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NEWSLETTER

Canadian Export/Domestic Controls and U.S. Export Controls



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This newsletter is designed to meet the needs of Canadian industry involved in Canadian export controls, U.S. export controls or Canada's Controlled Goods Program (CGP). It identifies amendments or proposed amendments to such programs and, where appropriate, provides timely and useful assessments on such changes, especially with respect to how such changes might impact Canadian domestic and trade interests. If you require further advice or clarification on the issues included herein, or on any related issue not covered here, please contact Chris Fauquier or Thomas Jones of CECS at (705) 325-7288 or (613) 825-5080, respectively or, Michael Woods or Carmen Francis of Heenan Blaikie at (613) 236-2705 or (613) 236-7904, respectively.

The articles and comments contained in this newsletter provide general information only. They should not be regarded or relied upon as legal advice or opinions.

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SECTION A: Canadian Export Controls

1. Revised Export Control List

On 15 March 2013 Canada issued a revised Export Control List (ECL). The new ECL is dated April 2011 and incorporates changes in the various export control regimes up to the following dates:

- ECL Groups 1 and 2: Wassenaar Arrangement to 10 December 2010
- ECL Group 6: Missile Technology Control Regime to 15 April 2011
- ECL Group 7 (partial): Australia Group to 4 June 2010
- ECL Groups 3 & 4: No changes noted

2. Change in Definition of Consignee/End-user

DFAIT has recently changed its procedures regarding consignee/end-user designations. Previously, exporters were required to identify any “intermediate consignees” which could be forwarders or consolidators, but certainly not the end-user of the goods. We now understand that because the term “intermediate consignee” is not identified in the Export Permits Regulations (EPR), DFAIT will no longer make use of this concept. In fact, the “person” to whom the goods are first sent becomes the “consignee/end-user” even though the true end-user may be located in another city in the immediate country of receipt or in another country altogether. The following illustration might help:

A company wishes to ship an item enumerated in the ECL to a company in Shanghai. They use a shipper in Hong Kong to do this, but apply for a permit to ship to the Shanghai company, wherein the shipper is specified as being located in Hong Kong.

According to DFAIT, since “intermediate consignee” is not found in the EPR, they may only authorise the movement of an ECL-controlled good from Canada to a foreign consignee — which is the foreign entity to which a Canadian exporter is shipping directly as a result of its contractual obligations (in this case,

the Hong Kong company). The subsequent movement, transfer or re-export of the goods which may take place between the consignee and other entities in the same country (in this case, Shanghai) are local transfers and are out of DFAIT’s jurisdiction. Should the consignee wish to re-export the goods to another country, this export will have to be carried out under the country’s export controls requirements. However, this practice does not relieve Canadian exporters from identifying the actual end-user in Shanghai and providing supporting documentation regarding the actual end-user in Shanghai.

3. Mexico Joins the Wassenaar Arrangement and the Nuclear Suppliers’ Group

The Republic of Mexico has become a participant in the Wassenaar Arrangement (WA) and the Nuclear Suppliers’ Group (NSG). They become the 41st country to join the WA and the 47th country to join the NSG.

4. Wassenaar Posts New Documents

The Vienna-based Secretariat of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies has posted the following on its website:

- [A public statement](#) on the outcome of the 2012 Plenary Meeting;
- [A summary of changes](#) on the list of dual-use goods and technologies and munitions list; and
- [Updated control list](#) reflecting the aforementioned changes.

5. Canadian Government Amends Automatic Firearms Country Control List

On December 14, 2012, the Government of Canada amended the *Automatic Firearms Country Control List* (AFCCL) to include Colombia, bringing the number of countries on the AFCCL to 34.

6. Canadian Government Issues General Export Permit No. 46 on Cryptography (GEP 46)

On January 14, 2013, the Government of Canada issued General Export Permit No. 46 as a companion to GEP 45, issued in August 2012. Both GEPs cover similar goods and technology and carry similar conditions. GEP 45 covers certain exports of cryptography for development or production of a product, whereas the most recent GEP 46 covers certain exports of cryptography to certain consignees as detailed below.

GEP 46 allows residents of Canada, subject to certain conditions and limitations, to export or transfer certain items included in Group 1-5 Part 2 of “A Guide to Canada’s Export Controls” to eligible consignees, which include non-government affiliated entities that are located in any destination, excluding an “ineligible destination”, provided the entity is controlled by either a resident of Canada or a non-governmental affiliated individual or an entity located in one of 29 “designated countries” which also controls the resident of Canada who exports or transfers the items.

