Working Successfully with ITAR in U.S. Canadian Defence Industry Technology Transfers

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FOREWORD

With the level of defense and homeland security spending in the United States at an all time high combined with the growth in technology applications for the defense related industries, it is no wonder that an increasing number of Canadian companies—particularly Québec companies—are looking for opportunities to participate in this market. With Québec's industry leadership in aerospace, optics and other key technologies, the opportunities presented are significantly relevant for the region. However, in working with Québec suppliers over the past few years, the Québec Government Office in Los Angeles has found that International Traffic in Arms Regulations (ITAR) continue to pose a significant challenge to doing business in this arena.

Canada being a partner in NAFTA and cosignatory to the Canada - U.S. Defense Production Sharing Arrangement (DPSA), there is an official Canadian Exemption for most U.S. federal contracts. This exemption mandates that Canadian suppliers be included in the North American industrial base and considered in the same manner as U.S. suppliers (with the exception being in certain specific matters of national security.) Therefore, proper use of the Canadian Exemption should put Québec suppliers ahead of suppliers from other countries. However, the process is not always understood by all parties. Questions regarding ITAR continue to pose barriers to the development of business relations and make Québec entities less competitive in bidding on contracts.

Although in no position to alter the requirements of ITAR, the Québec Government Office in Los Angeles would like to make the process a little easier for Quebec companies to manage. With this in mind, we are particularly happy to provide Québec's suppliers and bidders with an easy to understand guide about how to work successfully within the ITAR regulations. This Guide, in addition to clarifying when and where ITAR applies, provides tools that may be posted to websites and cited in letters to the industry.

Working Successfully with ITAR in U.S. Canadian Defence Industry Technology Transfers [1]

When not properly assessed, export controls can limit Canadian industry participation in cooperative arrangements with the U.S. defence industry. The following provides a guide to U.S./Canada technology transfers regulated by U.S. export controls, which include the International Traffic in Arms Regulations ("ITAR").

Export Controls on U.S./Canada Industry Technology Transfers

U.S. export controls consist of laws and regulations restricting the transfer of various products, technology, software, and services provided by U.S. persons to certain countries, foreign nationals, and other designated entities. These laws and regulations include the Export Administration Regulations, administered by the U.S. Department of Industry and Security ("BIS"), and the ITAR, administered by the U.S. Department of State Directorate of Defense Trade Controls ("DDTC"). They govern both the shipment of physical goods to foreign countries (known as "direct exports") and the communication of technical information to foreign entities and individuals, regardless of where those entities or individuals are located (known as "deemed exports" if made in the U.S.). The EAR and ITAR also control foreign made products that incorporate controlled U.S. technology.

U.S. export controls were developed with the understanding that the U.S. and Canada share a unique long-standing cooperative relationship. This relationship is pursued through a variety of bilateral agreements that include the North American Aerospace Defense Command for mutual defence, the Defence Production Sharing Arrangement and the Defence Development Sharing Agreement for government procurement, and the North American Free Trade Agreement for mutual trade. In the EAR, the cooperative relationship is seen through limited license requirements and various exceptions. In the ITAR, the cooperative relationship is seen through the "Canadian Exemption."

The ITAR Canadian Exemption

When all conditions of the ITAR Canadian Exemption are met, no license from the U.S. Department of State is required for a U.S. company to: (i) provide design drawings to a Canadian company to determine if the Canadian company has the capability to produce/build-to-print, or (ii) provide specifications to a Canadian company to determine if the company can design to those specifications.

The ITAR Canadian Exemption is reproduced in Appendix A, and the complete provisions of the ITAR are posted on the DDTC website at http://pmddtc.state.gov/itar index.htm.

The Canadian Exemption significantly relaxes DDTC licensing requirements for exports to Canada of ITAR-controlled "defense articles," "defense services," and related technical data. Canadian companies that register with the Canadian Controlled Goods Directorate are generally eligible to use the ITAR Canadian Exemption. This greatly facilitates business with the U.S. defence industry. However, the Exemption is limited and violations of the ITAR are often costly. For this reason, many U.S. companies that do not know of or misunderstand the Exemption often refuse to discuss products and projects involving ITAR-controlled technical data with Canadian industry. The following guidelines offer methods to resolve this barrier by outlining five specific steps Canadian companies can take to facilitate lawful cross-border cooperative arrangements.

STEP 1. Determine Which U.S. Agency Has Jurisdiction.

Before taking advantage of the ITAR Canadian Exemption, companies must first determine that the ITAR controls the technology at issue, rather than the EAR or another regulation. This analysis must be performed anew for each prospective export that differs in scope of technology, end user, and/or end use.

The ITAR controls the export of any item or technical data designated in the U.S. Munitions List ("USML"), a copy of which is available on the DDTC website at http://pmddtc.state.gov/itar_index.htm. This includes articles designed, developed, adapted, modified, used, repaired, or manufactured for military or defence purposes, technical data regarding such articles, and technical assistance related to such articles, known as "defense services." It also includes hardware and technical data in any form (i.e., models, mock-ups. etc.) that reveal technical data directly relating to items on the USML.

The EAR controls the export of products, technology, and software with commercial or military applications not controlled by the ITAR and technical assistance with the design, development, and use of non-military encryption source code and technology. If the technology is subject to the EAR, exporters must follow the guidance provided by BIS on its website available at http://www.bis.doc.gov/licensing/exportingbasics.htm.

