


Defense Trade Advisory Group



Competing Requirements - Controlled Unclassified Information & Critical Program Information (CUI/CPI)

Plenary Session

January 16, 2014

Agenda



1. Team Members
2. Assignment and Task Approach
3. Background, History, Observations
 - a. Controlled Unclassified Information
 - b. Critical Program Information
4. Summary and Recommendations

Working Group Members



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*Tasking (#4)

- Survey of industry on how they reconcile potentially competing requirements placed on them by the USG in terms of protection of controlled unclassified information, including export control data.



*Further clarification on Tasking #4

1. Review how various USG agencies define controlled unclassified information (CUI) including export controlled technical data, and critical program information (CPI).
2. Review the statutory, regulatory and other bases (e.g., policy or directive) for agency control.
3. Assess how USG agencies impose potentially competing requirements on industry for protecting CUI and CPI

Additional Notation:

USG agencies use terms such as “CUI” and “CPI” and “export controlled technical data”—each term has its own definition and protection requirements. These agency requirements may overlap, duplicate or be in conflict with one another.

- Example—AECA and ITAR, DOS is responsible for controlling export. USG program offices may also impose controls for protection. The same information could also be controlled for FOCI under the NISPOM. (paraphrased for brevity)



DTAG Approach to Tasking #4

- Identified potential relevant US Government agencies
- Researched how those agencies define CUI/CPI
- Researched those agencies' legal authority
- Held discussions with US Government and industry representatives regarding CUI/CPI requirements
- Identified potential areas of conflicting/competing requirements
- Compiled research and documented observations/recommendations



Agencies Reviewed

- Department of Commerce
 - Bureau of Industry and Security (BIS)
- Department of Homeland Security (DHS)
- Department of Defense (DOD)
 - Defense Security Service (DSS)
 - Defense Technology Security Administration (DTSA)
 - National Security Agency (NSA)
 - National Geospatial-Intelligence Agency (NGA)
 - National Reconnaissance Office (NRO)
- Department of Energy (DOE)
- Department of Justice
 - Drug Enforcement Agency (DEA)
 - Federal Bureau of Investigation (FBI)
- Federal Energy Regulatory Commission (FERC)
- Nuclear Regulatory Commission (NRC)
- Department of Treasury
 - Office of Foreign Assets Control (OFAC)



