

EXPORTS TO CANADA

Guidance on ITAR Exemption Effective May 30, 2001

Introduction: On February 16, 2001, the Department of State published a rule in the Federal Register (66FR10575) amending the International Traffic in Arms Regulations (ITAR) at 22 C.F.R. § 126.5 concerning exports to Canada. The new rule takes effect May 30, 2001. The Office of Defense Trade Controls and representatives of the Defense Trade Advisory Committee (the State Department's federal advisory committee in this field) have prepared the following questions and answers, reflecting the most common queries or requests for clarification drawn from various sectors of the U.S. defense industry, including by participants in the April 2001 Spring Conference of the Society for International Affairs (SIA).¹ They are intended as an informal aid to U.S. manufacturers and exporters, and may be modified from time-to-time in light of experience gained in use of the new exemption. U.S. persons requiring authoritative guidance on specific exports, however, should continue to rely on the written advisory opinion process set forth in the ITAR.

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- (1) *What are the chief changes in the ITAR that come into effect on May 30, 2001?*

Answer: Canada has changed its export control laws and regulations governing defense articles in several ways, the most important of which are to establish a system of registration for the Canadian defense industry and to strengthen requirements for re-export of defense articles and technology imported from the United States. In response, the United States has modified its regulations in several ways. Generally, the types of defense articles that may be exported under the new exemption have been broadened, while use of the exemption has been narrowed to the following recipients: (1) Canadian federal or provincial authorities; (2) and Canadian firms that are registered in Canada. Under separate authority, US Government and U.S. state government officials or organizations in Canada are also eligible for the exemption (see below).

¹ The Department wishes to acknowledge the efforts and advice provided by DTAG members in the preparation of this guidance.

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- (2) *When the new Canadian Exemption becomes effective on May 30, 2001, may U.S. companies continue to use the pre-May 30th Canadian exemption to cover activities with Canadian companies that have not yet registered under Canadian law?*

Answer: No. On May 30, 2001, the previous Canadian exemption is no longer valid; it has been revoked and replaced with the new provisions incorporated in § 126.5 of the ITAR effective on that date. Export activities with Canadian companies not registered in Canada require a State Department license from May 30th onward unless another exemption in the ITAR is available (see below).

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- (3) *What about Canadian crown corporations and other individuals and entities exempt under Canada's laws and regulations from their new registration requirement? How should U.S. companies deal with exports to such exempt persons?*

Answer: The U.S. Government will generally require a State Department license effective May 30, 2001, for exports to all Canadian persons not registered with the Canadian Government. Under the new regulation, there are only two categories of recipients in Canada currently eligible for license-free exports under the new ITAR exemption: (1) federal and provincial authorities of Canada acting in an official capacity and (2) Canadian firms registered in accordance with Canada's new regulation.² Under separate authority another category of eligible recipients are U.S. Government facilities, organizations and employees (e.g., a U.S. Department of Defense component) acting in an official capacity or U.S. state government employees (e.g., law enforcement officers) acting in an official capacity.³ Importantly, even where a Canadian business entity is registered in Canada, this does not qualify all of its employees to receive U.S.-origin defense articles pursuant to this exemption, but only employees who are nationals, dual nationals or permanent residents of Canada.

² As provided in the February 16, 2001 Federal Register notice, certain specified crown corporations may also be identified in the future by the Department of State as eligible for the exemption.

³ The Director, Office of Defense Trade Controls has determined in accordance with 22 C.F.R. § 126.3 that it is in the best interests of the United States to suspend the licensing provisions of § 123 when the articles to be exported license-free are permissible under § 126.5 (i.e., do not always require a license pursuant to § 126.5(b)) and the recipient is a U.S. Government facility, organization or employee acting in an official capacity, such as a DoD component, or a U.S. state government employee acting in an official capacity, such as a law enforcement officer. The U.S. exporter in this instance should cite § 126.5 on the SED.

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- (4) *The Federal Register notice of February 16, 2001, notes that it remains the responsibility of U.S. exporters “to determine, in writing, the Canadian end user, end-use, and that the Canadian recipient is registered with the Canadian Government...” What written information should be obtained, whether from the Canadian company or other sources, to satisfy this responsibility?*

Answer: Determinations of end-use and end user should follow established practices and corporate procedures (e.g., contracts, purchase orders, shipping records, etc.) arising from the record keeping requirements of the ITAR. Concerning registration of Canadian companies, the Canadian Government has agreed to post a list of registered Canadian business entities (including individuals registered as doing business but not employees of registered companies) on a web site developed for that purpose (www.pwgsc.gc.ca/ciisd). U.S. exporters should download a copy of the relevant web site page that lists the Canadian registered business entities and maintain it with their shipping records or other export documentation as part of their record keeping requirements.

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- (5) *May the Canadian exemption be used for access to controlled U.S. defense technology arising from employment of Canadians in the U.S. defense industry?*

Answer: This exemption only applies to Canadian registered business entities, with respect to specified items exempted from licensing requirements, for end use in Canada. Thus, employment of foreign nationals (including Canadian nationals) in a U.S. defense company typically involves access to a variety of controlled technical data and other covered defense services. Even if the other criteria just mentioned to qualify for the exemption were met, defense services (except to the limited extent specified in § 126.5(c)) are generally not included within the exemption for Canada. Therefore, a technical assistance agreement or other written authorization will be required.