The EAR, ITAR, or both will control assistance related to chemical, biological, and nuclear weapons proliferation and associated delivery systems for such weapons. Other regulations that may be relevant depending on a company's industry include those administered by the Department of Energy, Nuclear Regulatory Commission, Drug Enforcement Administration, Department of Agriculture, Food and Drug Administration, and other U.S. agencies. However, the EAR and ITAR are the most frequently applied and regularly encountered sources of control for high technology industries. They cover a wide range of activities beyond what one may typically consider an export. They affect many industries. Those in the defence, aerospace, optics, energy, communications, computer, electronics, and semiconductor industries are especially likely to encounter application of these regulations.

STEP 2. Determine if the Scope of Export Meets the Canadian Exemption Requirements.

If the product, technology, or services at issue is ITAR-controlled, a license or other authorization is required for export from the U.S. unless all requirements of an ITAR exemption are met. There are over thirty exemptions to the ITAR. One or several may apply to a given transaction. However, these are limited in application and have many conditions. Similar to the case of jurisdictional determinations,

exporter analysis of exemptions must be performed anew for each prospective export that differs in scope of technology, end user, and/or end use. With the Canadian Exemption, under certain conditions, many U.S. origin defense articles, technical data, and services can be exported to a defined class of Canadian end-users for specific end uses without a license or other authorization from the DDTC. Some sensitive U.S. origin defense articles, data, and services are not covered by the Exemption. The Exemption also authorizes the temporary import of certain unclassified defense articles from Canada into the U.S. for temporary use and subsequent return to Canada without a license.

Scope of Eligible End Uses and End Users under the Exemption

Exports must not transit through a third country, must be for end-use in Canada or for subsequent return to the U.S., and the end-use must be by Canadian governmental (federal or provincial) authorities acting in their official capacity or "Canadian-registered" persons, defined as:

- A Canadian national (including Canadian business entities organised under the provisional or federal laws of Canada) registered in Canada in accordance with the Canadian Defence Production Act. Canadian nationals include naturalized Canadian citizens, as well as lawful permanent residents (e.g., landed immigrants/permanent residents).
- A Canadian dual national registered in Canada in accordance with the Canadian Defence Production Act. The non-Canadian nationality held must not be from a proscribed country listed in ITAR Section 126.1. At present, these include: Afghanistan, Belarus, Burma, People's Republic of China, Democratic Republic of the Congo (formerly known as Zaire), Cote d'Ivoire (Ivory Coast), Cuba, Cyprus, Eritrea, Haiti, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Rwanda, Sierra Leone, Somalia, Sudan, Syria, Venezuela, Vietnam, Yemen, and Zimbabwe. [2]
- Canadian Crown Corporations that are specifically identified by the DDTC (see http://www.pmddtc.state.gov/corp_list.htm).
- A Canadian person or company must not be on the DDTC lists of "debarred parties" (see http://www.pmddtc.state.gov/debar059intro.htm), the U.S. Department of Treasury Office of Financial Assets Control Specially Designated Nationals List at http://www.treas.gov/offices/enforcement/ofac/sdn), or other applicable list of prohibited parties.

Scope of Eligible U.S. Exporters under the Exemption

U.S. exporters must be properly registered as a defense article manufacturer, defense article exporter, and/or defense article broker with the DDTC and must not

be listed on the DDTC list of debarred parties (see http://www.pmddtc.state.gov/debar059intro.htm). Canadian companies should request the U.S. party's DDTC registration number early in a transaction and verify that the number is current and valid by contacting the DDTC at (202) 663-1282 or DDTCResponseTeam@state.gov.

Scope of Eligible Articles and Data under the Exemption

A U.S. exporter will only need export licenses for defense articles and technical data identified in subsections (b)(1) through (b)(20) of the Exemption as reproduced in Appendix A. These defense articles and technical data require a license or other authorization for export to Canada and include: defense articles requiring "Congressional Notification" (i.e., for dollar limits set forth in ITAR sections 123.15 and 124.11 and/or that involve the manufacture of "significant military equipment" as defined by the ITAR); firearms, ammunition, and accessories of a calibre up to .50; missile systems; military aircraft; chemical and biological agents; and military spacecraft. The Exemption does permit unlicensed exports of commercial communications satellites.

Examples of items covered by the Exemption include:

- Certain components, parts, accessories, attachments, and associated equipment, including ground support equipment, specifically designed or modified for military aircraft (excluding those for developmental aircraft specifically designed, modified, or equipped for military uses or purposes, or developed principally with U.S. Department of Defense funding).
- Electronic systems or equipment specifically designed, modified, or configured for intelligence, security, or military purposes for use in search, reconnaissance, collection, monitoring, direction-finding, display, analysis and production of information from the electromagnetic spectrum, and electronic systems or equipment designed or modified to counteract electronic surveillance or monitoring.
- Certain fire control systems; gun and missile tracking and guidance systems; gun range, position, height finders, spotting instruments and laying equipment; aiming devices (electronic, optic, and acoustic); bomb sights, bombing computers, military television sighting and viewing units, and periscopes.
- Lasers specifically designed, modified, or configured for military application, including those used in military communication devices, target designators and

range finders, target detection systems, and directed energy weapons.