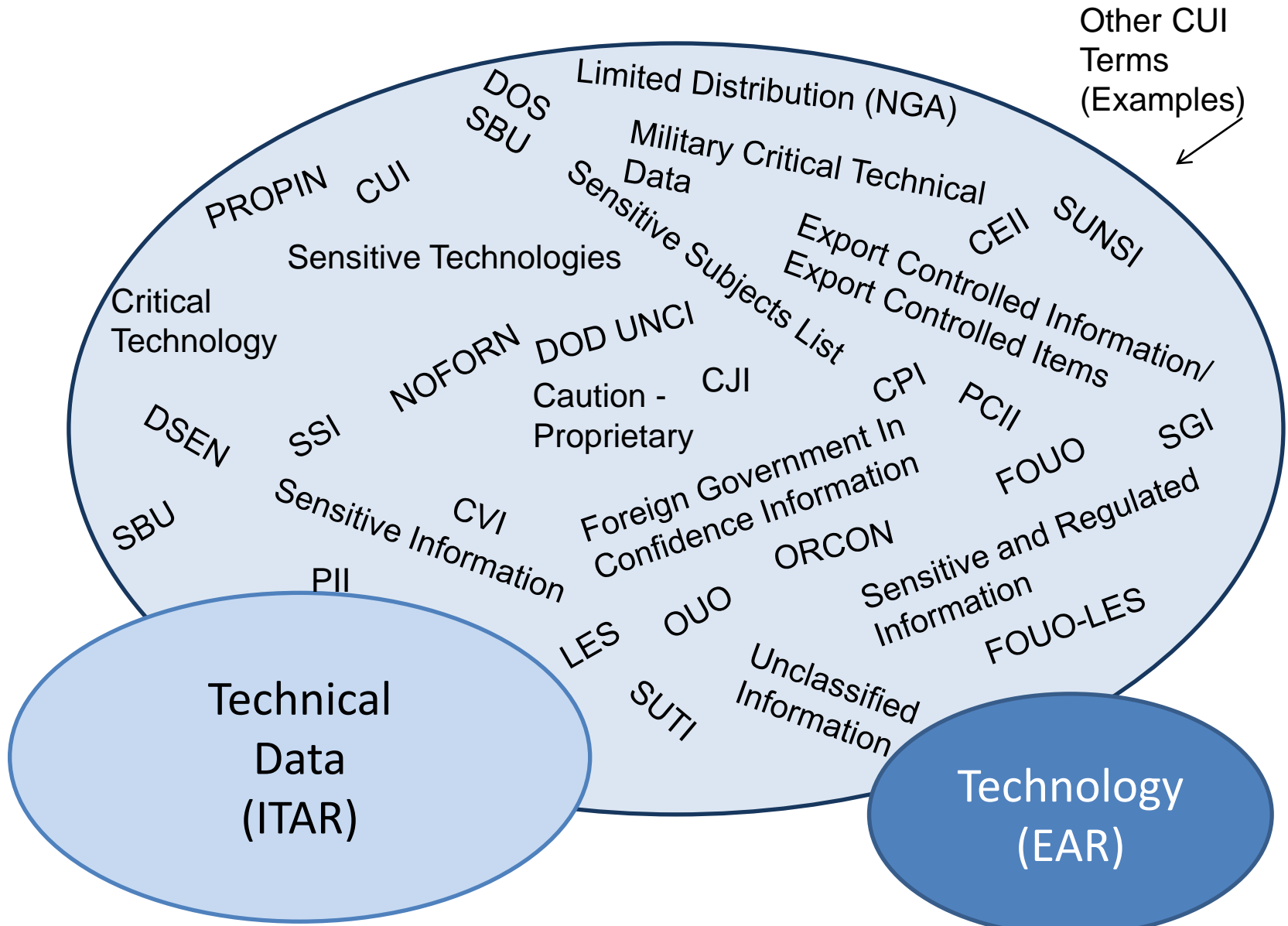
Excerpt of CUI & CPI Research Chart

DOC/BIS (Department of Commerce/Bureau of Industry & Security)			
Definitions and Examples of CUI	Definition of CPI	Statutory/Regulatory Authority	Agency Policy/Directive
<p>“Technology”: “the information and know-how (whether in tangible form, such as models, prototypes, drawings, sketches, diagrams, blueprints, or manuals, or in intangible form, such as training or technical services) that can be used to design, produce, manufacture, utilize, or reconstruct goods, including computer software and technical data, but not the goods themselves.” 50 U.S.C. App. § 2415(4)</p> <p>See also 15 C.F.R. § 772.1, defining “Technology” (General Technology Note) as: “Specific information necessary for the ‘development’, ‘production’, or ‘use’ of a product. The information may take the form of ‘technical data’ or ‘technical assistance.’”</p> <p>“Technical data”: “May take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories.” 15 C.F.R. § 772.1</p> <p>“Technical assistance”: “May take forms such as instruction, skills training, working knowledge, consulting services.” 15 C.F.R. § 772.1</p> <p>“Controlled Technology,” General Technology Note (Supp. No. 2 to Part 774) and the Commerce Control List (Supp. No. 1 to Part 774)</p> <p>“Section 12(c) Information,” Supp. No. 2 to Part 736—Administrative Orders</p>	None	<p>Export Administration Act (“EAA”) of 1979, as amended (50 U.S.C. App. § 2401 et seq.), extended under the authority of the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.)</p> <p>Export Administration Regulations (“EAR”), 15 C.F.R. §§ 730-774</p> <p>Section 12(c) of the EAA (50 U.S.C. App. § 2411(c))</p> <p>Exec. Order No. 11,958 §§ 1(l)(3), 2(a) (Jan. 18, 1977) (revoked by Exec. Order No. 13,637 (Mar. 8, 2013), “except that, to the extent consistent with this order, all determinations, authorizations, regulations, rulings, certificates, orders, directives, contracts, agreements, and other actions made, issued, taken, or entered into under the provisions of Executive Order 11958, as amended, and not revoked, superseded, or otherwise made inapplicable, shall continue in full force and effect until amended, modified, or terminated by appropriate authority.”)</p> <p>22 C.F.R. § 120.4 (Commerce participation with State/DDTC in commodity jurisdiction requests)</p>	<p>Administrative Order One: Disclosure of License Issuance and Other Information (Supplement No. 2 to 15 C.F.R. § 736) “[I]nformation obtained by the U.S. Department of Commerce for the purpose of consideration of or concerning license applications”</p>



Controlled Unclassified Information (CUI)

Analysis: Overlap Export-Controlled and CUI Terms*



*DTAG found at least 40 terms overlapping with “Technical Data” (ITAR) and “Technology” (EAR).

CUI Relevant Older History



- September 11, 2001
- The final report from the National Commission on Terrorist Attacks upon the United States:

“Information was not shared, sometimes inadvertently or because of legal misunderstandings. Analysis was not pooled...Often the handoffs of information were lost across the divide separating the foreign and domestic agencies of the government.”

