

Blakes Bulletin

International Trade & Investment

Consultation on Cryptography Exemption to Licensing of Exports of Information Security Technology

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The Department of Foreign Affairs and International Trade is currently engaged in consultations relating to export controls of goods or technology employing cryptography. The government is seeking information on the way in which different countries are interpreting the scope of an export licence exemption for products sold at the retail level to the general public. The consultation is in regards to those that have obtained a ruling or have received other supplementary information from the U.S., European or other Wassenaar Arrangement participating states on the operation of the exemption in that foreign country. These consultations are ongoing, with submissions by interested parties due by April 30, 2010.

Canada restricts the export of certain goods and technology. Many such restrictions are found in Canada's *Export Control List*. When a good or technology is captured by the *Export Control List*, the exporter must first obtain an export permit before shipping the good or technology abroad, although many restrictions do not apply to exports to the U.S. provided the goods or technology are used in the U.S. and not merely transferred to a third country through the U.S. Among other things, the government uses the *Export Control List* to bring into force commitments made by Canada as a party to various international agreements regulating the export of goods and technology. One such agreement is the Wassenaar Arrangement, which was first established in the mid-1990s and currently has 40 states as parties. The Wassenaar Arrangement requires the parties to restrict the export of certain strictly military goods and technology and such items that may have both a military or commercial "dual-use." Canada has included several categories of items to its *Export Control List* as a result of its participation in this arrangement. One such "dual-use" category is "Information Security," which is listed in Group 1 Category 5 Part 2 of the *Export Control List*. It

encompasses items employing cryptography with, in the case of a symmetric algorithm, a key-length greater than 56 bits. As a consequence of these restrictions, Canadian exporters must obtain export permits for many goods containing cryptography prior to exporting such items to locations other than the U.S.

A significant aspect of the Wassenaar provisions is an exemption from the requirement to obtain an export permit for certain commercial cryptography items sold to the general public. This is known as the Wassenaar Arrangement Cryptography Note (the Note) and has existed in its present form since 2000. In general, the Note exempts items where the item is sold to the public at a retail level, can be installed by the user without substantial support, and where the cryptographic function cannot be easily altered by the user.

While the Note is implemented by the other Wassenaar Arrangement countries, including the U.S. and countries of the European Union, the Canadian government has recognized that, over time, divergent interpretations of the Note may have developed. In particular, Canada has recognized that its interpretation of the export licence exemption may be different than that applied by other Wassenaar Arrangement countries. As such, the government is now in the process of gathering information on the way in which other parties have interpreted this clause. Specifically, the government has asked for input from Canadian companies and individuals who have received either a former ruling or received some other supplemental information on this issue from another Wassenaar Arrangement country.

While the government has not explicitly stated any purpose for these consultations other than to collect information on the issue of interpretation of the Note, it is possible that the consultation process could lead the government to adopt a broader interpretation of the Note should this be consistent with how other Wassenaar Arrangement countries are interpreting the Note. This would allow more Information Security goods or technology to qualify for the exemption and allow exporters to ship such items abroad without applying for a permit. In consequence, Canadian companies

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and individuals who export or may export goods or technology containing cryptography and have a relevant foreign country ruling or supplementary information on this issue may want to consider participating in the consultations by making representations to the government.

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