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- (6) *May the Canadian exemption be used for discussions with a Canadian employee of a Canadian-registered company?*

Answer: Yes, the exemption may be used for discussions as long as the requirements of the exemption are met (e.g., the employee is a national, dual national or permanent resident of Canada and the discussions do not rise to the level of a defense service that is not eligible for the exemption). Other exemptions in the ITAR may also be available to cover such discussions when the requirements of those exemptions are met.

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(7) *Does § 126.5 describe the universe of exemptions that may be used for defense trade with Canada?*

Answer: No. Eligible U.S. exporters may use any other exemption in the ITAR available for export of defense articles, including technical data, and defense services to Canada (e.g., §§ 123.4, 123.16, 124.2, 125.4, 126.6, and 126.14.) as long as the requirements of the exemptions relied upon can be met. If no exemption is available, then a license or other written authorization will be required.

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(8) *Are DSP-83s (Non-Transfer and Use Certificate) Still Required for Exports to Canada?*

Answer: Yes, with one new exception. Whether in a licensed export or pursuant to use of the exemption in § 126.5 a DSP-83 is always required for exports involving significant military equipment (SME), except that it is no longer necessary, due to an exchange of diplomatic notes between the United States and Canada, to obtain the signature of the Canadian Government when it is the recipient and end user. For example, when there is a direct shipment of SME to a Canadian Government department, no DSP-83 is needed. Where the shipment involves private intermediate consignees, the consignees are still required to execute the DSP-83, but the Canadian Government is not.

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(9) *How will notifications to the U.S. Congress pursuant to the Arms Export Control Act be handled?*

Answer: Any transaction involving the export of defense articles or defense services for which Congressional notification is required is not eligible for the Canadian exemption (See § 126.5(b)(4)) and requires a license or other written authorization.

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- (10) *What obligations does a U.S. exporter have to inquire into the Canadian or dual nationality of: (a) employees of Canadian registered companies; (b) employees of Canadian companies that have not registered in Canada; or (c) unregistered individuals (e.g., sole proprietors)?*

Answer: The basic premises of U.S. law and regulation governing the export of defense articles and defense services require that such items be used abroad for the purposes intended and by the foreign persons authorized, whether licensed or authorized pursuant to an exemption. Therefore, with respect to exports of defense articles and defense services to Canada -- whether or not licensed -- U.S. persons need to take responsible steps to ascertain and ensure the eligibility of both the items and recipients.

- With respect to the eligibility of Canadian recipients for items exempt under § 126.5, U.S. exporters will need to establish in most cases (e.g., except for Canadian federal authorities): (1) that their Canadian business partner is registered in Canada if the transaction contemplated will rely on a license exemption; and (2) that access is limited to eligible employees, meaning nationals, dual nationals and permanent residents of Canada.
- Notably, Canada has exempted from its registration requirements Canadian crown corporations and temporary employees and visitors. This exemption from Canadian registration requirements by Canada, however, may not be construed by U.S. exporters as establishing eligibility for license free receipt of U.S. defense articles under the ITAR.⁴
- Similarly, the basic responsibility for U.S. exporters regarding the foreign nationality of employees of registered Canadian companies with respect to items exempt under § 126.5 is to establish that only Canadian nationals, Canadian dual nationals and Canadian permanent residents (i.e., landed immigrants) will have access to U.S. defense articles. Access by other foreign nationals in Canada must be approved in writing through a State Department license.
- With respect to licensed transactions (including technical assistance agreements), access by all foreign nationals (including Canadian nationals and permanent residents holding foreign nationalities) will be approved in writing in the normal way.

⁴ As noted previously, certain Canadian crown corporations may be identified by the Department of State in the future as eligible for the exemption under § 126.5.

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- (11) *What is the responsibility of U.S. exporters in the case of a Canadian dual national or permanent resident who also holds nationality from a country proscribed by § 126.1 of the ITAR?*

Answer: As noted in the Department's February 16th Federal Register notice, it remains the responsibility of the U.S. exporter of record to determine, in writing, the Canadian end-user, end use, that the Canadian recipient is registered with the Canadian Government, and that the defense articles are for end use in Canada and not for reexport or retransfer to another foreign destination. Should this information not be available or the exporter has knowledge or reason to know that the export would result in a transfer or sale to a proscribed destination (see § 126.1), this exemption is not available. Thus, the rule change does not affect the continuing application of other requirements of the ITAR, in particular § 126.1(e), which requires any person who knows or has reason to know of a prohibited activity involving a proscribed country to immediately inform the Office of Defense Trade Controls. Further (also noted in the February 16th notice), Canadian registered persons are eligible recipients of ITAR-controlled items under the new exemption, except where application of U.S. law may require prohibiting (e.g., by treating a transaction as non-exempt or a Canadian registered person as ineligible on a case-by-case basis, or more broadly) an export, re-export or transfer of such an item to a person with citizenship or nationality of a country to which U.S. defense exports are prohibited by law.

- For example, in the case of a Canadian dual national/permanent resident employee of a Canadian registered firm who will have access to U.S. defense articles under the exemption and who holds citizenship of a country whose government has been designated by the Secretary of State pursuant to section 40 of the Arms Export Control Act as a sponsor of terrorism, should the U.S. exporter know or have reason to know that the export would result in a transfer or sale to the proscribed destination, then the U.S. exporter should not allow the export to proceed under the exemption and should consult the Office of Defense Trade Controls.