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AVIATION LAW MADE SIMPLE

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State Department Guidance Makes Export Compliance More Difficult for Avionics Shops

Ever wonder whether or not the avionics you export are being exported under the right standards? For AEA members in the United States who are exporting articles, and for non-U.S. members who are importing from the United States, this can be an important issue.

The United States can issue civil penalty fines of up to \$250,000 or more — the fine can be up to twice the value of the transaction if the transaction is worth more than \$125,000.

To avoid huge fines, it is important to know how to comply with U.S. export regulations, and this includes knowing whether or not an export falls under Commerce Department or State Department jurisdiction.

Several months ago in this column, I reported Congress was considering better guidance for the public as to which aircraft parts are considered “civil” and subject to Commerce Department oversight (often no need for a license for most exports), and which exports are considered to reflect defense-related articles and subject to State Department export jurisdiction under the International Traffic in Arms Regulations.

Rather than have Congress correct the problem, however, the U.S. State Department agreed to issue guidance to clear up the ambiguities. Well, that was what it was supposed to do.

The State Department issued a ruling

on Aug. 14, 2008, which was announced as “clarifying” the State Department’s policy with respect to which aircraft parts are considered commercial for export purposes and which are considered to be governed by the ITARs.

The true effect of this ruling, however, was to expand the range of civil aircraft parts considered to potentially fall within the State Department’s export jurisdiction — it actually seems to have made the proper categorizations of many aircraft parts more confusing, instead of achieving the clarification Congress requested and the State Department promised.

Deciding which regulatory regime applies to your export can be difficult if your 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 could arguably fall within the scope of technologies the State Department wants to control.

The New Rule

The new descriptive language is found in a “Note” in the regulations:

“Note: The Export Administration Regulations (EAR) administered by the Department of Commerce control any component, part, accessory, attachment and associated equipment (including propellers) designed exclusively for civil, non-military aircraft (see Sec.

121.3 of this subchapter for the definition of military aircraft) and control any component, part, accessory, attachment and associated equipment designed exclusively for civil, non-military aircraft engines.

“The International Traffic in Arms Regulations administered by the Department of State control any component, part, accessory, attachment and associated equipment designed, developed, configured, adapted or modified for military aircraft, and control any component, part, accessory, attachment and associated equipment designed, developed, configured, adapted or modified for military aircraft engines.

“For components and parts that do not meet the above criteria, including those that may be used on either civil or military aircraft, the following requirements apply. A non-SME component or part (as defined in Sec. 121.8b and 121.8d of this subchapter) that is not controlled under another category of the USML, that: (a) is standard equipment; (b) is covered by a civil aircraft type certificate (including amended type certificates and supplemental type certificates) issued by the Federal Aviation Administration for a civil, non-military aircraft (this expressly excludes military aircraft certified as restricted and any type certification of Military Commercial Derivative Aircraft); and (c) is an integral part of such civil air-

craft, is subject to the jurisdiction of the EAR.

“In the case of any part or component designated as SME in this or any other USML category, a determination that such item may be excluded from USML coverage based on the three criteria above always requires a commodity jurisdiction determination by the Department of State under Sec. 120.4 of this subchapter. The only exception to this requirement is where a part or component designated as SME in this category was integral to civil aircraft prior to Aug. 14, 2008. For such part or component, U.S. exporters are not required to seek a commodity jurisdiction determination from State, unless doubt exists as to whether the item meets the three criteria above (See Sec. 120.3 and Sec. 120.4 of this subchapter).

“Also, U.S. exporters are not required to seek a commodity jurisdiction determination from State regarding any non-SME component or part (as defined in Sec. 121.8b and 121.8d of this subchapter) that is not controlled under another category of the USML, unless doubt exists as to whether the item meets the three criteria above (See Sec. 120.3 and Sec. 120.4 of this subchapter). These commodity jurisdiction determinations will ensure compliance with this section and the criteria of Section 17c of the Export Administration Act of 1979.

“In determining whether the three criteria above have been met, consider whether the same item is common to both civil and military applications without modification of the item’s form, fit or function. Some examples of parts or components that are not common to both civil and military applications are tail hooks, rotodomes and low observable rotor blades.

“‘Standard equipment’ is defined as a part or component manufactured in compliance with an established and published industry specification or an established and published government specification (such as 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,” such as 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. Simply testing a part or component to meet a military specification or standard for civil purposes does not, in and of itself, change the jurisdiction of such part or component. Integral is defined as a part or component that is installed in an aircraft.

“In determining whether a part or component may be considered as standard equipment and integral to a civil aircraft (such as latches, fasteners, grommets and switches), it is important to carefully review all of the criteria noted above. For example, 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.”

What Does This Mean?

In our industry, we need to be concerned about dual-use items and certain other items that may fall within the scope of the ITARs.

The State Department divides the world of exported items it controls into “Significant Military Equipment” and “Non-Significant Military Equipment.” An article is SME if the government has decided special export controls are warranted because of its capacity for substantial military utility or capability.

