

VOLUME 3, OCTOBER 2012

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.

Contents

SECTION A: CANADIAN EXPORT CONTROLS	4
1. Nuclear and Nuclear-related Goods and Technology: General Export Permits 43 & 44 and Notice to Exporters 181	4
2. Cryptographic Goods and Technology: General Export Permit 45 and Notice to Exporters 182	4
3. Canada Identifies Iran and Syria as State Supporters of Terrorism	4
4. Proposal to Add Colombia to the Automatic Firearms Country Control List (AFCCL)	4
SECTION B: U.S. EXPORT CONTROLS	5
1. Body Armour Proposed to be moved from USML Category X to CCL 600 Series	5
2. Transition Plan from USML to CCL	5
3. "Specially Designed"	5
4. Afghanistan	5
5. U.S. House Passes Bill on Commercial Satellite Controls	5
6. U.S. Finishes Review of All 21 USML Categories	5
7. U.S. DDTC: Licensing of Foreign Persons	6
8. ITAR and Its Relationship with the U.S. Immigration and Nationality Act (S. 274B)	6
9. U.S. Implements Tough New Sanctions Against Iran	6
SECTION C: CONTROLLED GOODS PROGRAM	7
1. Enhanced Security Strategy (ESS)	7
SECTION D: CANADA BORDER SERVICES AGENCY (CBSA)	8
Nothing to Report	
SECTION E: MISCELLANEOUS	8
1. Cloud Computing	8
2. United Kingdom Open General Export Licences (OGEL)	8
3. UK/BIS Export Control Organisation Changes Website	8
4. UK ECO Implementation of Intra-Community Transfer Directive	8
5. Mexico Criticises Failure on Arms Trade Treaty	9
6. U.S. Arms Sales Explode	9
7. UK ECO Amends Export Control Lists	9
SECTION F: UPCOMING EVENTS	10
1. Heenan Blaikie - CECS Training Seminars	10
2. CECS Undertakes Export Control Study for CADSI	10

SECTION A: Canadian Export Controls

1. Nuclear and Nuclear-related Goods and Technology: General Export Permits 43 & 44 and Notice to Exporters 181

On 31 July 2012 DFAIT issued two new General Export Permits (GEP) designed to replace GEP 27. GEP 43 and GEP 44 cover the export of certain nuclear (GEP 43) and nuclear-related dual-use goods and technology (GEP 44) to certain destinations. Notice to Exporters No. 181, which describes in detail how these operate, can be accessed at: <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/181.aspx?lang=eng>

The purpose of these GEPs is to update GEP 27, which has now been cancelled. GEP 27 was designed to eliminate the requirement for a Canadian export permit if an export licence was issued by the Canadian Nuclear Safety Commission (CNSC). GEPs 43 and 44 now obligate exporters to obtain DFAIT export permits for a broader range of goods and technology and a broader number of countries than was required under GEP 27. For example, only 29 countries are included as permissible destinations pursuant to these GEPs. For all other countries both a DFAIT export permit and a CNSC export licence are now required for most Group 4 dual-use nuclear-related goods and technology.

Some of the items that were excluded from export permits under GEP 27 but which are now subject to DFAIT permits under GEP 44 include:

- a. ECL Item 4-1.B (flow forming machines; machine tools; dimensional inspection machines and instruments; gas induction furnaces; isostatic presses; vibration test systems; and, certain melting and casting furnaces);
- b. ECL Item 4-3.B.3 (balancing machines); and,
- c. ECL Item 4-3.B.4 (filament winding machines).

GEP 43, however, does allow certain nuclear-related goods and technology not covered by the previous GEP 27 to be exported with only a CNSC licence.

Most new GEPs will include reporting requirements before using them, annual reporting requirements on the use of any GEP and an obligation to retain records for six years.

2. Cryptographic Goods and Technology: General Export Permit 45 and Notice to Exporters 182

On 15 August 2012 DFAIT issued a new General Export Permit 45 (GEP 45) covering certain exports of cryptography for development or production of a product under certain defined conditions. The purpose of GEP 45 is to allow the export or transfer of certain items included in ECL Group 1-5 Part 2 to an entity in one of 29 “designated countries” or to a non-governmental **affiliated** individual or entity located in any country except a defined “ineligible destination”.

Notice to Exporters No. 182, which describes in detail how this GEP operates, can be accessed at: <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/182.aspx?lang=eng&view=d>

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

- 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. (with certain exceptions)
- c. item 1-5.D.2. (with certain exceptions)
- d. item 1-5.E.2. (with certain exceptions)

Most new GEPs will include reporting requirements before using them, annual reporting requirements on the use of any GEP, and an obligation to retain records for six years.

