

Department of State

§ 126.5

the exporter certifying that these requirements have been met must be presented at the time of export to the appropriate Port Director of U.S. Customs and Border Protection or Department of Defense transmittal authority. A copy of the SED and the written certification statement shall be provided to the Directorate of Defense Trade Controls immediately following the export.

[58 FR 39312, July 22, 1993, as amended at 70 FR 50964, Aug. 29, 2005]

§ 126.5 Canadian exemptions.

(a) *Temporary import of defense articles.* Port Director of U.S. Customs and Border Protection and postmasters shall permit the temporary import and return to Canada without a license of any unclassified defense articles (see § 120.6 of this subchapter) that originate in Canada for temporary use in the United States and return to Canada. All other temporary imports shall be in accordance with §§ 123.3 and 123.4 of this subchapter.

(b) *Permanent and temporary export of defense articles.* Except as provided below, the Port Director of U.S. Customs and Border Protection and postmasters shall permit, when for end-use in Canada by Canadian Federal or Provincial governmental authorities acting in an official capacity or by a Canadian-registered person or return to the United States, the permanent and temporary export to Canada without a license of defense articles and related technical data identified in 22 CFR 121.1. The above exemption is subject to the following limitations: Defense articles and related technical data, and defense services identified in paragraphs (b)(1) through (b)(21) of this section and exports that transit third countries. Such limitations also are subject to meeting the requirements of this subchapter, (to include 22 CFR 120.1(c) and (d), parts 122 and 123 (except insofar as exemption from licensing requirements is herein authorized) and § 126.1, and the requirement to obtain non-transfer and use assurances for all significant military equipment. For purposes of this section, "Canadian-registered person" is any Canadian national (including Canadian business entities organized under the laws

of Canada), dual citizen of Canada and a third country (subject to § 126.1), and permanent resident registered in Canada in accordance with the Canadian Defense Production Act, and such other Canadian Crown Corporations identified by the Department of State in a list of such persons publicly available through the Internet Web site of the Directorate of Defense Trade Controls and by other means. The defense articles, related technical data, and defense services identified in 22 CFR 121.1 continuing to require a license are:

(1) All classified articles, technical data and defense services covered by § 121.1 of this subchapter.

(2) All Missile Technology Control Regime (MTCR) Annex Items.

(3) Defense services covered by part 124 of this subchapter, except for those in paragraph (c) of this section.

(4) Any transaction involving the export of defense articles and defense services for which congressional notification is required in accordance with § 123.15 and § 124.11 of this subchapter.

(5) All technical data and defense services for gas turbine engine hot sections covered by Categories VI(f) and VIII(b). (This does not include hardware).

(6) Firearms, close assault weapons and combat shotguns listed in Category I.

(7) Ammunition listed in Category III for the firearms in Category I.

(8) Nuclear weapons strategic delivery systems and all components, parts, accessories and attachments specifically designed for such systems and associated equipment.

(9) Naval nuclear propulsion equipment listed in Category VI(e).

(10) All Category VIII(a) items, and developmental aircraft, engines and components identified in Category VIII(f).

(11) All Category XII(c), except any 1st- and 2nd-generation image intensification tube and 1st- and 2nd-generation image intensification night sighting equipment. End items (see § 121.8 of this subchapter) in Category XII(c) and related technical data limited to basic operations, maintenance and training information as authorized under the exemption in § 125.4(b)(5) of this subchapter may be exported directly to a

§ 126.5

22 CFR Ch. I (4-1-11 Edition)

Canadian Government entity (*i.e.* federal, provincial, territorial, or municipal) without a license.

(12) Chemical agents listed in Category XIV (a), (d), and (e), biological agents and biologically derived substances in Category XIV (b), and equipment listed in Category XIV (f) for dissemination of the chemical agents and biological agents listed in Category XIV (a), (b), (d), and (e).

(13) Nuclear radiation measuring devices manufactured to military specifications listed in Category XVI(c).

(14) All spacecraft in Category XV(a), except commercial communications satellites.

(15) Category XV(c), except end items (see §121.8 of this subchapter) for end use by the Federal Government of Canada exported directly or indirectly through a Canadian-registered person.