Generally speaking, the following ECL Items are not eligible under GEP 45 or 46:

- a. Items 1-5.A.2.a.2., 1-5.A.2.a.4., or 1-5.A.2.a.9.
- b. Item 1-5.B.2. (if related to items in a.)
- c. item 1-5.D.2. (if related to items in a.)
- d. item 1-5.E.2. (if related to items in a.)

These new GEPs include reporting requirements which are expected to be typical for future GEPs. This includes notification before using them, annual reporting requirements and an obligation to retain records for six years.

These GEPs do not replace the Broad-based Permits for Cryptography. Further information concerning this regulation can be found in Notice to Exporters 186 at: <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/186.aspx?lang=eng&view=d>

SECTION B: U.S. Export Controls

1. ITAR End-Use Investigations Reveal Compliance Priorities with use of Canadian Exemptions (126.5)

The article found at the website noted below commented on the use of the Canadian Exemptions by U.S. companies. According to the Blue Lantern Report of 2009, it identified 154 examples of misuse of the Canadian Exemptions out of a total of 35,000 uses of 126.5 over a 2-year period. Overall, the review was largely positive. <http://www.globaltradelawblog.com/2012/11/20/itar-end-use-investigations-reveal-compliance-priorities/#page=1>

2. U.S./Australian Defence Trade Exemption comes into effect

Effective 06 June 2013, the U.S./Australian Defence Trade Exemption (ITAR Part 126.16) comes into effect. This is the second of 2 new defence trade Exemptions, the first one applying to the United Kingdom (ITAR Part 126.17) which came into effect in April 2012.

3. State/DDTC and Commerce/BIS Publish Proposed Plans for Removing Certain Military Electronics from USML Cat. XI.

The equipment proposed for transfer from the USML to the CCL is broad. Details may be found at: <http://www.gpo.gov/fdsys/pkg/FR-2012-11-28/html/2012-28477.htm>

4. U.S. Proposes Changes to CCL, USML and Multilateral Control Lists

The U.S. Administration is proposing changes to its Commerce Control List (CCL) but will seek approval in the four multilateral export control regimes before proceeding. The U.S. wants to review the CCL, the USML and the multilateral lists to make sure that they remain "positive" in nature. In other words, the lists "should be sufficiently 'positive', clear, and precise so that persons, including persons who are not knowledgeable about U.S. export controls, who understand the technical parameters, characteristics, and capabilities of an item, will ordinarily be able to determine its export control classification and jurisdictional status without needing to consult the government for an interpretation." DOC/BIS is considering comments received from U.S. interests. Information on these proposed changes can be found at: <http://www.gpo.gov/fdsys/pkg/FR-2010-12-09/html/2010-30966.htm>

5. Congress Grants Authority for President to Remove Comsats and Related Components from USML

As part of the fiscal year 2013 *National Defence Authorisation Act* (2013 NDAA), the U.S. President removed commercial satellites and related components and technology from the U.S. Munitions List (USML). This action was as a direct result of an August 2012 Congressional proposal that approved the elimination of USML controls over commercial satellites. Congressional action was taken because the U.S. satellite industry's global market share, estimated at 80% in 1998, dropped to 40% in 2004 as a direct result of the migration of such controls from DOC/CCL to DOS/USML in 1999. Controls over commercial satellites now fall under the Export Administration Regulations (EAR).

6. The U.S. has published additional and multiple ITAR/EAR changes that come into effect on 15 October 2013

These changes cover certain goods and technologies that no longer warrant export control on the U.S. Munitions List (USML) but will remain controlled under the Commerce Control List (CCL), that is, aircraft, gas turbine engines, and related items. According to reports these changes will help to streamline U.S. export controls by transferring certain aerospace export controls from the ITAR to the EAR. These changes may be found at: <http://www.gpo.gov/fdsys/pkg/FR-2013-04-16/html/2013-08351.htm>; and <http://www.gpo.gov/fdsys/pkg/FR-2013-04-16/html/2013-08352.htm>

7. DDTC Adds Afghanistan as Major NATO Ally under ITAR

(77 Fed. Reg. 76864) - The U.S. Department of State's Directorate of Defence Trade Controls (DDTC) has changed the ITAR status of Afghanistan. That country is now considered to be a major non-NATO ally under ITAR Part 120.32 and no longer a country under ITAR Part 126.1.

