EXPORT CONTROLS

And Your Trade with the United States & Abroad

Presented at the 2005 CCCA Annual Spring Conference
April 18, 2005: Toronto, ON

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

ROBERT G. KREKLEWETZ, LL.B., M.B.A.

Rob is a partner at MILLAR KREKLEWETZ LLP, with an LL.B. from Osgoode Hall Law School, and a M.B.A. from York University.

Extensive Customs, Trade & Commodity Tax Experience. Rob's practice focuses on **Customs & Trade** matters, including Periodic Verification Audits and Voluntary Disclosures concerning Valuation, Tariff Class Origin, or Marking issues, and NAFTA Origin Verification Reviews, Forfeitures, Seizures, and other NAFTA & WTO issues. Rob's practice area also focuses on **Commodity Taxes**, which encompasses all issues involving Canada's Goods and Services Tax (GST) and Harmonized Sales Tax (HST), as well the various other provincial sales taxes, including Ontario RST and Quebec QST. All elements of Millar Kreklewetz's practice include **Tax and Trade Litigation**, and Rob has acted as lead counsel in the CITT, Tax Court of Canada, Federal Court of Appeal, Ontario Court of Justice, and the Ontario Court of Appeal.

Speaking Engagements / Publications. Rob has 17 years of experience, published over **325 articles & papers**, and spoken at over **125 conferences** in each of the areas described above. He continues to write and speak extensively, regularly addressing the Canadian Association of Importers & Exporters (IE Canada), at its annual and semi-annual conferences, and various seminars, and bodies like the Tax Executive Institute (TEI), Canadian Tax Foundation, Canadian Bar Association (CBA), and Canadian Institute of Chartered Accountants (CICA), as well as speaking at many other professional conferences.

Client Base. MILLAR KREKLEWETZ LLP has some of the best tax and trade files in Canada, and Rob advises blue chip corporate clients who are international leaders in:

- Airlines, Avionics & Aerospace
- Oil & Gas
- Chemicals & Petrochemicals
- Forestry Products
- Steel
- Drugs & Pharmaceuticals
- Medical Testing & Health Services
- Computer Hardware & Software
- Information Technology
- IT & Internet Solutions
- Banking
- Financial Services
- Leasing
- Publishing
- Public Sector
- Manufacturing
- Wholesaling
- Retailing
- Direct Mail
- Direct Selling

We are proud to announce that the International Tax Review has ranked us as the top Canadian law firm in our field for three consecutive years – "Indirect & State and Local Taxes".

LINDSAY B. MEYER, J.D.

Lindsay is a partner at Venable LLP, with an J.D. from George Washington University, National Law Center and a licensed U.S. Customs Broker.

Extensive Trade, Customs and Export Control Experience. For over sixteen years, Lindsay has provided **International Trade and Customs** advice at Venable where she heads its International Practice, located in Washington, D.C., concentrating on **Customs & International Trade** matters, including representation during U.S. Customs Focused Assessments, NAFTA Audits, C-TPAT, ISA Programs, Detentions, Forfeitures, Seizures, other Customs-related matters. She regularly provides strategic customs and trade counseling to Fortune 100 clients, by conducting Pre-Assessment Compliance Reviews including corporate-wide, multi-location assessments and training programs, and by representing companies before the U.S. Bureau of Customs and Border Protection, the Court of International Trade, and U.S. Court of Appeals for the Federal Circuit. Lindsay has extensive experience counseling companies on compliance with export controls regulated by the Departments of Commerce, State and Treasury and performing Export Control Assessments. Lindsay has also successfully represented companies in antidumping duty investigations and reviews before the U.S. Department of Commerce and International Trade Commission and on appeal. Lindsay also advises clients on **International Transactional** matters, where she counsels on strategic sourcing, sales and distribution arrangements in the U.S. and abroad; the use of foreign agents, affiliated offices, and joint ventures.

Venable LLP's Client Base. As one of *The American Lawyer*'s top 100 law firms, Venable LLP has lawyers practicing in all areas of corporate and business law, litigation, intellectual property and government affairs. Venable serves corporate, institutional, governmental, nonprofit and individual clients in the U.S. and around the world from its base of operations in and around Washington, DC. Likewise, Lindsay's clients range from multinational manufacturers to start-up enterprises from a wide variety of industries including high technology, chemical, petrochemical, pharmaceutical, automotive, avionics, space control equipment, steel, and retail industries.

Speaking Engagements / Publications / Memberships. Lindsay is also very active in business and trade associations related to her profession, and in her fourth term as Chair of the International Trade and Customs Committee for the ABA's Section of Administrative Law and Regulatory Practice, is a member of the American Association of Exporters and Importers, and was appointed by the U.S. Secretary of Commerce to the Maryland-Washington District Export Council.

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

THE ROAD MAP

General Focus of the Presentation

While many readers will now be aware of their general obligations under the export controls regimes governing their cross-border shipments, many will not yet have had the pleasure of dealing "first-hand" with a full export control investigation, or indeed, the "aftermath" of such an investigation.

Persons likely to possess "first-hand" knowledge of export reporting and control requirements are persons in the logistics or traffic department, responsible for classifying and coordinating a company's shipments. However, the reach of the export control regimes of most industrialized countries goes well beyond simple controls on the shipment of goods. They usually extend to the transfer of related software and technology, technical data, and certain know-how or technical assistance and training. In the most extreme of cases, someone else's rules can even extend to meetings with foreign nationals within your own country 's borders.

There is no two ways about it: today 's businesses, and those within them responsible for compliance, need to be aware of export reporting and control requirements.

From a Canadian perspective, it is often incorrectly assumed that Canadian export reporting and control requirements are only the worry of a Canadian exporter of goods, and that U.S. export controls are only the worry of an American exporter. Far from it.

Both Canada and the U.S. now have very similar legislation regarding export controls. While similar in design, these control regimes often differ in practice; and the interplay between the Canadian and U.S. rules can be very complicated. They are substantially similar, but not identical. Differences in historic and modern-day political underpinnings have resulted in different enforcement practices, and different philosophies. The U.S., for example, views its export controls as governing the conduct of foreign-based companies, so long as U.S. technology is involved. Thus the U.S. federal government has pursued claims against Canadian individuals and companies where it perceives its rules to have been contravened.

The results for multi-nationals can be traumatic, and can include civil and criminal fines and penalties, and the loss of exporting privileges.

Accordingly, today's businesses need to ensure that their export procedures are in compliance at each turn. This often requires consulting someone with this specialized knowledge, or developing that knowledge in-house. Who will be the person to guide your business through these laws and regulations ?

Canadian and U.S. reporting and export controls and, more importantly, the full reach of these controls, will be the general topic of discussion in today's Presentation, and in the Materials below.

The Presentation will focus on first providing a brief overview of the basic export control requirements for Canadian and U.S. exported goods, including common errors and pitfalls, using examples, and then proceed to a discussion of the strategies and overall approach to be taken to ensure compliance with export requirements, in advance of an investigation.

Navigating Through the Materials

The Materials are broken into two parts, containing fairly comprehensive reviews, respectively, of the Canadian and U.S. export control regimes, and are designed to allow readers not completely familiar with these systems to more fully understand the export control systems in place between our two countries.

The aim of the Presentation will be to weave the systems together, while pointing out difficulties facing the unwary.

The audience is encouraged to participate !
So feel free to ask questions at any time.

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

PART I

CANADIAN EXPORT CONTROLS

INTRODUCTION [1]

Overview. Canada's import and export controls are administered under the authority of the *Export and Import Permits Act* ("EIPA"), which was first enacted in 1947.

Under EIPA, the Minister of Foreign Affairs is delegated broad discretionary powers to control the flow of goods into and from Canada. The goods that are controlled are contained in specified lists provided for under EIPA, which are introduced a bit further below.

The Minister for International Trade also provides policy direction in most areas involving market access and trade policy (under the authority of the *Department of Foreign Affairs and International Trade Act*).

The actual administration of Canada's import and export controls system is delegated to the Export and Import Controls Bureau ("EICB") of the Department of Foreign Affairs and International Trade ("DFAIT").[2]

Most controlled exports are under the responsibility of the Export Controls Division ("EPE") of the EICB.[3]

What is a Controlled Import ? Generally speaking, controlled imports fall into one of the three following categories:

- Certain Textiles & Clothing *
- Agricultural Products
- Steel Products
- Weapons and Munitions

* Since April 1, 2005 the import permit requirement for many textile and clothing items have been softened, with import permits required only for clothing and textile products eligible for tariff preference levels ("TPLs") or benefits under certain free trade agreements.

What is a Controlled Export ? On the export side, Canadian export controls generally focus on the following eight categories:

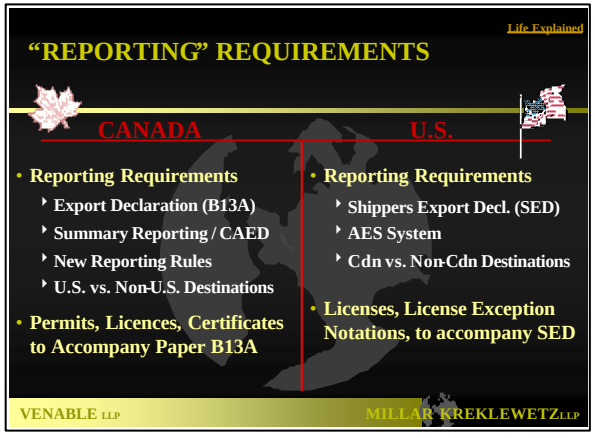
- Agricultural Products (e.g., Refined Sugar, Sugar-containing Products and Peanut Butter)
- Textiles and Clothing
- Softwood Lumber, Unprocessed Logs and Certain Other Forest Products
- All Goods Destined for Countries on the Area Control List (e.g., Myanmar)[4]
- Nuclear Energy Materials and Technology [5]
- Missile, Chemical or Biological Goods of Non-proliferation Concern
- Military, Strategic Dual-use Goods
- Miscellaneous Specified Other Goods, including Goods of U.S. Origin (e.g., Roe Herring and Certain Items with Medical Value)

Special Note: While the term "controlled" is often used quite loosely, it also has a special meaning in the context of Canada's "controlled goods" system – which is a system generally aimed at goods of military application, and which is technically separate from the goods subject to import and export control under EIPA. We will endeavour, through these materials, to explain how the two separate situations operate together, and overlap each other.

Object of Controls. Canada has implemented import and export controls for the following main reasons:

- to regulate trade in military and strategic dual-use goods, and prevent the proliferation of weapons of mass destruction;[6]
- to prevent the supply of military goods to countries that threaten Canada's security, are under UN sanction, are threatened by internal or external conflict, and/or abuse the human rights of their citizens;
- to protect vulnerable Canadian industries, such as clothing manufacturing;
- to obtain negotiated benefits from international agreements;
- to implement trade restrictions in support of Canada's supply management programs;
- to fulfill other international obligations; and
- to implement UN Security Council trade sanctions.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER



QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

The Use of Control Lists. Canada regulates imports and exports by way of specifically enumerated lists.

These lists are provided for under EIPA, and are established by the Governor-in-Council – making them statutory instruments.

The four main lists with which we are concerned are as follows:

1. The *Import Control List* ("ICL");
2. The *Export Control List* ("ECL");
3. The *Area Control List* ("ACL"); and the
4. The *Automatic Firearms Country Control List* ("AFCCL").

The purposes of these lists are to specify the goods and countries for which Canadian import and export controls are established.

The Import Control List. The ICL sets out controlled imports (some goods of which are only controlled for certain countries of origin).

Goods included in this list require an import permit.

The next three lists outline what are essentially Canada's export controls regime, and serve to control Canada's export / transfer of the listed goods and technology.

The Export Control List. The ECL is a list of goods only, and all goods contained on the list require an Export Permit – although in some cases "General Export Permit" authority can be used to export the goods – discussed below.[7]

While a more detailed discussion about the goods and technology encompassed in the ECL follows in the sections below, it is important to understand at this point that even if an item does not appear on the ECL, it may still need some sort of export authorization.

That is because several other departments and Ministries have responsibilities for certain aspect of export controls under their own specific jurisdictions. For example, the Canadian Wheat Board concerns itself with certain exports of wheat and agricultural products. Health Canada, Agriculture Canada, Canadian Heritage, Superintendent of Financial Institutions, Natural Resources Canada and Environment Canada also have certain requirements, as does the National Energy Board. These various export authorization requirements are summarized near the end of Part I, in a section entitled "Other Export Controls".

The Area Control List. The ACL is a list of countries for which Export Permits are required to export any and all goods.[8]

Automatic Firearms Country Control List. The AFCCL is a further list controlling automatic firearms, and is in some senses redundant given various provisions in the ECL. Its purpose, however, is to provide for limited export of such weapons to particular countries with which Canada has an intergovernmental defence, research, development and production arrangement and to which the Governor in Council deems it appropriate to permit the export.

Export Permits. Where a good is is set out on the ECL, it requires an Export Permit. It is important to recognize, however, that there are two types of Export Permits, referred to as *Individual Export Permits* ("IEP" or, more generally, an "Export Permit") and *General Export Permits* ("GEP").

Individual Export Permits. If you are "applying" for an "Export Permit", you are likely applying for an IEP. These Export Permits are specific to an individual importer / exporter, and to the particular goods to which they apply. Individual Export Permits can be obtained through application[9] to the Export Controls Division ("EPE") of DFAIT, which has the responsibility for the issuance or denial of Export Permits for most of the goods on the ECL.[10] We will explain the process of obtaining and using an Export Permit below.

Individual Export Permits. In contradistinction to IEPs, General Export Permits are general statutory permits that can be referenced in an exporters Export Declaration (Form B-13A),[11] as authority for the export, and can be used without application.

GEPs are not specific to an individual importer or exporter, and effectively allow for the pre-authorized export of certain eligible goods to/from certain eligible countries, and are also discussed further below.

Fees for Export Permits & Timing. Where an Export Permit is applied for (i.e., of the IEP variety), a fee is usually charged, as part of the federal government's cost recovery program.

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Violations. The EIPA makes provision for prosecution and penalties for contravention of the EIPA or its regulations.

Penalties for violating the EIPA (or its regulations) can range from maximum fines of $25,000 and 1 year imprisonment for less severe infractions (i.e., those prosecuted by summary judgment), and up to 10 years in prison, with no maximum fine, for the most severe of infractions (i.e., prosecuted by indictment).

There is a general 3 year limitation period for prosecutions.

Personal Liability. For directors or officers of corporations, section 20 of the EIPA is well-worth reading:

> 20. Where a corporation commits an offence under this Act, any officer or director of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

Mere employees are also caught, technically, by most of the penalty provisions, to the extent they themselves contravene them.

Investigations can be initiated by both the Canada Border Services Agency ("CBSA"), and the Royal Canadian Mounted Police ("RCMP"), and either can lead to such prosecutions and penalties.

Seizure and Detention of Goods. Where offences are suspected, CBSA may detain or seize goods, if the goods are available, or issue Notices of Ascertained Forfeiture.

THE EXPORT CONTROLS LIST IN DETAIL

Goods for which Export Permits are required – i.e., whether individual or General Export Permits – are set out in a regulation under the EIPA, called the *Export Control List* ("ECL").

Looking at the ECL itself will not prove that useful, as the ECL has essentially "outsourced" the real listing of controlled goods to a supplementary document published by the DFAIT, and entitled *A Guide to Canada's Export Controls* (the "Guide").

The most recent version of the Guide is dated April 2002.

Categories of Restricted Goods & Technology. Together, the ECL and the Guide can generally be viewed as a categorization of eight major groups of goods or technology, with each main grouping corresponding to Canada's obligations under one of the following international treaties of agreements.

Group 1 - Dual Use – Provided for under the *Wassenaar Arrangement*,[12] and as actually listed in Group 1 of the Guide.

Group 2 - Munitions – Provided for under the *Wassenaar Arrangement*, and as actually listed in Group 2 of the Guide.

Group 3 - Nuclear Non-Proliferation – Provided for, among others, under the *Treaty on the Non-Proliferation of Nuclear Weapons*,[13] and as actually listed in Group 3 of the Guide.

