Amendment to the Export Administration Regulations: Elimination of the De Minimis Rule for Category 7A Commodities
73 Fed. Reg. 70322 (November 20, 2008)

Comments on the Notice of Proposed Rulemaking
Submitted by email to publiccomments@bis.doc.gov

Submitted by the
Aviation Suppliers Association

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January 20, 2009

U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
ATTN: 7A/De minimis
Room H-2705
Washington, DC 20230

Dear Sir or Madam:

Please accept these comments on the proposed rule, Amendment to the Export Administration Regulations: Elimination of the De Minimis Rule for Category 7A Commodities, which was offered to the public for comment at 73 Fed. Reg. 70322 on November 20, 2008.

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Who is ASA?

Founded in 1993, ASA represents the aviation parts distribution industry, and has become known as an organization that fights for safety in the aviation marketplace. ASA primarily represents civil aircraft parts distributors.

ASA members buy and sell aircraft parts. These aircraft parts transactions take place domestically and internationally. Many distributors sell aircraft parts that are 7A commodities or that incorporate 7A commodities. ASA members have found that foreign buyers are concerned about US export compliance, and that compliance issues influence their purchasing decisions. As a consequence, ASA's members have a great interest in maintaining the *de minimis* rule as a part of the Export Administration Regulations (EAR).

Comments on the Proposed Rule

General Comments/Overview

The proposed change to eliminate the *de minimis* standard would unnecessarily punish distributors and manufacturers, and cripple trade in avionics commodities, without providing any correlative benefit to the United States.

In the marketplace, the Category 7A commodities (and their components) affected by the proposed elimination of the *de minimis* rule can be easily obtained from non-U.S. manufacturers.

For purposes of the aerospace community, category 7A represents avionics components. The de minimis standard allows US suppliers to provide avionics subcomponents to foreign manufacturers. Foreign manufacturers generally will try to keep the level of US content below the *de minimis* threshold because the US export restrictions are perceived to be onerous (without regard to whether they truly are as onerous as they seem). The 25% *de minimis* standard has encouraged foreign manufacturers to rely on US components in their avionics designs.

This affects the market for parts in new components and it also affects the market for parts to be used in repair. Generally, the standard for aviation repair outside the United States is that the parts installed during maintenance must be those found in the original equipment manufacturer's manual, or those otherwise found acceptable by the government.[1] This means that if the European manufacturer of avionics decides to discontinue using US components because of the elimination of the *de minimis* rule, the change to non-US suppliers will also likely prevent the European installers from installing the US components that may have been used in earlier versions of the product. Thus, eliminating the *de minimis* rule affects the aftermarket as well as the original equipment market.

Eliminating the De Minimis Rule Would Result In Fewer US Export Because Foreign Suppliers Are Available

The elimination of the *de minimis* rule would cause initial inconvenience to European manufacturers and distributors, but it would likely NOT have a long term effect on non-US parties due to the fact that most avionics components of the sort that are most critical are available from overseas suppliers. For example, accelerometers of the sort that the United States considerers to be missile technology are available from CORRSYS-DATRON (Germany), Siemens (Germany), Murata (Japan) and BAE (UK). Similarly, gyros/angular rate sensors of the sort that the United States considerers to be missile technology are available from CORRSYS-DATRON (Germany), Siemens (Germany), and Murata (Japan). Thus, the most critical items are available from foreign sources.

[1] See., e.g., EASA 145.A.42 (requiring the European installer to ensure the eligibility of a product) and EASA 145.A.45 (requiring the European installer to rely on the manufacturer's instructions for continued airworthiness and other documents).

In addition, the US suppliers of non-critical supplies would also be affected. Thus, if a foreign avionics manufacturer obtains their angular rate sensors from Siemans, but obtains some non-critical components from US suppliers, the elimination of the *de minimis* rule would also cause the non-US buyer to seek out non-US sources for the non-critical components, because of the impact of the elimination of the *de minimis* rule (there is certainly no business reason to accept US export controls on your inertial avionics when the inertial components did not come from the United States, but instead you merely relied on US suppliers for other non-critical components!).

Thus, while currently foreign distributors can purchase parts with small amounts of U.S. commodities incorporated and feel confident that they will not be subject to U.S. export jurisdiction for this transaction, the elimination of the *de minimis* rule would result in foreign distributors avoiding parts with **any** amount of U.S.-sourced 7A commodities. This would have a negative affect on U.S. industry, and make it unlikely that any foreign distributors would be willing to buy parts with U.S.-sourced 7A components, in turn making it unlikely that foreign manufacturers would continue to incorporate any U.S.- sourced 7A components in their products.

