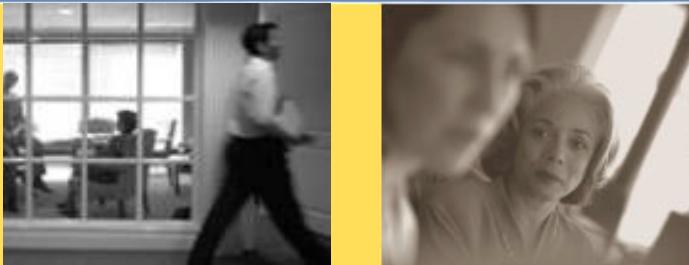


U.S. Export Controls vs. Canadian Human Rights and Employment Laws – Conflict or Compatibility?

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U.S. Export Controls: Retransfer of EAR and ITAR-controlled Technology to Nationals of Third Countries



STEPTOE & JOHNSON LLP

step toe.com

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*Meredith Rathbone
Step toe & Johnson LLP
mrathbone@step toe.com
202-429-6437*

U.S. Export Controls and Technology Transfers

- What is expected under the EAR and ITAR of Canadian companies employing Canadian dual nationals or third-country foreign nationals?

Export Administration Regulations

What is a deemed reexport?

- ❑ Deemed Export – The release of technology or source code subject to the EAR to a foreign national
- ❑ Deemed Reexport – The release in one country of technology or source code subject to the EAR to a national of another country (other than a U.S. national)
- ❑ “Release” includes technology or software being made available to foreign nationals through:
 - visual inspection (technical specifications, plans, blueprints, etc.)
 - oral exchanges, such as technical discussions
 - training by persons with knowledge of the technology
- Example: A Canadian company employs an Indian engineer to work on a project involving semiconductors. The Indian engineer must access U.S.-origin drawings and specifications to perform his work.

Export Administration Regulations

Who qualifies as a national of another country?

- Under U.S. law, someone is a U.S. person only if they are:
 - A U.S. citizen, lawful permanent resident (“green card” holder) or person granted certain protected status (e.g., refugee or asylee)
- For deemed reexports, BIS’s guidance states that for individuals who are citizens and/or or permanent residents of more than one foreign country, “as a general policy, the last permanent resident status or citizenship obtained governs”
 - Example: Chinese national who subsequently obtained U.K. citizenship but now is in Canada on a work visa is considered a national of the U.K.

Export Administration Regulations

Who qualifies as a national of another country? (cont.)

- BIS's guidance says that if "the status of a foreign national is not certain..." you should contact BIS to "determine where the stronger ties lie, based on the facts of the specific case" through a review of the individual's family, professional, financial and employment ties
 - Example of uncertain status: information may indicate involvement with prohibited entities or activities, such as missile or nuclear related end uses or end users

Export Administration Regulations

Reviews of BIS' deemed export policy

- ❑ 2004 OIG report
 - Recommended BIS should discontinue general policy of looking to most recently acquired citizenship or permanent residency and instead require companies to seek authorization if the individual was born in a country for which a license to transfer the technology would be required

- ❑ Deemed Export Advisory Committee (DEAC)
 - Recommended that fewer technologies be controlled for deemed exports
 - And that the “criteria for determining allegiance and national affiliation of a foreign national should include country of birth”

Export Administration Regulations

What do I do if I employ a national of another country who I'd like to access U.S. origin technology?

- ❑ Determine whether the data is controlled for export to that person's country of nationality
 - Depending on the ECCN, it may not require a license
 - Or the data may be publicly available, fundamental research, publicly available patent information, etc.
- ❑ Determine whether a license exception applies
- ❑ Seek a license from BIS
 - Letter of explanation
 - Job description
 - Biographical information (detailed CV or resume)
 - Technology Control Plan

Export Administration Regulations

Problem areas for companies seeking to comply

- ❑ Status of individual “uncertain”
- ❑ Cuban nationals
- ❑ Equivalent of permanent resident status

International Traffic in Arms Regulations

Are ITAR restrictions the same as EAR restrictions?

- While the ITAR do not use the term “deemed exports,” they do regulate:
 - the transfer to non-U.S. persons of ITAR-controlled technical data
 - the reexport or retransfer of ITAR-controlled technical data to an end use, end user, or destination not previously authorized
- Example: ITAR-controlled technical data that has been authorized for export to Canada may not be reexported to a citizen of Australia without DDTTC authorization

International Traffic in Arms Regulations

Who is a dual national or foreign national under the ITAR?

- ❑ “U.S. persons” include U.S. citizens, lawful permanent residents (“green card” holders), and protected individuals (e.g., asylees and refugees)
- ❑ “Foreign person” is defined as any natural person who is not a [U.S. citizen], lawful permanent resident, or protected individual of the United States
- ❑ The terms “dual national” and “third country foreign national” are not defined
 - General Motors 2004 Draft Charging Letter:
 - “General Motors violated 22 C.F.R. § 126.1(e) of the [ITAR] when it failed to inform DDTC of the actual transfer of technical data it had made... to foreign nationals or dual citizens of [proscribed countries]”
 - A footnote explained that the employees at issue were “either citizens of or born in” certain proscribed countries

International Traffic in Arms Regulations

Who is a dual national or foreign national under the ITAR? (cont.)

- ❑ Somebody born to Canadian parents at a Canadian military base in Germany?
- ❑ A baby born in China and adopted at the age of 5 months by Canadian parents?
- ❑ An individual who renounced her prior citizenship?
- ❑ An individual who lost his prior citizenship by operation of law upon becoming a citizen of Canada?
- ❑ A Canadian citizen born and raised in Canada who automatically is granted (or has the right to be granted) citizenship of the native country of his father or mother?

International Traffic in Arms Regulations

Didn't the Canadian and U.S. Governments reach an agreement on this?

- ❑ 2007 Agreement between the Canadian DND and the U.S. State Department providing that:
 - DND personnel (including Canadian Forces, civilians, contractors working at DND facilities, etc.)
 - Who are Canadian citizens (even if they hold another nationality)
 - Can access ITAR controlled defense articles and services
 - If they have a need to know and possess a minimum Secret-level security clearance
- ❑ Not yet applied to other Canadian Government agencies or the private sector

International Traffic in Arms Regulations

How to I obtain authorization to transfer ITAR-controlled technology to a foreign national?

- ❑ Technical Assistance Agreement
- ❑ Manufacturing License Agreement
- ❑ General Correspondence Letter

Best Practices

How do I comply with U.S. law?

- Determine, as appropriate:
 - Last country of citizenship/permanent residence (EAR)
 - Be on the lookout for any red flags
 - All country(ies) of birth, permanent residency, and citizenship (ITAR)
- Badges indicating who is/is not authorized to access controlled technical data
- Segregated work areas (secure rooms, tape lines, signs, etc.)
- Segregation of EAR or ITAR controlled electronic data (password protection, separate databases, etc.)
- Screening of visitors' citizenship/nationality
- TRAINING!