Source: www.9-11commission.gov 416-419

CUI Relevant History



- December 2004: The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)—requires President within 1 year to issue guidelines to promote a sharing environment.
- **December 2005: President Bush IRPTA guidelines**
- **May 2008: President Bush Memorandum**
- **May 2009: President Obama Memorandum**
- **August 2009--Report and Recommendations of the Presidential Task Force on Controlled Unclassified Information**



CUI Task Force Report (2009)

SBU Markings in Use: 117

1. SENSITIVE 2. DO NOT DISSEMINATE 3. SBU-NF 4. SBU/ NOFORN 5. UNLIMITED RIGHTS 6. GOVERNMENT PURPOSE RIGHTS 7. LIMITED RIGHTS 8. RESTRICTED RIGHTS 9. SPECIAL LICENSE RIGHTS 10. PRE-EXISTING MARKINGS 11. COMMERCIAL MARKINGS 12. CLOSE HOLD 13. RSEN 14. PREDECISIONAL PRODUCT 15. SOURCE SELECTION SENSITIVE 16. DEA SENSITIVE (DEA S) 17. SENSITIVE (SENS) 18. COPYRIGHT (DATE) (OWNER) 19. DELIBERATE PROCESS PRIVILEGE 20. RELIDO 21. EYES ONLY 22. BANK SECRECY ACT INFORMATION (BSA) 23. ACQUISITION SENSITIVE 24. ATTORNEY WORK PRODUCT 25. LIMITED ACCESS 26. RESTRICTED ACCESS 27. MEDICAL RECORDS 28. LAN INFRASTRUCTURE 29. IT SECURITY RELATED 30. LAN BACKUP SENSITIVE INFORMATION 31. SOURCE SELECTION INFORMATION 32. TRADE SECRET 33. ATTORNEY CLIENT 34. BUDGETARY INFORMATION 35. PRE-DECISIONAL, 36. FOR INTERNAL USE ONLY 37. NOT FOR DISTRIBUTION SAFEGUARDS INFORMATION (SGI) 38. AGENCY INTERNAL USE ONLY (U//AIUO) 39. TRADE SENSITIVE INFORMATION 40. SENSITIVE BUT UNCLASSIFIED (SBU) 41. HEALTH RELATED INFORMATION (EM) 42. NO DISTRIBUTION (NODIS OR ND) 43. LAW ENFORCEMENT SENSITIVE (LES) 44. EXCLUSIVE DISTRIBUTION (EXDIS OR XD) 45. FOR OFFICIAL USE ONLY (FOUO) 46. SENSITIVE STUDENT RECORDS (STR) 47. CONFIDENTIAL BUSINESS INFORMATION (CBI) 48. LIMITED OFFICIAL USE (LOU) 49. LIMITED DISTRIBUTION 50. LIMITED DISTRIBUTION (LIMDIS) 51. SENSITIVE INFORMATION (SINFO) 52. COVERED BY CONFIDENTIALITY AGREEMENT 53. ORIGINATOR CONTROLLED (ORCON) 54. CONTRACTUAL SENSITIVE INFORMATION 55. ENFORCEMENT CONFIDENTIAL INFORMATION (ECI) 56. LIMITED OFFICIAL USE INFORMATION (LOUI) 57. SUBSTANCE ABUSE RECORDS (SAB) 58. SENSITIVE SECURITY INFORMATION (SSI) 59. TITLE III COMMUNICATIONS (T3) 60. FEDERAL TAXPAYER INFORMATION 61. TECHNOLOGY TRANSFER INFORMATION 62. BOMB TECH SENSITIVE (BTS) 63. CFIUS INFORMATION (CFIUS) 64. RESTRICTED BY COURT ORDER (CO) 65. LIMITED USE ONLY (LUO) 66. PRIVACY ACT PROTECTED INFORMATION (PAPI) 67. PROPRIETARY