

U.S. Export Controls: Understanding Your Obligations Practical Tips and Traps

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Road Map for Today's Presentation

- Goal: Understanding Impact on Petroleum Industry
- Overview of Key US Export Control Basics
- Which Agency and Regulations Apply?
 - Defense Articles and Services (ITAR)
 - Dual-Use Commodities (EAR)
 - Economic Sanctions & Embargoes (OFAC)
- Current Status and Obligations Given Export Control Reform
- Drilling Down on Specific Areas of Risk to the Petroleum Industry
- Understand the Era of Heightened Enforcement

Questions?

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Canadian Compare & Contrast



- Periodic input from the Canadian
- Similarities & Differences in Canada's Regime

Questions?

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Why Do You Care?

- Do you work with detailed or sensitive information about U.S. products, software, or technology?
 - *e.g., WMD, Chemical Agents, Resins, Propulsion Additives or Systems*
- Do you interact with U.S. persons located overseas?
 - *e.g., Employees, Contractors, Multinationals, Customers*
- Do you interact or collaborate by electronically with foreign persons either in the U.S. or abroad?
 - *e.g., Researchers, Contractors, Foreign Agencies, State-Controlled Entities*
- Do you travel outside the U.S. with a computer or documents containing work-related technical data?
 - *e.g., Sales proposals, International Collaboration, Research Presentations*

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Canadian Compare & Contrast

Why Do You Care?

- Shipping Goods to / from Canada?
- Canadian Subsidiaries or Affiliates?
- Canadian based technologies ?

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In the words of ...

- “Supplying products and related services to the aviation industry in more than 90 countries”
- “We are stepping up our expansion in markets in Asia and the Middle East, by developing world-class platforms aligned with the aspirations of our partners in Qatar, Saudi Arabia, South Korea and China.”
- “... Employs the latest generation of 3-D technology, coupled with advanced computing, to create detailed images of the world’s oil and gas reservoirs. Four-dimensional seismic technology, which compares 3-D seismic surveys from the same field over different points in time, is extending our reach, and optimizing thermal recovery in heavy oil reservoirs.”

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Understanding Basic Principles

- What are “U.S. Export Controls”?
 - U.S. laws and regulations that control:
 - Exports, reexports and deemed exports of
 - Products, Software & Technology and
 - Services

 - Rules that govern how we export goods and services in order to protect national security and other U.S. policy concerns

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Who Controls? Primary Regulatory Agencies

■ Export Control Regulatory Provisions

- International Traffic in Arms Regulations (“**ITAR**”)
 - Defense Articles (including software & technology) & Services
 - U.S. Munitions List (USML)
 - Administered by State Dep’t, DDTC

- Department of Defense Regulations (“**DoD**”)
 - Defense items (including software & technology)
 - Classified (NISPOM) and unclassified articles

- Export Administration Regulations (“**EAR**”)
 - Dual-Use Items (including software & technology)
 - Commerce Control List (CCL)
 - Administered by Commerce Dep’t, BIS

- Office of Foreign Assets Control (“**OFAC**”) Regulations
 - US sanctions and embargo programs
 - Specially Designated Nationals (SDN) List
 - Administered by Dep’t of Treasury, OFAC

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Canadian Compare & Contrast

Export Controls Basics?

- Canada has similar scope but different process:
 - Export Controls List
 - Foreign Affairs, Trade and Development Canada (**DFATD**)
 - Controls: Goods, Software, Technology, Global Areas

- Guide
 - http://www.international.gc.ca/controls-controles/about-a_propos/expor/guide.aspx

- Handbook
 - <http://www.international.gc.ca/controls-controles/military-militaires/handbook-manuel.aspx?lang=eng>

- OGD
 - SEMA, UN Act, NEB Act, etc.

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More Export Control Basics

- Jurisdiction of US Export Controls
 - U.S. Origin Items
 - Items in the United States (Even Foreign Made)
 - Certain Items Made from US Technology
- Inquiry: Who, What, When, Where?
- Selling in or Sourcing from the U.S.?
 - “Defense” Item?
 - “Dual Use”?
 - “EAR 99” -- No License Required
- License Required for the Export/Reexport?
- Dealing with Controlled Technical Data or Technology?
 - Don’t Know? Then, Request a CJ

Tip: Authorization Always Takes Longer Than Expected!