(16) Category XV(d).

(17) The following systems, components and parts included within the coverage of Category XV(e):

(i) Anti-jam systems with the ability to respond to incoming interference by adaptively reducing antenna gain (nulling) in the direction of the interference.

(ii) Antennas:

(A) With aperture (overall dimension of the radiating portions of the antenna) greater than 30 feet; or

(B) With all sidelobes less than or equal to -35dB, relative to the peak of the main beam; or

(C) Designed, modified, or configured to provide coverage area on the surface of the earth less than 200 nautical miles in diameter, where "coverage area" is defined as that area on the surface of the earth that is illuminated by the main beam width of the antenna (which is the angular distance between half power points of the beam).

(iii) Optical intersatellite data links (cross links) and optical ground satellite terminals.

(iv) Spaceborne regenerative baseband processing (direct up and down conversion to and from baseband) equipment.

(v) Propulsion systems which permit acceleration of the satellite on-orbit (*i.e.*, after mission orbit injection) at rates greater than 0.1g.

(vi) Attitude control and determination systems designed to provide spacecraft pointing determination and control or payload pointing system control better than 0.02 degrees per axis.

(vii) All specifically designed or modified systems, components, parts, accessories, attachments, and associated equipment for all Category XV(a) items, except when specifically designed or modified for use in commercial communications satellites.

(18) Nuclear weapons, design and testing equipment listed in Category XVI.

(19) Submersible and oceanographic vessels and related articles listed in Category XX(a) through (d).

(20) Miscellaneous articles covered by Category XXI.

(21) Man-portable air defense systems, and their parts and components, and technical data for such systems covered by Category IV.

(c) *Defense service exemption.* A defense service is exempt from the licensing requirements of part 124 of this subchapter, when the following criteria can be met.

(1) The item, technical data, defense service and transaction is not identified in paragraphs (b)(1) through (21) of this section; and

(2) The transfer of technical data and provision of defense service is limited to the following activities:

(i) Canadian-registered person or a registered and eligible U.S. company (in accordance with part 122 of this subchapter) preparing a quote or bid proposal in response to a written request from a Department or Agency of the United States Federal Government or from a Canadian Federal, Provincial, or Territorial Government; or

(ii) Produce, design, assemble, maintain or service a defense article (*i.e.*, hardware, technical data) for use by a registered U.S. company; or, a U.S. Federal Government Program; or for end use in a Canadian Federal, Provincial, or Territorial Government Program; and

(iii) The defense services and technical data are limited to that defined in paragraph (c)(6) of this section; and

(3) The Canadian contractor and subcontractor certify, in writing, to the U.S. exporter that the technical data

and defense service being exported will be used only for an activity identified in paragraph (c)(2) of this section; and

(4) A written arrangement between the U.S. exporter and the Canadian recipient (such as a consummated Non-Disclosure or other multi-party agreement, Technology Transfer Control Plan, contract or purchase order) must:

(i) Limit delivery of the defense articles being produced directly to an identified manufacturer in the United States registered in accordance with part 122 of this subchapter; a Department or Agency of the United States Federal Government; a Canadian-registered person authorized in writing to manufacture defense articles by and for the Government of Canada; a Canadian Federal, Provincial, or Territorial Government; and

(ii) Prohibit the disclosure of the technical data to any other contractor or subcontractor who is not a Canadian-registered person; and

(iii) Provide that any subcontract contain all the limitations of this section; and

(iv) Require that the Canadian contractor, including subcontractors, destroy or return to the U.S. exporter in the United States all of the technical data exported pursuant to the contract or purchase order upon fulfillment of the contract, unless for use by a Canadian or United States Government entity that requires in writing the technical data be maintained. The U.S. exporter must be provided written certification that the technical data is being retained or destroyed; and

(v) Include a clause requiring that all documentation created from U.S. technical data contain the statement, "This document contains technical data, the use of which is restricted by the U.S. Arms Export Control Act. This data has been provided in accordance with, and is subject to, the limitations specified in §126.5 of the International Traffic In Arms Regulations (ITAR). By accepting this data, the consignee agrees to honor the requirements of the ITAR"; and

