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## **U.S. Export Controls vs. Canadian Human Rights and Employment Law – Conflict or Compatibility:**

### **Some Practical Considerations for Counsel**

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# Topics

1. Helping Your Client Make an Informed Decision Whether or Not to Be Involved in Canadian Transactions Subject to Elevated U.S. Export Controls
2. Help With Next Steps For Your Client Based On Their Decision
3. Anticipating and Addressing Client Misconceptions
  - Canadian Controlled Goods Regulations
  - ITAR License Exemptions
  - The Difference Between Export Controls and Controls on Classified Information Protected in the National Security Interest



# Helping Your Client Make an Informed Decision Whether or Not to Be Involved in Canadian Transactions Subject to Elevated U.S. Export Controls

## Helping Your Client Make an Informed Decision

- The legal issues arising from interplay between U.S. export controls and Canadian Human Rights and Employment Laws are not settled. There is potential exposure here for which there is no “silver bullet” counsel can offer.
- As a responsible actor:
  - The client’s decision needs to be careful and respectful of the client’s obligation to comply with U.S. and Canadian laws.
  - The client’s decision needs to realistically consider their business objectives and capabilities.
  - The client needs to understand and accept the consequences of their decisions.

# Helping Your Client Make an Informed Decision

**The client's decision needs to be careful and respectful of the client's obligation to comply with U.S. and Canadian laws.**

- Do not ignore the issues
- Do not be paralyzed by the complexity of the issues
- Be Disciplined in Your Process:
  - Get expert third party objective advice
  - Identify the issues and alternatives
  - Gather the stakeholders and educate them
  - Achieve consensus
  - Develop a plan (identify timeframes and action owners)
  - Implement the plan
  - Audit the plan
  - Document throughout

# Helping Your Client Make an Informed Decision

**The client's decision needs to realistically consider their business objectives and capabilities.**

Has the client thought through:

- Their business objectives – what's the right balance of complexity, cost and risk for them?
- Which markets and customers is the client targeting?
- What business resources, organizational structure, and command and control relationships would need to exist?

Does the client have or will the client create the capacity and resources to deal with:

- Intensive compliance and oversight activity required?
- Continuing management of unresolved legal issues related to interplay between U.S. export controls and Canadian HR/employment?

# Helping Your Client Make an Informed Decision

**The client needs to understand and accept the consequences of their decisions.**

- For excellent reasons, this is a highly regulated and aggressively enforced space.
- Clients who work in this space are partnering with their governments on national security and defense – this is an enormous responsibility.
- While enforcement agencies are sensitive to responsible actors who have tried to “do the right thing”, noncompliance with regulatory requirements is treated very seriously, and can be punished with significant fines and penalties.
- ITAR controlled work for non-U.S. clients is significantly more complex than performing ITAR controlled work for U.S. clients – increased risk of violations.
- Show your clients enforcement examples relevant to their business operations.
  - [http://www.pmddtc.state.gov/compliance/consent\\_agreements.html](http://www.pmddtc.state.gov/compliance/consent_agreements.html)
  - <http://www.bis.doc.gov/complianceand enforcement/dontletthishappentoyou-2008.pdf>



# Helping With Next Steps for Your Client Based on Their Decision

## Helping Your Client With Next Steps if Their Decision is Not to be Involved in Canadian Transactions Subject to Elevated U.S. Export Controls

- Creation of export compliance policies, procedures, and training
  - <http://www.bis.doc.gov/complianceand enforcement/emcp.htm>
  - Nunn Wolfowitz Task Force Report: Industry “Best Practices” Regarding Export Compliance Programs
- Creation of export compliance function - staffing
- Export Compliance Screening of Transactions (automated if possible)

## Helping Your Client With Next Steps if Their Decision is Not to be Involved in Canadian Transactions Subject to Elevated U.S. Export Controls

- Contract language
  - If you don't want involvement in ITAR controlled activities, say so.
  - Put customers on notice about what you will and won't do.
  - Get commitment from customer in contract that none of the technical data, software, materials or services supplied by them is subject to the ITAR, and that no ITAR controlled materials/activities are necessary for the performance contract.
  - Get commitment from customer that they'll seek your advance consent before sharing with you materials controlled at a level other than EAR99/AT.

## Helping Your Client With Next Steps if Their Decision is to be Involved in Canadian Transactions Subject to Elevated U.S. Export Controls

- Export compliance infrastructure must be in place prior to receipt of materials/involvement in activities subject to elevated export controls
- For some clients this can create a “chicken and the egg problem”
- The client must grapple with whether to:
  - piggyback these costs and effort onto a watershed opportunity, or
  - undertake this effort as part of business development in advance of and preparatory to a given opportunity involving activities subject to elevated export controls

## Helping Your Client With Next Steps if Their Decision is to be Involved in Canadian Transactions Subject to Elevated U.S. Export Controls

- Creation of an export compliance policies, procedures, and training
  - <http://www.bis.doc.gov/complianceand enforcement/emcp.htm>
  - [http://www.pmdtc.state.gov/documents/ddtc\\_getting\\_started.doc](http://www.pmdtc.state.gov/documents/ddtc_getting_started.doc)
  - Nunn Wolfowitz Task Force Report: Industry “Best Practices” Regarding Export Compliance Programs
- Canadian Controlled Goods Registration
  - <http://www.ssi-iss.tpsgc-pwgsc.gc.ca/dmc%2Dcgd/index-eng.html>
- Creation of export compliance function - staffing
- Export Compliance Screening of Transactions (automated if possible)