8. State/DDTC Posts Proposed ITAR Amendments

The U.S. Department of State (DOS), Directorate Defence Trade Controls (DDTC) continues to move forward on migrating certain goods and technology from the USML to the CCL under the EAR. Details may be found at: http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&atPub=true&agencyCode=&showStage=active&agencyCd=1400&image58.x=28&image58.y=8

9. New Notices from Directorate of Defence Trade Controls (DDTC)

The Directorate of Defence Trade Controls issues a number of Notices over the course of the year. These Notices, both current and past, may be accessed at the website below. The following Notices might be of particular interest to our readers:

1. Updated Procedures for Utilizing the ITAR §126.18 Exemption have been posted (12March2013);
2. The End-Use Monitoring of Defense Articles and Defense Services Commercial Exports FY 2012 Report (20March2013);
3. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XVI has been posted (31Jan2013), and public comments received on the proposed revision to Category XVI are now available (27March2013);
4. Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category IV has been posted (31Jan2013), and public comments received on the proposed revision to Category IV are now available (26March2013);
5. Policy on Jurisdiction of ITAR Controlled "Defense Articles" at the Point of Manufacture has been posted (01Feb2013); and
6. Public comments received on the proposed revision to Category XI are now available (31Jan2013).

Details may be found at: <http://www.pmddtc.state.gov/index.html>

10. Proposed Rule to Cover Launch Vehicles, Rockets, Missiles, etc., moved from USML Category IV to the Commerce Control List

SUMMARY: This proposed rule describes how articles that the President determines no longer warrant control under USML Category IV would be controlled on the CCL. These articles, which are related to launch vehicles, missiles, rockets, torpedoes, bombs, mines, and other military explosive devices enumerated in USML Category IV, would be controlled under new Export Control Classification Numbers (ECCNs) 0A604, 0B604, 0D604, 0E604, 9A604, 9B604, 9D604, and 9E604 on the CCL. In addition, this proposed rule would amend ECCNs 0D001, 0E001, 9B115, 9B116, 9D001, 9D002, 9D003, 9D104, 9E001, 9E002, 9E101, and 9E102 to make clarifications and conforming changes based on the proposed addition of the aforementioned 0x604 and 9x604 ECCNs to the CCL and proposed amendments by DDTC to the list of articles controlled by USML Category IV.

This is one in a planned series of proposed rules describing how various types of articles that the President determines no longer warrant control on the USML, as part of the Administration's Export Control Reform Initiative, would be controlled on the CCL in accordance with the requirements of the EAR.

11. Revised ITAR Agreement Information

On 22 April 2013 the U.S. Directorate of Defence Trade Controls (DDTC) published revised instructions on completing ITAR agreements (TAAs, MLAs and WDAs). These can be found at the PMDDTC website: <http://www.pmddtc.state.gov/licensing/documents/agreement-ElectronicGuidelinesv4.pdf>

12. DDTC Posts Summary of U.S. Export Enforcement: 2007-2013

(Source: <http://pmddtc.state.gov/compliance/documents/OngoingExportCaseFactSheet022013.pdf>)

The U.S. Directorate of Defence Trade Controls has published a summary of criminal cases involving export controls, espionage and other enforcement cases during the period from 2007 to February 2013.

13. U.S. Administration Moves To Simplify International Sales

On 7 March 2013 the Obama administration filed a proposal in Congress designed to overhaul the U.S. export control system which would permit an easing of export controls to allow U.S. defence companies to compete more effectively in the global marketplace. Congress was given 30 days to review the proposed modifications. Following Congressional review and comment, the new system would be put in place during a 180-day transition period. The first proposed changes involve a revision to USML Category 8 (aircraft) and the creation of Category 19 (turbines).

The complete news report can be found at: <http://www.defense-news.com/article/20130307/DEFREG02/303070017/Administration-Moves-Simplify-International-Sales?odyssey=tab|topnews|text|FRONTPAGE>

14. Obama Issues Executive Order to Implement Export Control Reform

In furtherance of President Obama's Export Control Reform Initiative (ECRI), President Obama signed an Executive Order covering the administration of certain export and import controls under the Arms Export Control Act of 1976. It supersedes and replaces [Executive Order 11958](#). The second Executive Order updates the 2001 [Executive Order 13222](#) covering certain controls administered by the Department of Commerce. Here is a summary of these changes:

- A consolidation of all brokering responsibilities with the Department of State;
- An elimination of possible "double licensing" under the EAR and the ITAR. Only one licence will be required; and
- The introduction of Congressional Notification for certain USML Items that moved from the USML to the CCL. At the present time Congressional Notification applies only to certain ITAR proposed exports.