3. Canada Identifies Iran and Syria as State Supporters of Terrorism

On 7 September 2012 the Governor in Council identified Iran and Syria as supporters of terrorism pursuant to subsection 6.1(2) of the *State Immunity Act* (SIA).

While states normally enjoy immunity from the jurisdiction of courts, this action removes this immunity and allows private law suits to be brought against identified countries where it can be established that an act of terrorism resulted in a loss to the claimant. Background information on the SIA can be found at: www.publicsafety.gc.ca/media/nr/2011/nr20110208-1-eng.aspx

4. Proposal to Add Colombia to the Automatic Firearms Country Control List (AFCCL)

The Department of Foreign Affairs, Export Controls Division, is proposing to add Colombia to the AFCCL. Interested persons may send their comments to: tie.consultations@international.gc.ca

SECTION B: U.S. Export Controls

1. Body Armour Proposed to be moved from USML Category X to CCL 600 Series

The Bureau of Industry and Security (BIS) and the Directorate of Defence Trade Controls (DDTC) have agreed that most armour and some armour plate need no longer be controlled under USML Category X. Controls will be moved to the CCL under ECCN 1A005.

2. Transition Plan from USML to CCL

On 21 June 2012 (**Federal Register /Vol. 77, No. 120 /Proposed Rules 37347**) DDTC published a "Transition Plan" should the Export Control Reform Initiative (ECRI) come to fruition.

The intent of the "Transition Plan" is to provide a clear description of DDTC's proposed policies and procedures for the transition of items to the jurisdiction of the Department of Commerce. Generally speaking, DDTC proposes to transition the changes over a period of time because they fear that an immediate effective date would impose undue compliance burdens on the defence industry. The "Transition Plan" envisages a number of phases. Please consult the plan for details at: <http://www.gpo.gov/fdsys/pkg/FR-2012-06-21/html/2012-15070.htm>

3. "Specially Designed"

On 19 June 2012 the Department of Commerce (DOC) proposed a new rule under **Federal Register Notice Vol. 77, No. 118, Proposed Rules 36423**. This proposed rule can be found at: <https://www.federalregister.gov/articles/2012/06/19/2012-14475/specially-designed-definition>

This proposed rule is part of the Export Control Reform Initiative (ECRI) and it is expected that the adoption of a new definition would significantly reduce the use of the term "specially designed" throughout the CCL and the USML, thereby making both lists more positive lists of specifically controlled goods and technology.

In response to a request for public comments re: the proposed rule, the DOC published the comments at: http://pmdotc.state.gov/regulations_laws/documents/proposed_rules/SpeciallyDesigned_Comments.pdf

Should the U.S. definition be adopted by the various multilateral export control regimes this will go a long way in assisting Canadian companies in determining whether many of their parts and components are truly controlled. But do not expect an early Canadian resolution to this multilateral issue!

4. Afghanistan

On 7 July 2012 the Obama administration declared Afghanistan the United States' newest "major non-NATO ally", an action designed to facilitate close defence co-operation after U.S. combat troops withdraw from the country in 2014. Afghanistan is the 15th such country. Also included are Australia, Egypt, Israel, Pakistan and Japan.

5. U.S. House Passes Bill on Commercial Satellite Controls

In July 2012, the U.S. House of Representatives passed a Bill that would allow the President to remove commercial communications satellites and related technology from the USML and move those controls to the CCL. This change will address the global satellite market which was dominated by the U.S. prior to 1999 when such controls were transferred from the EAR to the ITAR. By some accounts the U.S. market share has dropped to approximately 40% post 1999 from 80% pre-1999. According to an Aerospace Industries Association (AIA) 2012 report U.S. industry has lost approximately \$21 Billion to European competitors. This proposed change is an attempt to regain some of that market share.

6. U.S. Finishes Review of All 21 USML Categories

The review of all 21 Categories of the USML has been completed and the public has now had an opportunity to comment on the proposed changes. Generally speaking, this exercise under the Export Control Reform Initiative (ECRI) is designed to remove countless items from the USML and place them under the CCL. While it was expected that the transfer from the USML to the CCL would have been completed before the U.S. election, such changes will now have to await the election outcome. Please consult the U.S. Federal Register for details at: <https://www.federalregister.gov/>.