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Export Control Basics: Defense Items

- What if your Item is on US Munitions List?
 - Registration Required as Mftr, Exporter and/or Broker
 - USML Affirmative List with “Exemptions”
 - License for Export/Reexport Required, Unless Exemption Applies
 - U.S. Origin Items (wherever located)
 - Items in the U.S. (regardless of origin)
 - Items in transit through the U.S. / in FTZs
- Some Foreign-Owned/Made Items
 - When Made with U.S. content or technology
 - No “de Minimis” Consideration
- Technical Assistance Agreement (TAA) or Manufacturing License Agreement (MLA) may be needed

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Tip: Remember: “Privilege” to Export, not a Right

Export Control Basics: Commercial Items

- What is “Subject to the EAR”?
 - U.S. Origin Items (including software and technology) wherever located
 - Items in the U.S. (regardless of origin)
 - Items in transit through the U.S.
 - Items in FTZs
- Some Foreign-Owned/Made Items
 - When Made with U.S. content / technology
- de Minimis US Content Concept Applies
 - > 10% to Sanctioned Countries
 - > 25% to all other Countries
- Commerce Control List and Country Chart, some “Exceptions” from License Requirements

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Tip: Understand How Your Business Process Involves the U.S.!



Canadian Compare & Contrast

Canada to US Exports?

- For many “controlled” goods exported from Canada to US, no specific required license.
 - Exceptions: Military, Nuclear, Chemical, Missile + Misc
http://www.international.gc.ca/controls-controles/export-exportation/exp_ctr_handbook-manuel_ctr_exp-p2.aspx?lang=eng#d_5

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Exports from Canada of US Origin Goods?

- Controlled under Item 5400
 - Aimed at ALL US Origin Goods/Technology, not just Military
 - GEP 12 can normally be used (not to Area Control List)
 - Carve Out: “Substantial Change in Value, Form, Use” test
- US Export Controls will also still Apply



Canadian Compare & Contrast

Area Control List / Sanctioned Parties List

- Exports to certain Global Areas are controlled (prohibited):

- Area Control List

- OGD also add to Canada's Trade Sanction Party List

- UN Act, SEMA, etc.

http://www.international.gc.ca/sanctions/current_sanctions_actuelles.aspx?lang=eng

Al-Qaida and the Taliban	Iran	Somalia
Burma/Myanmar	Iraq	Sudan
Belarus	Lebanon	Suppression of Terrorism
Côte d'Ivoire	Libya	Syria
Democratic Republic of the Congo	Liberia	Tunisia and Egypt
Eritrea	North Korea	Ukraine
Guinea-Bissau	Sierra Leone	Zimbabwe

- Questions ? sanctions@international.gc.ca

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Understanding Reexports

Shipment of Item Subject to ITAR or EAR from U.S. to One Country, then Exported to a Third Country

- Also, Further Release of Software/Technology

If New Destination & End-User:

- Perform Who, What, When, Where, Why Analysis

Be Careful not to Violate a License Restriction

- No “Exception” for Foreign Affiliates
- Reexports and Technology Transfers

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Tip: Watch out for U.S. Long Arm & Heavy Hand!



Controls Apply Beyond “Items”

Not Just Items, But Software and Technology too

- Who, What, When, Where, Why Also Applies
- Electronic Transmission and/or Access
- Consider your Affiliates, Distributors, Suppliers and Others Dealing in/with United States
- Products Made from Software & Technology
 - >25% and > 10% de minimis levels with US content
- Controlled by ECCN & Destination

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Tip: Keep Current as Changes to Your Business Processes can Affecting Change in Export Controls!



What is a “Deemed Export” of Technology or Technical Data?

- U.S. Laws Also Control “Deemed Export” in U.S.:
 - Release of U.S. Technology or Software
 - To Non-U.S. (Foreign) Person
 - Deemed an Export to Their Home Country
- Different Interpretations State vs. Commerce:
 - Place of Citizenship or Birth
 - Dual National?
- New Immigration Form I-129 Visa Requirements
 - Requires Certification as to Compliance
 - Any secondments in your U.S. operation?

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Tip: Talk to Human Resources, Watch for Updates!

Who is a “Foreign Person?”

- Any individual who is not a U.S. citizen or U.S. lawful permanent resident (i.e., “green card” holder) or does not have “protected status” (protected asylee).
- Any foreign entity that is not incorporated or organized in the U.S. to do business in the U.S.
 - Includes foreign governments
 - International organizations

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Are All of Your Foreign Nationals Authorized?

- When Dealing with Foreign Persons, Remember Your:
 - Employees
 - Research Fellows
 - Interns
 - Resellers & Agents
 - Affiliates
 - Overseas Joint Ventures
 - Subcontractors or Service Providers
 - Remember the Embargoed Countries!
- Coordinate with HR and Empowered Official/Export Compliance Manager
 - Get Licenses/Authorizations
 - Manage Release of controlled Technical Data
 - Provide Training for Existing and New Personnel
 - Regularly Monitor your Activities

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When does an “Export” Occur?

