Proposed US Defence Control Changes Aim to Resolve Conflicts with Canadian Human Rights Law

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Canadian companies dealing in aerospace and military goods and technology have long struggled with requirements under the US International Traffic in Arms Regulations (ITARs) that prohibit employees of certain nationalities or born in certain proscribed countries from accessing US-controlled defence services and technology in Canada. In order to comply with these restrictions, Canadian companies have had to risk violating provincial and federal anti-discrimination laws, as well as exposure to human rights complaints, when denying employees access to projects involving US-controlled defence items because of their nationality or country of birth.

There may now be some light at the end of the tunnel for companies subject to these conflicts between Canadian and US law. Today, the US State Department released its proposal to amend the ITARs to address the conflicts with human rights policies in Canada and other countries and the administrative burden associated with compliance with these restrictions — see Amendment to the International Traffic in Arms Regulations: Dual Nationals and Third-Country Nationals Employed by End-Users. Comments on the proposed amendments may be submitted until September 10, 2010.

The proposal provides that no approval from the US State Department Directorate of Defense Trade Controls (DDTC) will be required for the transfer of defence articles within a foreign business entity that is an approved end-user or consignee for those items, "including the transfer to dual nationals or third-country nationals who are bona fide, regular employees, directly employed by the foreign business entity." Further, the transfer must take place completely within the territories where the end-user is located or where the consignee operates, and must be within the scope of an approved export licence, other export authorization, or licence exemption.

There are significant conditions, however, that Canadian companies will have to satisfy in order to take advantage of this exemption. They include:

> (i) obtaining security clearances for their employees from the Canadian government or having a process in place to screen employees and execute Non-Disclosure Agreements ensuring that the employee will not transfer any information to unauthorized parties; and
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> (ii) screening employees for substantive contacts with the prohibited or restricted countries, and establishing and maintaining a technology security/clearance plan for such screening and related record-keeping (such plan to be available to the DDTC upon request).

The proposed amendments set out those considered to be "substantive contacts" with the restricted countries, and include recent or regular travel, recent or regular contact with agents or nationals of such countries, continued allegiance to such countries, or acts otherwise indicating a risk of diversion. An employee with substantive contacts with persons from restricted countries "shall be presumed to raise a risk of diversion, unless DDTC determines otherwise."

Canadian companies dealing with aerospace and defence products, technology or services should review these proposals carefully to assess their potential impact on current and future operations. In particular, the amendments appear to impose on Canadian companies a significant due diligence burden with regard to the gathering of information on employee activities outside of the workplace.

Even if these amendments are finalized, Canadian aerospace and defence companies will continue to face challenges in ensuring they are compliant with a patchwork of applicable US and Canadian law in this area, including the ITARs, Canadian privacy and human rights law, as well as Canadian defence controls under Canada's Defence Production Act and Export and Import Permits Act.

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