INFORMATION (PROPIN) 68. CHILD VICTIM/WITNESS (CH) 69. FINANCIAL RECORDS (NON-NSL) (FR) 70. FINANCIAL RECORDS NSL (NSLF) 71. SOURCE SELECTION INFORMATION 72. LIMITED CREDIT INFORMATION NSL (NSLC) 73. SELECT AGENT SENSITIVE INFORMATION (SASI) 74. CALEA COST RECOVERY INFORMATION (CALEA) 75. INNOCENT IMAGES VISUAL INFORMATION (IIVI) 76. SENSITIVE TREATY/MOU/NDA INFORMATION (STM) 77. PRIVILEGED FBI ATTORNEY CLIENT 78. OFFICIAL USE ONLY-SMALL BUSINESS 79. OFFICIAL USE ONLY-PROTECTED COOPERATIVE CENSUS CONFIDENTIAL 80.SBU-GSA-BI 81.OFFICIAL USE ONLY (OUO) 82.ATTORNEY/ CLIENT PRIVILEGED 83. GRAND JURY MATERIAL (FGJ) 84. OFFICIAL USE ONLY-APPLIED TECHNOLOGY 85. DOD UNCLASSIFIED CONTROLLED INFORMATION (CCPI) 88. CONTROLLED NUCLEAR INFORMATION (U//DCNI OR U//ECNI) 89. CHEMICAL-TERRORISM VULNERABILITY INFORMATION (CVI) 90. NAVAL NUCLEAR PROPULSION INFORMATION (U-NNPI) 91. OFFICIAL USE ONLY-EXPORT CONTROLLED INFORMATION 92. NAVAL NUCLEAR PROPULSION INFORMATION (NOFORN) 93. SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION (SUNSI) 94. PROTECTED CRITICAL INFRASTRUCTURE INFORMATION (PCII) 95. OFFICIAL USE ONLY - SENSITIVE INTERNAL INFORMATION 96. TELEPHONE OR ELECTRONIC COMMUNICATIONS NSL (NSLT) 97. JUVENILE - PROTECT IDENTITY IN ACCORDANCE WITH 18 USC 5031 (JI) 98. SENSITIVE INFORMATION- SPECIAL HANDLING REQUIRED 99. SENSITIVE WATER VULNERABILITY ASSESSMENT INFORMATION 100. LIMITED OFFICIAL USE-LAW ENFORCEMENT SENSITIVE (LOU-LES) 101. EXPORT CONTROLLED INFORMATION (OR MATERIAL) (ECI) 102. SENSITIVE HOMELAND SECURITY INFORMATION (SHSI) 103. OPERATIONS SECURITY PROTECTED INFORMATION (OSPI) 104. DISSEMINATION IS PROHIBITED EXCEPT AS AUTHORIZED BY AR 20-1 105. COMMUNICATION/ ATTORNEY WORK PRODUCT (PRV) 106. RESEARCH AND DEVELOPMENT AGREEMENT INFORMATION 107. INNOVATION RESEARCH INFORMATION AND SMALL BUSINESS 108. CONFIDENTIAL INFORMATION PROTECTION AND STATISTICAL EFFICIENCY ACT OF 2002 (CIPSEA) 109. WITNESS SECURITY PROGRAM -PROTECT IDENTITY IN ACCORDANCE WITH 18 USC 3521 (WS) 110. SENSITIVE DRINKING WATER RELATED INFORMATION (SDWRI) 111. CONTRACTOR ACCESS RESTRICTED INFORMATION (CARI) 112.COMPUTER SECURITY ACT SENSITIVE INFORMATION (CSASI) 113. SMALL BUSINESS INNOVATION RESEARCH (SBIR) PROGRAM 114. PERSONALLY IDENTIFIABLE INFORMATION - PRIVACY ACT OF 1974 115. PERSONNEL DATA, PRIVACY ACT OF 1974 (5 U.S.C. 552A) 116. FOR OFFICIAL USE ONLY- LAW ENFORCEMENT SENSITIVE (FOUO-LES) 117. FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