- More than just physical shipments of goods overseas, an “export” includes:
 - E-mail / faxing technical data to a foreign person (even in the U.S.);
 - Allowing foreign person to visually inspect technical data or software source code;
 - Hand carrying controlled items abroad (e.g., traveling abroad with laptops containing software source code or technical data);
 - Performing controlled service overseas; or
 - Transferring products, software or technical data to a foreign affiliated entity.

- All can be controlled U.S. exports.

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Canadian Compare & Contrast

Meaning of Export

- Same General Rules in Canada
- Export broadly defined
 - Export occurs when technical data, assistance information necessary to develop or produce controlled good is provided or disclosed in any manner from place in Canada to place outside of Canada.

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“Reexports” & “Transfers” also covered

- **Reexports:** Shipment or transmission of items subject to U.S. export controls from one foreign country to another, which apply to:
 - Reexport of U.S. origin goods, technology and services;
 - Reexport of non-U.S. origin articles that contain more than a specified percentage of controlled U.S. content;
 - Reexport of non-U.S. origin articles produced using U.S. technology or software.

- **Retransfer:** Transmission of a controlled item from one person/entity within a country to another within that same country.

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What You Must Know When Exporting

- What is the item or technology being exported?
- Where is the export going?
- Are there intermediate stops?
- Who will receive the export?
- Is that party the end-user or are there additional parties to the transaction?
- What will the end-user do with the export?
- Are all parties to the transaction allowed to engage in the export under the regulations?

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Understanding ITAR

- What exactly is an “export” under ITAR?
 - Sending or taking a defense article out of US in any manner, except by mere travel outside U.S. by a person whose personal knowledge includes technical data;
 - Disclosing (incl. orally or visually) or transferring in US any defense article to foreign person, embassy, any agency or subdivision of a foreign government (e.g., diplomatic missions);
 - Disclosing (incl. orally or visually) or transferring technical data to a foreign person, whether in US or abroad; or
 - Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in US or abroad (e.g., for a foreign government or armed force)
 - No *de minimis* levels for ITAR exports!

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How is “Defense Article” Defined?

- Any item or technical data designated on the U.S. Munitions List (“USML”)
 - Specifically designed, developed, configured, adapted, or modified for military application;
 - Does not have predominant civil applications;
 - Does not have performance equivalent (defined by “form, fit and function”) to those of an article or service used for civil applications.
 - Unsure? Get a Commodity Jurisdiction (“CJ”) Determination

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Defense Articles include “Technical Data”

- Technical data includes:
 - Information for design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles
 - Such as: blueprints, drawings, photos, plans, instructions, or documentation
 - Classified info relating to defense articles & services
 - Information covered by an invention secrecy order
 - Software directly related to defense articles
- Tech. data does NOT include:
 - Info concerning general scientific, mathematical or engineering principles commonly taught in schools, or
 - Information in the public domain, or
 - Basic marketing information on function or purpose or general system descriptions of defense articles
- **Be CAREFUL –DDTC may consider as Tech Data!**

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What is “Public Domain?”

- Information published and generally accessible or available to the public, including that:
 - Sold publicly
 - At libraries
 - Through patents
 - At public conference, meeting, trade show or exhibition
 - Through public release (any form) after approval by US govt. Dept. or agency
 - Example: “DOD Distribution Statement A”
 - Through “fundamental research” in scientific community, published and shared
- Note: If containing a Military Standard or Specification, it’s NOT in Public Domain absent govt. approval
- Note: Unclassified may still be controlled (e.g., China)

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ITAR Also Covers “Defense Services”

- You are providing a “defense service” if:
 - Furnishing assistance (including training) to foreign persons, whether in the US or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles; or
 - Transferring ITAR-controlled technical data to foreign persons, whether in the US or abroad

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Examples of ITAR-controlled articles

- **ITAR: Category V: Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents**
 - (b) Propellants;
 - (c) Pyrotechnics, fuels and related substances, mixtures thereof (e.g., liquid fuels specifically formulated for controlled articles);
 - (e) Binders and mixtures thereof (e.g., HTPB);
 - (f) Additives (Titanium IV);
 - (h) Technical data and defense services
 - Technical data directly related to the manufacture or production of any defense articles are designated as “Significant Military Equipment” (SME)
 - (i)(1) Category V contains explosives, energetic materials, propellants and pyrotechnics and specially formulated for aircraft, missile and naval applications.

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So it's on USML, Now what?

- License is Required
- Who may get an ITAR License?
 - Only U.S. Persons & foreign govt. entities in the US
 - Other foreign persons not eligible
 - U.S. persons with certain criminal convictions or debarred persons/entities Not eligible
 - Registration with DDTC first required
 - Understand the process and How long it can take
 - Remember: License approval required BEFORE export!
- Any Applicable Exemption?
 - Remember: Don't apply to Embargoed Countries & Classified Defense Articles.
- If you don't know, get expert advice!

