

## Exporter Alert: Canadian Exports Subject to Increasing Trade Control Scrutiny

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Canada's customs authority, the Canada Border Services Agency (CBSA), continues to exercise its broad authority under the *Customs Act* and the *Export and Import Permits Act* to engage in numerous searches, detentions, seizures, ascertained forfeitures, investigations and other enforcement activities to ensure that exports from Canada are in full compliance with Canadian legislation. Exporters must comply with significant, and at times complex, regulatory requirements, including controls over the transfer of goods and technology identified on the *Export Control List* (ECL), economic sanctions measures imposed under the *Special Economic Measures Act* (SEMA) and the *United Nations Act* (UNA), and CBSA export reporting obligations.

Continued reports of US authorities' dissatisfaction with Canadian enforcement of export controls appear to be at least part of the reason for increasingly aggressive CBSA enforcement in this area.<sup>1</sup> Historically, Canada does not have an as extensive enforcement record as that of the United States regarding export controls and economic sanctions. However, Canadian officials point to a "continuum of successes" recently, in addition to prosecutions and convictions, in addressing export violations – these include detentions and seizures which delay and disrupt shipments and can result in lost contracts.<sup>2</sup>

### Critical Areas for Exporters

Areas in which Canadian exporters are facing significant compliance and enforcement challenges include the following:

- (i) **dealings with "designated persons"** – regardless of the destination country, exporters should be routinely screening all involved parties against the lists of companies, organizations and individuals established under the numerous SEMA and UNA sanctions regulations, the *Freezing Assets of Corrupt Foreign Officials Act*<sup>3</sup>, as well as the *Criminal Code* provisions regarding dealings with terrorist entities; Canadian exporters are prohibited from engaging in dealings with these listed parties;
- (ii) **information security items** – Canada's export controls over goods, software and technology designed or modified to perform encryption or to work with such items (as identified on the *Export Control List*<sup>4</sup> (ECL)) are more cumbersome than their US counterparts; often, exporters first discover that their products are subject to control when they are detained or seized by CBSA and the delays in responding to the

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<sup>1</sup> See, for example, "Fronts in Canada set up to ship banned goods abroad: secret cable", The Globe and Mail, November 23, 2011.

<sup>2</sup> October 31, 2011 Testimony of Geoff Leckey, CBSA Director General, Intelligence and Targeting, before the Standing Senate Committee on National Security and Defence.

<sup>3</sup> See the *Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations*, SOR/2011-316.

enforcement action and obtaining a permit result in costly commercial disruption and lost sales<sup>5</sup>;

- (iii) **“catch-all” controls** – pursuant to a “catch-all” provision in the ECL, exports of all goods and technology are prohibited without a permit if “their properties and any information made known to the exporter ... would lead a reasonable person to suspect that they will be used” in connection with chemical, biological or nuclear weapons and their delivery systems or missiles (WMDs) or used in any WMD facility<sup>6</sup>; accordingly, exporters must exercise due diligence to ensure that their uncontrolled goods and technology are not destined for a WMD facility;
- (iv) **Iran** – the supply of any goods and related technology to Iran for use in the petrochemical, oil or natural gas industry or for nuclear-related purposes is prohibited under SEMA and UNA regulations which also contain an extensive list of other prohibited items<sup>7</sup>; Canada’s recent imposition of a financial services ban can also significantly complicate matters for exporters to Iran<sup>8</sup>; further, no US-origin goods or technology can be transferred to Iran without an export permit which can only be obtained in limited circumstances<sup>9</sup>; exporters should be aware that CBSA is also closely scrutinizing exports to locations that are commonly used for transshipment to Iran, including the United Arab Emirates, Malaysia and Hong Kong;
- (v) **Syria** – there is a ban on the export to Syria of any goods or technology identified on the ECL as well as any goods or technical data for use in the monitoring of telecommunications<sup>10</sup>; as is the case with transfers to Iran, all US-origin goods and technology is prohibited from being transferred to Syria without a permit which can only be obtained in very limited circumstances;
- (vi) **Cuba** – Canada does not restrict exports or transfers to Cuba unless the goods or technology are of US-origin or otherwise controlled on the ECL in which case a permit must first be obtained; however, pursuant to an Order issued under the *Foreign Extraterritorial Measures Act*<sup>11</sup>, companies and individuals are prohibited from complying with the extraterritorial US trade embargo of Cuba and are required to advise the Canadian Attorney General forthwith of any communications related to