Group 4 - Nuclear-Related Dual Use – Provided for, among others, under the *Treaty on the Non-Proliferation of Nuclear Weapons*, and as actually listed in Group 4 of the Guide.

Group 5 - Miscellaneous Goods – Provided for because of domestic policy decisions, or under various multilateral agreements. Examples include certain forestry products (logs, pulpwood, etc.), agricultural products (roe herring, sugar, syrups, molasses, and certain foreign origin goods – including goods of U.S. origin).[14]

Group 6 - Missile Technology Control Regime – Provided for under the *Missile Technology Control Regime*,[15] and as set out in Group 6 of the Guide.

Group 7 - Chemical and Biological Weapons Non-Proliferation – Provided for under agreement with the U.S. and under the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*,[16] and as set out in Group 7 of the Guide.

Group 8 - Chemicals for the Production of Illicit Drugs – Provided for under agreement with the U.S. and under the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*,[17] and as set out in Group 8 of the Guide.

Reading and Understanding the ECL. Understanding and reading Canada's ECL could be the subject of a complete day's workshop.

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

IMPORTANT NOTE – Item 5400 Goods

Note that Group 5 of the Export Controls List contains an important export control, as follows:

> **United States Origin Goods**
>
> 5400. All goods that originate in the United States, unless they are included elsewhere in this List, whether in bond or cleared by Canadian Customs, other than goods that have been further processed or manufactured outside the United States so as to result in a substantial change in value, form or use of the goods or in the production of new goods. (All destinations other than the United States)

This control serves to control the export (i.e., other than exports back to the U.S.) of any U.S. origin good that cannot be said to have been substantially changed in value, form or use. The rule is part of the "extended" scope of U.S. controls that Lindsay Meyer addresses in Part II of the Materials.

Suffice to say that the control has its origins in the United States' traditional attempts at controlling the re-export in foreign countries of goods and technology that had their origins in the United States.

In adding Item 5400 to the ECL, Canada has effectively put into Canadian law, a re-export system like that in the U.S. – albeit aimed only at U.S. origin goods and technology, when not otherwise changed in value, form or use, and when re-exported to a place other than the United States. The precise rules here are tricky, however, as while Export Permit requirements for Item 5400 goods are easily met under GEP 12 (see below), many other U.S. goods still require permits, on account of being listed elsewhere in the ECL .

Also note that Customs Notice 558 (March 17, 2004) has further watered down the effectiveness of the Item 5400 restriction, putting exporters on notice that where goods fall under Item 5400, there is no longer any requirement to present a B13A for goods to which GEP-12 applies if the goods are valued under Cdn $2000 (and so long as the goods are for end-use in an eligible destination). For values over Cdn $2000, a print out of the B13A showing the GEP information is *also* not required from CAED or G7 participants (although presumably, the GEP12 designation is still required in the electronic report– although that is not entirely certain either.

While CBSA notes that A paper B13A would be required if a paper permit has been issued to cover the goods being exported (i.e., which would be the case if the goods were otherwise restricted under the ECL), that situation would also seem to preclude Item 5400 from applying in the first place.

IMPORTANT NOTE: Exports to the United States

Note that under special bilateral arrangements with the U.S., Export Permits are not usually required for many ECL items when shipped to a final destination and for end-use in the U.S.

The special status of U.S. bound exports will be dealt with below.

Exceptions exist for some items, including "Controlled Goods", also dealt with below, which do still require IEPs, even when exported to the U.S.

If you are still having trouble determining whether a particular good is listed in the ECL, please consult expert advice.

Once one determines whether a particular goods is subject to Export Controls, what does one do ?

The short answer is that unless otherwise exempt, one has to secure an Export Permit, as discussed below.

Applying for an Export Permit

The *Export Permits Regulations,* SOR/97-204 ("EPR") set out the precise procedures for obtaining and using an Export Permit.[18]

Applications must be made by Canadian "residents", which would generally require a natural person to ordinarily reside in Canada, or a corporation to have its head office in Canada, or to operate a branch office in Canada.

While it is not necessary for the exporter to personally apply for the Export Permit, the exporter's name and address must be specified.

Form of Application & Information Required. The form of application must be signed, and contain, among other requirements, the following information:

(a) **Date –** The date on which the application form is completed;

(b) **Applicant's Information –** The applicant's name, address and telephone number and, if the applicant is a corporation, the name of a contact person;

(c) **Exporter Information, if Different –** If the applicant is applying for a permit for, on behalf of or for the use of another person who will export the goods, the name, address and telephone number of the real exporter must be provided;

(d) **Customs Office where Goods to be Reported –** The customs office at which the goods will be reported in the prescribed form under the *Customs Act*;

(e) **Name and Address of Consignee –** The name and address of each consignee;

(f) **Ultimate Destination –** The country in which the goods are to be consumed or the country of final destination;

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

(g) **Good Specific Information –** For each type of separately identifiable goods, the following information must be provided:

(i) *Country of Origin* – The country of origin of the goods and, if any portion of the goods is of United States origin, and is included in item 5400 of Group 5 of the ECL, the percentage that the portion is of the total cost of the goods, (see Item 5400 above);[19]

(ii) *ECL Number* – The corresponding Item Number for the goods, as set out in the ECL / Guide;

(iii) *H.S. Code* – The Harmonized Commodity Description and Coding System commodity code, if available;[20]

(iv) *Description of the Goods* – A description of the goods, including technical specifications, with sufficient detail to disclose their "true identity" and in terms that avoid the use of trade-names, technical names or general terms that do not adequately describe the goods; and

(v) *Statistical Data* – The quantity, unit value and total market value of the goods, free on board (f.o.b.), factory or first shipping point of Canada and the approximate net weight;

(h) **Total Value** – The total value of all types of separately identifiable goods intended to be exported.

Further Information & End-Use Assurances. Canada and its major industrialized trading partners have attempted to harmonize their export control systems in order to prevent diversions or trans-shipments of controlled commodities for unauthorized end-uses or to unauthorized destinations.

In some cases, however, the CBSA will require government-to-government assurances from the "end-user" of the goods.

Accordingly, the EPR empower the CBSA to demand the following information before issuing the Export Permit:

(i) an International Import Certificate,

(ii) an End-use Certificate,

(iii) an End-use Statement,

(iv) a copy of the contract of sale between the applicant and the person from whom the applicant purchased the goods,

(v) a copy of the contract of sale between the applicant and the person to whom the applicant sold the goods for export,

(vi) a summary report on prior exports of like goods by the applicant,

(vii) the name and address of the person from whom the applicant acquired the goods,

(viii) the intended end-use of the goods by the consignee of the goods,

(ix) the intended end-use location of the goods if different from the location of the consignee,

(x) the Export Permit numbers of any previous Export Permits issued to the same applicant,

(xi) an import permit issued by the government of the country for which the goods are destined, or

(xii) an in-transit authorization.

As a practical matter, applicants for IEPs should think about obtaining some sort of end-use assurance prior to making an Export Permit application, and many exporters, with sensitive goods, will do so. In most instances, the EPE will want to know who the end-user is, and will only waive compliance where the export is being made directly to the government (i.e., with no middleman) of a NATO or other equally "friendly" country.

Assurances can come in several internationally recognized forms:

- International Import Certificates (IIC);[21]
- End-use Certificates (EUC) / Import Licences (IL);[22]
- End-use Statements (EUS).[23]

And on a "post transaction" Delivery Verification Certificates (DV) can sometimes be helpful.[24]

In certain circumstances end-use assurances can be waived, although this is at the sole discretion of the EPE. Some common situations where waiver can occur is in the case of low-value shipments (i.e., shipments valued at less than $10,000), exports to certain government departments or agencies, certain relief agencies for use in relief projects, etc.

Declarations. In addition to the information required above, an applicant for an Export Permit is required to provide the CBSA with a "declaration" that, to the "best of the applicant's knowledge, the goods will enter into the economy of the country" listed as the country of Final Destination (see paragraph (f), further above) and will not be trans-shipped or diverted from that country.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

A declaration is also required on the application form, certifying that the information provided is true, complete and correct.

Special Considerations for "Controlled Goods". While "Controlled Goods" are dealt with in more detail below, it is important to note some special considerations applying where an Export Permit is being sought for a "Controlled Good". For these purposes, consider "Controlled Goods" to be goods and technology falling within certain parts of ECL Group 2, ECL Group 6 or ECL Item 5504.

Where goods are "Controlled Goods", the applicant for an Export Permit will generally be required to provide a proof of registration or exemption from registration under the *Controlled Goods Regulations*, or proof that the person occupies a position referred to in paragraph 36(a) of the *Defence Production Act*. (These would be the bare minimum requirements for the person to lawfully have possession of the Controlled Good in the first place).

Where the Controlled Goods are of U.S. origin, or contain sub-assemblies of U.S. origin, CBSA may also require an applicant for an Export Permit to, as part of the Canadian application process, obtain a U.S. export authorization.

The Government of the U.S. has traditionally controlled the export from other countries of goods and technology that had their origins in the U.S., and as such, imposes "re-export controls" on a broad and extra-territorial basis, and this last requirement appears to be an independent of Canadian requirement aimed at making the Canadian process consistent with the U.S. approach, and part of the 2001 rules place to "beefed up" Canada's export provisions.

Status Inquiries. After submitting an application, exporters may obtain information regarding the processing of their permit application by contacting the EPE and citing the red I.D. number located in the upper right-hand corner of the Export Permit application.

While routine applications can be obtained relatively quickly (1 to 2 day turn around, or less), some permit applications for more sensitive goods and technology (e.g., military or strategic goods going to specific destinations) could take much longer (e.g., 2 to 3 weeks).

In most cases EPE consults with other government departments, or seeks ministerial approval. These cases can take 6 weeks or more.

PERMIT & SHIPPING REQUIREMENTS [25]

Issue of Permit. If an Export Permit is issued, the exporter receives a stamped and signed copy of the original application form, and that, together with the information contained in it (and any other terms and conditions that are described in the permit), becomes the valid Export Permit for the goods.

Presentation of Permit to Customs on Export. The validated Export Permit (yellow copy) must be presented to the CBSA at the port of export together with the appropriate shipping documents and Customs Export Declaration (Form B13A) prior to exportation.

When the goods are ultimately exported, the Export Permit is surrendered to a customs officer at the customs office specified in the Export Permit – along with other required documentation (e.g., the Canada Customs' Export Declaration Form B-13A, referencing the Export Permit number).

Multiple Shipments. If the permit allows multiple shipments, then a photocopy of the "Exporter's Copy" must be submitted to Customs for subsequent shipments.

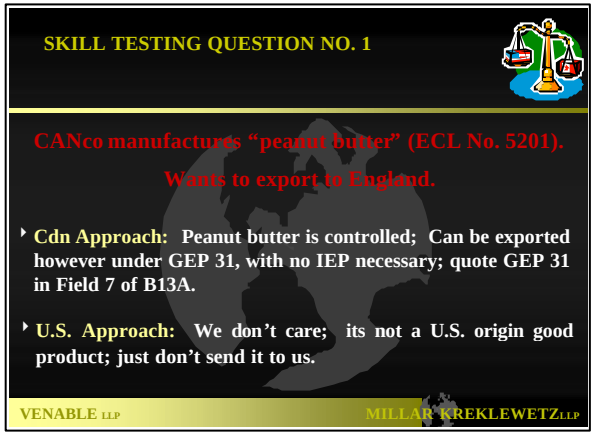
Where the goods are exported in a series of shipments over the term of the Permit, the exporter required to notify the customs office for each shipment, with the shipments each noted on the Export Permit by the officer notified (until the total quantity of goods covered by the Permit has been exported or the permit has expired).

All other required forms must be submitted at the same time.

Discrepancies. Where discrepancies exist (e.g., between the Export Permit and the exported goods), Customs is able to refuse to allow the export.

Record Retention Requirements. The exporter must retain, at his/her place of business or residence, all documents in respect of each export made under an Export Permit (whether it is a GEP or an IEP), for a period of seven years.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER



QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Lost Permits, Amendments. Special rules exist for amending Export Permits, and for dealing with situations in which an Export Permit has been lost or destroyed. Export Permits of this type (i.e., individual permits) are generally valid for one or two years, but that is dependent on the group in the ECL to which the goods correspond.

UNDERSTANDING & USING GEPS

Overview. As indicated above, some goods on the ECL do not require Individual Export Permits ("IEPs"), and can be exported under the authority of one of a number of General Export Permits ("GEPs").

TRAP: Note that some GEPs contain conditions which must be adhered to in order to use them. For example, in some cases, the use of a GEP is conditional on an exporter undertaking to report on actual volumes of exports or on specific final consignees made against the GEP.

EXAMPLE: Assume you are a manufacturer of peanut butter, and to date have only sold in the Canadian market. You now want to try selling your best known brand ("Richard's Finger Likin-good Peanut Butter") to England.

Since "peanut butter" is listed in Group 5 of the ECL (Item No. 5201), it needs an Export Permit. However, GEP 31 provides as follows:

GENERAL EXPORT PERMIT NO. 31

SHORT TITLE

This Permit may be cited as General Export Permit no. Ex 31 - Peanut Butter.

INTERPRETATION

In this Permit, "peanut butter" means goods that are classified under tariff item No. 2008.11.10 in the List of Tariff Provisions set out in the schedule to the Customs Tariff. (Beurre d'arachides)

GENERAL

Any person may, under authority of this Permit, export peanut butter to any country other than the United States.

Accordingly, Richard's peanut butter can be exported to England simply by inserting a reference to GEP 31 in field 7 of the Form B13A. (If Richard's is to be exported to the U.S., however, GEP 31 would not apply, and IEP would have to be applied for from the EPE.)

The authority to issue GEPs is vested with the Minister of Foreign Affairs, and GEPs themselves are statutory instruments. They are aimed at relieving the administrative burdens associated with IEP applications, and generally cover goods of a more routine nature.

GEPs enable an exporter to export certain goods or technology which are subject to control to eligible destinations without the necessity of submitting IEP applications.

Accordingly, a GEP is in itself a valid Export Permit which is used to minimize the administrative burden for exporters and to streamline licensing procedures.

By using a GEP, exporters do not have to apply to EPE for authorization. Instead, when exporting goods listed on the ECL, and which are capable of being exported under a GEP, all the exporter is required to do is reference the appropriate GEP number in the relevant box on the Customs Export Declaration (Form B13A).

When are GEPs Generally Available ? GEPs are available for specific goods and technology, and specific destinations.[26]

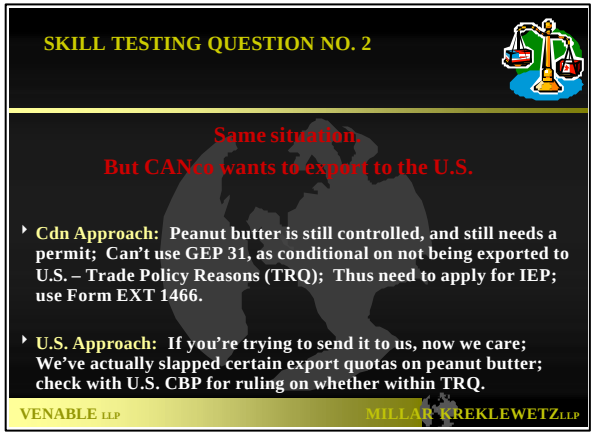
Some examples of available GEPs include, as follows: *

GEP 1:	Export of Goods for Special and Personal Use
GEP 3:	Export of Consumable Stores …Vessels and Aircraft
GEP 5:	Export of Logs
GEP 12:	United States Origin Goods
GEP 18:	Portable Computers and Associated Software
GEP 26:	Industrial Chemicals
GEP 27:	Nuclear-related Dual-use Goods
GEP 29:	Eligible Industrial Goods
GEP 31:	Peanut Butter
GEP 39:	Mass-Market Cryptographic Software

Note: There may be certain restrictions or conditions associated with GEPs

TRAP: Exporters exporting under the authority of a GEP should understand that failing to reference the GEP on the Form B 13A (or other reporting device) amounts to an export of the goods without the proper permission, and is a technical, but potentially serious, violation of the EIPA.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER



QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

How Does One Export under a GEP ? Where goods on the ECL qualify under one or more GEPs, the exporter can export them simply by referencing the GEP on the Canada Customs' Export Declaration Form B 13A, or other export reporting device.