7. U.S. DDTC: Licensing of Foreign Persons

The U.S. Department of State's Directorate of Defence Trade Controls (State/DDTC) has posted updated guidelines and instructions for **Licensing of Foreign Persons** on its website. Basically, the new guidelines impose a licence requirement for foreign person employees of "U.S. persons" working in foreign countries, including Canada. More specifically, the DSP-5 (unclassified) or DSP-85 (classified) authorises the U.S. person to transfer technical data and perform defence services to the foreign employee(s) on their products. The DSP-5/85 authorises the foreign person to perform defence services on behalf of the employing U.S. person. The employing U.S. person must ensure the employee's compliance with U.S. export laws wherever the employee resides. Canadian companies believing that they might be "U.S. persons" should review the new policy to ensure that they are in compliance.

Details of this new policy can be accessed at: http://www.pmddtc.state.gov/licensing/documents/WebNotice_Licensing-Foreign2.pdf

8. ITAR and Its Relationship with the U.S. Immigration and Nationality Act (S. 274B)

The ITAR imposes a licence requirement for the export of U.S. defence articles and defence services to foreign persons. The ITAR does not, however, impose requirements on U.S. companies concerning the recruitment, selection, employment, promotion or retention of a foreign person because Federal law prohibits discrimination in hiring, firing, or recruitment. Unless otherwise required to comply with law, regulation, executive order, government contract, or determination by the Attorney General of the United States, discrimination based on an individual's citizenship status is unlawful. The Office of Special Counsel, located in Washington, D.C., has issued public guidance relating to non-discriminatory practices when complying with ITAR. For additional guidance, please contact the Office of Special Counsel at osccrt@usdoj.gov, its employer hotline at 1-800-255-8155, or visit its website at www.justice.gov/crt/about/osc.

9. U.S. Implements Tough New Sanctions Against Iran

On 1 August 2012 the U.S. House of Representatives passed a Bill (HR 1905) that, if implemented, would treat Iran in essentially the same way the U.S. treats Cuba. The Bill is entitled "An Act to strengthen Iran sanctions laws for the purpose of compelling Iran to abandon its pursuit of nuclear weapons and other threatening activities, and for other purposes.". The Bill can be found at: http://thomas.loc.gov/home/gpoxmlc112/h1905_eah.xml

On 10 October 2012 the U.S. President issued an Executive Order implementing HR 1905. It can be found at: <http://www.whitehouse.gov/the-press-office/2012/10/09/executive-order-president-regarding-authorizing-implementation-certain-s>

In essence, the Bill prohibits "persons" located abroad that are owned or controlled by a "U.S. Person" from knowingly engaging in direct or indirect transactions with the Iranian Government. Generally speaking, this particular law, similar to the Cuban Assets Control Regulations, requires foreign non-U.S. subsidiaries to obtain a licence from the Office of Foreign Assets Control (OFAC) before engaging in any action prohibited by the new law. While Canadian companies are already restricted under current Canadian laws targeting Iran, this new U.S. law could also impact Canadian companies. Individuals wishing to learn more about this law, which is administered by OFAC. U.S. Department of the Treasury, may wish to review frequently asked questions at: <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx>

SECTION C: Controlled Goods Program

1. Enhanced Security Strategy (ESS)

The ESS continues towards full implementation. However, it has been a slow process and the Controlled Goods Directorate (CGD) does not expect full implementation before end of 2014. In the meantime, two committees continue to meet: The Interdepartmental Working Group on the Schedule of Controlled Goods and the Industry Engagement Committee (IEC).

Interdepartmental Working Group of the Schedule of Controlled Goods

This Committee, which comprises a number of Canadian Government Departments and Agencies, is charged with reviewing the Schedule of controlled goods and making recommendations as to which goods and technology should remain on the Schedule and which should be removed. CGD has indicated that when the draft is completed it will be passed to industry for comment.

Industry Engagement Committee (IEC)

On 25 September 2012, Heenan Blaikie's Montreal office hosted the first Government – Industry Engagement Committee meeting held outside of Ottawa. Carmen Francis and Michael Woods represented Heenan Blaikie, the only law firm invited to serve on the Committee. Thomas Jones also serves on the Committee representing CECS. The IEC intends to hold two further meetings in 2012.

SECTION D: Canada Border Services Agency

Nothing to Report

SECTION E: Miscellaneous

1. Cloud Computing

Cloud computing is changing the way business is being conducted. It allows companies to access networks from anywhere and have information and technology stored in locations that are unknown to the user. However, 'cloud computing' also saves companies money that can be used in other business opportunities or ventures or to address the bottom line. In any case, the use of 'cloud computing' has expanded exponentially. However, few companies realise that the use of 'cloud computing' services can impact the way in which those same companies address export controls and related compliance. While 'cloud computing' can be a huge cost saver it is a double-edged sword: on the other side is the potential for violating national export controls and more seriously, national security issues should the 'cloud' servers be located in a country that could prove to be unfriendly or a potential adversary.