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Understanding EAR

- What exactly is an “Export” under EAR?
 - Sending or taking a non-defense U.S.-origin or dual-use item out of US in any manner, except by mere travel outside U.S. by a person whose personal knowledge includes controlled technology;
 - Disclosing (incl. orally or visually) or transferring in US any U.S.-origin or dual-use item to foreign person, embassy, any agency or subdivision of a foreign government (e.g., diplomatic missions);
 - Disclosing (incl. orally or visually) or transferring controlled technology to a foreign person, whether in US or abroad;
 - Remember: *de minimis* levels apply for EAR exports!

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Understanding “Dual Use” Controlled Items and Technology

- Any item or technology designated on the Commerce Control List (“CCL”)
 - With a predominant civil application
 - Export Control Classification Number (ECCN) identifies controlled items
 - Categories 0-9
 - Five Product Groups:
 - A: Systems, Equipment, Components
 - B: Test, Inspection & Production Equipment
 - C: Material
 - D: Software
 - E: Technology

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Examples of EAR-controlled articles

- ECCN 1C111 – Propellant additives and agents
- ECCN 1C111.b.1 – Carboxyl-terminated polybutadiene
- ECCN 1C980 - Aviation engine lubricating Oil
- ECCN 1C981 – Tar Sands and Shale Oil (short supply)
- ECCN 1C982 – Products from Naval Petroleum Reserves
- ECCN 2B350 – Chemical Manufacturing Equipment
- ECCN 2B350.e – Certain absorption or distillation columns
- ECCN 2B350.g – Certain Valves (e.g., double seal)
- ECCN 2B350.i – Multi Seal pumps
- ECCN 2B999.h – Certain drilling equipment
- ECCN 5D002, 5D992 – Encryption software
- ECCN 6A002.c – Imaging equipment, visible and infrared
- ECCN 8A992.a.1 - Camera, designed or modified for remote operation with submersible vehicle

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So it's on CCL, Now what?

- License May be Required
 - Check Country Destination and Use
 - Understand policy controls
 - Any Applicable License Exception?
- Cover your Exports of Technology
 - Including Deemed Exports in the U.S.
- No Registration Required
 - Not sure? Get Commodity Classification
 - Understand the process and How long it can take
 - Remember: License approval required BEFORE export!
- If you don't know, get expert advice!

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Penalties for Violations of ITAR/EAR

- Criminal Penalties
 - \$1,000,000 per violation and/or
 - 20 years imprisonment for individuals
 - Prosecution by Department of Justice

- Civil Administrative Penalties
 - Fines up to \$250,000 per violation or twice the amount of the transaction at issue, whichever is greater and/or
 - Debarred Parties / Denied Persons List
 - Loss of Export Privileges

- **Be Careful: Enforcement is Up!**

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Canadian Compare & Contrast

Canadian Penalties and Prosecution?

■ Three Levels of Possible Fines

- Amps: \$2,000 - \$8,000
- Summary Conviction Offences: \$25,000 + 12 Months
- Indictable Offences: \$Unlimited + 10 Years

http://www.international.gc.ca/controls-controles/export-exportation/exp_ctr_handbook-manuel_ctr_exp-p2.aspx?lang=eng#d_5

■ Prosecution Case Study

- *Yadegari* (2010)
- Pressure Transducers, from US to Canada to Iran.
- For Potential use in Nuclear Industry / Contrary to UN Resolution
- Result: 3 years imprisonment
- Tip ? From the US Manufacturer

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Enforcement and Self-Disclosure

- Criminal and Civil Penalties Possible
- Detention and Seizure of Goods
- The “Privilege” of Exporting
- Possibility of Debarment
- Enforcement Mechanisms:
 - Charging Letters (Proposed and Actual)
 - Aggravating & Mitigating Factors
 - Self-Disclosure – When and How?

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Tip: Serious Implications Require Expert Assistance



Canadian Compare & Contrast

Canadian Voluntary Disclosure Process

- Requirements:
 - Full & Complete
 - Voluntary
 - Penalties Involved

- No-Names Disclosure Process

- Full Voluntary Disclosure Process

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Canadian Compare & Contrast

National Energy Board Licensing / Orders

- Exports of Canadian Energy Products
 - Oil & Oil Sands
 - Natural Gas
 - Liquid Natural Gas
 - Electricity

- Orders allow Exports for 1-2 Years

- Monthly Reporting Requirements

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Thank you!

Questions and Answers

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