DEALING WITH GOODS SHIPPED TO THE U.S.

As mentioned above, under a bilateral arrangement with the U.S., Export Permits are not required for most ECL items when shipped to a final destination and for end-use in the U.S.

Some technical exclusions to this arrangement include as follows: goods and technology lists in Groups 3, 4, 7 and 8, as well as Item Nos. 2001, 2002, 2003, 5001, 5011, 5101, 5102, 5103, 5105, 5201, 5203, 5204, and 5503.[27]

(This rule also applies to U.S. and non-U.S. origin goods).[28]

DEALING WITH U.S. GOODS EXPORTED ABROAD

Since 2001, the treatment of "U.S. origin goods" that are re-exported from Canada (to countries other than the U.S.) has undergone some significant change.

Among other things, the EPR was amended, effective June 1, 2001, to ensure that certain "Controlled Goods" of U.S. origin were held up to virtually the same controls as imposed under U.S. domestic legislation – requiring even a U.S. Export Authorization before any parallel Canadian Export Permit will be issued.

> **Note:** Recall that under GEP 12, many U.S. origin goods, not otherwise caught by other provisions of the ECL, could historically be exported virtually anywhere, simply by noting GEP 12 in Field No. 7 of the Canada Customs Export Declaration (Form B13A); exceptions would have been ACL countries, and Cuba, Korea, Iran and Libya.[29]
>
> Also recall that for goods shipped to the U.S., the general system ensures that Export Permits are not generally required for many ECL items,[30] when shipped to to a final destination and for end-use in the U.S., pursuant to a Memorandum of Understanding Between the Parties.

Under the new rules, where a good is of "U.S. origin", or contains inputs that are of U.S. origin, it will be important to ensure what its status is under the ECL, and to determine where it is ultimately being exported.

Given recent changes to Canada's reporting requirements, and the need not to refer to GEP 12 by CAED or G7 participants, it is (see above), the importance of this process from a "Canadian" perspective is a bit uncertain; what is certain, however, is that from the "U.S." perspective, the control of exports on this basis is a serious concern.

As noted above, some of the U.S.'s domestic export controls have the effect of imposing extra-territorial obligations on Canadians seeking to re-export U.S. origin goods.

DEALING WITH CONTROLLED GOODS

We have referred above, to "Controlled Goods".

While we introduce the essential concepts below, beyond this introductory discussion, a complete discussion of Canada's Controlled Goods Program is probably beyond the scope of these materials. If you have reason to believe that the goods you are attempting to export are "controlled goods", please consult the authors, or otherwise seek your own expert advice.

Canada's New "Controlled Goods" Requirements. "Controlled Goods" are defined in the *Defence Production Act* ("DPA") and are essentially some goods already specified in Group 2 of the ECL, as well as all goods and technology referred to in Item 5504, and all goods and technology referred to in Group 6. For a complete list of these "Controlled Goods", please refer to the Schedule to the DPA.

The "Controlled Goods" items in the DPA essentially mirror most, if not all, of the goods under "State" control in the U.S., and as set out in the United States Munitions List ("USML").

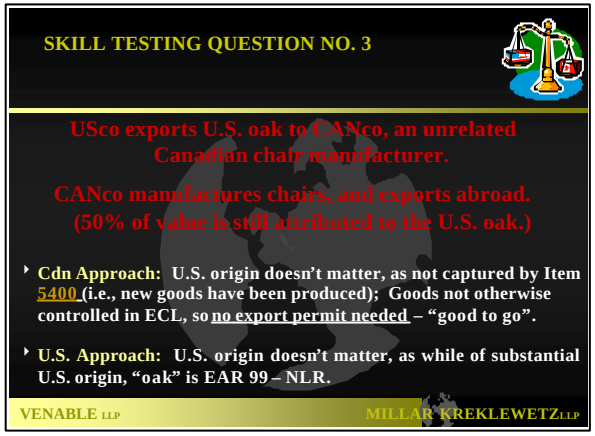
The bulk of the recent amendments, including the addition of Item 5504, were made in response to the April 12, 1999 decision of the U.S. to remove many of the provisions that allowed for the unregulated trade in most unclassified goods and technology between Canada and the U.S.[31]

In conjunction with certain new requirements in the EPR, the new system creates positive licensing obligations on Canadians attempting to import and export goods and technology critical to industries like defence and aerospace, and a secure system for Canadians even attempting to possess or examine "controlled goods".

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER



QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

The Controlled Goods Registration Programme. The Controlled Goods Registration Programme ("CGRP") was established in 2001 under the DPA and the *Controlled Goods Regulations* ("CGR"), to establish a registration system for person having the authority to possess "Controlled Goods".

Accordingly, and generally speaking, companies or persons having access to "controlled goods" as defined in the Schedule to the DPA, or who may possess, examine or transfer "controlled goods", including related technology within Canada, must be registered under the CGRP – which is administered by the Department of Public Works and Government Services Canada ("PWGSC").

Obligations Imposed on Registered Persons. Once registered, the DPA requires that registered persons ensure that their employees are security assessed before they are given access to controlled goods and/or controlled technology, and that they must also ensure that any person who will have access to their controlled goods and/or controlled technology is either registered with CGD, are exempt or are excluded from registration.

Furthermore, a registered person is required to have a security plan, and that security plan must provide for the protection of controlled goods and/or controlled technology in their possession from being accessed by any person not legally authorized to do so.

Section 13 of the Controlled Goods Regulations ("CGR") required registered persons to appoint a Designated Official ("DO") who will conduct a security assessment on every officer, director and employee who, in the course of their duties, require access to controlled goods and/or controlled technology.

Contractual workers are not officers, directors or employees of a registered person and are not expected to be subject to such a security assessment, but the Controlled Goods Directorate ("CGD") of PWGSC does provide policy guidelines for allowing contractual workers access to controlled goods and/or controlled technology.

Contractual Workers. Under the CGD's administrative policies, registered persons are responsible for ensuring the safeguarding of the controlled goods and/or controlled technology in their possession.

Accordingly, when hiring contractual workers (non-employees), registered persons must exercise due diligence in determining if the presence of these individuals poses a risk of unauthorized examination, possession or transfer of controlled goods and/or controlled technology.

Contractual workers who access controlled goods and/or controlled technology and work specifically with these goods must be registered.

As a general guideline, the CGD indicates that "contractual workers who may require direct involvement in the acquisition, repair, modification, transfer or disposal of controlled goods and/or controlled technology, or the transmission, reception, interpretation, manipulation or safekeeping of controlled goods and/or controlled technology information, must be registered." Apparently these contractual workers are viewed as having "a greater opportunity of examining or transferring controlled goods and/or controlled technology than do service providers who simply work in the vicinity of the controlled goods and/or controlled technology".

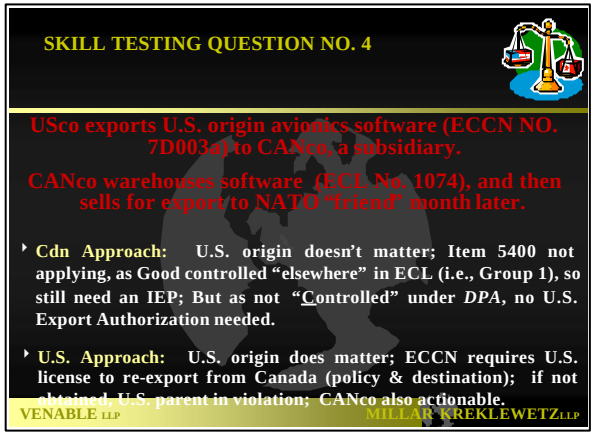
Where service providers and contractual workers simply work in the vicinity of controlled goods and/or controlled technology and who have no real opportunity to examine or transfer controlled goods and/or controlled technology, provision for their treatment must be dealt with in the registered person's security plan. Such service providers and contractual workers may not be registered with the CGD.

Where a contractual worker claims to be a registered person, he or she must provide his or her Certificate of Registration to the client DO, with the DO required to confirm the identity of the contractual worker and the validity of the Certificate of Registration, either by consult the list of valid registrations on the CGD website (http://www.cgd.gc.ca/) or by communicating with a CGD Call Center personnel (866-368-4646).

Special considerations exist where the contractual worker is an employee of another registered person in the CGRP, or an employee of a U.S. or foreign ITAR registered person, or the U.S. government.

For further information on Contractual Workers see the CGD's *Policy Guideline on Contractual Workers* (August 10, 2004).

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER



QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

DPA Requirements are Domestic – Not Extra-Territorial. Note that the DPA requirements, and registration under the CGRP, do not affect export directly, but are more broadly targeted, on a national basis, to virtually any use of "controlled goods".

Specifically, section 37 of the DPA creates the following offences:

(1) No person shall, unless the person is registered under section 38 or exempt from registration under section 39 or 39.1, knowingly examine or possess a controlled good or transfer a controlled good to another person.

(2) No person registered or exempt from registration shall knowingly transfer a controlled good to or permit the examination of a controlled good by a person who is not registered or exempt from registration.

"Transfer" is broadly defined in the same section to mean, in respect of a controlled good, "to dispose of it or disclose its content in any manner". The effect, therefore, is to create a national system for monitoring and controlling those goods defined as "controlled goods" in the DPA.

Export Control & Controlled Goods. While the DPA and the CGRP are "domestic", the "export control" arises in connection with the requirement that (1) a positive Export Permit be obtained for all "controlled goods" – no matter the destination, and that (2) proof of registration or exemption/exclusion from registration under the *Controlled Goods Regulations* ("CGR") be provided with the application, and before any Export Permit is issued.

What this means is that exporters wishing to export "Controlled goods" must be registered under the Controlled Goods Registration Programmed ("CGRP") – which operates under the DPA and the CGR,[32] before applying for the Export Permit.

(This makes some sense, as section 37 of the DPA, above, would preclude the exporter from possessing the "Controlled goods" in the first place, unless registered, or exempt).

If the exporter is not registered, an Export Permit application cannot be issued and the application will be held in abeyance until there is evidence that the exporter has registered.

At present, however, there is no obligation on the exporter to verify or ensure that the person taking possession of the exported goods is likewise registered under the CGRP – which again goes to the non-extra-territorial nature of Canada's system.

Controlled Goods & U.S. Export Authorizations. Where a Controlled Goods is of "U.S. origin", a further wrinkle arises.

Under Canada's new rules, if the "controlled goods" (or their inputs) are of "U.S. origin", a United States Export Authorization will also be required with the Export Permit application.[33]

As indicated earlier, when applying for the Export Permit, the applicant is required to submit to the Minister a declaration that, to the best of the applicant's knowledge, the goods will enter into the economy of the country referred to in paragraph (1)(f) and will not be trans-shipped or diverted from that country.

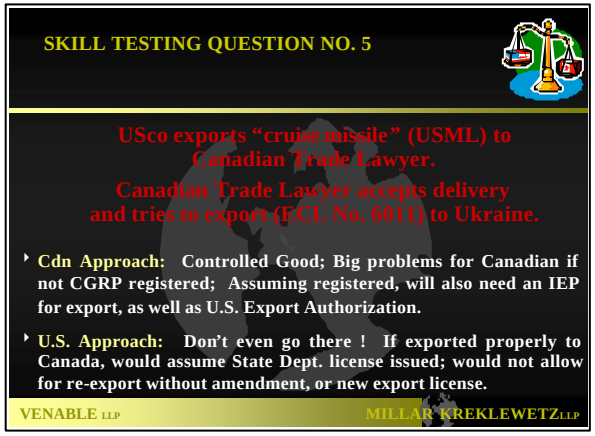
When the goods are or are derived from U.S. "controlled goods", this has the effect of requiring the applicant to declare that the final destination of the goods will be the country as specified in the U.S. export authorization, described just below.

(Note that the U.S. Export Authorization may not be required if the Controlled Goods are being re-exported to the U.S.).

Form of U.S. Export Authorization. The U.S. Export Authorization can take many forms, as is plain from the definition of the term in the EPR:

> "United States export authorization" means a copy of any of the following approvals issued by the United States under the International Traffic in Arms Regulations, Title 22, Parts 120-130 of the Code of Federal Regulations (United States):
>
> (a) an export licence;
>
> (b) a Warehousing and Distribution Agreement;
>
> (c) a Technical Assistance Agreement;
>
> (d) a Manufacturing Licence Agreement;
>
> (e) a re-export authorization letter; or
>
> (f) a U.S. export licence exemption.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER



QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Personal Liability. For directors, officers or agents of corporations, section 46 of the DPA is well-worth reading:

> 46. An officer, director or agent of a corporation that commits an offence under this Act is liable to be convicted of the offence if he or she directed, authorized, assented to, acquiesced in or participated in the commission of the offence, whether or not the corporation has been prosecuted or convicted.

Violations, Penalties, and Punishments. Given its sensitive nature, is it not surprising that the DPA incorporates some of the harsher penalties and punishments for violations of its terms.

Penalties for violating the DPA can range from maximum fines of $100,000 to $2,000,000, and maximum incarcerations periods of 2 years to 10 years, or both – all depending on the severity of the violation, and the manner in which it is prosecuted (i.e., by summary conviction, or by indictment).

Even the relatively more minor transgressions are subject to maximum $25,000 penalties, and imprisonment of up to 12 months.

Accordingly, and before exporting any goods or technology, exporters must assure themselves that their export is not being transferred, directly or indirectly, to a WMD end-use/end-user.

If in doubt, or in doubt of one's obligations, the exporter should consult expert assistance.

GOODS FOR CERTAIN USES – ITEM 5505

On April 11, 2002, Canada finally implemented a "catch-all" control that covers the export of any goods and technology not listed elsewhere on the ECL, when intended for certain uses.

Specifically, ECL Item 5505, entitled "Goods for Certain Uses", imposes a specific Export Permit requirement on any goods and related technology if it is determined that the goods or technology are destined to an end-use or end-user involved in the development or production of

1. Chemical weapons
2. Biological weapons
3. Nuclear weapons or
4. Weapons of Mass Destruction (or their missile systems).

DEALING WITH CERTAIN GROUP 5 GOODS

Recall that Group 5 under the ECL is a catch-all for various miscellaneous items important from a economic trade perspective.

The ECIB has developed a special on-line system, and Handbook, for dealing with the export of non-originating textiles, textiles products and apparel entering the United States and Mexico under the tariff preference levels established in the North American Free Trade Agreement (NAFTA), as well as the export of peanut butter, refined sugar and sugar-containing products and the export of softwood lumber.

The on-line computer system is the Export and Import Control System ("EICS"), and can be accessed through the ECIB website (www.dfait-maeci.gc.ca/trade/eicb).

Export Procedures for Group 5 Goods. The Export Procedures for each of the main categories listed above are varied, and beyond the short summary provided below, beyond a full discussion in the Presentation.

In the main, the export procedures are a bit different, in that the application is submitted to different divisions under ECIB (instead of the EPE), and the appropriate form is Form EXT-1466, *Application for Import / Export Permit.* (Applications can also be made through an on-line customs broker). A summary of the various procedures are as follows.

Textiles and Apparel. A Certificate of Eligibility is required for each shipment of non-originating textiles and apparel to enable U.S. and Mexican Customs to identify goods qualifying for the NAFTA duty rate for goods under the Tariff Preference Level (TPL). The Handbook details the additional requirements in section "F".

Certain Sugars, Syrups and Molasses. An Export Permit is required for exports to the U.S. of certain sugars, syrups and molasses, described in Chapter 17 and 21 of the Harmonized Tariff Schedule of the U.S. (HTSUS). Section "G" of the Handbook provides further information.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Softwood Lumber. An Export Permit is required for exports of softwood lumber to the U.S. of articles classified under tariff item 4407.10.10, 4409.10.10, 4409.10.20, and 4409.10.90 of the Harmonized Tariff Schedule of the U.S. Section H of the Handbook provides further information. See also Notices to Exporters, serial Nos. 90, 92, 94, 97, 98, 99 and 103. (An Export Permit is required for exports of used railway ties and used barn board to the U.S.).

