license process. Although the Nuclear Transfer and Supplier Policy Division has some responsibilities for reviewing deemed export license applications, that office was not providing oversight of the deemed export process. Energy officials, in response to

our report, stated that the Department is establishing a new policy that will clarify where responsibility lies between Headquarters and DOE facilities.

We selected a relatively small, judgmental sample of the documentation processed for proposed assignments to the laboratories of foreign nationals from the five countries included in our review. From this sample, we identified several cases where an export license may have been required because of the information being accessed or the individual's employer. For example, at Oak Ridge National Laboratory, a license application might have been required for three of 20 foreign national assignees because of possible access to technology subject to export controls. A license application may also have been required for two other assignees because of their affiliation with nuclear end-users in their native countries. Also, at Lawrence Livermore National Laboratory, one foreign national assignee was involved in discussions about lasers, which might have exposed the individual to export controlled technology.

On March 16, 1999, we advised the Acting Deputy Secretary of our concerns regarding deemed exports. We subsequently met with Energy officials regarding our preliminary findings. Following those meetings, Energy officials initiated a number of corrective actions that address the recommendations in our report. Among the more significant actions are:

- establishment by the Under Secretary of an export control task force to review export control issues relating to Energy facilities, including deemed exports;

- initiation of dialogue with Commerce on the issue of deemed exports;
- redrafting of policy with respect to unclassified foreign visits;
- redrafting of export control guidelines that would clarify requirements for deemed exports;
- initiation of efforts to educate Energy personnel on the issue of export control.

Summary of Review

In summary, we found that, with the exceptions that I have previously discussed, Energy's export licensing process for dual-use and munitions commodities was adequate. We also found that additional actions are needed by Energy to complete the recommendations in our 1993 report. Some of these actions will require coordination with Commerce and State. Finally, we found that clarification and improvements are needed in Energy's process for determining whether an export license is required in conjunction with assignments of foreign nationals to Energy laboratories. Management agreed with the recommendations in our report and identified specific actions to implement each of the recommendations. We intend to closely monitor Energy's actions.

Mr. Chairman, this concludes my testimony. I would be pleased to answer any questions.