2. United Kingdom Open General Export Licences (OGEL)

Effective 06 July 2012 the UK amended five Open General Export Licences (OGELs):

- [Open General Export Licence \(Export for Exhibition: Military Goods\)](#)
- [Open General Export Licence \(Military Goods: For Demonstration\)](#)
- [Open General Export Licence \(For Repair/Replacement Under Warranty: Military Goods\)](#)
- [Open General Export Licence \(Military Goods\)](#)
- [Open General Export Licence \(Military Goods: Government or NATO End-Use\)](#)

UK companies that have business dealings with, or are related to Canadian companies may benefit from the use of these OGELs. It is important to note, however, that even if some of the above-noted OGELs can be used to export to Canada, there are no reciprocal Canadian provisions. As such, even if the goods arrive from the UK licence-free it is likely that an individual export permit would be required to return the goods to the UK from Canada.

3. UK/BIS Export Control Organisation Changes Website

Effective 01 October 2012 the UK government implemented a single link into UK government programmes <http://www.gov.uk>. The Export Control Organisation (ECO) is the UK's regulatory export licensing authority. Practical guidance for exporters is available on the Businesslink website at: <http://www.businesslink.gov.uk/exportcontrol>.

For general export control queries please contact the ECO Helpline on 020 7215 4594 or email to: eco.help@bis.gsi.gov.uk

4. UK ECO Implementation of Intra-Community Transfer Directive

The U.K. Government's Export Control Organisation (UK ECO) has issued [Notice to Exporters 2012/28](#), Intra-Community Transfers.

5. Mexico Criticises Failure on Arms Trade Treaty

On 28 July 2012 Mexico criticised the failure of the United Nations to clinch an international treaty regarding the multi-billion dollar arms trade. Mexico was particularly critical of a minority of countries that blocked the agreement. In 2011 approximately \$85 billion in arms were traded internationally. (See next article on arms sales)

6. U.S. Arms Sales Explode

According to a new study by Congress (see New York Times article of 26 August 2012 NewYorkTimes.com), weapons sales by the United States tripled in 2011 to a record high, driven by major arms sales to Persian Gulf allies concerned about Iran's regional ambitions. Overseas weapons sales by the U.S. totalled \$66.3 billion in 2011, or more than three-quarters of the global arms market,

valued at \$85.3 billion. Russia was a distant second, with \$4.8 billion in deals. The American weapons sales total was an "extraordinary increase" over the \$21.4 billion in deals for 2010, the study found, and was the largest single-year sales total in the history of United States arms exports.

The previous high was in fiscal year 2009, when American weapons sales overseas totalled nearly \$31 billion. (see above article on Arms Trade Treaty).

7. UK ECO Amends Export Control Lists

The U.K. Government amended its export control lists. The relevant amendments appear in [The Export Control \(Amendment\) \(No2\) Order 2012 \(S.I. 2012 No. 1910\)](#). The amendments came into effect on 10 August 2012.

SECTION F: Upcoming Events

1. Heenan Blaikie-CECS Training Seminars

Summary

Compliance with Canada's export control regulations is an essential part of doing business. This November, Heenan Blaikie and CECS will be hosting one-day intensive seminars on Canadian and U.S. export controls and trade sanctions in three cities: Ottawa, on November 1; Montreal, on November 6; and Toronto, on November 8. The seminars will be of particular interest to individuals involved in the export of controlled goods, including project managers, trade compliance officers, traffic personnel, contract managers, procurement officials and in-house counsel. Heenan Blaikie and CECS have been collaborating on this very popular seminar series since 2009. In particular, many of our aerospace and defence clients and contacts have benefited from this seminar in past years. The recent changes to the U.S. International Traffic in Arms Regulations and to Canada's Controlled Goods Program's Enhanced Security Strategy make this updated seminar particularly relevant. For more details, please contact Brittany Soucie at 613-236-1668 extension 250220 or by e-mail at bsoucie@heenan.ca.

REGISTER TODAY - This one-day seminar is a must. You cannot afford to miss this opportunity! For more information, please contact Brittany Soucie at (613)236-1668

2. CECS Undertakes Export Control Study for CADSI

CADSI has asked CECS to undertake a study on Canadian export controls. CECS will be asking Canadian industry to provide their unattributed views on which goods and technology they believe should be considered for removal from Canada's Export Control List (ECL) because they are:

- a. dated and no longer relevant; and/or
- b. widely available from countries that are not participants in export control regimes.

If you are contacted by CECS we ask you to contribute to the best of your ability because it is you and your company who will benefit from any changes that might occur.

In the meantime, CECS thanks you in advance for your assistance.



Heenan Blaikie