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<sup>5</sup> In an effort to level the playing field for Canadian exporters, the Export Controls Division of Foreign Affairs and International Trade Canada (ECD) has made available several types of “multidestination” export permits (MEPs) for cryptographic items. Although they still require exporters to apply to EDC and meet reporting and other conditions depending on the applicable MEP, they may be obtained without having to specify consignees in the application. This avoids having to apply for individual export permits for different consignees. ECD has made seven such MEPs available with varying terms and conditions (see “Export Permits for Cryptographic Items” at [http://www.international.gc.ca/controls-controles/export-exportation/crypto/Crypto\\_Intro.aspx?lang=eng&view=d](http://www.international.gc.ca/controls-controles/export-exportation/crypto/Crypto_Intro.aspx?lang=eng&view=d)).

<sup>6</sup> ECL Item 5505. See ECD Notice: “Export Controls over Goods and Technology for Certain Uses” (March 2011, Serial No. 176) at <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/176.aspx?lang=eng&view=d>. This does not apply if the goods or technology are intended for end use in, and the final consignee (and any intermediate consignee) is located in, one of 29 listed allied countries.

<sup>7</sup> *Special Economic Measures (Iran) Regulations*, SOR/2010-165 and *Regulations Implementing United Nations Resolutions on Iran*, SOR/2007-44.

<sup>8</sup> Effective November 21, 2011.

<sup>9</sup> *Export Control List* item 5400 controls all US-origin goods and technology for export or transfer from Canada. General Export Permit No.12, allows for the shipment of goods to any destination other than Belarus, Burma, North Korea, Cuba, Syria, and Iran.

<sup>10</sup> *Special Economic Measures (Syria) Regulations*, SOR/2011-114.

<sup>11</sup> *Foreign Extraterritorial Measures (United States) Order*, 1992, SOR/92-584.

the US trade embargo received from a person in a position to influence their policies in Canada; failure to comply with the Order is punishable with criminal penalties; and

- (vii) **Belarus and Burma** – Canada’s sanctions against Belarus and Burma are more aggressive than those imposed by other countries, including those of the United States and the European Union; they prohibit the export or transfer of all goods and technology to Belarus and Burma and permits are available in only very limited circumstances, i.e., for humanitarian purposes.<sup>12</sup>

In addition to the ECL product and technology-specific controls and the sanctions against the countries already mentioned above, exporters should be aware that Canada also currently imposes trade restrictions of varying degrees on activities involving **Côte d'Ivoire, the Democratic Republic of the Congo, Egypt, Eritrea, Guinea, Iraq, Lebanon, Liberia, Libya, North Korea, Pakistan, Sierra Leone, Somalia, Sudan, Tunisia, and Zimbabwe.**

### Mitigating Risk

Failure to comply with these requirements exposes exporters to significant financial and operational costs arising from penalty assessments as well as delayed, detained or cancelled export shipments. In many cases, there can also be disastrous reputational consequences for the company as a whole.

In order to mitigate risk, exporters should be in a position to demonstrate effective due diligence by designing and implementing a robust trade controls compliance strategy. An exporter’s internal compliance program should include measures such as:

- a clearly articulated and readily accessible written manual that is regularly reviewed and updated;
- appointing senior officer(s) responsible for the implementation and enforcement of the policies and procedures;
- education and training of frontline sales and other employees and executives;
- procedures for reporting potential violations internally and externally (e.g., voluntary disclosure) and for providing protection against retaliation;
- internal disciplinary procedures for violations;
- destination and party screening, including the screening of customers, suppliers, freight forwarders and other involved service providers or agents;
- end-use screening, including written certification from customers; and
- regular reviewing, testing and enhancement of processes and procedures to ensure full compliance.

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<sup>12</sup> Belarus and Burma, along with North Korea, are listed on Canada’s *Area Control List*, SOR/81-543. Burma is also subject to SEMA sanctions under the *Special Economic Measures (Burma) Regulations*, SOR/2007-285.

There is no “one-size-fits-all” compliance program as these measures will differ depending on the size of the company, the nature of the exporter’s goods, services and technology, and its markets, customers and end-users, among other factors. However, as exporters face increasing CBSA scrutiny of their shipments, it is important to pay careful attention to trade control obligations in order to minimize non-compliance risk and avoid the financial and reputational costs associated with CBSA enforcement and delayed or cancelled orders.

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