CUI Relevant History



- **November 2010 - Executive Order 13556 regarding “Controlled Unclassified Information”**
- 2011: Several agencies publish reports and guidance
- 2012: DoD Manual (5200.01) issued regarding CUI; FAR change proposed by DoD, NASA and GSA
- 2013:
 - NDAA Section 941 – Reports to DoD on Penetrations of Networks and Information Systems
 - NISPOM conforming changes – tabled (in formal coordination at DoD)
 - DOD Manual updated to incorporate changes
 - **SECDEF Memo October 10, 2013 “Safeguarding Unclassified Controlled Technical Information”**
 - **November 18, 2013—DFAR Supplement Final Rule**—providing adequate security of systems containing controlled technical information.



CUI – Next USG Steps

2014:

- CUI Task Force anticipated to have collected all input for CUI handling.
- For each CUI category and subcategory, federal agencies shall comply with information security requirements defined by the National Institute of Standards and Technology (NIST). Federal agencies shall consult the following NIST publications for guidance on implementing specific measures to safeguard CUI.



Industry Examples of CUI Confusion

- US DOD agencies (e.g., DSS) requiring cleared contractors to produce
 - Lists of export licenses/authorizations by country of end users/recipients on all programs (not just classified),
 - Copies of ITAR/EAR Voluntary Disclosures—one cleared contractor was asked to provide copy of VD's prior to submission to DDTC.
 - Information about network security and/or unauthorized release/access/compromise for unclassified networks (not just those related to classified programs).
 - These same requirements are included in (“agreed”) standard FOCI mitigation instruments
 - (Creates confusion within industry about authority, adds burden and cost, duplicative oversight, threats of removal of security clearance)
- Documentation Marking Issues
 - Improperly labeled information (labeled FOUO but not containing sensitive information), an STTC (Army Simulation and Training Technology Center) staff member advised that email system defaults attachments as FOUO.
 - (Mislabeling leads to improper handling, creates confusion with what is actually sensitive and what can be fundamental research)



Industry Examples of CUI Confusion

- Documents marked FOUO published by the CBP/DHS on FedBizOps
(Memorandum published by DSS on what to do in such circumstances)
- Some DOD Intel agencies (e.g., NSA, NGA, NRO) and program offices appear to have unwritten processes and requirements relating to export authorizations (pre-clearance), imposing ad hoc requirements on industry that can't be anticipated.
(Confusing to Industry and lines of responsibility are unclear—who is the authorizing authority?)
- One contractor responded and acted upon direction from DOD program office that conflicted with DOS provisos and other directives. Contractor submitted a “Voluntary Disclosure” to State which resulted in a required audit (\$\$\$\$).
(DOD program direction sometimes puts industry at risk to violate AECA).
- Some companies have received provisos on licenses unrelated to ITAR or export controlled information—
 - How to manage/control CUI
 - Provisos related to proprietary information not export controlled
 - Proviso if including another company's product/data that they have to get permission from the company prior to export.



DTAG Observations - CUI

- Various agencies define, regulate and/or control CUI, including US Government export controlled information differently.
- Various agencies have statutory authority to regulate CUI, but some may be operating under overlapping policies and/or directives.
- The USG has already identified these “CUI” problems, created a CUI Task Force, but focusing on government information sharing problems, and not on impact to industry and its role as a partner in the safeguarding of CUI.
- Even if definitions are harmonized, problems stem from confusing/conflicting controls and lack of intra/inter agency coordination.



Critical Program Information (CPI)