 Military-type armed or armoured vehicles, military railway trains, and vehicles specifically designed or modified to accommodate mountings for arms or other specialized military equipment or fitted with such items; military tanks, combat engineer vehicles, bridge launching vehicles, half-tracks and gun carriers.

Scope of Eligible Defense Services under the Exemption

Absent an ITAR exemption, no U.S. defense service may be provided to foreign persons, entities, or governments without written authorization from the DDTC in the form of a Technical Assistance Agreement or a Manufacturing License Agreement. Pursuant to the ITAR, defense services consist of any of the following:

- The furnishing of assistance (including training) to foreign persons, whether in the U.S. or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles.
- The furnishing to foreign persons of any controlled technical data, whether in the U.S. or abroad.
- Military training of foreign units and forces, regular and irregular, including formal or informal instruction, of foreign persons in the U.S. or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice.

No DDTC authorization is required for the transfer of U.S. origin defense services to Canadian-registered persons or companies when the scope of defense services does not concern a product or technical data identified in Section 126.5 (b)(1) through (21); and the defense services are limited to the following activities:

- Canadian-registered person or a registered and eligible U.S. company preparing a quote or bid proposal in response to a written request from a Department or Agency of the U.S. Federal Government or from a Canadian Federal, Provincial, or Territorial Government.
- Production, design, assembly, maintenance, or servicing of a defense article
 or technical data for use by a registered U.S. company; or a U.S. Federal
 Government Program; or for end use in a Canadian Federal, Provincial, or
 Territorial Government Program; and the defense services and technical data

are limited to "build-to-print," "build/design-to-specification," "basic research" and/or "maintenance" activities; and does not include "design methodology," "engineering analysis," or "manufacturing know-how" as such is defined in Part 126.5(c)(6)
See Appendix A.

In addition, in the case of either activity, the Canadian contractor and subcontractor must certify, in writing, to the U.S. exporter that the technical data and defense service being exported will be used only for the permissible activities; and a written arrangement between the U.S. exporter and the Canadian recipient (such as a consummated Non-Disclosure or other multi-party agreement, Technology Transfer Control Plan, contract, or purchase order) must contain the provisions specified in Section 126.5(c)(4). See Appendix A.

STEP 3. Register with the Canadian Controlled Goods Directorate.

The Controlled Goods Directorate ("CGD") is a security program established by Canada's Defence Production Act and the Controlled Goods Regulations and implemented by Public Works and Government Services Canada. Those dealing with goods and technology included on the Export Controls List administered by International Trade Canada and/or technical data related to same in Canada are required to register with the CGD unless exempted or excluded. The CGD should not be confused with the Export Import Controls Bureau, which regulates the import and export of Canadian goods and administers Canada's dual-use and munitions control lists.

The CGD web site provides instructions on how to register, along with a list of registered persons and entities at http://www.cgd.gc.ca. The list is used by the U.S. defence industry to verify whether a prospective Canadian business partner is registered with the CGD. Businesses are eligible to register with the CGD provided that they are incorporated or authorized by federal, provincial, or territorial law to carry on business in Canada. Individuals are also eligible to register with the CGD. They must consent to a security assessment and be ordinarily resident in Canada as either a Canadian citizen or permanent resident.

For more information, visit the CGD website or contact CGD Information Services Officers at 1-866-368-4646 or by email: ncr.cgd@pwgsc.gc.ca.

STEP 4. Obtain Certification Under the U.S./Canada Joint Certification Program

In addition to satisfying the requirements of the ITAR, registered Canadian companies interested in projects involving U.S. Department of Defense ("DOD") unclassified technical data regarding military or space applications should further obtain certification under the U.S./Canada Joint Certification Program ("JCP"). This certification may also be used by U.S. contractors to receive Canadian Department of National Defence ("DND") technical data governed by Canada's Technical Data Control Regulations.

Once certified, Canadian companies may request unclassified technical data controlled by the DOD or DND necessary to respond to defence-related contracts whose specifications involve unclassified technical data releasable only to certified contractors; attend restricted gatherings where unclassified technical data is presented; and arrange unclassified visits directly with other certified U.S. or Canadian defence contractors or U.S. and Canadian military facilities. Certified companies may also use technical data in other legitimate business purposes, as defined by the JCP.

The certification requirement is in addition to compliance with U.S. export controls. Even when certification permits the transfer from a DOD contractor to a Canadian company, a license or other authorization must be obtained for exports to foreign persons, companies, or other parties unless an ITAR exemption applies. Participation in the JCP is restricted to individuals and enterprises that are located in the U.S. or Canada.

Where a parent/subsidiary relationship exists between two companies and the parent or subsidiary is located in a country other than the U.S. or Canada, such parent or subsidiary and its employees are not authorized access to any DOD or DND controlled technical data which a certified U.S. or Canadian contractor has obtained under the provisions of the JCP without prior written government approval and export controls compliance.

The Defense Logistics Information Service ("DLIS") in Battle Creek, Michigan is the only authorized source of JCP Certification. To obtain certification, contractors should review the requirements of the Certification Pamphlet prepared by the U.S./Canadian JCP Office available at http://www.dlis.dla.mil/jcp. Companies may also contact the JCP Office at (800) 352-3572.