(5) The U.S. exporter must provide the Directorate of Defense Trade Controls a semi-annual report of all their on-going activities authorized under this section. The report shall include

the article(s) being produced; the end user(s) (*i.e.*, name of U.S. or Canadian company); the end item into which the product is to be incorporated; the intended end use of the product (e.g., United States or Canadian Defense contract number and identification of program); the name and address of all the Canadian contractors and subcontractors; and

(6) The defense services and technical data are limited to those in paragraphs (c)(6)(i), (ii), (iii) and (iv), and do not include paragraphs (c)(6)(v), (vi) and (vii) of this section:

(i) *Build-to-print*. "Build-to-print" means that a foreign consignee can produce a defense article from engineering drawings without any technical assistance from a U.S. exporter. This transaction is based strictly on a "hand-off" approach because the foreign consignee is understood to have the inherent capability to produce the defense article and only lacks the necessary drawings. Supporting documentation such as acceptance criteria, and specifications, may be released on an as-required basis (*i.e.* "must have") such that the foreign consignee would not be able to produce an acceptable defense article without this additional supporting documentation. Documentation which is not absolutely necessary to permit manufacture of an acceptable defense article (*i.e.* "nice to have") is not considered within the boundaries of a "Build-to-print" data package; and/or

(ii) *Build/Design-to-specification*. "Build/Design-to-specification" means that a foreign consignee can design and produce a defense article from requirement specifications without any technical assistance from the U.S. exporter. This transaction is based strictly on a "hands-off" approach since the foreign consignee is understood to have the inherent capability to both design and produce the defense article and only lacks the necessary requirement information; and/or

(iii) *Basic research*. "Basic research" means a systemic study directed toward greater knowledge or understanding of the fundamental aspects of phenomena and observable facts without specific applications towards processes or products in mind. It does not

include “Applied Research” (*i.e.* a systemic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met. It is a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.); and

(iv) *Maintenance* (*i.e.*, inspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items, parts or components, but excluding any modification, enhancement, upgrade or other form of alteration or improvement that changes the basic performance of the item); and does not include

(v) *Design methodology*, such as: The underlying engineering methods and design philosophy utilized (*i.e.*, the “why” or information that explains the rationale for particular design decision, engineering feature, or performance requirement); engineering experience (e.g., lessons learned); and the rationale and associated databases (e.g., design allowables, factors of safety, component life predictions, failure analysis criteria) that establish the operational requirements (e.g., performance, mechanical, electrical, electronic, reliability and maintainability) of a defense article. (Final analytical results and the initial conditions and parameters may be provided.)

(vi) *Engineering analysis*, such as: Analytical methods and tools used to design or evaluate a defense article’s performance against the operational requirements. Analytical methods and tools include the development and/or use of mockups, computer models and simulations, and test facilities. (Final analytical results and the initial conditions and parameters may be provided.)

(vii) *Manufacturing know-how*, such as: Information that provides detailed manufacturing processes and techniques needed to translate a detailed design into a qualified, finished defense article. (Information may be provided in a build-to-print package identified in paragraph (c)(6)(i) of this section that is necessary in order to produce an acceptable defense article.).

(d) *Reexports/retransfer*. Reexport/retransfer in Canada to another end user or end use or from Canada to another destination, except the United States, must in all instances have the prior approval of the Directorate of Defense Trade Controls. Unless otherwise exempt in this subchapter, the original exporter is responsible, upon request from a Canadian-registered person, for obtaining or providing reexport/retransfer approval. In any instance when the U.S. exporter is no longer available to the Canadian end user the request for reexport/retransfer may be made directly to Department of State, Directorate of Defense Trade Controls. All requests must include the information in §123.9(c) of this subchapter. Reexport/retransfer approval is acquired by:

(1) If the reexport/retransfer being requested could be made pursuant to this section (*i.e.*, a retransfer within Canada to another eligible Canadian recipient under this section) if exported directly from the U.S., upon receipt by the U.S. company of a request by a Canadian end user, the original U.S. exporter is authorized to grant on behalf of the U.S. Government by confirming in writing to the Canadian requester that the reexport/retransfer is authorized subject to the conditions of this section; or

(2) If the reexport/retransfer is to an end use or end user that, if directly exported from the U.S. requires a license, retransfer must be handled in accordance with §123.9 of this subchapter.