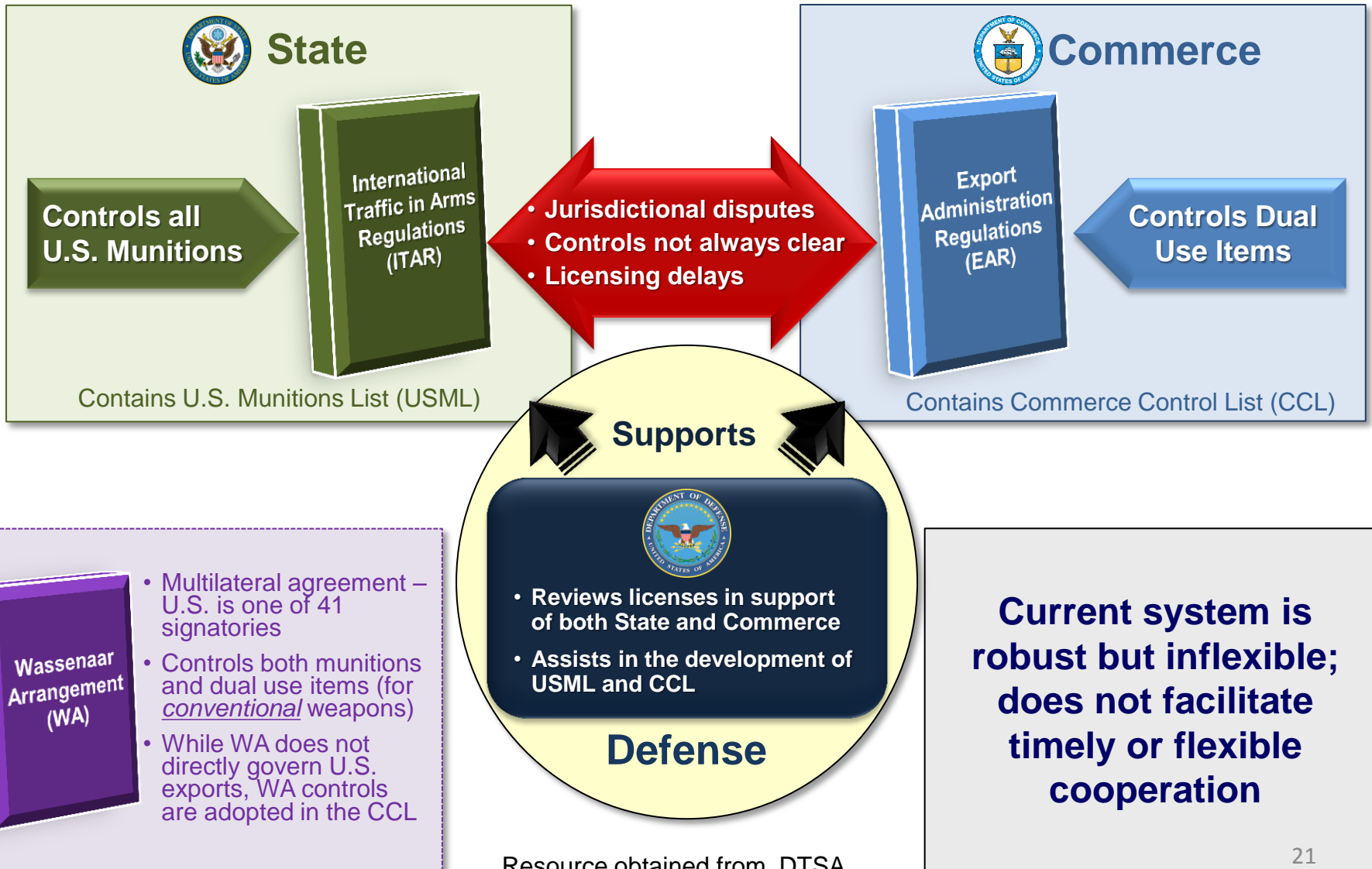


DOD--Critical Program Information

- CPI = another area where “CUI” terminology, requirements and processes are unclear
- CPI Definition =

“Elements or components of a Defense Department Research Development, and Acquisition program that, if compromised, could cause significant degradation in mission effectiveness; shorten the expected combat-effective life of the system; reduce technological advantage; significantly alter program direction; or enable an adversary to defeat, counter, copy, or reverse engineer the technology or capability. Includes information about applications, capabilities, processes, and end-items. Includes elements of components critical to a military system or network mission effectiveness. Includes technology that would reduce the US technological advantage if it came under foreign control.”
- DOD – CPI Review Process and Requirements
 - Currently, there are 13 DOD processes for reviewing requests to export or “release” certain technology and associated products considered to fall within the definition of CPI (e.g., LO/CLO, MTCR, AT)
 - These review processes were initiated over the past 50 years and are evolving.

DoD's Role in Export Control



TS&FD “Pipes Chart”

MILDEP Processes DoD Lead: Various <i>MILDEP-specific release policies & processes</i>	NDP	★	Policy	Primary
	LO/CLO		AT&L	Primary
	AT		AT&L	Process
	COMSEC	★	NSA & NII	Primary
Other DoD Processes DoD Lead: Various <i>Org.-specific release policies & processes</i> Processes being documented currently	SAP		SAPCO	Specialized
	DSC		AT&L + Policy	Specialized
	MTCR	★	Policy	Specialized
	NVD		DTSA	Specialized
	Intel	★	USD(I)	Specialized
	Data Links/WF		NII	Specialized
	PNT/GPS		NII	Specialized
	GEOINT	★	NGA	Specialized
	EW	★	None	No single process

★ Interagency process

TS&FD Status Quo

Multiple Exit/Entry – Multiple ‘Pipes’

PROBLEM #2

Too Many Entry Points/No Triage

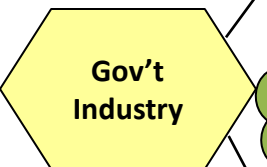
PROBLEM #3 Too Much Autonomy w/out Synchronization & Timelines

PROBLEM #4

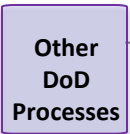
Too Many Decision Documents

PROBLEM #1

Reactive Approach

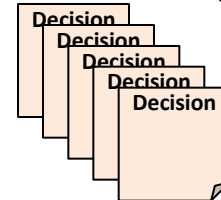
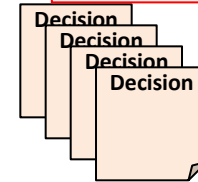