STEP 5. Make ITAR and JCP Compliance Information Available to U.S. Partners.

Once received, CGD Registration and JCP Certification information should be made available to U.S. partners. This information can reassure an uncertain U.S. company that it can exchange technical information covered by the ITAR Canadian Exemption without violating the ITAR. Disclosure of registration and certification information may also educate U.S. partners on availability of the Exemption and assist them in meeting their records maintenance requirements.

The best method to make registration and certification information available is through use of a company website ITAR compliance notice and direct correspondence with prospective U.S. partners. A suggested form of company website notice is provided in Appendix B, and a suggested form of direct correspondence is provided in Appendix C. The sample direct correspondence provides a simple method to begin technical discussions with potential U.S partners. This should take place as early as possible before technical discussions (i.e., prospective exports) to permit the U.S. partner's senior management and/or general counsel sufficient time for review.

Avoiding Common Pitfalls in Use of the Canadian Exemption [3]

The following points will assist companies in preventing inadvertent violations of the ITAR.

Beware of ITAR Requirements on Proposals.

The ITAR identifies various items on the USML as significant military equipment ("SME"). Certain proposals to foreign persons for the sale or manufacture abroad of SME require licenses or other prior approval of, or prior notification to, DDTC. These requirements are set forth at Section 126.8 of the ITAR. Among other stated requirements, the prior approval of DDTC is required before a U.S. person may make a proposal or presentation designed to constitute a basis for a decision on the part of any foreign person to enter into any manufacturing license agreement or technical assistance agreement for the production or assembly of significant military equipment, regardless of dollar value, in any foreign country, whenever: (i) the equipment is intended for use by the armed forces of any foreign country; and (iii) The agreement would involve the export from the United States of any defense article or the furnishing abroad of any defense service including technical data.

What constitutes a proposal?

The terms proposal or presentation (designed to constitute a basis for a decision to purchase and to enter into any agreement) mean the communication of information in sufficient detail that the person communicating that information knows or should know that it would permit an intended purchaser to decide

- Do not self-blind. If a Canadian company or U.S. exporter knows that a
 defense article, technical data, or services otherwise exempt from licensing is
 being exported to an ineligible end-user or for an unauthorized end-use, an
 export license must be obtained prior to the transfer to Canada. This rule
 applies to exports, re-exports, and retransfers
- Do not delay applying for DDTC authorization necessary for performance of an agreement or arrangement.

In most cases, companies should not exclusively rely on the Canadian Exemption for performance of an arrangement or contract because the provision of defense services beyond build-to-print, build/design-to-specification, basic research, and/or maintenance will eventually be required. As the approval of a Technical Assistance Agreement or Manufacturing License Agreement can take six months to a year or more to obtain, companies should consider having their U.S. partner apply for such authorizations as soon as possible. This can result in a wider scope of permissible technical data transfers and defense services.

- No unauthorized end-uses are permitted following export. Exports
 made under the Canadian Exemption may only be used for end-uses authorized
 by the Exemption. For example, a military supply vehicle, which is otherwise
 eligible under the Exemption, cannot be shipped under the Exemption if it is for
 use with a mobile missile system.
- No retransfers/re-exports are permitted without DDTC authorization.
 U.S. origin technology exported pursuant to the Canadian Exemption cannot be retransferred/re-exported to another CGD registered company or any other entity or person in Canada without DDTC authorization. Where retransfer/re-export would qualify under the ITAR Canadian Exemption if exported directly from the U.S., the original U.S. exporter is authorized to grant authorization for the retransfer/re-export on behalf of DDTC by confirming in writing to the Canadian requester that the retransfer/re-export is authorized subject to the conditions of the Exemption.

- The Canadian Exemption may not cover all employees of a CGD registered company. Importantly, even where a Canadian company is CGD registered, the Canadian Exemption does not automatically qualify all of its employees to receive ITAR controlled technical data. It only qualifies employees who are nationals, dual nationals, or permanent residents of Canada. In addition, dual national employees with national status from any ITAR embargoed country (i.e., proscribed countries under Section 126.1) may not have access to ITAR controlled technical data.
- The Exemption does not apply to Canadian employees of U.S. companies in the U.S. or in Canada.

Generally, the Exemption may not be used to transfer technical data and defense services to a Canadian citizen who is an employee of a U.S. company as this is a licensable activity. The Exemption only applies to CGD registered companies and persons, specified items, and specific end uses in Canada. Even if other conditions of the Exemption are met, the types of defense services generally provided by regular employees are not included within the Canadian Exemption. Therefore, a Technical Assistance Agreement would normally be required for a U.S. defence company to employ a Canadian citizen. (Source: DDTC May 30, 2001 Guidance)

• Keep complete and accurate records of ITAR controlled imports.

The U.S. exporter is required to comply with the ITAR shipping documentation requirements and maintain all records of any export made under the Canadian Exemption for a period of no less than five years. Among other records, the U.S. exporter must maintain documentation that identifies the Canadian end-user; that demonstrates the Canadian parties are registered with the CGD; and, that evidences the items exported are for end use in Canada. The U.S. exporter must also file annual reports with DDTC as required by Section 126.5(c)(5) and is required to obtain a completed DDTC form DSP-83 Non-Transfer and Use Certificate for the export of and defense services related to SME items.

