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PUBLICATION

Canada-US Beyond the Border Action Plan Proposes Immigration-Related Initiatives

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INTRODUCTION

On February 4, 2011, President Obama and Prime Minister Harper announced the United States-Canada joint declaration, *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness*. It contemplated a shared approach to security in which both countries would work together to address threats within, at, and away from the border, while expediting lawful trade and travel.

On December 7, 2011, Obama and Harper released their *Beyond the Border Action Plan* (the "Plan") which discusses, among other things, their shared vision for perimeter security. In furtherance of this objective, the Plan proposes several immigration-related initiatives. The United States and Canada state that they will:

a) Use a common approach to screening methodologies and programs, including pre-travel screening and targeting; “board/no-board” perimeter screening and decision processes, and technology;

b) Share relevant, reliable, and accurate information within the legal and privacy regimes of both countries, such as information contained on biographic and biometric national security watchlists, certain traveler criminal history records, and immigration violations; and

c) Share United States–Canada entry data at the land border such that the entry information from one country could constitute the exit information from another through an integrated entry and exit system.

Each of these initiatives is described in further detail below.

COMMON APPROACH TO SCREENING

In connection with this initiative, Canada has agreed to implement two initiatives over the next 4 years: (a) the Electronic Travel Authorization ("eTA"), to improve screening of all visa-exempt foreign nationals, and (b) Interactive Advance Passenger Information ("IAPI") to make “board or no-board” decisions on all travelers flying to Canada prior to departure. A brief description of each appears below:

a) The eTA initiative mirrors the *Advance Passenger Information System* ("APIS") currently in place in the United States; APIS enables the Department of Homeland Security ("DHS") to collect manifest information for international flights departing from or arriving in the United States and to compare them to relevant watchlists prior to the issuance of a boarding pass; Canadian citizens are subject to APIS so it is reasonable to assume that United States citizens will be subject to eTA once it is implemented.

b) IAPI mirrors the *Electronic System for Travel Authorization* ("ESTA"), which currently applies to foreign nationals who travel to the United States under the Visa Waiver Program ("VWP"). Canadian citizens are visa exempt but not as a result of the VWP so they are not currently subject to ESTA. It is therefore reasonable to assume that United States citizens will not be subject to eTA, once it is implemented.

SHARE RELEVANT INFORMATION TO IMPROVE IMMIGRATION AND BORDER DETERMINATIONS

In connection with this initiative, the United States and Canada have agreed to:

a) Share risk assessment/targeting scenarios, and enhance real time notifications regarding the arrival of individuals on U.S. security watchlists;

b) Provide access to information on those who have been removed or who have been refused admission or a visa from either country, as well as those who have been removed from their respective countries for criminal reasons; and

c) Implement a systematic and automated biographic information sharing capability by 2013 and biometric information sharing capability by 2014 to reduce identity fraud and enhance screening decisions, and in support of other administrative and enforcement actions.

This initiative has raised concerns among privacy advocates, who claim that Canada may be sharing too much information with the United States. Although some of this information is already shared between United States Customs & Border Protection ("USCBP") and the Canadian Border Services Agency ("CBSA"), the Plan proposes even greater sharing of information between the two countries, including:

a) Sharing information concerning who has been removed, denied admission, or refused a visa from the other country; this information has not traditionally been shared between the two countries. Access to this level of information could adversely affect an applicant's ability to enter the destination country even when they have not previously violated the laws of that country. Not all denials of admission or visa refusals are based on valid grounds of

inadmissibility but may have the effect of prejudicing an immigration officer's decision to admit or deny a specific passenger.

b) Implementing automated biographic information and biometric information sharing capability; this certainly has the potential to violate the privacy rights of Canadian and United States citizens. It remains to be seen how much sensitive information will actually be shared once this initiative has been implemented.

ESTABLISH AND COORDINATE ENTRY AND EXIT INFORMATION SYSTEMS

In connection with this initiative, Canada and the United States have committed to developing a system to exchange biographical information on the entry of travelers, including citizens, permanent residents, and third country nationals, such that a record of entry into one country could be considered as a record of an exit from the other. With regard to air travel, Canada has committed to develop (by June 30, 2014) a system to establish exits, similar to that in the United States, under which airlines will be required to submit their passenger manifest information on outbound international flights.

The United States has been trying to develop and entry-exit control system since it passed Section 110 of the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* ("IIRIRA"). However, it was never able to develop an efficient exit control system to track the departure of foreign nationals.

USCBP has implemented an informal exit control system by requiring most departing passengers to surrender their Form I-94 Departure Records at the time of their exit (Canadian citizens entering as visitors for business or pleasure are not issued Form I-94s). However, it is hardly an effective or reliable system. This initiative will eventually allow the United States to track the departure of foreign nationals from the United States by outsourcing the task to CBSA.

Perhaps sharing the Canadian entry information of foreign nationals departing from the United States by land is not a serious concern for Canada, since CBSA must inspect these foreign nationals in connection with their application for admission to Canada and since an entry into Canada is clearly evidence of their departure from the United States. However, Canada's commitment to share the exit information of foreign nationals departing from Canada by air on international flights may be going a bit too far.

While there may be a legitimate need for the United States to know when a foreign national has entered Canada (i.e. to verify his or her departure from the United States), there is no justification for sharing information on foreign nationals who are departing Canada for a destination other than the United States. If they are in Canada and are not travelling to the United States, there appears to be no legitimate reason why the United States would need this information.

CONCLUSION

Although some of the above initiatives are potentially controversial (in some cases, potentially unjustifiable), it is still only an action plan. None of the immigration-related initiatives described in the Plan have been implemented yet and it may be some time before this occurs. It will be interesting to see how Canada and the United States ultimately implement these initiatives in the future.