Peanut Butter. For exports to the U.S., an IEP is required for each shipment of peanut butter exported to or trans-shipping through the U.S. Section "G" of the Handbook provides further information. See also Notice to Exporters, serial no. 81 (January 13, 1995). For exports to countries other than the U.S, GEP 31 may be relied upon.

Sugar-containing products. An Export Permit is required for exports to the U.S of certain sugar-containing products, described in Chapters 17, 18, 19 and 21 of the Harmonized Tariff Schedule of the United States (HTSUS). Section "G" of the Handbook provides further information. See also Notices to Exporters, serial nos. 117 and 126.

Handbook and H.S. Codes for Group 5 Goods. The Handbook, called the *Handbook of Export and Import Commodity Codes – 2003*, is designed to assist exporters in categorizing and identifying a product, as well as in providing the necessary information concerning the import or export control requirements for the product – and ties into the EICB's adoption of the Harmonized Commodity Description and Coding System (HS) to classify and identify these products.

Is it my understanding that there is currently some discussion as to whether the 10 digit H.S. statistic codes used for "import" purposes by Canada are permitted in using EICS; the practice varies.

OTHER SPECIAL SITUATIONS

In the context of obtaining an IEP, there are some special situations that can arise, and that bare discussion.

Advisory Opinions on Proposed Exports. From time to time, situations arise where exporters may want to request an opinion on the control status of goods and technology, or on the prospect of receiving an Export Permit.

This advice can be obtained through the EPE, but is not binding.

Accordingly, exporters will generally want to seek legal advice prior to undertaking such an exercise, at least to determine the prospects of getting the answer that the exporter wants.

Permits for Temporary Exports. Temporary permits are common for goods and technology exported for trade shows, exhibitions, demonstrations, geological surveying, and other events where the goods and technology will return to Canada.

Exporters must apply for a permit in the normal manner and must note in the body of the application that they are asking for a permit for a *temporary export.* In granting a permit for a temporary export, the EPE may place certain conditions on the export.

Multiple Shipments / Multiple Consignee Permits. In some cases, an exporter may use an Export Permit for more than one shipment to the consignee(s) specified on the Export Permit (a maximum of three consignees per permit in a single country) up to the value and quantity noted on the permit.

This procedure applies to all goods and technology in Groups 1, 4, 5 (except ECL Items 5501, 5502, 5503, 5504 and 5505), 6 and 7.

Project Development Permits. Permits are required in all cases (except the U.S.) where technology, as defined in the ECL, is transferred abroad, regardless of the means of transmission.

As a technology transfer is often required for issuing or responding to RFPs (Requests for Proposal), developing new products or other circumstances where no physical goods are exported, Export Permits should be sought to cover these contingences.

Should this development work lead to a contract to supply goods, a permit valid for up to five years covering the deliverables (both goods and technology) of the contract may be issued in certain circumstances.

Single Shipment Permits (Offensive Military Equipment). As a general rule, Export Permits for military goods and technology falling under ECL Items 2001 through 2004, will be issued for a single shipment/single consignee only. The Export Permit becomes invalid after the first shipment is made even if the shipment is only a partial one. Exporters must re-apply for a new Export Permit to cover any shortfalls.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Amendments and Extensions of Export Permits. Minor amendments to permits may be allowed in limited circumstances. Requests to amend existing Export Permits must be made in writing, addressed to the Director, Export Controls Division.

All such requests should be received in the Division at least four weeks prior to the expiry date of the Export Permit.

Goods and technology not listed on the Export Permit, or destined to a consignee not listed on the Export Permit, may be subject to CBSA detention or seizure. Therefore, exporters must ensure that their Export Permit has been formally and legally amended before any export takes place.

OTHER CONTROLS

While the discussion to this point has focused on the controls set out in the ECL, Canada imposes a number of other export controls through a variety of other Departments and Ministries.

While a complete discussion of these controls is beyond the scope of these Materials, some of the more important of these are as follows.

Dual-controls for Nuclear & Atomic Energy Goods/Technology. In addition to the dual-controls imposed by DFAIT and the Canadian Nuclear Safety Commission (CNSC) for nuclear and nuclear-related items identified in Groups 3 and 4 of the ECL, the CNSC also controls, under the *Nuclear Safety and Control Act* (NSCA), certain radioactive substances and isotopes which are deemed capable of releasing atomic energy or being required for the production, use or application of atomic energy.

Exporters of such substances (whether or not already on the ECL), potentially require an export licence from the CNSC.

Accordingly, it can be noted that exports of goods listed in Group 3 of the ECL can only occur when export authorizations are obtained from both DFAIT and CNSC.

Narcotics, Controlled Drugs and Precursors. Controls on the export, import and internal trade in illicit drug precursors identified in Group 8 of the ECL, which are controlled pursuant to international agreements, are soon to be taken over by Health Canada under the *Controlled Drugs and Substances Act*, along with other drugs, controlled substances, and precursors already subject to their control.

Exporters of drugs, controlled substances, and precursors ought to obtain an update as to the status of the process, and determine what Export Permits are now required.

The Canadian National Authority for the CWC. The Canadian National Authority (CNA) for the Chemical Weapons Convention is responsible for the collection and monitoring of Canadian data dealing with, among other things, the import and export of certain chemicals and precursors.

Other Export Authorizations. It is possible that export authorizations may be required for other goods from other government departments.

These include, but are not limited to:

- Heritage Canada
- Health Canada
- Agriculture Canada
- Natural Resources Canada
- Canadian Wheat Board
- Environment Canada
- Fisheries and Oceans

Foreign "Anti-Corruption Legislation. Other controls that may come into play in any given transaction include the federal Corruption of Foreign Public Officials Act, adopted by Parliament in 1999 ("CFPOA").

The CFPOA makes it a criminal offence to bribe a foreign public official in the course of business, and is part of Canada's international participation in anti-corruption initiatives, and meant to be consistent with Canada's obligations under the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which Canada signed in Paris on December 17, 1997.

The CFPOA features three offences: bribing a foreign public official, laundering property and proceeds, and possession of property and proceeds. In addition, the Act would make it possible to prosecute, for example, a conspiracy or an attempt to commit the offences. It would also cover aiding and abetting in committing these offences, an intention in common to commit them, and counseling others to commit the offences.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Bribery Offence. The center-piece of the legislation is the "bribery of foreign public officials", which is prohibited in section 3 of the CFPO as follows:

> 3.(1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official.
>
> (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
>
> (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

Note that no particular mental element (mens rea) is referred to. It is likely intended that the offence be interpreted in accordance with Canadian common law principles of criminal culpability, with the Courts expected to read in the mens rea of intention and knowledge.

Jurisdiction. Canada has jurisdiction over the bribery of foreign public officials when the offence is committed in whole or in part in its territory. Accordingly, in order to be subject to Canadian jurisdiction, a significant portion of the activities constituting the offence must take place in Canada, with the courts finding that a sufficient basis for jurisdiction will exist where a "real and substantial link" exists between the offence and Canada. The court must also determine whether there is anything in those facts that offends international comity. (See *R.* v. *Libman* (1985), 21 C.C.C. (3d) 206 (S.C.C.))

Penalties. Note that the penalty for bribery of foreign public officials includes a five-year maximum term of imprisonment (which ensures that it is an extraditable offence, with no set limitations period).

Corporations, of course, cannot be subject to imprisonment, but they can be fined, and the amount of any fine would be at the discretion of the judge, with no set maximum. In this sense, the CFPOA's penalty provisions are comparable to the maximum penalties for domestic bribery in sections 121 and 123 of the *Criminal Code.*

While a full discussion of the CFPO Act is beyond the scope of these materials, readers with additional questions are asked to consult the authors.

A WORD ON EXPORT REPORTING

While the principal issues addressed in these materials relate to Canada's recently revised 'export controls system', Canada is also embarking on changing the manner in which goods being exported from Canada are reported.

New Export Reporting Regulations. The Export Process Division ("EPD") of CBSA has revised the Reporting of Exported Goods Regulations and the related Customs D Memorandum, D20-1-1. Customs Notice N-608 announced the changes, with the revised Regulations published February 23, 2005, and set for implementation on March 31, 2005. On March 15, 2005, however, the implementation date was further delayed to May 16, 2005, in part due to pressure from affected parties.

The new regulations involve a change in the responsibilities of exporters, carriers and customs service providers.

When the new rules do come into effect, they will also be made subject to the Administrative Monetary Penalty System ("AMPS"), and AMPS penalties will be applied in any circumstance where a person fails to comply with the new reporting requirements.

What are the Changes ? The new regulations are expected to place a new emphasis on the reporting of the export, and require the need for a *proof of report, before an exporting carrier can load good for export.* Thus a carrier will be prohibited from loading goods for export without first obtaining proof that the exporter has reported to customs. Thus, "No report/No load".

The new rules are thus expected to impact virtually everyone involved in the export process, from freight forwarders to cargo intermediaries that act on behalf of the exporters and are responsible for completing export declarations and arranging for bookings with exporting carriers.

For a full discussion of the new export reporting requirements, please see an article by Robert Kreklewetz and Vern Vipul of Millar Kreklewetz LLP, entitled *New Export Requirements*, in I.E. Canada's *Tradeweek* magazine, March 15, 2005. A copy is available for download from the Millar Kreklewetz LLP website. Look for "Free Tax Information" at www.taxandtradelaw.com, select "Articles" and look under Customs & Trade.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

How are exported goods to be reported to Canada Customs? Currently, there are four ways for exporters to report goods for export, as follows:

1. **Canadian Automated Export Declaration (CAED).**

   As touched on above, a CAED is an electronic option used to report exports, and the necessary software is available free of charge from the CBSA. Given that some of the new requirements will force manual Form B13As to be physically stamped at a customs office, the use of a CAED may become more important under the new rules. A CAED demo and information on how to get the software are available on the Internet at www.statcan.ca/english/exports. Note that if the exported goods require a permit or other license, then in addition to the requirement to note the CAED Authorization ID and Form ID on the bills of lading or air waybills, the exporter is also required to print a paper copy of the B13A and submit it to Customs along with the permit.[34]

2. **G7 EDI Export Reporting.**

   A "G7 EDI Export reporting" is a new electronic service option that allows an exporter to submit export declarations. The scope of G7 EDI Export Reporting presently allows for (1) G7 EDI to all modes of transportation, and (2) entry validation on a 24/7 basis. Interested participants can obtain information from the CBSA's web site at ccra-adrc.gc.ca/customs. [35]

3. **Export Summary Reporting**

   The export summary reporting program is available to exporters, who export bulk type goods on a regular basis, and have met customs requirements (Bulk type goods sold for export, including containerized bulk goods – like logs, newsprint, or ore – should be on summary reporting).[36] Export Summary Reporting allows exporters to summarize required export data, via a written report submitted on a monthly basis, after the goods have left Canada.[37] In the case of summary reporting the proof of report number has been assigned to all participants. An approved summary reporter will not be required to submit a B13A to Customs. Note that written authorization to report in this manner must be granted by customs before it can be used. [38]

4. **Form B13A Export Declaration**

   Exporters who do not report via CAED, G7 EDI Export Reporting or Summary Reporting are required to complete a manual paper B13A Export Declaration. In this instance, the properly completed Form B13A's must be brought into a customs office and assigned a transaction number. This number is provided by a stamp machine or by a manual stamp. The B13A needs to be completed in three copies and each copy of the B13A must have an original /identical stamp.

   If the goods to be exported require a permit, then in addition to the requirement of the B13A the necessary permit must be presented attached to the B13A declaration. Many large volume customs ports provide an automated transaction numbering machine. The exporter or his service provider must use it to date stamp their declarations and obtain their proof of report number.[39]

The No Report / No Load Requirement. Under the new rules, goods may not be tendered for export without a proper export reporting transaction number (i.e., the "No report/No load").[40] This will have a marked effect for exporters currently using manual paper Form B13As, as it is anticipated that most exporters will be effectively required to move to an electronic transmission of their export declarations. Carriers are also expected to be severely impacted by these new requirements.[41]

Time Frames. The regulations require exporters to submit the export report before the goods are exported in keeping with the following legislated time frames for each mode of shipment:

Mail: Not less than two hours before the goods are delivered to the post office where the goods are mailed

Marine: Not less than 48 hours before good loaded on vessel

Aircraft: Not less than 2 hours before goods loaded on aircraft

Rail: Not less than 2 hours before the railcar on which the goods have been loaded is assembled to form part of a train for export

Highway: (or any other means): Immediately before export

Where the particular Cargo does not Require Reporting. Fortunately, where particular cargo does not require reporting (i.e., where it qualifies for the "exceptions" to reporting), the exporter or his service provider is required to specify to the carrier that **No Declaration is Required** ("NDR"). The exporting carrier is required to note the NDR on their bills of lading or air waybills. The main exception here would encompass goods that are not controlled, and are valued at less than $2000, and goods that are being exported to the United States for consumption in the United States.

AMPS Implications. The proposed new rules will be policed by AMPS penalties, including the following AMPS contraventions, C**170** (Exporter failed to report the export of goods on an export declaration according to time frames), **C315** (Exporter failed to provide to customs prior to export any Export Permit, licence or certificate required), and **C316** (Exporter failed to submit an export summary report according to the required time frame).

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

PART II

THE U.S. EXPORT CONTROL REGIME

Introduction[1]

Canada has consistently remained as the most significant trading partner for the U.S., with shipments into and from the United States surpassing those of other countries. With the implementation of the U.S. - Canada Free Trade Agreement and, subsequently the NAFTA, customs duties between our two countries have been virtually eliminated. Likewise, our countries traditionally experienced trade that has been largely free of export control regulation. Under a bilateral arrangement, most exports from Canada and to the U.S., as well as most exports from the U.S. to Canada do not require an export permit or license, as described below.

Canadian Controls Not deemed Adequate by U.S. This environment came under scrutiny when, in 1999, the U.S. Government reviewed the Canadian export controls regime including the access to controlled goods and technology within Canada, and determined that the controls in Canada did not adequately protect U.S. national security interests. What followed was a removal of many of the preferential, license-free export of unclassified goods and technology to Canada on April 12, 1999. The removal of the "Canadian Exemptions" lead to new licensing requirements on a broad scope of goods and technology that had not been imposed prior to that effective date. The industries most affected were Canada's defense, aerospace and satellite industries.

New Cooperative Controls put into Effect in Canada. The following June 2000, the U.S. and Canada announced a series of legislative and regulatory provisions designed to cooperatively enhance our respective defense trade controls. Then, in May 2001, the U.S. implemented a new exemption under the International Traffic in Arms Regulations ("ITAR") authorizing the export of certain defense articles and services to Canada. The more liberal provisions under the U.S. Department of Commerce regulations regarding "dual use" items exported to Canada, however, remained constant.

Therefore in the era of increasing cooperation, trade with the U.S. has actually reached new levels of scrutiny, perhaps not directly between our two countries but indirectly as concerns transactions with third countries. For example, in December 2002, the U.S. Bureau of Industry and Security reiterated the need to take cooperative steps among countries to address concerns about the security of international trade flows, especially among those countries where trans-shipment concerns are great. (*See* Remarks of BIS Deputy Under Secretary at Regional Forum on Transshipment Controls, Dec. 12, 2002, www.bis.gov/pressreleases). The U.S. sees a significant vulnerability that certain sensitive items could be circumvented resulting in those items going to end-users or end-uses of concern, including terrorists or countries that support them.

Simply put, enforcement of export controls is live and well in the U.S. and is seeking to expand its reach beyond its borders. Accordingly, it will pay well for Canadian importers and exporters to understand the additional nuances of the U.S. export control regime as they may unwittingly apply to your activities.

Overview of the U.S. Export Control Rules

How the Rules Developed. The restriction of a country's trade has been a policy tool throughout history. Historically, restrictions were placed during times of conflict or when relations between particular countries became strained. However, following World War II, the United States implemented legislation to protect the country's economy for everything from post-war scarcity to protecting national security exports of military significance.

