The Effects of Export Controls on Decisions To Use or Not Use U.S.-Origin Parts and Components in Commercial Products and the Effects of Such Decisions

74 Fed. Reg. 263 (January 5, 2009)

Comments Pursuant to the Request for Public Comments
Submitted by email to publiccomments@bis.doc.gov

Submitted by the Aviation Suppliers Association

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February 19, 2009

U.S. Department of Commerce
Bureau of Industry and Security
Office of Technology Regulation
ATTN: Parts and Components Inquiry
14th St. and Pennsylvania Ave. NW
Room 2705
Washington, DC 20230

Dear Sir or Madam:

Please accept these comments in response to the notice of inquiry concerning The Effects of Export Controls on Decisions To Use or Not Use U..S.-Origin Parts and Components in Commercial Products and the Effects of Such Decisions, 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. 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 any proposed future changes to the Export Administration Regulations (EAR).

Comments on the Notice of Inquiry

Currently, ASA members see the effects of U.S export regulations in how purchasers buy U.S.-sourced goods. They also see the effect in the decisions made by persons who forbear from US export transactions because of fear of the complexity of the US export regulations.

Issue: Complexity of the Rules and Fear of Non-Compliance

Aviation is a global marketplace; however there are some US companies that have affirmatively decided to only sell to domestic customers, and have actively refused to service non-US customers.

The main reason for turning away business in this manner is because of a fear that the regulations are too complex to readily permit compliance. Companies fear that they cannot export properly in compliance with the often-bewildering export regulations. The companies that make this decision tend to be smaller companies that do not feel that they can afford the sort of expert third-party compliance advice that larger companies are able to hire.

ASA has started to provide day-long export training workshops, as well as shorter export training opportunities, in order to promote compliance with the regulations, and to make small aerospace companies feel more comfortable with the export regulations so that they will start engaging in export transactions.

Issue: Using U.S. Repair Stations for Upgrades

Under the current rules, there is an exception from the licensing requirements that applies to parts that are sent to the U.S. for repair and then exported back to their origin. 15 C.F.R. § 740.10.

It has become common for non-US air carriers and other foreign parties to use US agents to select repair vendors in the United States. ASA member companies often provide this sort of logistics support. The foreign owner would send the part to the US logistics provider. The US logistics provider would send it to a repair station for maintenance, and then the part would be shipped back to the foreign customer – either through the US logistics provider or directly by the repair station (depending on the business relationships).

Companies are willing to send repair business to the US because the work is high quality and it can be accomplished within a reasonable turn-around time. Often, the original equipment manufacturer of the article is in the United States, and that OEM may license its data to a repair station nin the United States to facilitate high-quality repairs. The repairs may also be conducted by independent repair stations under the Instructions for Continued Airworthiness, which are made available to repair stations and others who need to comply with them under 14 CFR § 21.50(b). The licensing exception of 15 C.F.R. § 740.10 helps to make sure that turn-around times are not onerous. If a license was required to return the articles to their foreign owners, then the foreign owners would probably not bother to send the articles to the United States for repair.

There are several problems with the regulation that creates this licensing exception. One of them is that it is common for articles to need to be upgraded for safety reasons. The upgrades may be manufacturer-ordered (service bulletins) or they may be required by the FAA (airworthiness directives under 14 CFR Part 39). But the licensing exception does not apply when the article has been upgraded.

It may be impossible to know whether an upgrade is necessary until the component is at the US repair station's facility. At that time, the repair station may undertake an inspection and find that an upgrade is required. But if this will affect the licensing exception, then the customer may choose not to do it. This represents a loss of income for the US companies, which lose the upgrade business, and it also reflects a diminution of safety because the foreign customer chooses not to implement a safety upgrade. Comparing foreign commercial aviation accident rates with US accident rates shows that the US commercial aviation system is safer than that of any other part of the world, by a statistically relevant margin. Part of the reason for this safety is that safety upgrades are implemented frequently in the US, and are often mandated by the FAA for US civil aviation.

Thus, the fact that the exception found in 15 C.F.R. § 740.10 does not include parts that have been altered/modified leads to both a loss of business for the US economy and a diminution of safety for the rest of the world.

Example: De Minimis Rule

One example of the effect of export regulations can be found in the recent proposal to modify the *de minimis* rule that applies to regulated CCL 7A commodities.

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. The effect of U.S. export regulations can be seen in how foreign manufacturer try to keep the level of US content below the *de minimis* threshold. If the US content is below the threshold, US export laws do not come into effect for re-export of the item. This precaution is taken because foreign manufacturers perceive the US export restrictions 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.

In researching the likely effects of an elimination of the *de minimis* standard, we were told by our European contacts that European manufacturers already take the *de minimis* rule into account, and that they would likely find alternative sources for components if the rule were eliminated.

In the case of the proposed elimination of the 7A *de minimis* rule, this was not an idle threat. Many US origin components are also produced outside the United States. While elimination of the *de minimis* rule would cause initial inconvenience to European manufacturers and distributors, most avionics components of the sort that are 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).

In addition, the US suppliers of non-critical supplies would also be affected by the proposal. 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!).

The fact that currently, foreign manufacturers seek to purchase parts that fall under the *de minimis* rule exception shows that other countries consider U.S. export law consequences when purchasing U.S.-sourced goods.

In fact, 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"[1]

Our communications with foreign aerospace parties have confirmed that the *de minimis* rule has been effective, because it is considered by foreign manufacturers who consider whether to incorporate US content in their designs.