While this ITAR requirement does not expressly extend to Canadian companies receiving the export, it is good practise for Canadian companies to maintain similar records, to include a description of the articles and/or technical data, the name of the exporter, the date and time of the export, and the method of transmission. Where a Canadian company transfers or re-exports a U.S. origin item that was received under the Exemption, the ITAR's documentary requirements will extend to the Canadian company.

REMEMBER that the Canadian Exemption does not cover:

- Exports, retransfers, and re-exports of excluded items
- Exports, retransfers, and re-exports to unregistered persons
- Exports, retransfers, and re-exports to any person with a nationality from a proscribed country
- Exports, retransfers, and re-exports destined for a third country
- The provision of technical assistance beyond that expressly permitted in the exemption

[1] This Guide does not explain the elements of any specific treaty, arrangement, or government contracting generally. It does not replace the advice of competent legal counsel and/or other qualified professionals and is not intended to constitute legal advice, regulatory advice, or an opinion on specific facts. It does not create, and the receipt of it does not constitute, a lawyer-client relationship. Rather, it is provided as a reference that should be used in conjunction with the advisement of competent legal counsel and/or other qualified professions. It is not intended to replace the Export Administration Regulations, International Traffic in Arms Regulations or other government regulations, and it does not relieve exporters or importers of their statutory duties to comply with current laws and regulations of the U.S. and Canada. The Government of Quebec shall have no responsibility or liability, implied or implicit, in whole or in part, arising from any unauthorized use of this Guide. This Guide is provided "as is" without any express or implied warranty of any kind whatsoever, including, without limitation, the implied warranties of merchantability and fitness for a particular purpose. In no event shall the Government of Quebec be liable for any damages whatsoever, including, without limitation, direct incidental, indirect, or consequential damages, damages for loss of business, damage to reputation, loss of profits, business interruption, or other loss arising out of the use or inability to use this Guide. Certain U.S. requirements may conflict with Canada's Charter of Rights and Freedoms, the Canadian Human Rights Act, provincial human rights codes, and other laws that prohibit discrimination against workers based on citizenship, nationality, or country of origin. This Guide does not address these issues or other Canadian laws to include Canadian import and export regulations, which may be implicated by technology transfers. Information contained on government websites identified in this Guide may not be current, and the Government of Quebec does not warrant the accuracy

or completeness of the information contained therein. The listings of regulatory agencies, treaties, and arrangements in this Guide are not exhaustive.

- [2] This list of countries is subject to change and should be verified by checking the embargo reference chart on the DDTC website, available at http://www.pmddtc.state.gov/country.htm. The proscribed countries under ITAR Section 126.1 also include countries subject to United Nations arms embargoes (see http://www.sipri.org/contents/armstrad/embargoes.html) and those designated as State Sponsors of Terrorism by the U.S. Department of State (see http://www.state.gov/s/ct/c14151.htm). In addition, because limited exceptions, amendments, sunset provisions, and withdrawals may apply to various embargoes, Companies should contact the DDTC at (202) 663-1282 or DDTCResponseTeam@state.gov to confirm that a specific embargo is in effect and that the embargo prohibits disclosure to a Canadian dual national with a respective nationality at issue.
- [3] Certain parts adopted from DDTC May 30, 2001 Guidance.
- [4] Certain parts adopted from DDTC May 30, 2001 Guidance.

APPENDIX A: Canadian Exemptions to ITAR 22 C.F.R. § 126.5.

- (a) Temporary import of defense articles. Port Director of U.S. Customs and Border Protection and postmasters shall permit the temporary import and return to Canada without a license of any unclassified defense articles (see §120.6 of this subchapter) that originate in Canada for temporary use in the United States and return to Canada. All other temporary imports shall be in accordance with §§123.3 and 123.4 of this subchapter.
- (b) Permanent and temporary export of defense articles. Except as provided below, the Port Director of U.S. Customs and Border Protection and postmasters shall permit, when for end-use in Canada by Canadian Federal or Provincial governmental authorities acting in an official capacity or by a Canadian-registered person or return to the United States, the permanent and temporary export to Canada without a license of defense articles and related technical data identified in 22 CFR 121.1. The above exemption is subject to the following limitations: Defense articles and related technical data, and defense services identified in paragraphs (b)(1) through (b)(21) of this section and exports that transit third countries. Such limitations also are subject to meeting the requirements of this subchapter, (to include 22 CFR 120.1(c) and (d), parts 122 and 123 (except insofar as exemption from licensing requirements is herein authorized) and §126.1, and the requirement to obtain non-transfer and use assurances for all significant military equipment. For purposes of this section, "Canadian-registered person" is any Canadian national (including Canadian business entities organised under the laws of Canada), dual citizen of Canada and a third country (subject to §126.1), and permanent resident registered in Canada in accordance with the Canadian Defense Production Act, and such other Canadian Crown Corporations identified by the Department of State in a list of such persons publicly available through the Internet Web site of the Directorate of Defense Trade Controls and by other means. The defense articles, related technical data, and defense services identified in 22 CFR 121.1 continuing to require a license are:
- (1) All classified articles, technical data and defense services covered by §121.1 of this subchapter.
- (2) All Missile Technology Control Regime (MTCR) Annex Items.
- (3) Defense services covered by part 124 of this subchapter, except for those in paragraph (c) of this section.