What followed was the development by the NATO allied countries and their Coordinating Committee ("CoCom") designed to prevent diversion to the East and to counter any Soviet military threat. This resulted in the 1949 Export Control Act (Act of Feb. 26, 1949, ch. 11, 63 Stat. 7). Over the years, the CoCom participating governments changed the export control cooperation to meet the changing needs from restriction of trading with China and North Korea through the use of a 1917 Trading with the Enemy Act ("TWEA") and later the 1977 International Emergency Economic Powers Act ("IEEPA"),

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

which authorized broad trade and financial restrictions, and export embargoes. In the 1980s, a new threat emerged requiring export control cooperation to thwart the proliferation of nuclear, chemical and biological weapons and missile delivery systems.

In the 1990s, the export control regime further changed. First, the CoCom severely reduced the restrictions on trade with the former Soviet Warsaw pact countries. Second, in 1994, CoCom was terminated and was replaced by the establishment in 1996 of the "Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies" ("Wassenaar Arrangement"). All such regimes are informal and consensus-based controls requiring coordination and consultation. They are not treaty based and do not constitute an "organization" *per se.* With this historical backdrop were developed the U.S. export control laws and regulations restricting trade with U.S.

Be Wary of Controls on Re-exports and Items with U.S. Content. When importing products from the U.S., a Canadian importer may seek to ensure that there are no export control restrictions placed on the use or resale of the imported item or, if so, ensure that they fully understand the scope of the restrictions. Therefore, this section will provide an overview of the U.S. export control regime to allow you to assess whether it will impact your business activities.

The Governmental Entities that Control U.S. Exports

We will start with an overview of the various U.S. Departments that regulate export controls. As the bulk of items (including commodities, software and technology) exported from the United States are within the control of the U.S. Department of Commerce, the majority of the discussion which follows will be dedicated to those regulatory provisions.

U.S. Dept. of Commerce, Bureau of Industry and Security. The U.S. Department of Commerce under its Export Administration Regulations ("EAR") regulate a broad range of controls, predominantly those that apply to items that are "dual use." 15 C.F.R. § 730-774. The primary focus of export controls under the EAR has been to prevent the diversion of "dual use" exports; that is, exports of items capable of either military or non-military use from the United States that could adversely affect the security or foreign policy interests of the U.S.

The EAR provides differing regulatory provisions for "national security" controls and for "foreign policy" controls.

The rules controlling items for national security reasons were developed and later amended to decontrol those items that are broadly available and to concentrate on controlling access to relatively high-technology or to materials and equipment in which the particular country is deficient. Conversely, there is no list of items controlled for foreign policy reasons. In addition to such unilateral controls, the U.S. multilateral export control regimes serve as the basis for controlling the proliferation of weapons of mass destruction under, for example, the Wassenaar Arrangement. As the majority of goods offered for sale are potentially subject to the controls of the U.S. Department of Commerce, these controls will be the focus here with a brief introduction to the controls by other U.S. agencies.

U.S. Department of State, Office of Defense Trade Controls. The U.S. Department of State controls exports of defense articles and defense services under the authority of the Arms Export Control Act (22 U.S.C. §§ 2778-2994) through its Office of Defense Trade Controls ("ODTC"). Items, services and technologies are regulated if they are positively identified on the U.S. Munitions List, which is part of the International Traffic in Arms Regulations, commonly referred to as the "ITAR".

Defense Articles, Services and Technical Data Controlled. The U.S. Munitions List ("USML") primarily includes items designed for military purposes; namely, defense articles. Persons or entities in the U.S. who are in the business of exporting or manufacturing defense articles or services must register with ODTC as such services are also controlled. "Defense services" are defined as furnishing assistance or training of non-U.S. persons (either in the U.S. or abroad), in the design, engineering, manufacture, production, assembly or testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles.

Also, related technical data -- that is information required for the development, production, operation or maintenance of defense articles (such as blueprints, drawings, photos, or instructions) -- are also controlled by the U.S. State Department.

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

While exports are generally controlled worldwide, exports to Canada are broadly excepted. That means, licenses are typically not required before a shipment may be sent to Canada. As will be discussed in greater detail below, that does not mean, however, that you should not concern yourself with U.S. export control matters as there may easily be instances where the controls may nevertheless apply to your actions. This can occur when, for example, the items are re-exported to a third country or when the product directly manufactured from a U.S. import contains more than *de minimis* levels of U.S.-origin content.

Single vs. Multiple Export Licenses. While case-by-case licensing is the general rule, multiple exports may be made under an approved manufacturing license agreement ("MLA") or a technical assistance agreement ("TAA"). The USML is much briefer than the corresponding CCL of Commerce. As a practical matter, State Department retains greater discretion in its jurisdiction of controls.

Which Agency Controls? File a CJ Request. The State Department will examine certain factors to determine if a factual or logical basis for its jurisdiction exists. These factors include:

- Number, variety, and predominance of civil applications
- Nature, function, and capability of civil applications
- Nature, function, and capability of military applications
- The Performance Equivalent of the item, and
- Whether the "Form, Fit and Function" are for civil applications.

If you don't know which agency controls the export, you can submit a Commodity Jurisdiction ("CJ") request with the State Department. The CJ will then identify the proper agency with which export control jurisdiction lies.

U.S. Department of Treasury, Office of Foreign Assets Control

The U.S. Department of Treasury imposes further controls on certain export and export-related activities. Its regulations are issued by the Office of Foreign Assets Control ("OFAC") and include broad trade embargoes issued under the TWEA, currently against Cuba and North Korea, and more recent controls under IEEPA have imposed embargoes against Libya, Iran, Sudan and formerly, Iraq. All OFAC regulations deal, either directly with an export from the U.S. or indirectly, by example, on some control transactions abroad by U.S. persons, without regard to the origin of the items. The regulations include some additional economic measures, such as restricting imports or financial transactions or freezing assets. The implementing regulations define the term "U.S. person" to include overseas branches, but with the exception of the Cuban regulations, do not include foreign incorporated firms controlled by U.S. persons. There is, however, no clear delineation between transactions controlled by OFAC rules and those subject to the licensing requirements of other U.S. agencies. There are instances where more than one U.S. agencies' regulations may apply.

IMPORTANT NOTE: Exports to Embargoed Countries

Note that Canadian exports to U.S. embargoed countries may lead to fines, penalties and even the denial of export privileges.

OFAC imposed a 20-year denial of export privileges against a Canadian company and its president from its purchases of certain U.S. items and resales to Iran, in violation of OFAC laws and without a BIS license.

See BIS Press Release Oct. 9, 2003 regarding OTS Refining Equipment Corporation of Markham, Ontario and Abdulamir Mahdi, President.

In addition, the Treasury Department maintains a list of "Specially Designated Nationals" with whom U.S. persons are prohibited from dealing. That is, a U.S. person (or entity) can make no exports to or financial dealings with them without being severely penalized. Examples include entities and persons associated with Libya, Cuba, North Korea, Iran or Sudan and their governments; as well as certain identified narcotics traffickers and international terrorists. It is important to note that dealings with the embargoed countries are *per se* violations.

IMPORTANT NOTE: Freight Forwarder Paid Civil Penalties

Canadian companies must also take care in instructing its freight forwarder not to deal with any Denied Parties.

BIS imposed civil penalties a freight forwarding company when it exported certain air conditioning units to a company whose export privileges had been denied.

See BIS Press Release Sept. 3, 2003 regarding Expeditors International of Washington, Inc.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Other U.S. Agency Controls

Finally, there are also nuclear controls which are governed by the Nuclear Regulatory Commission, for exports of nuclear reactor vessels and those commodities which are specially designed or such reactors. (10 C.F.R. § 110). Other nuclear items including technical data related directly or indirectly to the production of special nuclear materials are regulated by the U.S. Department of Energy (10 C.F.R. § 810). The U.S. Department of Commerce controls exports of all other commodities and technical data related to nuclear power plants, dual use nuclear commodities, and otherwise uncontrolled commodities, if they are for use in sensitive nuclear activity. (15 C.F.R. §§ 742.3, 744.2, and 744.5.)

Also Watch out for the "FCPA" and Antiboycott Regulations. Other controls that may come into play in any given transaction include the U.S. Foreign Corrupt Practices Act ("FCPA") and the U.S. Antiboycott regulations.

FCPA. The FCPA has two parts: one dealing with anti-bribery provisions (enforced by the U.S. Department of Justice) and the second part dealing with accounting and recordkeeping provisions (enforced by the U.S. Securities and Exchange Commission on U.S. public companies).

The antibribery provisions prohibit corruptly giving money or things of value to foreign officials, an official, a candidate of a foreign political party or office or to a foreign political party for the purpose of influencing an act or decision inducing them to do or omit to do an act in violation of his duty or inducing them to use influence to affect an act or decision to direct or retain business.

The FCPA allows for payments for certain "routine government action", but that term is very strictly interpreted, thereby allowing only processing of governmental papers, obtaining permits, and the like. Violations of FCPA may result in up to U.S. $2 million for firms and up to U.S.$100,000 in criminal and U.S.$10,000 in civil fines for individuals. They may also result in debarment and the imposition of other penalties (such as racketeering charges).

Antiboycott. The U.S. Antiboycott regulations prohibit a U.S. person from participating in or cooperating with a foreign boycott that is not sanctioned by the U.S. government. A boycott request must be reported to the government even if you refuse to participate and, more importantly, the failure to report, itself, can result in fines. A boycott "request" is a communication, either oral or written, from a boycotting or non-boycotting country entity to take any action to further or support a restrictive trade practice or boycott against a country that is friendly to the United States. A recent BIS report noted that "U.S. companies continue to report receiving requests to engage in activities that further or support the boycott of Israel." To date, over U.S.$26 million in civil penalties have been imposed on U.S. persons for such violations.

Against this backdrop, we will focus on the Department of Commerce controls, regulated by the former Bureau of Export Administration ("BXA"), now the Bureau of Industry and Commerce ("BIS"). BIS controls exports from the United States of a wide range of products, materials, technology and software.

The affirmative controls system is set forth in the Export Administration Regulations. 15 C.F.R. §§ § 730-774, 61 Fed. Reg. 12, 714 (Mar. 25, 1996). After the 1994 expiration of the Export Administration Act of 1979 ("EAA"), no new export act has been enacted by Congress. Therefore, the export regulations have been maintained by Presidential order under the IEEPA (50 U.S.C. §§ 1701-1706; Exec. Order No. 12, 294 (Aug. 19, 1994), continued in effect by Presidential Notice of August 7, 2003 (68 Fed. Reg. 47,831 (Aug. 11, 2003).

Controls: Exports & Re-exports of "Dual-Use" Items by BIS.

If you seek to export from the U.S. goods, software, technology with commercial and military or proliferation applications, such items are likely controlled through the EAR. Also, if you are outside the United States and seek to export or re-export an item that is of U.S. origin or that has a certain U.S. connection, your product may require a license from BIS.

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

What is "Subject to the EAR?". How do you determine whether your item is subject to the EAR? The EAR regulates both items and activities "subject to the EAR." 15 C.F.R. § 734.2. Namely, "items" subject to the EAR includes all items *in* the U.S. regardless of origin, including items in-transit and in foreign trade zones. It also includes all "U.S.-origin" items wherever located. In addition, the involvement of U.S.-origin content or technology can make some foreign-owned items subject to the EAR.

Do you have any "Deemed Exports"? In addition to the "items" subject to the EAR, certain *activities*, which are not ordinarily regarded as an export or re-export, are also subject to the EAR. For example, a "release" of technology or software to a non-U.S. national even if occurs in the United States can constitute a "deemed" export to the home country of that recipient. Also, a "deemed re-export" can occur if it occurs outside of the U.S.

Deemed exports are the latest focus of enforcement in the U.S. On March 28, 2005, BIS issued its Advance Notice of Proposed Rulemaking, 70 Fed. Reg. 15607, seeking changes to the requirements that would call for the institution of a compliance program to monitor and inspect those being licensed to ensure that they are complying with any conditions imposed by the license. This move, which has raised concern among the exporting community, was the result of a Commerce Inspector General's report in March 2004, which criticized the agencies policies.

IMPORTANT NOTE: Proposed Changes May affect your Business

Areas under review within the proposal include: (1) Revising the definition of "use" to include "operating, installing, maintaining or repairing controlled equipment in the U.S." is subject to the deemed export requirements; (2) Basing deemed export requirements on the birthplace of a foreign national and not their citizenship or permanent residence status; and (3) Reevaluating the policy that permits issuance of deemed export licenses to nationals of Iran and Iraq. For example, if you employ an Iranian national, who permanently resides in Canada, under the proposed rule, that person would be treated as if they still lived in Iran, rather being treated as a "Canadian".

What Information is Needed to Determine if you Need a License? Who, What, When, Where? In order to determine if you need a license for your U.S.-origin product you need to know the following:

A "release" can occur through oral or other communication and through visual inspection of equipment or facilities. Further, with regard to proliferation controls, uncontrolled activities of U.S. persons may be within the reach of these regulations if they are performed with knowledge that the destination or use if of proliferation concern. This may even involve foreign-origin items, to which the EAR does not typically apply. *See* 15 C.F.R. §§ 744.2 – 744.4, and 744.6(a)(1).

Watch out for a "Re-export". A "re-export" is the shipment or transmission of an item subject to the EAR from one country outside the U.S. to another non-U.S. country. A re-export may also occur when there is a "release" of technology or software (*i.e.*, source code) subject to the EAR from one non-U.S. national to another non-U.S. national. While many items subject to the EAR do not require a license to re-export an item from one country to another, many items are controlled and will either require a license or qualify for a License Exception.

1. ***WHO? The End-Use or End-User of the Item***. Even if you determine a license is not required based any list-based requirement, a license may nevertheless be required because of the end-use or end-user. There are particular restrictions that apply to persons or entities identified in the EAR as well as to persons whom you know or have reason to know are involved in weapons proliferation activities.
2. ***WHAT? The Export Control Classification Number ("ECCN").*** The ECCN specifies the reasons for control for particular items, software and technology for reasons such as national security and antiterrorism and will specify the applicable countries to which the controls apply.
3. ***WHEN? The Timing of the Export***. It is prospective and is there sufficient time before it will be shipped to obtain a license, if necessary?
4. ***WHERE? The Ultimate Destination of the Item***. For each export, you need to determine if the *ultimate* destination is a country that is controlled. *See* 15 C.F.R. Part 738 to determine if a "X" is listed on the country chart, then the transaction is free of any list-based export license requirement.

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Getting to Know the Ten Categories of the CCL. The Commerce Control List includes items (including commodities, software and technology) subject to the authority of BIS. (The CCL does not include those items that are exclusively controlled for export by another U.S. department or agency, but those are noted in the CCL.) Additionally, those items that are "subject to the EAR" but not affirmatively identified on the CCL are "EAR 99".

You should familiarize yourself with the ten categories of the CCL to determine where your products, software and/or technology may be identified. The categories are, as follows:

Category 0 – Nuclear Materials, Facilities, and Equipment

Category 1 – Materials, Chemicals, Microorganisms, and Toxins

Category 2 – Materials Processing

Category 3 – Electronics

Category 4 – Computers

Category 5 – Telecommunications and Information Security

Category 6 – Sensors and Lasers

Category 7 – Navigation and Avionics

Category 8 – Marine

Category 9 – Propulsion Systems, Space Vehicles & Related Equipment

Each category follows the same general format.

Section A covers the "Systems, Equipment and Components"

Section B covers "Test, Inspection and Production Equipment" related to the category,

Section C covers Materials associated with the category,

Section D covers "Software" for the category and

Section E covers the related "Technology" for the category.

For the category, the sections are further broken down to identify the items and their respective License Requirements, applicable License Exceptions, and List of Items Controlled. *Note:* Supplement No. 1 to part 774 provides a helpful alphabetical index which includes a listing of most of the controlled items.

What are the various Controls that may apply? The export controls may attach to particular products, software or technology. The controls may also target certain persons, which are considered "end-user" based controls. The controls may be limited to certain countries (embargoed countries).