- FMS
- Direct Comm'l Sale
- Cooperative MOUs
- Other



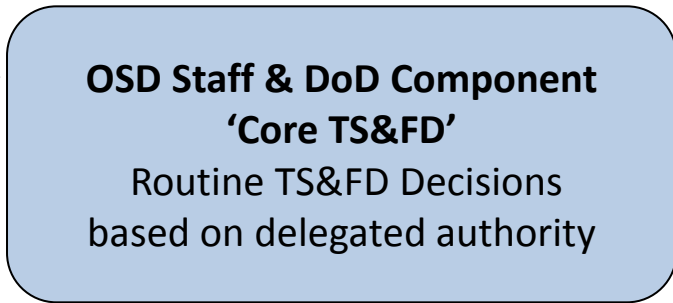
NDP	★	Policy	Primary
LO/CLO		AT&L	Primary
AT		AT&L	Process
COMSEC	★	NSA & NII	Primary
SAP		SAPCO	Specialized
DSC		AT&L + Policy	Specialized
MTCR	★	Policy	Specialized
NVD		DTSA	Specialized
Intel	★	USD(I)	Specialized
Data Links/WF		NII	Specialized
PNT/GPS		NII	Specialized
GEOINT	★	NGA	Specialized
EW	★	None	No single process

★ Interagency process



PROBLEM #5

No Top Level DoD Closure Process

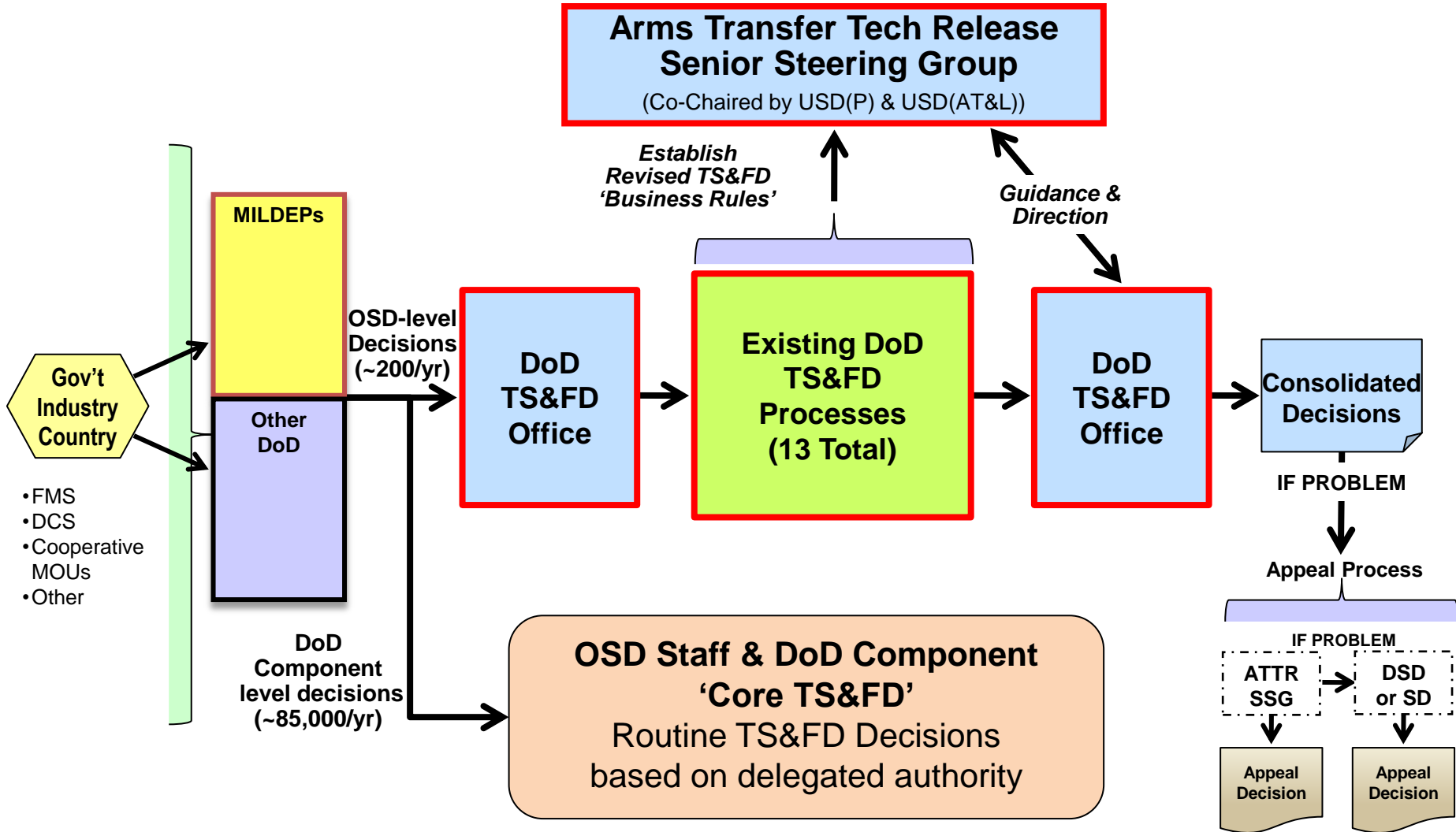


———— 200 Priority TS&FD Reviews (PTR) /yr

----- 85,000 Routine Decisions (RDs) /yr

TS&FD New Process

Strategy-Driven, System-Oriented Approach



CPI Background



- These “stovepipes processes” relate to ITAR licenses but are additional processes—outside the purview of industry and sometimes even within or among the DOD agencies.
- There appear to be no common standards, documentation or inputs for the TS&FD technical review process.
- The Armed Services branches that review ITAR licenses involve different offices having different objectives and technical expertise (i.e., “Acquisition” reviews for Army, “International Program Office” reviews for Navy, “International Affairs” for Air Force).
- Some “stovepipes” are taking longer than others--DTAG understands there is no standard for review (causing RWA’s and delays).



CPI Background

DOD recognizes that there is an issue with its technology release review process.

- August 11, 2008--Deputy Secretary Defense Lynn asked DOD to review and streamline the tech release processes. “Establishment of the Department of Defense Senior Steering Group (SSG) on Arms Transfer and Technology Release” (ATTRSSG)
- July 22-2010—Deputy Secretary Defense Memo—”Comprehensive Review of DOD Technology Security and Foreign Disclosure (TS&FD) Processes
- January 9, 2012 and February 8, 2013--Deputy Secretary Ashton Carter - Directive Type Memorandum (DTM) 11-053, “Technology Security and Foreign Disclosure (TS&FD) Processes”
- DTSA Strategic Plan 2013—”Objectives” page 25



Industry Examples of CPI Confusion

A Defense Contractor recently had a license denied

- The specifications exceeded what was exportable per a classified document.
- The DOD “policy owner” had recently changed the “policy” but was not involved in the license review.

(Industry does not have insight as to what is CPI, let alone the process that happens because information is declared to be CPI.)

(Industry does not have insight as to the relevant offices or departments that control technical release policies and determinations.)

(Policies are not transparent and only by direct meetings can “policy” be learned)

(Not all companies have clearance--access to the classified policy).

(Changes in technical release or licensing policy do not appear to be effectively communicated within DOD).

Industry Examples of CPI Confusion