- (4) Any transaction involving the export of defense articles and defense services for which congressional notification is required in accordance with §123.15 and §124.11 of this subchapter.
- (5) All technical data and defense services for gas turbine engine hot sections covered by Categories VI(f) and VIII(b). (This does not include hardware).
- (6) Firearms, close assault weapons and combat shotguns listed in Category I.
- (7) Ammunition listed in Category III for the firearms in Category I.
- (8) Nuclear weapons strategic delivery systems and all components, parts, accessories and attachments specifically designed for such systems and associated equipment.
- (9) Naval nuclear propulsion equipment listed in Category VI(e).
- (10) All Category VIII(a) items, and developmental aircraft, engines and components identified in Category VIII(f).
- (11) All Category XII(c), except any 1st- and 2nd-generation image intensification tube and 1st- and 2nd-generation image intensification night sighting equipment. End items (see §121.8 of this subchapter) in Category XII(c) and related technical data limited to basic operations, maintenance and training information as authorized under the exemption in §125.4(b)(5) of this subchapter may be exported directly to a Canadian Government entity (i.e. federal, provincial, territorial, or municipal) without a license.
- (12) Chemical agents listed in Category XIV (a), (d), and (e), biological agents and biologically derived substances in Category XIV (b), and equipment listed in Category XIV (f) for dissemination of the chemical agents and biological agents listed in Category XIV (a), (b), (d), and (e).
- (13) Nuclear radiation measuring devices manufactured to military specifications listed in Category XVI(c).
- (14) All spacecraft in Category XV(a), except commercial communications satellites.
- (15) Category XV(c), except end items (see §121.8 of this subchapter) for end use by the Federal Government of Canada exported directly or indirectly through a Canadian-registered person.
- (16) Category XV(d).
- (17) The following systems, components and parts included within the coverage of Category XV(e):

- (i) Anti-jam systems with the ability to respond to incoming interference by adaptively reducing antenna gain (nulling) in the direction of the interference.
- (ii) Antennas:
- (A) With aperture (overall dimension of the radiating portions of the antenna) greater than 30 feet; or
- (B) With all sidelobes less than or equal to -35dB, relative to the peak of the main beam; or
- (C) Designed, modified, or configured to provide coverage area on the surface of the earth less than 200 nautical miles in diameter, where "coverage area" is defined as that area on the surface of the earth that is illuminated by the main beam width of the antenna (which is the angular distance between half power points of the beam).
- (iii) Optical intersatellite data links (cross links) and optical ground satellite terminals.
- (iv) Spaceborne regenerative baseband processing (direct up and down conversion to and from baseband) equipment.
- (v) Propulsion systems which permit acceleration of the satellite on-orbit (i.e., after mission orbit injection) at rates greater than 0.1g.
- (vi) Attitude control and determination systems designed to provide spacecraft pointing determination and control or payload pointing system control better than 0.02 degrees per axis.
- (vii) All specifically designed or modified systems, components, parts, accessories, attachments, and associated equipment for all Category XV(a) items, except when specifically designed or modified for use in commercial communications satellites.
- (18) Nuclear weapons, design and testing equipment listed in Category XVI.
- (19) Submersible and oceanographic vessels and related articles listed in Category XX(a) through (d).
- (20) Miscellaneous articles covered by Category XXI.
- (21) Man-portable air defense systems, and their parts and components, and technical data for such systems covered by Category IV.
- (c) Defense service exemption. A defense service is exempt from the licensing requirements of part 124 of this subchapter, when the following criteria can be met.
- (1) The item, technical data, defense service and transaction is not identified in paragraphs (b)(1) through (21) of this section; and

- (2) The transfer of technical data and provision of defense service is limited to the following activities:
- (i) Canadian-registered person or a registered and eligible U.S. company (in accordance with part 122 of this subchapter) preparing a quote or bid proposal in response to a written request from a Department or Agency of the United States Federal Government or from a Canadian Federal, Provincial, or Territorial Government; or
- (ii) Produce, design, assemble, maintain or service a defense article (i.e., hardware, technical data) for use by a registered U.S. company; or, a U.S. Federal Government Program; or for end use in a Canadian Federal, Provincial, or Territorial Government Program; and
- (iii) The defense services and technical data are limited to that defined in paragraph (c)(6) of this section; and
- (3) The Canadian contractor and subcontractor certify, in writing, to the U.S. exporter that the technical data and defense service being exported will be used only for an activity identified in paragraph (c)(2) of this section; and
- (4) A written arrangement between the U.S. exporter and the Canadian recipient (such as a consummated Non-Disclosure or other multi-party agreement, Technology Transfer Control Plan, contract or purchase order) must:
- (i) Limit delivery of the defense articles being produced directly to an identified manufacturer in the United States registered in accordance with part 122 of this subchapter; a Department or Agency of the United States Federal Government; a Canadian-registered person authorized in writing to manufacture defense articles by and for the Government of Canada; a Canadian Federal, Provincial, or Territorial Government; and
- (ii) Prohibit the disclosure of the technical data to any other contractor or subcontractor who is not a Canadian-registered person; and
- (iii) Provide that any subcontract contain all the limitations of this section; and
- (iv) Require that the Canadian contractor, including subcontractors, destroy or return to the U.S. exporter in the United States all of the technical data exported pursuant to the contract or purchase order upon fulfillment of the contract, unless for use by a Canadian or United States Government entity that requires in writing the technical data be maintained. The U.S. exporter must be provided written certification that the technical data is being retained or destroyed; and
- (v) Include a clause requiring that all documentation created from U.S. technical data contain the statement, "This document contains technical data, the use of which is restricted by the U.S. Arms Export Control Act. This data has been provided in accordance with, and is subject to, the limitations specified in §126.5 of the International Traffic In Arms Regulations (ITAR). By accepting this data, the consignee agrees to honor the requirements of the ITAR"; and