Additionally, the controls may be based upon particular policy reasons. The policy-based controls are largely set out under the "Reasons for Control" that you might find on the CCL. They include controls for the following:

Anti-Terrorism (AT);
Crime Control (CC);
Firearms Convention (FC);
Missile Technology (MT);
National Security (NS);
Nuclear Non-Proliferation (NP);
Chemical and Biological Weapons (CB);
Chemical Weapons Convention (CW);
Computers (XP)
Encryption Items (EI);
Regional Stability (RS);
Short Supply (SS);
Significant Items (SI).

Does your Item or Activity Require a License under a General Prohibition? If you determine that your export, re-export or activity is subject to the EAR, then you need to assess whether one of the ten General Prohibitions applies. These prohibitions dictate that you may not engage in the export, re-export or activity, unless you have a license from BIS or qualify for a License Exception (*see* part 740 of the EAR).

The obligations under the General Prohibitions depend largely upon five types of information (again, the who, what, when, where data):

1. ***Classification of the Item.*** The classification of the item on the CCL (*see* part 774 of the EAR).
2. ***Destination.*** The country of ultimate destination for an export or re-export (*see* parts 738 and 774 of the EAR concerning the Country Chart and the CCL);
3. ***End-User.*** The ultimate end-user (*see* General Prohibition Four and parts 744 and 764 for a list of persons with whom you may not deal;
4. ***End-Use.*** The ultimate end-use (*see* General Prohibition Five and part 744 for general end-use restrictions);
5. ***Conduct.*** Conduct such as contracting, financing, freight forwarding in support of a proliferation project (*see* part 744 of the EAR).

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Once you have this information available, you can assess whether one of the ten General Prohibitions apply. If General Prohibitions 1, 2 or 3 apply, then the item is classified under an ECCN. If General Prohibitions 1, 2 or 3 do not apply, then it is deemed "EAR 99".

Next, you must determine if any of General Prohibitions 4-10 apply. They are, as follows:

General Prohibition One – Exports and Re-exports. Prohibits the export and re-export of controlled items to listed countries. A license or License Exception is required when your item is listed as controlled under the ECCN and Country Chart list.

General Prohibition Two – Parts and Components. Prohibits the re-export and export from abroad of foreign-made items incorporating more than a *de minimis* amount of controlled U.S. content. For this prohibition to apply, there must be more than minimal U.S.-origin "controlled" content in a "controlled" foreign-made item, with "controlled" as to the CCL/Country Chart for the ultimate destination. You may not, without a license or License Exception, export, re-export, or export from abroad any foreign-made commodity, software, or technology incorporating U.S.-origin commodities, software, or technology which is controlled to the country of ultimate destination. The *de minimis* threshold is up to 25% of the value of the finished foreign product in most instances. For designated terrorist supporting countries, the U.S. controlled content may not be more than 10% of the value of the finished product.

"U.S. controlled content" is content that would require a U.S. license if it were to be re-exported as separate parts or components to the country of ultimate destination.

General Prohibition Three – Foreign-Produced Direct Product Re-exports. Prohibits the export, re-export, or export abroad to Cuba, Libya, or a destination in Country Group D:1 for National Security control reasons (*see* Supp. No. 1 to part 740) for items that are the direct product of controlled U.S. software or technology.

General Prohibition Four – Denial Orders. Prohibits engaging in actions prohibited by a denial order. These orders may prohibit many actions in addition to direct exports by the person denied export privileges, including transfers within a country, either in the U.S. or abroad, by others. These Denial Orders are published in the Federal Register and a list is maintained on BIS' website. There are no License Exceptions which supercede this prohibition.

General Prohibition Five – End-Use, End-User. Prohibits knowingly exporting or re-exporting any item subject to the EAR to an end-user or end-use that is prohibited by part 744 of the EAR. These include, for example, restrictions on certain nuclear, missile, chemical or biological weapons end-uses, on certain activities of U.S. persons, for the use of certain foreign vessels and aircraft, and to all countries for Libyan aircraft, on technical assistance by U.S. persons for certain encryption items. It further places restrictions on certain entities in Russia, on exports and re-exports to "specially designated terrorists", foreign terrorist organizations, and to persons named in General Orders.

General Prohibition Six – Embargo. Prohibits exports and re-exports to embargoed destinations. Countries currently under U.S. embargo include: Cuba, Iran, Libya, Rwanda and special sanctions administered by OFAC have been placed on Angola. (*See* part 746 of the EAR.) Iraq was recently removed from the list of U.S.-embargoed countries.

> **IMPORTANT NOTE:**. The Prohibition as to Cuba may be particularly difficult for a Canadian entity. The U.S. requires a license or License Exception, however, there is a general policy of denial except for certain medicines and medical devices, telecommunications commodities, non-strategic foreign-made products that contain an insubstantial proportion of U.S.-origin materials, parts or components, or exports intended to provide support to the Cuban people. These restrictions are at odds with the policy and laws in Canada, such as the Blocking Statute.

General Prohibition Seven – U.S. Person Proliferation Activity. Prohibits the support of proliferation activities, including the financing, contracting, servicing, supporting, transporting, freight forwarding, or employment activities.

General Prohibition Eight – In-transit. Prohibits in-transit shipments and items to be unladen from vessels or aircraft. You may not export or re-export an item through or transit through certain countries without a license or the application of a License Exception. The prohibited countries include: Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Cambodia, Cuba, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Laos, Latvia, Lithuania, Mongolia, North Korea, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbkeistan, and Vietnam.

General Prohibition Nine – Orders, Terms and Conditions. Prohibits the violation of any order, terms, or conditions of a license or License Exception issued or made under the EAR. There are no License Exceptions to this Prohibition. Supplement Nos. 1 and 2 to part 736 of the EAR provide for certain General Orders and Administrative Orders.

General Prohibition Ten – Knowledge Violation to Occur. Prohibits proceeding with transactions with "knowledge" that a violation has occurred or is about to occur. You may not sell, transfer, export, re-export, finance, order, buy, remove, conceal, store, use, loan, dispose of, transfer, transport, forward, or otherwise service, in whole or in part, any item subject to the EAR and exported or re-exported with knowledge that a violation has occurred or is about to occur. There are no License Exceptions that apply to this Prohibition.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

IMPORTANT NOTE:. Commerce recently issued a Proposed Rule which seeks to revise the definition of "knowledge". See 69 Fed. Reg. 60829 (Oct. 13, 2004). The changes sought would incorporate a "reasonable person" standard and replace the phrase "high probability" with a "more likely than not" standard. It would also add "inter alia" (i.e. among other things) to the description of inferred facts and circumstances in keeping with the notion of "conscious disregard of facts known." These proposed modifications make it more likely that "knowledge" of a violation can be inferred, thereby increasing potential exposure to exporters and re-exporters of U.S. items.

Once you have determined that your item is EAR 99 or your item in classified under an ECCN on the CCL (as covered by General Prohibitions 1-3), then you need to determine if any of General Prohibitions 4-10 apply. If yes, then a License Application must be submitted. If not, and if the item is "EAR 99", then the item can ship "No License Required" or "NLR". If, however, the item is classified under an ECCN and there is an "X" in the CCL and Country Chart, then you next review if a License Exception applies.

Is there a License Exception that Applies? If the CCL and country chart indicate that a license is required, it is next important to determine if there is a License Exception that may apply to make the transaction "license free." That is, a License Exception will allow for an export without the need to make application to BIS. (This term replaced the term "General License" which led to confusion to many who inquired as to where they were to apply for the general license.)

IMPORTANT NOTE:. Before determining whether a License Exception applies, the exporter must first confirm that the transaction is, in fact, subject to the EAR and that the country chart for the particular entry and destination has an "X" under one or more of the "Reason for Control".

The circumstances covered by different License Exceptions vary widely. For example, is the shipment low value? Is it going to an agency of the U.S. or a cooperating government? Is the item in – transit through the United States? Then, a particular exception may apply. There are over twelve License Exceptions, so an exporter is advised to familiarize itself with the complete range by reviewing Part 740 of the EAR.

The availability of a License Exception may depend upon the destination of the export or re-export. The scope of the availability is determined by referencing the "Country Groups" in Supplement No. 1 to Part 740 of the EAR. The countries range from Group A (more than 30 countries that cooperate with the U.S. by means of a multilateral regime) to Group E (embargoed countries, such as Cuba). A country may be in more than one group, due to the differing criteria for a particular License Exception.

The ability to apply one of these License Exceptions depends largely upon *what* is to be exported. A "License Exception" is an authorization that allows an export or re-export of an item that would otherwise require a license based upon certain General Prohibitions. By using a License Exception, you are certifying that the terms, provisions and conditions for the Exception have been met. (*See* part 758 of the EAR for clearance of shipments and documenting the use of License Exceptions.) Exporters are required to maintain records of its transactions involving exports under any of the License Exceptions for a period of five years (*see* EAR, part 762).

License Exceptions. There are three letter symbols for each License Exception, which are used for export clearance and are recorded on the Shipper's Export Declaration ("SED") along with the appropriate ECCN for the shipment. The License Exceptions are, briefly, as follows:

LVS - Limited Value Shipments (part 740.3) Legitimate orders must not exceed the applicable dollar value limits and may not be split.

GBS – Shipments to Group B Countries (part 740.4) If controlled for National Security reasons only of Country Group B.

CIV – Civil End-Users (part 740.5) If controlled for National Security reasons only of Country Group D:1, except North Korea)

TSR – Technology and Software Under Restriction (part 740.6) Allows exports of technology and software controlled for National Security reasons provided it is destined to Country Group B.

CTP – Computers (part 740.7) Allows exports and re-exports of certain computers, electronic assemblies and components that meet particular thresholds and are destined to particular eligible countries.

KMI – Key Management Infrastructure (part 740.8) Authorizes the export and re-export of certain encryption software and equipment.

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

TMP – Temporary Imports, Exports, and Re-exports (pat 740.9) Permits various temporary exports and re-exports as well as the return of items temporarily in the U.S. and beta test software.

RPL – Servicing and Replacement of Parts and Equipment (part 740.10) Allows for exports or re-exports associated with one-for-one replacement parts or servicing and the replacement of equipment.

GOV- Governments, International Organizations, and International Inspections under the Chemical Weapons Convention (part 740.11) Allows for exports and re-exports for international safeguards, U.S. government agencies or personnel, and agencies of certain cooperating governments and inspection programs.

GFT – Gift Parcels and Humanitarian Donations (part 740.12). Permits donation by and to certain limited persons and entities for immediate use and not for resale.

TSU – Technology and Software Unrestricted (part 740.13) Authorizes operation and sales technology and software, software "updates" and "mass market" software and encryption source code that is considered publicly available.

BAG – Baggage (part 740.14) Authorizes persons leaving the U.S. either temporarily or permanently, to take to any destination certain authorized classes of commodities and software.

AVS – Aircraft and Vessels (part 740.15) Allows for the departure from the U.S. of foreign registry aircraft and U.S. civil aircraft and their parts and components.

APR – Additional Permissive Re-exports (part 740.16) Permits re-exports from particular Country Groups and to and among others as identified.

ENC – Encryption Commodities and Software (part 740.17) Covers certain encryption items controlled under particular ECCN provisions.

AGR – Agricultural Commodities (part 740.18) Permits the export and re-export of agricultural commodities to Cuba.

So, Now What do we do? The regulations provide for a means by which exporters can receive direction from BIS. It may take the form of a classification request, an advisory opinion, or other advice.

Classification Requests and Advisory Opinions. You make seek guidance from BIS to classify your item within the ECCN. As part of that process, BIS will advise you as to whether your item is subject to the EAR and, if applicable, provide the appropriate ECCN for the item.

IMPORTANT NOTE: . Recent Changes to Encryption Policy

In Dec. 2004, BIS implemented certain changes to its U.S. encryption policy, which include:

- Implementing 30-day review period;
- Removes the requirement for de minimis eligibility treatment for exception ENC for certain items;
- Relaxes the requirements for beta test encryption software under license TSU;
- Addresses "mass market" treatment of certain encryption items simplifying procedures for treatment;
- Updates Supp. No. 3 to include new EU countries in the "license free zone" ; and
- Clarifies the semi-annual reporting requirements of License Exception ENC apply to export destinations except Canada , and to re-exports from Canada to other foreign destinations.

Each Classification Request must be limited to six items and must be submitted on BIS Form 748P (*see* Supp. No. 1 to part 748 of the EAR for specific instructions). Each Request must provide sufficient descriptive literature and technical data, in BIS' opinion, to enable the classification or the Request will be rejected.

Therefore, it is advisable to consult with an expert in such matters to guide a company through the process particularly in the first instance.

Also, if requested, BIS will advise as to whether a license is required, or likely to be granted, for a particular transaction. They will not, however, provide any blanket Advisory Opinion, rather each request must be fact- and transaction-specific. While these provide guidance, they do not bind BIS to issuing a license in the future on the item.

Again, sufficient information must be provided to BIS to permit a determination of the matter. As with any request to the government, the request should be carefully drafted with the determination sought and the rationale in support provided as part of the request. As such, it is recommended that an expert be consulted. Otherwise, the exporter may find itself bound to an affirmative decision that it was not seeking.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Another alternative is to seek the guidance and opinion of an expert without seeking a decision per se from the government. This provides a greater level of security to the exporter and a "first level of defense" should the transaction ever be questioned. Often, a export control attorney may seek anonymous oral confirmation of a provision without ever having to declare the particular company seeking to make the export or re-export and, again, in an effort to minimize risk.

We Need a License, so How do we Get One? To apply for a license, the applicant (the principal party in interest or its agent) must submit its request on a BIS form (748P) in keeping with the agencies instructions (*see* part 748.6 of the EAR). Each application will receive a Control Number which permits status tracking during the process.

Each application must provide sufficiently descriptive information including the technical description, manufacturer, quantity, units, value as well as identify all parties to the transaction such as the purchaser, intermediate consignee, ultimate consignee, end-user. The application must also describe the end-use and the recommended ECCN. If insufficient data is provided, the application may be returned "without action," additional information may be submitted, but it must follow the original application Control Number.

An application may cover a single transaction or multiple shipments that may be made under a particular license. And, any extension of a license must be sought *before* the license expires. There are also procedures to seek emergency treatment, but BIS does not favor the delay by an exporter as a basis for seeking emergency processing.

A license may be approved or denied (in whole or part), or simply returned "without action." (An applicant may request that it be considered as a whole and either approved or denied in its entirety). The regulations require that a change in the facts occurs at any time which would affect any material or substantive change in the terms of the order – whether issued or pending -- then it must be promptly reported to BIS, unless the changes are excepted (*see* EAR, part 750.7(c)).

Each license application may undergo review by several U.S. agencies, including the Departments of State, Defense, Energy, Arms Control and Disarmament Agency.

Some of the obstacles that may face a license application include a "pre-license check" to establish the identity and reliability of the intended recipient of the item. These can take the form of site visits or other inquiries by U.S. officials abroad.

In certain cases, a government-to-government assurance may be required as to the end-use of sensitive items. Additionally, special conditions may be imposed on a license, which can cause complications and delay in normal processing. Conditions imposed may include the provision of assurances and certifications as well as potential visits and monitoring of the items once exported.

TIP: Also consider if your customer can assist in putting pressure on the U.S. agency that may have some questions regarding an application and can allay the concerns. Alternatively, you may consider seeking the assistance from a local expert to facilitate the approval of the license.

What are our Export Clearance Requirements? Given the recent changes to the export system, entities seeking to export items, software, and technology or undertake activities in support, are well-advised to properly observe the regulatory requirements relating to the clearance of shipments. In recent years, there has been a great reduction in the number of exports requiring an issued license by BIS along with the shift in burden to the exporter to determine and declare the basis for license-free exports. Therefore, exporters today are required to properly classify their items, to refer to the Country Chart to determine whether a license is required to a particular destination, and to correctly reporting the availability of a License Exception. More importantly, these responsibilities may not be outsourced to a freight forwarder as liability for misstatements on the export documentation is the ultimate responsibility of the exporter of record.