The Proposed Rule's "Exception" Is Too Narrow to Protect US Aerospace Interests

The exception in the proposed rule for the aviation community is too narrow to alleviate the disastrous affects of eliminating the *de minimis* rule.

The proposed rule states that an exception would apply only where "the commodities are incorporated as standard equipment in FAA (or national equivalent) certified civilian transport aircraft".

The exception would not cover several categories of parts that ought to be covered. It would not cover avionics for non-transport aircraft even if they were already installed, it would not cover avionics not classified as "standard equipment", and it would not cover avionics shipped separately, in a container rather than installed in an aircraft. The exception creates an appearance of arbitrariness in light of the fact that identical items that are in dissimilar packing configurations would be treated differently.

The proposed aircraft exception would apply only to avionics (category 7A equipment) already installed in transport category aircraft. The exception would not cover avionics shipped separately in a container (instead of being installed in an aircraft. There is a significant business that is current being done in avionics and avionics upgrades and such avionics are generally shipped outside of the

context of an installed article. There is no good policy reason for inhibiting the re-export of such products when they have minimal US content.

The term "Transport Aircraft" is not defined in the commerce regulations nor in the FAA's regulations. Therefore this is a vague term that cannot be usefully relied upon for interpreting the scope of the exception.

In the FAA's regulations, an aircraft is a device used for flight – this includes airplanes and rotorcraft.[2] Although the FAA's regulations do not define the term "transport aircraft," the FAA's regulations do provide two Parts in its regulations that are identified as "Airworthiness Standards: Transport Category Airplanes" (14 C.F.R. Part 25) and "Airworthiness Standards: Transport Category Rotorcraft" (14 C.F.R. Part 29). One may assume that the term "transport aircraft" as used in this proposal was meant to apply to aircraft in those two categories.[3]

There is no policy basis for distinguishing Part 25 and Part 29 aircraft (which can be thought of, colloquially, as larger aircraft) from Part 23 and Part 27 aircraft (which may be though of as smaller aircraft). Creating a distinction between transport category aircraft and non-transport category aircraft for purposes of defining an exception to the re-export rules simply does not make sense. Any exception that applies to aircraft ought to apply to all aircraft.

One reason that there should be no distinction between transport category aircraft and non-transport category aircraft is that they may use the same avionics. It is not at all unusual to find the same avionics package installed in both Part 23 (non-transport category) and Part 25 (transport category) airplanes. Under the exception as proposed, the package that was installed in a Part 25 airplane might be excepted from the new standard, but the identical equipment in the Part 23 aircraft would not. This distinction creates a situation that contradicts basic tenets of equal protection.

Under the proposal, the exception for transport aircraft avionics applies only to articles defined as "standard equipment." Unfortunately, due to the State Department's recent redefinition[4] of "standard equipment," virtually no aircraft avionics fitting into category 7 will meet this exception.

The Note to 22 C.F.R. § 121.1 Category VIII(h) defines "standard equipment" in the context of aircraft parts to be:

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[2] 14 C.F.R. § 1.1.

[3] It is important to note that the terms "transport category aircraft" and "transport aircraft" are not defined in the FAA's regulations, but that the scope of 14 C.F.R. Part 25 is generally interpreted to reflect all airplanes that did not meet the scope of 14 C.F.R. Part 23, which includes better defined terms and scope at 14 C.F.R. § 23.3.

[4] Amendment to the International Traffic in Arms Regulations: The United States Munitions List Category VIII, 73 Federal Register 47523 (August 14, 2008).

> *"a part or component manufactured in compliance with an established and published industry specification or an established and published government specification (e.g., AN, MS, NAS, or SAE). Parts and components that are manufactured and tested to established but unpublished civil aviation industry specifications and standards are also "standard equipment," e.g., pumps, actuators, and generators. A part or component is not standard equipment if there are any performance, manufacturing or testing requirements beyond such specifications and standards."*[5]

This definition was specifically meant to apply to the "standard equipment" language of section 17(c) of the Export Administration Act. One problem with this definition arises in the preamble to the rule, which explains that

> *"An `accessory,' an `attachment,' and `associated equipment' are not considered standard equipment integral to the civil aircraft.*[6]

Most avionics are produced under Technical Standard Order Authorizations (TSOAs).[7] Thus, their certification basis falls outside the scope of the certification basis for the aircraft. As such, they may potentially be considered to be articles that do not meet the definition of standard equipment. Furthermore, they are manufactured to meet the standards published by the governments that publish Technical Standard Orders (TSOs), but those designs are not identical to the TSOs because the TSOs merely serve as performance standards and not as production standards or conformity standards.

