

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

Quarterly Newsletter on Canadian and U.S. export controls and Canada's Controlled Goods Program. In this issue...

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A. CANADIAN EXPORT CONTROLS

1. EXPORT CONTROL LIST (ECL)

The new ECL, which was expected to come into effect on 01 April 2011, has been delayed until after the federal election. The ECL regulation will have to be re-submitted to the Governor-in-Council after the new government takes office.

Revised ECL will have to wait

2. CATCH-ALL CONTROLS: ECL ITEM 5505

Revised catch-all controls under ECL Item 5505 came into effect 30 March 2011. All exports of goods for nuclear explosive and radiological dispersal devices, or chemical/biological weapons, or missiles that can carry such items and which are not covered elsewhere on the ECL are subject to individual export permits. Under certain circumstances no permits are required for 29 listed countries unless the Minister determines otherwise on a case-by-case basis. A new Notice to Exporters, Serial No. 176, has been issued.

Catch-all controls tightened up!

3. AUTOMATIC FIREARMS COUNTRY CONTROL LIST (AFCCL)

On 30 March 2011 the AFCCL was amended by adding Albania and Croatia. This brings to 33 the number of AFCCL countries.

Albania & Croatia – latest AFCCL countries

4. NEW EXPORT PERMIT FOR ECL GROUP 1 GOODS TO 29 COUNTRIES

On 29 March 2011, officials from the Export Controls Division (TIE) of DFAIT met with representatives of the Canadian Association of Defence and Security Industries (CADSI). This was a follow-on to the meeting held in Ottawa on 03

February 2011 (see related article “14. Summary of Briefing on Canadian and U.S. Export Controls – 03 Feb 2011”). TIE officials advised that they will be introducing in the near future a new permit designed to cover approximately 95% of Group 1 goods to a list of 29 countries. This will obviate the need for individual export permits once an initial permit is approved. This is an interim measure. A more permanent measure will be the establishment of a General Export Permit (GEP) later this year.

DFAIT is also considering the introduction of additional GEPs but any advancement in this area must wait until the new government takes office.

5. REGULATIONS IMPLEMENTING THE UNITED NATIONS RESOLUTION ON LIBYA

Summary

As a result of developments in late February 2011, the international community agreed to tighten controls on Libya, including implementing a range of export controls over goods and technology as well as economic financial restrictions. Canadian exporters, or Canadians operating in other countries, should seek advice from the Export Controls Division of the Department of Foreign Affairs and International Trade (DFAIT) before transacting any business with Libya.

Exporters in Canada or Canadian suppliers in other countries should consult the Export Controls Division for advice and direction at: (613)996-2387

Pursuant to the *United Nations Act* (UNA) and the *Special Economic Measures Act* (SEMA) these new and amended Canadian Regulations impose the following measures:

- Restrictions on the export, sale, and other provision of arms and related materials to Libya;
- Restrictions on the shipment to or from Libya of arms and related material by owners or operators of Canadian vessels or aircraft;

- Restrictions on the provision of technical, financial and other assistance related to military activities or the use of arms and related material;
- Restrictions on the import of arms and related material from Libya; and
- Restrictions on dealings with designated persons.

There are some exceptions to the above restrictions but any exceptions would need to be approved by the United Nations via DFAIT. In order to be considered for an exception to the general rule, a separate Permit Authorisation Order made pursuant to subsection 4(4) of the SEMA has been put in place. It authorises the Minister of Foreign Affairs to issue a permit under exceptional circumstances

6. REPORT ON THE EXPORT OF MILITARY GOODS FROM CANADA – 2007-2009

Summary

Since 1990, and as part of a multilateral effort to encourage greater transparency on military exports, DFAIT has published annual reports on exports of military goods/technology (ECL Group 2). In recent years, Canadian Reports have been issued more sporadically as evidenced by the latest Report which covers a 3 year period from 2007 through 2009.

For the 3 year period 2007-09 \$1.4 B in ECL Group 2 goods/technology were exported from Canada to all countries except the U.S.

The majority of arms-exporting UN countries have submitted voluntary information on their arms exports since 1990. The objective of these Reports was to avoid unacceptable build-ups of arms and other weapons in certain regions and countries of concern. These Reports are rolled into a much larger UN Report.

Canadian statistics on military exports are obtained from quarterly military reports filed by exporters on the actual shipments made against permits issued under the *Export and Import Permits Act*. The most recent Canadian Report can

Most ECL Group 2 goods are not subject to export permits when destined to the U.S. – such statistics are not part of the Report

be found at: http://www.international.gc.ca/controls-controls/assets/pdfs/military/documents/military_report-2007_09-rapport_militaire-eng.pdf

7. U.S. LICENCES APPROVED FOR EXPORT OF DEFENCE ARTICLES TO CANADA IN 2009

Summary

The U.S. government, pursuant to the International Traffic in Arms Regulations (ITAR), is required to report annually on all export licences issued under ITAR. The latest report covers calendar year 2009. According to that report, a total of \$3.5 billion in ITAR goods and technology were approved for export to Canada in 2009.