- (5) The U.S. exporter must provide the Directorate of Defense Trade Controls a semi-annual report of all their on-going activities authorized under this section. The report shall include the article(s) being produced; the end user(s) (i.e., name of U.S. or Canadian company); the end item into which the product is to be incorporated; the intended end use of the product (e.g., United States or Canadian Defense contract number and identification of program); the name and address of all the Canadian contractors and subcontractors; and
- (6) The defense services and technical data are limited to those in paragraphs (c)(6)(i), (ii), (iii) and (iv), and do not include paragraphs (c)(6)(v), (vi) and (vii) of this section:
- (i) Build-to-Print. Build-to-Print means that a foreign consignee can produce a defense article from engineering drawings without any technical assistance from a U.S. exporter. This transaction is based strictly on a "hand-off" approach because the foreign consignee is understood to have the inherent capability to produce the defense article and only lacks the necessary drawings. Supporting documentation such as acceptance criteria, and specifications, may be released on an as-required basis (i.e. "must have") such that the foreign consignee would not be able to produce an acceptable defense article without this additional supporting documentation. Documentation which is not absolutely necessary to permit manufacture of an acceptable defense article (i.e. "nice to have") is not considered within the boundaries of a "Build-to Print" data package; and/or
- (ii) Build/Design-to-Specification. "Build/Design-to-Specification" means that a foreign consignee can design and produce a defense article from requirement specifications without any technical assistance from the U.S. exporter. This transaction is based strictly on a "hands-off" approach since the foreign consignee is understood to have the inherent capability to both design and produce the defense article and only lacks the necessary requirement information; and/or
- (iii) Basic Research. "Basic Research"—means a systemic study directed toward greater knowledge or understanding of the fundamental aspects of phenomena and observable facts without specific applications towards processes or products in mind. It does not include "Applied Research" (i.e. a systemic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met. It is a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.); and
- (iv) Maintenance (i.e., inspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items, parts or components, but excluding any modification, enhancement, upgrade or other form of alteration or improvement that changes the basic performance of the item); and does not include
- (v) Design Methodology, such as: The underlying engineering methods and design philosophy utilized (i.e., the "why" or information that explains the rationale for

particular design decision, engineering feature, or performance requirement); engineering experience (e.g., lessons learned); and the rationale and associated databases (e.g., design allowables, factors of safety, component life predictions, failure analysis criteria) that establish the operational requirements (e.g., performance, mechanical, electrical, electronic, reliability and maintainability) of a defense article. (Final analytical results and the initial conditions and parameters may be provided.)

- (vi) Engineering Analysis, such as: Analytical methods and tools used to design or evaluate a defense article's performance against the operational requirements. Analytical methods and tools include the development and/or use of mockups, computer models and simulations, and test facilities. (Final analytical results and the initial conditions and parameters may be provided.)
- (vii) Manufacturing Know-how, such as: Information that provides detailed manufacturing processes and techniques needed to translate a detailed design into a qualified, finished defense article. (Information may be provided in a build-to-print package identified in paragraph (c)(6)(i) of this section that is necessary in order to produce an acceptable defense article.).
- (d) Reexports/retransfer. Reexport/re-transfer in Canada to another end user or end use or from Canada to another destination, except the United States, must in all instances have the prior approval of the Directorate of Defense Trade Controls. Unless otherwise exempt in this subchapter, the original exporter is responsible, upon request from a Canadian-registered person, for obtaining or providing reexport/retransfer approval. In any instance when the U.S. exporter is no longer available to the Canadian end user the request for reexport/retransfer may be made directly to Department of State, Directorate of Defense Trade Controls. All requests must include the information in §123.9(c) of this subchapter. Reexport/retransfer approval is acquired by:
- (1) If the reexport/retransfer being requested could be made pursuant to this section (i.e., a retransfer within Canada to another eligible Canadian recipient under this section) if exported directly from the U.S., upon receipt by the U.S. company of a request by a Canadian end user, the original U.S. exporter is authorized to grant on behalf of the U.S. Government by confirming in writing to the Canadian requester that the reexport/retransfer is authorized subject to the conditions of this section; or
- (2) If the reexport/retransfer is to an end use or end user that, if directly exported from the U.S. requires a license, retransfer must be handled in accordance with §123.9 of this subchapter.