Additionally, new rules requiring electronic filing of export documentation were published by the U.S. Census Bureau earlier this year.[1] The use of this automated system means that the U.S. Bureau of Customs and Border Protection ("U.S. Customs" or "CBP") will now have a greater ability to check the completeness and accuracy of export shipment documentation, such as the Shipper's Export Declaration ("SED") *before* the shipment leaves the U.S.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Any problems that arise will likely lead to a delay of the shipment and it will be the exporter that will suffer consequences including potential legal and commercial difficulties. The forwarding agent may also find itself under scrutiny for its actions.[2]

While many may believe that all shipments from the U.S. destined to Canada do not need an SED, there are instances where such documents are required and those are the areas where a company can quickly find itself with problems. For example, if the export requires a license from the U.S., then an SED must be filed for the shipment. The difficulty may arise if the item is exported to Canada, where it may undergo further manufacturing and the U.S. origin may exceed the *de minimis* thresholds. In such instances, the U.S. license requirements will follow the shipment even when it is exported from Canada. Another complication may arise in routed transactions, as discussed below.

Areas of Concern for Canadian Entities – Routed Export Transactions & Re-exports: Why Should You Care? A "routed transaction" is a transaction where the foreign principal party in interest authorizes a U.S. forwarding agent or other agent (perhaps a U.S. affiliated entity) to facilitate the export of items from the U.S. For routed transactions, the U.S. principal party in interest (that is, typically the seller that receives the primary benefit of the export transaction) may obtain from the foreign principal party (e.g., the Canadian buyer) an express assumption of responsibility for determining the licensing requirements and obtaining license authority (typically through a power of attorney, *see* part 758.3(b) and (d) of the EAR), thus making the U.S. agent the exporter for EAR purposes. Therefore, it is advisable to determine if you, as a "foreign principal party," have retained this responsibility for U.S. export control purposes.

Similarly, while most exports from the U.S. to Canada will not require the filing of an SED (provided a license is not required), if the item is to be re-exported from Canada, then the ultimate destination must be examined to see if the controlled item requires a license there. The more difficult scenario to address is under General Prohibition Two where a re-export from Canada may be of a "Canadian made" item which incorporates more than a *de minimis* amount of controlled U.S. content. Specifically, it is prohibited without a license or License Exception:

Any foreign-made commodity, software, or technology incorporating U.S. origin commodities, software, or technology respectively that is controlled to the country of ultimate destination if the foreign-made items meets all of the following conditions:

(A) It incorporates more than the *de minimis* amount of controlled U.S. content (that is, generally for non-computer related equipment, where there is no more than 10% U.S. origin controlled content to embargoed countries and no more than 25% to other countries (*see* part 734.4 of the EAR). ***Note:*** certain encryption items are subject to the EAR even if they incorporate less than the *de minimis* level of U.S. content.

(B) It is controlled for a reason indicated in the applicable ECCN; and

(C) Its export to the country of destination requires a license for that control reason as indicated on the Country Chart.

However, a License Exception may supersede this Prohibition.

Does your Canadian-made Item Incorporate Less than the de minimis level of U.S. parts, components and materials? First, determine the value of the U.S.-origin controlled content (see Supp. No. 2 to part 734 of the EAR). Next, classify the U.S.-origin content on the CCL to determine which items that require a license to the ultimate destination (if exported in the form received) and divide the total value of the controlled U.S. parts and components and materials by the sale price of the Canadian-made item. If the U.S.-origin content are below the *de minimis* levels (generally 25% unless to designated terrorist supporting countries, then 10%) then no U.S. license is required. If not, then a license must be obtained or a License Exception identified *before* the parts, materials and components are shipped from the U.S. Have you performed this analysis?

What about Canadian-made items produced with U.S. technology for re-export from Canada? Products manufactured outside of the U.S. directly from U.S.-origin technology are subject to the EAR only if they are intended for specific destinations, would be subject to national security controls (if they were of U.S.-origin) and the U.S.-origin technology or software on which the Canadian product is based required a written assurance from the recipient when it was exported from the U.S. (See sections 734.3(a)(4) and 736.2(b)(3)).

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Likewise, if you incorporate U.S.-origin software into your Canadian software or if your technology is commingled with or drawn from U.S.-origin technology, the same analysis must occur. Additionally, there is a one-time reporting requirement (see part 734.4 and Supp. No. 2 to part 734 of the EAR). Note: The *de minimis* exception can only be used for items that are alike. That is, hardware into hardware or software into software. You cannot use the *de minimis* exception for incorporating software into hardware.

For example, when the country scope of prohibition includes exports to Cuba, Libya and any country in Country Group D:1 and the software or technology was subject to the EAR, then the direct products manufactured outside of the U.S. remain subject to the export controls of the EAR.

The "Long Arm" of U.S. Law.

The regulations include enforcement and protective measure to ensure that the recipients of items subject to the EAR comply with the re-export license requirements. More importantly, if BIS determines that an entity has not so complied, it may institute administrative enforcement proceedings which can result in civil penalties and/or the denial of an eligibility to receive U.S. exports (*see* part 764 of the EAR), as discussed further below. Moreover, the fact that a person complies with the U.S. laws and regulations does not excuse them from also fulfilling the requirements of their respective country's laws. Conversely, any person who complies with the license or other requirements of its own laws and regulations is not relieved of the responsibility of complying with the U.S. laws and regulations.

Are you a "U.S. Person"?

In addition, if you are a foreign branch or affiliate of a U.S. entity, you may have further reason to understand the requirements. The EAR generally defines U.S. person as any individual who is a U.S. citizen or permanent resident alien (U.S. green card holder) or certain protected individuals. It also includes any juridical entity organized under U.S. laws (e.g., U.S. corporation) including its foreign branches as well as "any person in the U.S." (for purposes of sections 744.6, 744.10 and 744.11). Also, as regards encryption items, a U.S. person includes a foreign subsidiary when the U.S. entity owns (25%) or controls the subsidiary or entity.

Enforcement Proceedings

The Export Administration Act extends its criminal and civil penalties and administrative sanctions to violations not only of the Act, but also of "any regulation, order or license." (*See* 50 U.S.C. app. §§ 2410(a), (b)(1), and (c)(1)).

Additionally, the EAR contain expansive language regarding violations and any such "attempt, conspiracy, and aiding or abetting." (*See* 15 C.F.R. § 764.2(a)). Related activities are also prohibited, for example, to "transport, finance, forward … with knowledge that a violation … has occurred, is about to occur, or is intended to occur in connection with the item." (*See* 15 C.F.R. § 764.2(e)). Also prohibited is the unauthorized alteration of any license or export control documentation. (*See* 15 C.F.R. § 764.2(j)). It is also important to bear in mind that the civil penalties and administrative sanctions can be imposed on a strict liability basis.

Investigations – Detention and Seizure

Both the U.S. Department of Commerce (BIS' Office of Export Enforcement) and U.S. Customs and Border Protection ("CBP") have investigative and enforcement authority. These investigators will also typically work with the U.S. Attorney in the development of a potential criminal case. CBP also have authority to detain and seize items which it believes the items are being exported in violation of the export control laws. Preliminary investigations will be conducted following a detention to determine if the export is legal, resulting in a lift of the detention. Otherwise, the goods may be seized.

BIS Enforcement – Charging Letters and Self-Disclosure

Either the Office of Export Enforcement or Office of Antiboycott Compliance may begin administrative enforcement proceedings by issuing a charging letter, which shall constitute a formal complaint stating that there is reason to believe that a violation of the EAA, the EAR, or any order, license or authorization has occurred. It will provide the essential facts about the alleged violation, the applicable regulatory provisions, and give notice of the sanctions available. What follows may include an answer (or default finding), discovery, a pre-hearing conference, a hearing and either a decision by an administrative law judge or a settlement. (*See* part 766 of the EAR).

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

Cases may be settled before the service of a charging letter or after. In some instances, the government will provide a "proposed" charging letter in an effort to reach a settlement before pursuing a full investigation and hearing.

The regulations also provide for self-disclosure, which is regarded as a mitigating factor in determining administrative sanctions, if any, will be pursued. BIS recently issued a proposed rule entitle "Penalty Guidance in the Settlement of Administrative Enforcement Cases" (see 68, Fed. Reg. 54402 (Sept. 17, 2003) in order to further assist companies in identifying how BIS makes penalty determinations in such cases. The proposed guidance identifies both general factors, such as the destination for the export and the degree of willfulness involved in the violations, as well as specific mitigating and aggravating factors that are typically taken into account.

Mitigating factors include a voluntary self-disclosure; the existence of an effective export compliance program; when the violation was an isolated occurrence; if authorization for the export would likely have been granted; and clean prior record, cooperation and certain other enumerated factors. Aggravating factors are identified as including a deliberate effort to conceal or hide a violation; conduct demonstrating a serious disregard for export compliance responsibilities; the significance of the violation in terms of the sensitivity of the item or reason for control; false statements regarding an embargoed destination; a significant quantity and value of shipments; concurrent violations with other regulations; and the lack of a systematic export compliance program, among others.

The proposed rule also discusses the discretion exercised in issuing charging letters and in settling particular cases. The public records are replete with examples of entities, both in the U.S. and abroad, and persons who have violated U.S. export control laws and have been fined or have lost their export privileges. Importantly, fines and penalty cases have been brought against persons in the U.S. and abroad.

Sanctions

Violations may result in either administrative, criminal, or other sanctions, with significant corresponding penalties.

Administrative sanctions include:

(*1*) ***Civil penalties*** of up to U.S.$11,500 per violation (unless involving national security, then up to U.S.$100,000 per violation). The payment may be made a condition to the granting, restoring, or continuing validity of any export license and the payment may be deferred or suspended.

(*2*) ***Denial of Export Privileges*** restricting the ability of the persons from engaging in export and re-export transactions, which may be imposed as a sanction or as a protective measure. It may also revoke or suspend all existing licenses issued and may restrict dealings in which that person may benefit from an export transaction.

(*3*) ***Exclusion from Practice***. Any person acting as an attorney, accountant, consultant, freight forwarder, or other representative capacity may be excluded from practice before BIS.

Criminal sanctions include:

(1) General Fine for a knowing violation or conspiracy of the greater of 5 times the value of the exports or re-exports or U.S.$50,000, or imprisonment for up to 5 years, or both.

(2) Willful violations of EAA, or EAR or a license or order controlled for foreign policy purposes: Fines up to U.S.$ 1,000,000; and, for an individual, a shall of not more than U.S.$250,000, or up to 10 years imprisonment, or both.

(3) Other Criminal sanctions may also be prosecuted under other provisions of U.S. law, including 18 U.S.C. § 371 (conspiracy), 18 U.S.C. § 1001 (false statements), 18 U.S.C. §§ 1341, 1343, and 1346 (mail and wire fraud), and 18 U.S.C. §§ 1956 and 1957 (money laundering).

Other sanctions:

(1) Statutory sanctions on account of actions related to weapons proliferation.

(2) Seizure and forfeiture (50 U.S.C. app. § 2411(g); 22 U.S.C. § 401)).

(3) Cross debarment by the U.S. Department of State, Defense, or other agencies suspending the right to contract with the U.S. government or deny export privileges.

The potential sanctions associated with all of the above programs reveal the importance of understanding how the U.S. export control regime may affect your business. Certainly, given the potential downside, care must be taken to ensure that your procedures support the compliance with these programs. This is ever more important as cross-border trade between the U.S. and Canada expands.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

ENDNOTES TO PART I:

1. We assume that most readers will be familiar with the obligations placed on them by the *Customs Act* in respect of exports of goods from Canada.

2. The *Export and Import Controls Bureau* ("EICB") operates under the direction of the Minister of Foreign Affairs, and authorizes the import and export of goods restricted by quotas and/or tariffs. It also monitors the trade in certain goods and ensures the personal security of Canadians and citizens of other countries by restricting trade in dangerous goods and other materials.

3. Some goods in Group 5 of the *Export Control List* ("ECL") – see below – are the specific responsibility of other divisions in the ECIB. These goods are generally miscellaneous, and the divided responsibility would include as follows: softwood lumber is the responsibility of the Softwood Lumber Task Force, peanut butter and sugar and sugar products is the responsibility of Trade Controls Policy Division.

4. The *Area Control List* ("ACL") is published through DFAIT regulatory powers. Currently only Myanmar is listed on the ACL (Angola having been removed in June 2003).

5. One wonders why "Nuclear Energy Materials and Technology" would not be controlled on "import" to Canada as well.

6. This falls from Canada's various obligations under various multilateral agreements.

7. The EIPA provides that the purposes for which a good may be added to the ECL are as follows:

   (a) to ensure that arms, ammunition, implements or munitions of war, naval, army or air stores or any articles deemed capable of being converted thereinto or made useful in the production thereof or otherwise having a strategic nature or value will not be made available to any destination where their use might be detrimental to the security of Canada;

   (b) to ensure that any action taken to promote the further processing in Canada of a natural resource that is produced in Canada is not rendered ineffective by reason of the unrestricted exportation of that natural resource;

   (c) to limit or keep under surveillance the export of any raw or processed material that is produced in Canada in circumstances of surplus supply and depressed prices and that is not a produce of agriculture;

   (d) to implement an intergovernmental arrangement or commitment;

   (e) to ensure that there is an adequate supply and distribution of the article in Canada for defence or other needs; or

   (f) to ensure the orderly export marketing of any goods that are subject to a limitation imposed by any country or customs territory on the quantity of the goods that, on importation into that country or customs territory in any given period, is eligible for the benefit provided for goods imported within that limitation.

8. Please also note that in addition to the various lists provided for under the EIPA, other Acts and Regulations may also apply, simultaneously or otherwise, to particular goods, or particular situations.

   For example, the countries set out in the *Area Control List* can generally be expected to also be named in the *United Nations Act* ("UNA"), or applicable regulations, and to be subject to additional trade sanctions authorized by UN Security Council (UNSC) Resolution.

   The UNA is a Canadian federal piece of legislation which empowers the Governor in Council to make orders and regulations necessary to enforce, in Canada, U.N. Security Council resolutions or measures, under Article 41 of the Charter of the United Nations. This regulatory power has been used, for example, to promulgate regulations imposing a Canadian trade embargos on countries like Iraq, Libya, Yugoslavia (Serbia And Montenegro), Angola, Sierra Leone and Liberia.

   Readers should note the penalties provided for in the UNA for contraventions, which would amount to offences, and could give rise to (a) on summary conviction, a fine of not more than $100,000 or to imprisonment for a term of not more than one year, or to both; and (b) on conviction on indictment, to imprisonment for a term of not more than 10 years. Serious stuff.

   Exportersinterested in the current status of Canadian enforced U.N. Embargoes should consult the authors.

9. The prescribed application form is currently an *Application for Permit to Export Goods* (Form EXT 1042). The Form is a carbonated, multi-part form, and available only from the EPE in Ottawa (by mail), or can be obtained from any of Industry Canada's International Trade Centre offices.

10. The precise procedures are provided for under regulation. For import permits, the *Import Permit Regulations* ("IPR") apply. For Export Permits, the *Export Permits Regulations*, SOR/97-204 ("EPR") apply.

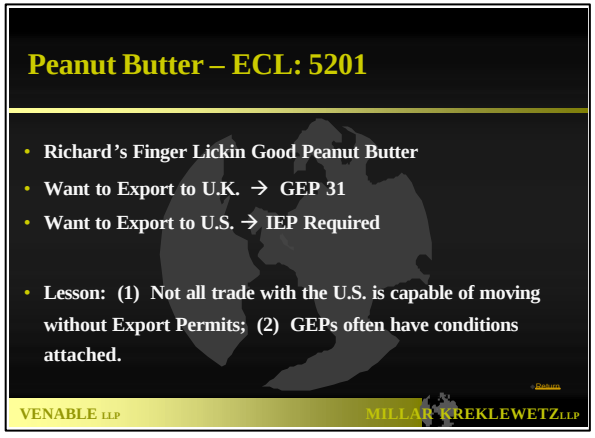
    Please also note the difference between the "Export Permits Regulations", established effective April 15, 1997, and the "Export Permit Regulations" which existed prior to that time, and which were repealed by the EPR.