## Helping Your Client With Next Steps if Their Decision is to be Involved in Canadian Transactions Subject to Elevated U.S. Export Controls

- Stakeholder consultation and creation of detailed compliance procedures and owners for:
  - Employee Screening
  - Foreign Person Access Policy
  - Site Security Plans
  - Safeguarding and Accessing Controlled Information
    - Documents
    - Electronic Files
    - Emails, Faxes, Phone Conversations, Meetings
  - Marking of Controlled Information
  - Training
  - Export Authorizations/Licenses
    - Application
    - Administration
  - Recordkeeping



## Anticipating and Addressing Client Misconceptions

- Canadian Controlled Goods Regulations
- ITAR License Exemptions
- The Difference Between Export Controls and Controls on Information Protected in the National Security Interest

# Anticipating and Addressing Client Misconceptions

## **Client Misconception: I'll register under the Controlled Goods Regulations and only deal in Canadian controlled goods.**

- What are the CGR?
  - More info: <http://www.ssi-iss.tpsgc-pwgsc.gc.ca/dmc-cgd/index-eng.html>
- Created by Canadian government in 2001 in large part to access certain trading privileges related to U.S. materials controlled under the ITAR
- CGR create domestic controls in Canada for military goods and technologies that would be controlled under ITAR USML
- General restriction: no one may examine, possess, or transfer controlled goods unless they are registered under the CGR (or exempt from registration)

# Anticipating and Addressing Client Misconceptions

## **Client Misconception: I'll register under the Controlled Goods Regulations and only deal in Canadian controlled goods.**

- Canada's defense infrastructure largely U.S. origin
- Often, performing CGR controlled services in Canada will require contractors to access ITAR controlled "Defense Articles", "Technical Data", and "Defense Services"

# Anticipating and Addressing Client Misconceptions

## Client Misconception: I'll register under the Controlled Goods Regulations and only deal in Canadian controlled goods.

- Canadian Air Force examples:
  - CP 140/140A (Cdn versions of U.S. Lockheed P-3 Orion)
  - CH 146 Griffon (Cdn version of U.S. Bell 412EP)
  - CF 18 Hornet (Cdn version of U.S. Boeing/McDonnell Douglas F/A 18 Hornet)
  - CH 148 Cyclone (Cdn version of U.S. Sikorsky H-92 Superhawk)
  - CC 177 Globemaster (Cdn version of U.S. Boeing C-17 Globemaster)
  - CC 130 Hercules (Cdn version of U.S. Lockheed C-130 Hercules)
  - CH 136 Kiowa (Cdn version of U.S. Bell OH-58A)
- These platforms are ITAR controlled “Defense Articles”, and related technical/training information is ITAR controlled “Technical Data”
  - Category VII of the USML – Aircraft and Associated Equipment
  - Category IX of the USML – Military Training Equipment and Training

# Anticipating and Addressing Client Misconceptions

## **Client Misconception: I'll register under the Controlled Goods Regulations and only deal in Canadian controlled goods.**

- Not just “registration”
  - Continuing obligations of registered entities
    - Filing of certain documents
    - Identification, registration and training of a “Designated Official”
    - Maintaining certain records
    - Conducting security assessments
    - Development of a security plan
    - Establishment of training programs
    - Continuing reporting requirements

# Anticipating and Addressing Client Misconceptions

## **Client Misconception: There's an ITAR exemption that takes care of all of this.**

- All exemptions are highly technical in nature
- Have specific scope, eligibility requirements, obligations attached to their use – this requires active oversight.
- Not a panacea, and sometimes a pitfall – see how many enforcement actions involve improper use of a claimed exemption.
- ITAR s.126.5 (b) “Canadian Exemption” often raised.

# Anticipating and Addressing Client Misconceptions

## Client Misconception: There's an ITAR exemption that takes care of all of this.

- ITAR s.126.5 (b) “Canadian Exemption”
  - Only available for exports and transfer to Canadian “registered persons” including agencies of Canadian federal and provincial governments
  - Only applies to specific categories of Defense Articles, Technical Data and Defense Services
  - Packages, e-mails and shipping documentation must be marked to properly claim the exemption: “Authorized pursuant to 22 C.F.R. 126.5”
  - In certain circumstances, requires an NDA (with specific provisions) between the U.S. exporter and the Canadian recipient
  - Items and data transferred to Canada under this exemption remain subject to U.S. jurisdiction and cannot be subsequently reexported from Canada to a third country without DTC authorization
  - Record keeping required

# Anticipating and Addressing Client Misconceptions


**Client Misconception: There's an ITAR exemption that takes care of all of this.**

- Question to ask: When you consider the compliance actions, training and oversight required in connection with the use of an ITAR exemption, is your client better off applying for a license?

# Anticipating and Addressing Client Misconceptions

## **Client Misconception: All of our people are cleared NATO Top Secret – this can't be a problem.**

- Export controls and controls over classified information are separate compliance regimes.
- Clearance/Approval under one program doesn't equate to clearance/approval under another.
- This will be hard for your clients to understand, so take care to help them with it.
- Point them to the 2004 General Motors Corporation and General Dynamics Corporation \$20,000,000 USD Consent Agreement (many other examples)
  - [http://www.pmdtc.state.gov/compliance/consent\\_agreements/GeneralMotorsCorp.htm](http://www.pmdtc.state.gov/compliance/consent_agreements/GeneralMotorsCorp.htm)



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