APPENDIX B: Sample Website Notice XYZ Company's ITAR Compliance Program

The U.S. International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. Parts 120-130, sets forth U.S. Government export and re-export controls on articles specifically designed or modified for military or space applications, and technical data and services related to such articles. Pursuant to the Canadian Exemption at Section 126.5 of the ITAR, eligible U.S. companies can send "build-to-print" and "build/design-to-specification" technical data for the manufacture of certain specified ITAR-controlled articles to Canadian companies that are registered with the Canadian Government Controlled Goods Directorate ("CGD") without a license or other written authorization from the U.S. Department of State Directorate of Defense Trade Controls ("DDTC"). U.S. companies must be properly registered with the DDTC for the exemption to apply.

XYZ Company is registered with the CGD and is therefore eligible to receive technical data on various defense articles as permitted under the ITAR Canadian Exemption. XYZ Company's CGD registration number is [insert number] and a copy of its registration certificate, valid until [insert date] can be downloaded here [insert link]. XYZ Company's registration status can also be confirmed through a search of the CGD registration database, available at http://www.cgd.gc.ca, and by telephoning the CGD information desk at 1-866-368-4646 or via e-mail at ncr.cgd@pwgsc.gc.ca [or - XYZ Company has opted not to be listed on the CGD database and does not appear through the CGD search engine. However, you can verify the validity of XYZ Company's CGD registration by directly contacting the CGD at 1-866-368-4646 or via e-mail at ncr.cgd@pwgsc.gc.ca].

XYZ Company is also certified pursuant to the U.S./Canadian Joint Certification Program ("JCP"). Under the JCP, XYZ Company is certified to receive technical data governed, in the U.S., by U.S. Department of Defense Directive 5230.25 and, in Canada, by the Technical Data Control Regulations (subject to compliance with U.S. and Canadian export and import control laws). XYZ Company's JCP Registration number is [insert date] and its certification is valid until [insert date].

XYZ Company views compliance with ITAR, U.S. Department of Defense, and Canadian Department of National Defence requirements as a priority. Its export controls compliance program includes:

- Secured network systems that restrict access to ITAR controlled technical data
- Physical security and access controls at all company facilities

Management commitment to ITAR compliance

To further ease its customer's use of the ITAR Canadian Exemption, XYZ Company has retained U.S. legal counsel to advise its customers on the Exemption's specific requirements. Alternately, a U.S. company can apply for an export license or other authorization from the DDTC to export articles, data, and/or services which does not fall under the ITAR Canadian Exemption to XYZ Company

APPENDIX C : Sample Compliance Letter XYZ Company 123 Street, Anywhere, Canada

U.S. Defence Manufacturer 123 Street Anywhere, U.S.A.

Re: Upcoming Visit and Disclosure of ITAR Technical Data

Dear U.S. Defence Manufacturer Representative:

In anticipation of XYZ Company's upcoming visit to U.S. Defence Manufacturer's production facility in Anywhere, U.S.A., we write to discuss the permissible scope of discussions regarding U.S. Defence Manufacturer's ITAR controlled technical data.

As you are aware, the U.S. International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. Parts 120-130, sets forth U.S. Government export and re-export controls on articles specifically designed or modified for military or space applications, and technical data and services related to such articles. Pursuant to the Canadian Exemption at Section 126.5 of the ITAR, eligible U.S. companies can send "build-to-print" and "build/design-to-specification" technical data for the manufacture of certain specified ITAR-controlled articles to Canadian companies that are registered with the Canadian Government Controlled Goods Directorate ("CGD") Program without a license or other written authorization from the U.S. Department of State Directorate of Defense Trade Controls ("DDTC"). U.S. companies must be properly registered with the DDTC for this exemption to apply.

XYZ Company is registered with the CGD and is therefore eligible to receive technical data on various defense articles as permitted under the ITAR Canadian Exemption. XYZ Company's CGD registration number is [insert number] and a copy of its registration certificate, valid until [insert date] is attached. XYZ Company's registration status can also be confirmed through a search of the CGD registration database, available at http://www.cgd.gc.ca, and by telephoning the CGD information desk at 1-866-368-4646 or via e-mail at ncr.cgd@pwgsc.gc.ca. (or - XYZ Company has opted not to be listed on the CGD database and does not appear through the CGD search engine. However, you can verify the validity of XYZ Company's CGD registration by directly contacting the CGD at 1-866-368-4646 or via e-mail at ncr.cgd@pwgsc.gc.ca.)

XYZ Company views compliance with the ITAR, U.S. Department of Defense, and Canadian Department of National Defence requirements as a priority. Its export controls compliance program includes:

Secured network systems that restrict access to ITAR controlled technical data

Physical security and access controls at all company facilities

Management commitment to ITAR compliance

[insert any additional measures]

To the extent relevant to the information at issue, please further note that XYZ Company is also certified pursuant to the U.S./Canadian Joint Certification Program ("JCP"). Under the JCP, XYZ Company is certified to receive technical data governed by U.S. Department of Defense Directive 5230.25 subject to U.S. exports control requirements. XYZ Company's JCP Registration number is [insert date] and its certification is valid until [insert date].

A detailed listing of the technical data XYZ Company expects to discuss and a copy of the ITAR Canadian Exemption are further attached for U.S. Defence Manufacturer's review. Please advise of any specific concerns related to disclosure of the technical data as soon as possible so that we may resolve any issues in advance of XYZ Company's upcoming visit.

Yours truly,

President, for XYZ Company

Enclosures