NOTES TO §126.5: 1. In any instance when the exporter has knowledge that the defense article exempt from licensing is being exported for use other than by a qualified Canadian-registered person or for export to another foreign destination, other than the United States, in its original form or incorporated into another item, an export license must be obtained prior to the transfer to Canada.

2. Additional exemptions exist in other sections of this subchapter that are applicable to Canada, for example Secs. 123.9, 125.4 and 124.2, which allows for the performance of defense services related to training in basic operations and maintenance, without a license,

Department of State

§ 126.6

for defense articles lawfully exported, including those identified in paragraphs (b)(1) through (21) of this section.

[66 FR 10576, Feb. 16, 2001; 66 FR 36834, July 13, 2001, as amended at 67 FR 78686, Dec. 26, 2002; 70 FR 34654, June 15, 2005; 70 FR 39919, July 12, 2005; 70 FR 50964, Aug. 29, 2005; 71 FR 20546, Apr. 21, 2006]

§ 126.6 Foreign-owned military aircraft and naval vessels, and the Foreign Military Sales program.

(a) A license from the Directorate of Defense Trade Controls is not required if:

(1) The article or technical data to be exported was sold, leased, or loaned by the Department of Defense to a foreign country or international organization pursuant to the Arms Export Control Act or the Foreign Assistance Act of 1961, as amended, and

(2) The article or technical data is delivered to representatives of such a country or organization in the United States; and

(3) The article or technical data is to be exported from the United States on a military aircraft or naval vessel of that government or organization or via the Defense Transportation Service (DTS).

(b) *Foreign military aircraft and naval vessels.* A license is not required for the entry into the United States of military aircraft or naval vessels of any foreign state if no overhaul, repair, or modification of the aircraft or naval vessel is to be performed. However, Department of State approval for overflight (pursuant to the 49 U.S.C. 40103) and naval visits must be obtained from the Bureau of Political-Military Affairs, Office of International Security Operations.

(c) *Foreign Military Sales Program.* A license from the Directorate of Defense Trade Controls is not required if the defense article or technical data or a defense service to be transferred was sold, leased or loaned by the Department of Defense to a foreign country or international organization under the Foreign Military Sales (FMS) Program of the Arms Export Control Act pursuant to an Letter of Offer and Acceptance (LOA) authorizing such transfer which meets the criteria stated below:

(1) Transfers of the defense articles, technical data or defense services using

this exemption may take place only during the period which the FMS Letter of Offer and Acceptance (LOA) and implementing USG FMS contracts and subcontracts are in effect and serve as authorization for the transfers hereunder in lieu of a license. After the USG FMS contracts and subcontracts have expired and the LOA no longer serves as such authorization, any further provision of defense articles, technical data or defense services shall not be covered by this section and shall instead be subject to other authorization requirements of this subchapter; and

(2) The defense article, technical data or defense service to be transferred are specifically identified in an executed LOA, in furtherance of the Foreign Military Sales Program signed by an authorized Department of Defense Representative and an authorized representative of the foreign government, and

(3) The transfer of the defense article and related technical data is effected during the duration of the relevant Letter of Offer and Acceptance (LOA), similarly a defense service is to be provided only during the duration of the USG FMS contract or subcontract and not to exceed the specified duration of the LOA, and

(4) The transfer is not to a country identified in §126.1 of this subchapter, and

(5) The U.S. person responsible for the transfer maintains records of all transfers in accordance with part 122 of this subchapter, and

(6) For transfers of defense articles and technical data,

(i) The transfer is made by the relevant foreign diplomatic mission of the purchasing country or its authorized freight forwarder, provided that the freight forwarder is registered with the Directorate of Defense Trade Controls pursuant to part 122 of this subchapter, and

(ii) At the time of shipment, the Port Director of U.S. Customs and Border Protection is provided an original and properly executed DSP-94 accompanied by a copy of the LOA and any other documents required by U.S. Customs and Border Protection in carrying out its responsibilities. The Shippers Export Declaration or, if authorized, the