    Copies of the IPR and EPR are available from the EICB, or the DFAIT generally. An excellent reference resource for the latter, and supported by the Department of Justice, can be found at http://laws.justice.gc.ca/en/E-19/index.html.

11. See Canada Customs' Export Declaration (Form B13A).

12. See the *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies*, reached at the Plenary Meeting of representatives of 33 states in Vienna, Austria on July 11-12, 1996, and more particularly as described in the Initial Elements summarizing the conclusions of that meeting.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER



QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

13. See the *Treaty on the Non-Proliferation of Nuclear Weapons*, signed by Canada at London and Washington on July 23, 1968, and at Moscow on July 29, 1968, and that came into force for Canada on March 5,1970.

    Goods and technology falling under this Group 3 are also provided for under other agreements and treaties, as follows: (a) Canada's obligations under the Information Circular 254/Rev. 2/Part 1 of the *International Atomic Energy Agency* of October 1995; (b) Canada's obligations under the *Exchange of Letters between the European Atomic Energy Community (Euratom) and the Government of Canada amending the Agreement between the European Atomic Energy Community (Euratom) and the Government of Canada for cooperation in the peaceful uses of atomic energy of 6 October 1959*, concluded on July 15, 1991; and (c) Canada's obligations under 23 additional bilateral *Nuclear Co-operation Agreements*, set out in the ECL.

14. Other examples include certain prohibited weapons, nuclear fusion reactors, anti-personnel mines mines antipersonnel, and other special use goods, like articles related to chemical, biological or nuclear weapons.

15. See the various bilateral arrangements concluded by Canada on April 7, 1987, in accordance with the *Guidelines for Sensitive Missile-Relevant Transfers*, issued by the *Missile Technology Control Regime* to control the export of missile equipment and technology that could be used in the development of missile systems capable of delivering nuclear weapons.

16. See (a) Canada's obligations under a bilateral arrangement with the U.S. concluded December 24, 1992, and having been made in accordance with the guidelines established by the Australia Group for the purpose of considering ways to limit the proliferation of chemical and biological weapons; and (b) Canada's obligations under the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, as amended from time to time pursuant to Article XV of that Convention, which was signed at Paris, France, on January 13, 1993.

    Note that the Australia Group serves to define controls to prevent the proliferation and development of chemical and biological weapons.

17. See (a) Canada's obligations under the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* that was signed by Canada at Vienna, Austria on December 20, 1988 and that came into force for Canada on November 11, 1990; and (b) Canada's obligations under the communication of the Secretary-General of the United Nations, dated June 2, 1995, informing Canada of the notification by the United States to the Secretary-General of the United Nations, requesting that the provisions of Article 12, paragraph 10 of the Convention referred to in paragraph (a) apply in respect of the exportation to the United States of the chemicals Ephedrine (item 8011.1) and Pseudoephedrine (item 8011.6).

18. The Regulations do not apply to certain exports of softwood lumber. If you are exporting these products, seek advice.

19. Note that the effect of this requirement is to require an inquiry into whether the particular U.S. origin good is included in Item 5400 of Group 5 of the ECL. That Item includes *all* U.S. origin goods that have not otherwise been "further processed or manufactured outside the United States so as to result in a substantial change in value, form or use of the goods or in the production of new goods."

    The meaning of this requirement is set out further below.

20. Reference will be required to be made to the *Handbook of Export and Import Commodity Codes – 2003* (Revised July 31, 2003). This is available at http://www.dfait-maeci.gc.ca/trade/eicb/general/Bluebook/Handbook-en.asp.

    Note that the Export and Import Commodity Codes correspond, at the H.S. codes used by CBSA for import purposes, but only to the 6 digit level. The other statistical levels differ, between these Departments.

    In practice, the HS Code is often not required by the EPE, although other divisions of the EICB do require it.

21. Where an International Import Certificate (IIC) is required, the exporter must ensure that the importer obtains the IIC from the appropriate import authority of the importing country. The IIC defines the items and quantities of the shipment, and will allow the government of the importing country to ensure that the goods exported are not diverted en route, or upon arrival.

22. Where an End-Use Certificates (EUC) or Import Licences (IL) is necessary, the Canadian exporter must again ensure that the importer obtain the EUC or IL from the importing country. Again, the importer will forward the document obtained to the Canadian exporter who will attach the original to the Export Permit application.

23. In lieu of an end-use certificate or other official assurances about the final use of a good, an End-Use Statement (EUS) from an importer is sometimes acceptable to the EPE. Seek advice if you are asked to obtain one of these.

24. Most countries that issue IICs also issue Delivery Verification Certificates (DV). DVs serve to confirm that the goods have arrived in the importing country, without diversion. There are sometimes required by the EPE.

25. Special rules exist for exports effected by mail or courier service. Essentially, when goods are exported by mail, the Permit under the authority of which they are exported has to be presented by the applicant or the exporter to the appropriate person at the post office where the goods are mailed. The Post Office then stamps the permit and returns it to the nearest customs office.

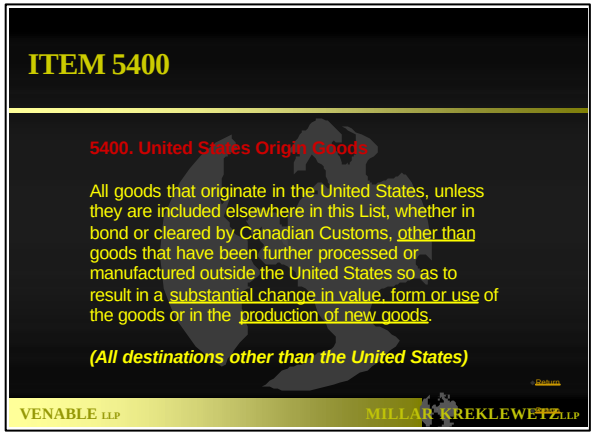
    When goods are exported by courier, the applicant or the exporter has to remit the permit to the courier, together with the goods, and the courier is required to present the permit to the customs office at which the goods are required to be reported.

26. A current list of GEPs was available, at the time of writing, at: http:\\laws.justice.gc.ca/en/E-19/index.html.

27. My understanding is that after January 1, 2004, an Export Permit will be required for exports to the U.S. of Item Nos. 2002 and 2003 (e.g. for certain arms, armaments, and accessories).

28. If the ECL goods are only transiting the U.S. for export to other destinations, an Export Permit will be required based on the country of final destination.

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER



QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

29. *GEP 12 for U.S. Origin Goods.* In addition to the exceptions provided for above, where goods of U.S. Origin are to be exported to countries which are not embargoed by the U.S., the requirements in Item 5400 of the ECL can generally be met by invoking a General Export Permit (GEP) – and specifically, GEP 12 (United States Origin Goods).

    While GEP 12 has not been updated since 1999, it current allows export under the authority of the GEP, any U.S. origin goods falling into Item 5400 of the ECL, to any country other than countries on the ACL, and each of (a) Cuba, (b) Democratic People's Republic of Korea, (c) Iran, and (d) Libya.

30. Note that exceptions exists for goods and technology in Groups 3 and 4 of the ECL, and some goods and technology in Groups 2, 5, 7 and 8, which can require an IEP even when the final destination is the U.S.

    These requirements are found under the rubric of the individual ECL Items, and accordingly, when dealing with ECL items, or goods and technology remotely related to these ECL items, it becomes necessary to review the ECL and the Guide to determine what permits are required.

31. Specifically, Item 5504 was added to the ECR to further harmonize the ECR with the USML.

32. The CGRP is administered by the Department of Public Works and Government Services Canada ("PWGSC").

33. Specifically, a U.S. export authorization is required in respect of the following goods:

    (i) any controlled goods that are goods of United States origin,

    (ii) any goods incorporating any goods of United States origin that are controlled goods, or

    (iii) any goods manufactured in Canada using any goods of United States origin that are controlled goods.

34. Note that the CAED Authorization ID is composed of 2 alpha/4 numeric digits e.g. SC1234. The Form ID is composed of the year/month/and five digit transaction number which refers to the # of shipments exported during the year. The carrier must then note the exporter's proof of report authorization ID and form ID on the bills of lading or air waybills, e.g. SC123420031000546.

35. Like the situation under the CAED, if the goods to be exported require a permit, then in addition to the requirement to notate the CAED Authorization ID and Form ID (CAED transaction number) on the bills of lading or air waybills, the exporter is also required to print a paper copy of the declaration and submit it to Customs along with the permit. The carrier then notes the exporter's proof of report authorization ID and form ID (CAED transaction number) on the bills of lading or air waybills, e.g. RC123420031000546.

36. Written authorization to report in this manner must be granted by customs before it can be used. Goods that are controlled, regulated or prohibited do not normally qualify for this program. In the Reporting of Exported Goods Regulations controlled, regulated or prohibited goods are referred to as restricted goods.

37. In the case of goods shipped by marine mode, this program also eliminates the need for a B13A report that needs to be submitted prior to export and then corrected after loading due to the load, quantity, and/or value being determined by the ballast of the ship.

38. The carrier must note the exporter's proof of report export summary reporting number on the bills of lading, so that the exporter is clearly identified as a summary reporter, e.g. SUM1234.

39. All ports have a manual log to backup their date stamp machine in case of mechanical problems. Also, where no machine is available, this log will be used to record the transaction number assigned by a customs officer to three copies of the B13A. Customs offices will not accept fax transmissions of B13As.

    A revised B13A Export Declaration is being issued with a customs notice in the near future.

40. The carrier must notate the export transaction number (proof of report) on the bills of lading or air waybills, e. g. 2003/11/01/ 13:00 497 000235 (year/month/day/24 hour clock/port number/6 digit transaction number).

41. One of the changes for the carrier under the revised export regulations will be that all carriers will be required to submit all cargo data prior to export. MOU carriers have the option of signing a no report/no load policy in which they will be allowed to report their cargo after exportation according to the time frames specified by mode. The exporting carrier is required to obtain the Customs export (proof of report) number for goods to be exported.

    If a freight forwarder or other service provider is presenting these goods to the exporting carrier, goods will not be loaded without all the proof of reports for all cargo. MOU carriers must ensure that the proof of report number from the B13A, CAED, G7 EDI or Summary Reporting is noted on the bills of lading/air waybills. Where no declaration is required (NDR), due to exceptions to reporting, the carrier/service provider must indicate NDR on the bills of lading/air waybills.

ENDNOTES TO PART II:

1. Automated Export System Mandatory Filing for Items of the Commerce Control List (CCL) and the United States Munitions List (USML) that Currently Require a Shipper's Export Declaration, Final Rule, 68 Fed. Reg. 42,534 (July 17, 2003).

2. In September 2003, the U.S. Government imposed a civil penalty against a freight forwarding company and agreed to a settlement in the amount of $5,000 to resolve charges that the company facilitated an export to a company in Taiwan that was, at the time, denied U.S. export privileges. And, earlier this year, another U.S. freight-forwarding company pleaded guilty today in U.S. District Court to a two-count Information, charging violations of the International Emergency Economic Powers Act and the Export Administration Act and admitted to forwarding over 30 shipments to India, from 1999 through 2001 in violation of U.S. Department of Commerce export controls designed to prevent nuclear proliferation.

EXPORT CONTROLS – And your Trade with the United States and Abroad

Presented at the 2005 CCCA Annual Spring Conference (April 18, 2005)

ROBERT G. KREKLEWETZ
LINDSAY B. MEYER

QUESTIONS ?

Please reach us as follows:

ROBERT G. KREKLEWETZ
Millar Kreklewetz LLP

Telephone: (416) 864 - 6200
Facsimile: (416) 864 - 6201

E-Mail: rgk@taxandtradelaw.com
Web: www.taxandtradelaw.com

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829
Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com
Web: www.venable.com

ROBERT G. KREKLEWETZ, LL.B., M.B.A.

Rob is a partner at MILLAR KREKLEWETZ LLP, with an LL.B. from Osgoode Hall Law School, and a M.B.A. from York University.

Extensive Customs, Trade & Commodity Tax Experience. Rob's practice focuses on **Customs & Trade** matters, including Periodic Verification Audits and Voluntary Disclosures concerning Valuation, Tariff Class Origin, or Marking issues, and NAFTA Origin Verification Reviews, Forfeitures, Seizures, and other NAFTA & WTO issues. Rob's practice area also focuses on **Commodity Taxes**, which encompasses all issues involving Canada's Goods and Services Tax (GST) and Harmonized Sales Tax (HST), as well the various other provincial sales taxes, including Ontario RST and Quebec QST. All elements of Millar Kreklewetz's practice include **Tax and Trade Litigation**, and Rob has acted as lead counsel in the CITT, Tax Court of Canada, Federal Court of Appeal, Ontario Court of Justice, and the Ontario Court of Appeal.

Speaking Engagements / Publications. Rob has 17 years of experience, published over **325 articles & papers**, and spoken at over **125 conferences** in each of the areas described above. He continues to write and speak extensively, regularly addressing the Canadian Association of Importers & Exporters (IE Canada), at its annual and semi-annual conferences, and various seminars, and bodies like the Tax Executive Institute (TEI), Canadian Tax Foundation, Canadian Bar Association (CBA), and Canadian Institute of Chartered Accountants (CICA), as well as speaking at many other professional conferences.

Client Base. MILLAR KREKLEWETZ LLP has some of the best tax and trade files in Canada, and Rob advises blue chip corporate clients who are international leaders in:

- Airlines, Avionics & Aerospace
- Oil & Gas
- Chemicals & Petrochemicals
- Forestry Products
- Steel
- Drugs & Pharmaceuticals
- Medical Testing & Health Services
- Computer Hardware & Software
- Information Technology
- IT & Internet Solutions
- Banking
- Financial Services
- Leasing
- Publishing
- Public Sector
- Manufacturing
- Wholesaling
- Retailing
- Direct Mail
- Direct Selling

We are proud to announce that the International Tax Review has ranked us as the top Canadian law firm in our field for three consecutive years – "Indirect & State and Local Taxes".

LINDSAY B. MEYER, J.D.

Lindsay is a partner at Venable LLP, with an J.D. from George Washington University, National Law Center and a licensed U.S. Customs Broker.

Extensive Trade, Customs and Export Control Experience. For over sixteen years, Lindsay has provided **International Trade and Customs** advice at Venable where she heads its International Practice, located in Washington, D.C., concentrating on **Customs & International Trade** matters, including representation during U.S. Customs Focused Assessments, NAFTA Audits, C-TPAT, ISA Programs, Detentions, Forfeitures, Seizures, other Customs-related matters. She regularly provides strategic customs and trade counseling to Fortune 100 clients, by conducting Pre-Assessment Compliance Reviews including corporate-wide, multi-location assessments and training programs, and by representing companies before the U.S. Bureau of Customs and Border Protection, the Court of International Trade, and U.S. Court of Appeals for the Federal Circuit. Lindsay has extensive experience counseling companies on compliance with export controls regulated by the Departments of Commerce, State and Treasury and performing Export Control Assessments. Lindsay has also successfully represented companies in antidumping duty investigations and reviews before the U.S. Department of Commerce and International Trade Commission and on appeal. Lindsay also advises clients on **International Transactional** matters, where she counsels on strategic sourcing, sales and distribution arrangements in the U.S. and abroad; the use of foreign agents, affiliated offices, and joint ventures.

Venable LLP's Client Base. As one of *The American Lawyer*'s top 100 law firms, Venable LLP has lawyers practicing in all areas of corporate and business law, litigation, intellectual property and government affairs. Venable serves corporate, institutional, governmental, nonprofit and individual clients in the U.S. and around the world from its base of operations in and around Washington, DC. Likewise, Lindsay's clients range from multinational manufacturers to start-up enterprises from a wide variety of industries including high technology, chemical, petrochemical, pharmaceutical, automotive, avionics, space control equipment, steel, and retail industries.

Speaking Engagements / Publications / Memberships. Lindsay is also very active in business and trade associations related to her profession, and in her fourth term as Chair of the International Trade and Customs Committee for the ABA's Section of Administrative Law and Regulatory Practice, is a member of the American Association of Exporters and Importers, and was appointed by the U.S. Secretary of Commerce to the Maryland-Washington District Export Council.