USML export licences issued for Canada in 2009 amounts to \$3.5 B

The report does NOT cover exports of defence articles and data under either the Foreign Military Sales (FMS) Programme or under any ITAR Exemption, e.g., the Canadian Exemptions, ITAR Part 126.5. As such, total overall arms sales to Canada from the U.S. cannot be determined. The entire report can be found at: http://www.pmddtc.state.gov/reports/documents/rpt655_FY09.pdf

8. GENERAL INFORMATION UPDATE FROM DFAIT

Summary

On 03 February 2011 the Export Controls Division published a document containing Qs & As, and general information on Canadian export controls that might prove useful to some Canadian exporters. DFAIT also issued a revised "Export Controls Handbook 2011". The publications can be found at: <http://www.exportcontrols.gc.ca>

9. REVISED CANADIAN PERMITS FOR CRYPTOGRAPHY/ ENCRYPTION

Summary

Recently, DFAIT issued guidelines on the export of encryption goods and technology. The paper does not minimise or eliminate export permit requirements, but rather introduces 6 new broad-based permits (BBP) which may apply to certain exports.

DFAIT announces 6 new broad-based permits for crypto

These BBP guidelines can be found at:

http://www.international.gc.ca/controls-controles/export-exportation/crypto/Crypto_Intro.aspx?lang=eng

10. IE CANADA WHITE PAPER: RESPONSES FROM MINISTERS

In July 2010 IE Canada submitted a White Paper on Export Control Reform entitled “*Canada’s Export Control System: Time for Review – Need for Reform*”. Two responses were received: one from the Minister of Public Safety, Vic Toews, and a second one from the Minister of International Trade, Peter Van Loan. Both responses were non-committal.

B. U.S. EXPORT CONTROLS

11. U.S. EXPORT CONTROL REFORM: UPDATE

Summary

The reform of the U.S. export control system appears to be moving forward unabated. One of the main objectives is to better protect fewer items, while loosening restrictions on other items that are already widely available on the global market. The impact on Canada could be significant especially if changes are made to the ITAR.

The U.S. government is moving full -steam ahead to amend its export control system

In a 23 February 2011 Reuters report, the Obama administration is continuing its drive to speed export reviews of weapons and high-tech gear. It expects to have proposals ready this summer. Pentagon acquisition Chief Ashton Carter underscored the need for reform saying the current system was so cumbersome it actually drove some nations to buy equipment from other countries. From a Canadian perspective there is considerable truth to this statement.

There is one potential obstacle: Escalating protests in the Middle East and North Africa have sparked questions about the wisdom of loosening U.S. export restrictions at this time. Critics worry that U.S. weapons could fall into the hands of Islamist-controlled governments which are hostile to the United States or its allies.

Nonetheless, defence officials say they are keeping a close eye on any pending arms sales through “case-by-case” reviews.

12. U.S. EXPORT ADMINISTRATION REGULATIONS: CHANGE IN WEBSITE

Summary

The U.S. Department of Commerce, Bureau of Industry and Security (DOC/BIS), has changed its website, as follows:
<http://www.bis.doc.gov/policiesandregulations/index.htm#ear>

13. CHANGES TO U.S. EXPORT CONTROLS RE: ENCRYPTION

Summary

Effective 07 January 2011, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) removed controls over "publicly available" mass market encryption object code software with a symmetric key length greater than 64-bits, and "publicly available" encryption object code classified under Export Control Classification Number (ECCN) 5D002 on the Commerce Control List when the corresponding source code meets the criteria specified under Licence Exception TSU (EAR Part 740).

U.S. announces major changes to encryption export controls by removing licensing requirements over a broad-range of crypto goods and technology

BIS made these changes because there are no regulatory restrictions on making such software "publicly available," and, once it is "publicly available," it is available for download by any end-user without restriction. This change will have no effect on general U.S. export control policy. This action does not result in the decontrol of source code classified under ECCN 5D002, but it does result in a simplification of the regulatory provisions for publicly available mass market software and specified encryption software.

While the European Union has implemented similar liberalisations, Canada has not made equivalent changes which continue to place Canada behind its main Western competitors. See the above article entitled "**9. Revised Canadian Permits for Cryptography/Encryption**" for the latest guidelines on Canadian crypto controls.

14. SUMMARY OF BRIEFING ON CANADIAN AND U.S. EXPORT CONTROLS – 03 FEB 2011

Summary

On 03 February 2011 Canada's Department of Foreign Affairs and International Trade (DFAIT) briefed Canadian industry on Canadian export control policies and upcoming changes. Also in attendance were officials from the United States Defence Technology Security Administration and Bureau of Political Military Affairs who briefed attendees on changes proposed for a revised U.S. export control system.