SME and non-SME items are all listed in the United States Munitions List. If an article is described or referenced in the USML, its export is controlled by the State Department.

The State Department has differing standards for handling SME versus non-SME. SME can be identified in the USMLs by the asterisks next to their entries. Unfortunately, there are avionics and technologies used in avionics that are asterisked and considered SME.

First, let’s look at the new rule for non-SME. A non-SME aircraft component or part may be controlled under one of the non-aviation chapters of the USML. If it is, it is State Department-controlled for export.

Remember, the USMLs have a catch-all permitting the State Department to declare any item used as a defense-related article is covered by the USMLs — such a declaration is made at the State Department’s discretion. Therefore, almost anything can be declared a non-SME item, which nonetheless is export-controlled by the State Department at the discretion of the State Department.

If the non-SME is not controlled under another category of the USML but is only referenced in the aviation chapter of the USML, it might be subject to the jurisdiction of the Commerce Department, not the State Department. A part will be subject to the jurisdiction of the Commerce Department if it meets each of the following criteria:

- It is standard equipment in an aircraft.
- It is covered by a civil aircraft type certificate, including amended type certificates and supplemental type certificates, issued by the FAA for a civil, non-military aircraft (the note expressly excludes Commercial Derivative Aircraft, such as certain commercial derivative helicopters).
- It is an integral part of such civil aircraft.

This definition is a real problem for avionics and other equipment handled by AEA members. If the avionics or article is not part of the type design, it may be excluded from Commerce control.

The State Department has taken the position in the past that a subcomponent that is an element of a component of a type-certificated aircraft may not be able to take advantage of the Commerce Department jurisdiction if the subcomponent is not specifically called-out in the type design.

Continued on following page

LEGAL EASE

Continued from page 61

This can be a problem for avionics that are retrofit options because they are not part of the type design. Such parts need to be incorporated as an amendment to the type design through a supplemental type certificate. Even then, they may have problems meeting the new connotation of the phrase “standard equipment.”

Let’s take a civilian GPS unit, for example. If the design-operating envelope of the unit permits it to be used above 60,000 feet altitude and at 1,000 knots velocity or greater, it is considered to be a non-SME USML item subject to State Department control — even if it is solely used on civilian aircraft and there is no defense-related installation eligibility. The GPS likely is not going to meet the requirements of the exception because it is not covered under a type certificate and it may not be standard equipment in the aircraft as the term is now being used.

What is Standard Equipment?

The new State Department regulations cause alarming confusion between the phrase “standard equipment in an aircraft” and the notion of “standard parts.”

The regulations state, “A part or component is not standard equipment if there are any performance, manufacturing or testing requirements beyond” industry specifications and standards.

The State Department also states, “In determining whether a part or component may be considered as standard equipment and integral to a civil aircraft (such as 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.”

Remember, anything not on the original type certificate needs to be on an STC to meet the “covered by a civil aircraft type certificate” requirement for the commercial exception. However, once it is on the STC, you risk running afoul of the language stating that standard equipment does not include anything requiring “any performance, manufacturing or testing requirements beyond (industry) specifications and standards.”

So, the proprietary performance standards manufacturers rely on to exceed the FAA’s minimum safety standards also would make their avionics ineligible for the civil aircraft export exception.

This rule could be a nightmare for companies seeking to export avionics if it is interpreted to permit the State Department to extend jurisdiction over all non-SME parts not manufactured as standard parts. It would mean avionics manufacturers who had been aggressive in obtaining Defense Department approval to sell their parts as replacements for military corollary parts could be penalized for doing business with the Defense Department by being required to obtain State Department approval for export of the otherwise civilian parts.

Significant Military Equipment

Some avionics are deemed SME. For example, all inertial navigation systems, inertial measurement units, and attitude and heading reference systems specifically designed, modified or configured for military use are classified as SME, which includes anything designed as a dual-use item.

In the case of avionics or components

designated as SME in any category of the USML, the part is assumed to be a USML item — in other words, it is subject to State Department regulation and licensing requirements.

This is true even if the SME in question has no military installations, such as a GPS unit that merely exceeds the performance parameters published in the regulations. The only way to avoid this assumption is to obtain a commodity jurisdiction determination by the Department of State — a very time-consuming process.

In cases for which a part or component designated as SME was integral to a civil aircraft prior to Aug. 14, 2008, there will be an exception — U.S. exporters are not required to seek a commodity jurisdiction determination from the State Department for exporting such parts, unless doubt exists as to whether or not the item meets the three criteria mentioned previously. However, the regulations are written so ambiguously, it is difficult to erase all doubt.

All together, this new rule creates more confusion in distinguishing State-regulated exports from Commerce-regulated exports. And it “solves” the confusion by demanding a greater number of commodity jurisdiction requests when the State Department cannot handle the volume of requests it receives currently.

The government’s complete analysis of the comments to the rule and the rationale for the decisions made in the final rule can be found at <http://edocket.access.gpo.gov/2008/E8-18844.htm>. □

If you have comments or questions about this article, send e-mails to avionicsnews@aea.net.