A company applied for a license based on an understanding of CPI release policy change; such license was subsequently denied because the policy was not “formalized.”

Advance submission had been encouraged by DOD citing that “either the policy will be formalized in time or your application will help drive it to closure.”

(Industry needs to be able to rely on anticipatory guidance. Lack of transparency in DOD process and lack of DOD internal coordination creates confusion and imposes unnecessary expense to industry.)

Industry Examples of CPI Confusion



- A cognizant military service advised a company the CPI associated with its product offering required Anti-tampering protection of an LRU (a low-tech component with ample foreign availability). After meetings and significant effort, the company was advised that the AT protection-- a much easier, less \$ fix was only required in the software. (Not every company has the indigenous expertise to manage the “stovepipes.”)
- An off-the-shelf product (previously widely authorized for export) was combined with other items for export. The conglomerated items received an Anti-Tamper protections for export...that had never been previously required. (Lack of anticipatory policy and industry coordination creates confusion and expense.)
- DOD attempted to impose Anti-Tampering requirements on the software of a foreign designed product under licensed manufacture in the US. The foreign company is the design authority. (The US company would have had to have the foreign design authority implement).



DTAG Observations - CPI

- The definition of CPI is unclear to industry.
- DOD's CPI release/export policies are often not transparent
 - Companies learn "post export license submission" that products are not exportable (or must be converted to FMS).
- DOD internal CPI release processes are often not transparent or well coordinated.
 - Companies experience delays and impractical restrictions.
- The USG has already identified the "CPI" problems, and has issued directives to streamline the relevant processes and provide more transparent policy and guidance.
- Even if the definition is CPI made more transparent, anticipatory policies are published, problems stem from confusing/conflicting controls and lack of intra/inter agency coordination.



DTAG Summary & Recommendations



DTAG Summary & Recommendations

- CUI and CPI issues relating to DDTC/ITAR export controls exist primarily with and within DOD agencies/processes
- Recommend that DDTC communicate with relevant DOD stakeholders regarding improvements to CUI and CPI issues to assist with a more holistic resolution
- The impact on industry stemming from CUI and CPI controls and oversight should be considered in addition to USG interests (information sharing)
- DDTC should continue to coordinate with the DoD agencies on a regular basis to ensure proper coordinated implementation of resolutions.



Thank you