SECTION C: Controlled Goods Program

1. Interdepartmental Working Group (IWG): Review of the CGP Schedule of Controlled Goods

18 months ago PWGSC, under the auspices of the Controlled Goods Program, established an Interdepartmental Working Group (IWG) to review the Schedule of Controlled Goods which forms part of the *Defence Production Act* (DPA). The Industry Engagement Committee (IEC – see next article) was provided with a copy of the draft Schedule for review and comment.

2. Industry Engagement Committee (IEC)

Heenan Blaikie and CECS continue to participate in the Controlled Goods Directorate's Industry Engagement Committee. The Committee is comprised of industry members representing both the aerospace and defence/security industries, and is intended to provide a forum for discussion of the impact of the Controlled Goods Program, and proposed amendments to it, upon Canadian industry. The most recent meeting of the IEC was held on Thursday, April 24, 2013. The Committee is currently reviewing and assessing proposed amendments to the Schedule of the *Defence Production Act*, many of which will have significant implications for industry members. The IEC will convene next on June 3, 2013 to continue its review of the proposed amendments to the Schedule to the DPA and address new industry concerns.

SECTION D: Canada Border Services Agency

Nothing to Report

SECTION E: Miscellaneous

1. Canada's Aerospace Review Releases 2-Part Report (aka The Jenkins Report)

The Canadian Government-mandated Aerospace Review has released its two-part report on how federal policies and programs can help maximize the competitiveness of Canada's aerospace and space sectors. Volume 1 is entitled *Beyond the Horizon: Canada's Interests and Future in Aerospace*, and Volume 2 is entitled *Reaching Higher: Canada's Interests and Future in Space*. Among other things, the report calls for the Canadian Government to relax certain aerospace technology export limits. Click [here](#) for a press release from the Aerospace Industries Association of Canada (AIAC) commenting on the report.

2. SIPRI Finds China Has Replaced UK as World's Fifth Largest Arms Exporter

The Stockholm International Peace Research Institute (SIPRI) has found that China has become the world's fifth largest arms exporter at 5%, behind the United States (30%), Russia (26%), Germany (7%) and France (6%). Details are available at the SIPRI website. Please click [here](#).

3. HB & CECS establish webinar for CGP

Heenan Blaikie and CECS are in the final stages of developing a Webinar designed to allow industry members to complete their required Controlled Goods training online, from their desks or from home. Individual companies will be able to register for the Webinar, which will be tailored to reflect the particular controlled goods typically handled by that company's employees in the scope of their work.

4. UK/BIS Revises 2 OGELs

Export Control Organisation Posts Two Revised Open General Export Licences (OGELs) Effective 31 March 2013. See: <http://www.bis.gov.uk/policies/export-control-organisation/eco-notices-exporters>. The 2 specific OGELs, one a revised OGEL for Military Goods and the second a revised OGEL covering certain military goods going to a Government or NATO end-use, can be found at:

<http://blogs.bis.gov.uk/exportcontrol/uncategorized/notice-to-exporters-201301-open-general-export-licence-military-goods-revised/>

<http://blogs.bis.gov.uk/exportcontrol/uncategorized/notice-to-exporters-201302-open-general-export-licence-military-goods-government-or-nato-end-use-revised/>

5. UN General Assembly Approves Global Arms Trade Treaty

The United Nations General Assembly approved a global arms trade treaty with 154 votes in favour. The object of this Treaty is to:

- a. Establish international standards for regulating and improving the international trade in conventional arms; and
- b. Prevent and eradicate the illicit trade in conventional arms and prevent their diversion.

SECTION F: Recent Events

1. CANSEC

Heenan Blaikie and CECS were pleased to participate in CANSEC 2013. In particular, a very successful cocktail party was hosted by the Southern Ontario Defence Association, in conjunction with CECS and Heenan Blaikie, on May 29, 2013.

2. HB-CECS Seminars

Heenan Blaikie and CECS will once again be presenting a series of export control compliance seminars this coming fall. The seminars will include a review of relevant laws and regulations such as the *Export and Import Permits Act*, the *Defence Production Act*, and the *International Traffic in Arms Regulations*. They will also provide attendees with an update on the most recent developments resulting from major legislative changes both in Canada and the U.S. Stay tuned for dates, locations, and agendas of the seminars.



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