Eliminate Conflicting Guidance

The State Department issued a rule on August 14, 2008 that was announced as 'clarifying' the State Department's policy with respect to which aircraft parts are considered commercial for export purposes, and which ones are considered to be governed by the International Traffic in Arms Regulations (ITARs). The true effect of this rule, though, was to expand the range of civil aircraft parts that are considered to potentially fall within the State Department's export jurisdiction, and it actually seems to have made the proper categorizations of many aircraft parts MORE confusing, instead of achieving the clarification that Congress had requested and that the State Department had promised.

Deciding which regulatory regime applies to an export can be difficult if the part is a dual-use part (one installed on both civilian and military models of an aircraft). This is particularly true of avionics, because many modern avionics features may arguably fall within the scope of technologies that the State Department wishes to control, but it can apply to almost any part because of the preference for commercial off-the-shelf aircraft parts (civil aircraft parts) exhibited in recent years by the Department of Defense (particularly the Air Force). While the use of civil aircraft parts in military aircraft and engines saves the taxpayers money while maintaining a high level of reliability, it also creates ambiguities about the nature of the parts when trying to decide whether they are defense-related or civilian for export jurisdiction purposes.

The New State Department regulations make an alarming confusion between the phrase "standard equipment in an aircraft" and the notion of "standard parts." Historically, the phrase standard equipment in an aircraft has been interpreted

[1] 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).

according to its apparent plain meaning. But the new regulations provide a very different meaning to this seemingly simple phrase. The rule states that "A part or component is not standard equipment if there are any performance, manufacturing or testing requirements beyond" industry specifications and standards. This seems to suggest that any part that has any quality assurance elements, or other manufacturer-designated testing standards associated with it will be deemed to be NOT standard equipment. Practically all civil aircraft parts will have some manufacturer-specified elements to them. The language of the rule makes it clear that any item that is not based on a "civil aviation industry specification [or] standard" is not standard equipment. This is a clear confusion between the intent of the original Export Administration Act, which was meant to exclude normal aircraft equipment, and the much more limited category of standard parts (which are excluded from the PMA requirement under 14 C.F.R. 21.303(b)).

The State Department explicitly states that "in determining whether a part or component may be considered as standard equipment and integral to a civil aircraft (e.g., latches, fasteners, grommets, and switches) … a part approved solely on a non-interference/provisions basis under a type certificate issued by the Federal Aviation Administration would not qualify. Similarly, unique application parts or components not integral to the aircraft would also not qualify." This seems to suggest that a part that is approved under a STC/ PMA combination based in part on a "no-technical-objection letter" from the OEM would not be considered standard equipment for purposes of determining export jurisdiction.

This rule could be a nightmare for distributors seeking to export aircraft parts, if it is interpreted to permit the State Department to extend jurisdiction over all non-SME parts that are not manufactured as standard parts. It means that any civil aircraft part that falls into the scope of the vague language of the USMLs could be deemed to be an ITAR item. For example, parts associated with an inertial system could be deemed to be ITAR items – even an old-fashioned spinning-mass gyro.

Some replacement parts might be marketed by the manufacturer under a single part number for a civilian model installation and the same part number for a different defense-related article installation. This represents a hidden trap for distributors, who could unwittingly export the part as a civilian model item with no knowledge that it was subject to the ITARs. Under prior interpretations, the fact that it met the three elements of the civil aircraft exception was sufficient, but under the convoluted language of the State Department rule, it is possible that the part may no longer be considered to meet the exception!

The Commerce Department issued its own interpretation on December 3 that further refines the State Department interpretation. The Commerce interpretation ameliorated the worst aspects of the State Department interpretation, but it did so

by essentially creating a conflict in interpretation. This creates more confusion in the industry and a greater level of uncertainty.

Domestic businesses wishing to avoid that uncertainty will avoid export transactions; foreign businesses wishing to avoid uncertainty will avoid purchasing products from the United States.

Conclusion

The US export rules currently act to shapes the decisions of foreign purchasers as to whether to use or not use U.S.-origin parts and components, as well as whether to rely on US businesses to provide services to products subject to export licensing provisions..

There are a number of remedies to this issue that should be considered:

The Commerce Department should consider expanding the scope of the exception found at 15 C.F.R. § 740.10 to include upgrades, modifications and alterations. If the Commerce Department is concerned that such a change in the regulations could have adverse consequences outside the aviation community, then the Commerce Department might consider limiting the exception only to upgrades, modifications and alterations performed in accordance with Chapter One of Title 14 C.F.R. This body of regulations requires such upgrades, modifications and alterations to be performed according to FAA-acceptable practices (14 C.F.R. § 43.13(a)), and in such a manner as to return the article to an FAA-approved configuration (14 C.F.R. §§ 43.13(b); 145.213(b)). The work must be performed according to FAA-approved data if it is a major alteration (14 C.F.R. § 145.201(c)(2)).

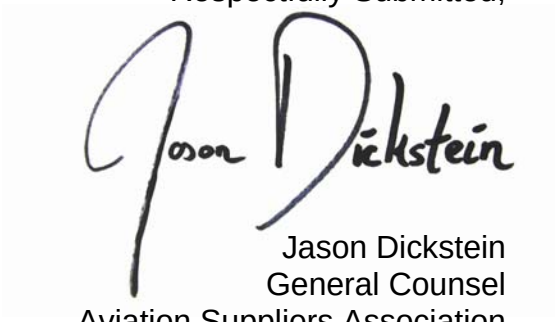
The Commerce Department could also consider supporting trade association efforts to bring low-cost high-quality export training to the small businesses that need this training.

The Commerce Department should also work with the State Department to eliminate State Department interpretations of Section 17(c) of the Export Administration Act. The State Department interpretations conflict with Commerce Department guidance, and they cause considerable confusion.

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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