Canada

Steven Goodinson, Director, Export Controls Division (TIE) briefed attendees. While his main message was with respect to the 2009 ECL (see article above "**1. Export Control List**"), he emphasised that even though the U.S. is dramatically changing the U.S. Munitions List (USML), TIE does not see the need to change the Canadian Export Control List (ECL). Mr. Goodinson commented that since Canada already has a unified system, changes in Canada's system are largely unnecessary. While this might be true in terms of 'lists', as far as procedures are concerned, Canada remains behind the U.S. and EU liberalisations in almost all export control areas. While the introduction of a new permit for Group 1 goods to 29 countries" is a good and positive step forward, (see article "**4. New Export Permit for ECL Group 1 Goods to 29 Countries**"), further substantive changes would be required in order to bring Canadian controls up to the levels of change that have already taken place in the export control systems of Canada's major competitors.

United States

According to the U.S. representatives at the meeting, the United States is well underway to reforming its entire export control regime. It is a three-phase exercise:

1. Create a framework for change and implement immediate improvements;

First major changes to U.S. export control system expected by June 2011

2. Implement the new framework within existing structures; and

U.S. export control changes are aimed at:

1. A single export control licensing authority;
2. A single control list;
3. A single enforcement coordination centre; and
4. A single IT system to process all licences.

3. Through legislative amendments, the current legislation will be merged and consolidated under one agency.

The U.S. is currently involved in a review of the entire U.S. Munitions List (USML) which is expected to be completed by June 2011. Guidelines for some items (e.g., Category VII, Tanks and Military Vehicles) have already been made and it is expected that this Category will become the template for others.

The USML will be rewritten to be a positive list controlling only those items to be considered technologically strategic. In doing this, the “catch all” philosophy which placed many items such as rivets and brackets under the ITAR will be reduced if not eliminated. DoD is taking the lead on consolidating all items under one control list. As a consequence, they will also be reviewing the Commerce Control List (CCL). The U.S. representatives made it very clear that by moving items from the ITAR to the CCL, they were not decontrolling the items. The items would still need an authorisation by means of a licence or an exception.

Some Expected Changes...

1. It is expected that when new regulations are finalised foreign nations and/or companies with an internal compliance program will no longer need USG approval of third country dual nationals.
2. The U.S. will be eliminating the need of foreign party signatures on TAA's and will be instituting a new exemption for replacement parts. Participants were encouraged to review the Notice of Inquiries published on December 9, 2010.
3. DDTC has eliminated the need of Prior Approval/Prior Notification under 126.8 which should facilitate sales of goods and services incorporating U.S. ITAR controlled articles.

See also the above article “**11. U.S. Export Control Reform: Update**”.

C. CANADA'S CONTROLLED GOODS PROGRAM

15. AMENDMENTS TO THE CONTROLLED GOODS REGULATIONS (CGR)

Summary

In December 2010 the Controlled Goods Regulations (CGR) were amended. According to the Regulatory Impact Analysis Statement (RIAS) the amendments do not change the intent or scope of the Regulations but only simplify the wording, remove redundant requirements, and reword sections to clarify legal intent. However, two specific CGR changes, sections 4 and 20, suggest the introduction of broader Ministerial discretion. In the previous sections 4 and 20 there were specific factors and reasons the Minister needed to consider in all registration or exemption requests. The amended sections 4 and 20 lack specificity and appear to provide the Minister with broad discretionary powers not provided for under Part 2 of the Defence Production Act (DPA).

Recent changes to the Controlled Goods Regulations suggest new, substantive discretionary powers being conferred upon the Minister

Following are the specific changes to CGR Sections/Subsections:

4. In deciding whether to register a person, the Minister shall consider, based on a security assessment, the extent to which the applicant poses a risk of transferring a controlled good to a person who is not registered or exempt from registration.
5. If the Minister approves an application for registration, the Minister shall provide a certificate of registration to the applicant that sets out the period for which the registration is valid and any conditions under which they may examine, possess or transfer controlled goods.
6. If the Minister denies an application for registration, the Minister shall send a notice with reasons for the denial to the applicant.
10. Section 10 of the Regulations is amended by adding "and" at the end of paragraph (h) and by replacing paragraphs (i) and (j) with the following:
 - (i) that the person make available, at any reasonable time, to the Minister the records referred to in paragraph (a), the records and documents referred to in paragraph (b) and the copy of the evidence referred to in paragraph (c).
- 15(6) The Minister may take into consideration other information provided by a person or another Minister if the Minister has reasonable grounds to believe that the information is necessary to determine the extent of the risk referred to in subsection (1).
20. In deciding whether to exempt a temporary worker or a visitor from registration, the Minister shall consider the extent to which the proposed temporary worker or visitor poses a risk of transferring a controlled good to a person who is not registered or exempt from registration.
21. (1) If the Minister approves an application for exemption, the Minister shall provide a certificate of exemption from registration to the registered person that sets out the period for which the exemption is valid and any conditions under which the temporary worker or visitor concerned may examine, possess or transfer controlled goods.
- 21(2) The registered person shall provide the temporary worker or visitor who is the subject of the exemption with a copy of the certificate.
22. If the Minister denies an application for exemption, the Minister shall send a notice with reasons for the denial to the registered person.

D. MISCELLANEOUS

16. NO ADDITIONAL ISSUES TO REPORT.