Finally, TSOA articles may be thought of as analogous to PMA articles in the sense that they are manufactured under production authority separate from the design and production authority associated with an aircraft. PMAs are approvals issued by the FAA to authorize the manufacture of civil aircraft components (they are purely for civil aircraft). The State Department explicitly refused to include PMA articles within the scope of the term "standard equipment":

> *Two (2) commenting parties recommended part (b) of the second sentence of the explanatory note add Parts Manufacturer Approval (PMA). As a PMA may be issued for an exclusively USML item, inclusion of PMA is not appropriate here*.[8]

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[5] Id. at 47526.
[6] Id. at 47524.
[7] See, e.g., 14 C.F.R. § 21.601 et seq. (US FAA TSOA rules); e.g. Automatic Pilots, FAA TSO-C9c (September 16, 1960) (the US TSO that established performance standards for autopilots).
[8] Amendment to the International Traffic in Arms Regulations: The United States Munitions List Category VIII, 73 Federal Register 47523. 47524 (August 14, 2008).

Thus, the 'standard equipment' term arguably may not apply to avionics, and therefore avionics manufacturers, dealers, and exporters around the world would be unable to rely on that provision to exempt avionics.

Requiring a foreign distributor to obtain U.S. export approval to sell an avionics product with minimal U.S. content to a third nation (for example, if the distributor was in one EU country and the buyer was in another EU country) would unduly burden the industry without providing any real benefit. The aircraft exception should be expanded to include all civil aircraft avionics. One way that this could be done would be to incorporate any 7A content that is described in a civil aviation design approval issued by the FAA (including type certificate, supplemental type certificate, PMA or TSOA). This should include both the articles themselves and their subcomponents.

The Economics of Avionics Make it Unlikely that they Would Be Purchased for their Restricted Components

Aircraft avionics utilize complex technologies, and as a result tend to be very expensive. In regards to the exception in the proposed rule, terrorists and other undesirables are unlikely to purchase expensive aircraft avionics to gain access to their component parts, when similar components can be obtained more inexpensively from foreign component producers. In fact, it is no more likely that terrorists would purchase aircraft avionics for their component parts then that they would purchase civilian transport aircraft with the avionics incorporated for the component parts, and civilian transport aircraft are an exception to the proposed rule change. Therefore, it does not make sense that aircraft avionics standing alone are to be subject to greater regulation than a civilian transport aircraft is for its component parts.

The De Minimis Rule Plays a Vital Role In Enticing Foreign Manufacturers To Buy U.S. Parts

The *de minimis* rule was added to the EAR in 1987 to "alleviate a major trade dispute with allies who strenuously objected to U.S. assertion of jurisdiction over all re-exports of non-U.S. items that contained even small amounts of U.S. content"[9]

Our communications with foreign aerospace parties have confirmed that the *de minimis* rule has been effective, because it is considered by foreign

[9] Request for Public Comments on the Prospect of Removing 7A Commodities From De Minimis Eligibility, Federal Register, 73 Fed. Reg. 70322, 70323 (Nov. 20, 2008).

manufacturers who consider whether to incorporate US content in their designs. Eliminating the rule today would eliminate the benefit, with no correlative benefit to the United States.

Conclusion

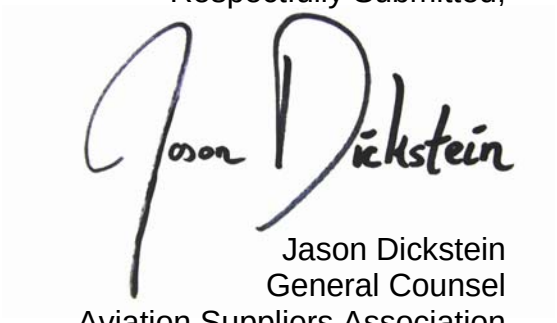
The proposal to eliminate the *de minimis* rule would result in non-U.S. manufacturers eschewing U.S. 7A component suppliers. The *de minimis* rule should remain untouched.

In the alternative, the aviation exception should be expanded to include all civil aircraft parts in Category 7, and components intended for inclusion in civil aircraft parts. One way that this could be done would be to describe the scope of the exception to include any content that is described in a civil aviation design approval issued by the FAA (including type certificate, supplemental type certificate, PMA or TSOA). This should include both the articles themselves and their subcomponents.

Thank you for affording industry this opportunity to comment on the proposed rule to help make it better serve the needs of the U.S. aviation industry. We appreciate the efforts of the Commerce Department in this regard.

Your consideration of these comments is greatly appreciated.

Respectfully Submitted,



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