



News from the Hill

BY JASON DICKSTEIN
AEA GENERAL COUNSEL

Exporting Issues for the Avionics Industry Part 2: State Department Restrictions on the Export of Avionics

Imagine you answer the door to find federal investigators. They want to know why you exported defense-related equipment in violation of United States law.

“Defense-related equipment?” you cry. “I’ve never exported defense-related equipment!”

But then they show you the paperwork on a recent sale you made for avionics, which you never realized were defense-related equipment.

It is possible to export an avionics device to a non-military customer and it still fall under the rules applying to defense-related articles. It is important to understand and recognize when you might be exporting defense-related articles.

Scope of the Series

This is the second in a four-part series addressing exporting avionics and other aircraft parts. This second installment provides an overview of the export laws applying to avionics deemed “defense-related articles.”

This article is not meant to reflect legal advice — if you have a specific issue or question, you should seek specific legal advice about your actual fact pattern.

In addition, this article focuses on the export laws of the U.S. It is valuable to AEA members located outside the U.S. in that it provides them with

useful information about U.S. laws applying to goods shipped to them from the U.S. However, this article does not address non-U.S. export nor import laws.

Introduction to the ITARs

The State Department regulates the export of defense-related articles pursuant to the International Traffic in Arms Regulations (ITARs). Contrary to the opinion of some people, export of defense-related articles is not regulated by the Department of Defense, and you should not seek assistance from DOD — they will not have the right answers.

The basis for most decisions under the ITARs is the United States Munitions List (USML). The USML is found in the regulations at 22 C.F.R. § Part 121. It describes categories of items covered by the USML and rules for identifying the scope of the coverage. Anything included on the USML is considered to be primarily defense-oriented in nature and is subject to the jurisdiction and control of the ITARs.

For example, the USML specifies guns more than .50 caliber are regulated. It also specifies rifles, shotguns and other weapons less than .50 caliber are regulated unless they are intended for non-combat purposes.

A serious problem for many people is categorizing dual-use items — the

items used in both civilian/commercial applications and also in defense-related applications. In examining the USML to determine if the item you are exporting might be covered under the USML, one guiding principle often helpful is to look at the *original* intended purpose of the article.

If the original intended purpose was military in nature but subsequently put into commercial use, the article may be considered a defense-related article. If it originally was commercial in nature but *modified* to perform a defense-related function, it may be considered a USML item because of the modification. But an article originally produced with the intent it be used on civilian aircraft, and subsequently used *without modification* for defense-related purposes, is the sort of dual-use item likely to be considered primarily civilian in nature, and therefore subject to the Commerce Department rules and not the ITARs.

Traditional avionics are found spread out in several places within the ITARs. Many avionics and components are covered under the USML as missile technology. The term missile includes missiles, rockets and certain unmanned air vehicles. The USML missile restrictions include:

- Accelerometers with a threshold of 0.05g or less, or a linearity error within 0.25 percent of full-scale out-

put, or both, which are designed for use in inertial navigation systems or in guidance systems.

- All types of gyros usable in missile systems, with a rated drift rate stability of less than 0.5 degree (1 sigma or rms) per hour.

- Inertial or other equipment using restricted accelerometers.

- Flight control systems and “technology” designed or modified for use in missiles.

Avionics equipment, “technology” and components designed or modified for use in missiles, including such items as radar (including radar altimeters), passive sensors for determining bearings, and electronic assemblies and components specifically designed for military use and operation at temperatures in excess of 125 degrees C.

There is also a section of the USML specifically restricting export of military aircraft. That section includes inertial navigation systems, aided or hybrid inertial navigation systems, inertial measurement units (IMU), and attitude and heading reference systems (AHRS) specifically designed, modified or configured for military use, and all specifically designed components, parts and accessories.

Most, but not all, of the items restricted as missile technology can be exported when installed in manned aircraft, or when intended as replacement parts for manned aircraft.

Certain GPS units also are listed under Category XV: Spacecraft Systems. For example, GPS receivers are covered by the USML if they are made or modified for military use. In addition, GPS receivers made for other, non-military uses still are considered covered by the USML if they are designed for producing navigation results above 60,000 feet altitude and at speeds exceeding 1000 knots.

GPS receivers designed for use with

a null steering antenna (to reduce or avoid jamming signals) also are covered by the USML. Further, a GPS designed for use with an unmanned vehicle capable of delivering a payload of 500 kilograms at a range of 300 kilometers also is covered by the USML. Finally, a GPS using civilian bands but not specifying whether it also has military-band capability is presumed to have military-band capability for export purposes.

In each case, the “covered” GPS equipment is subject to the ITAR restrictions on export, which means an exporter needs to be registered and have an export license.

I'm Confused: Who Can Help Me?

If you've reviewed the USML and the relevant portions of the ITARs but still can't determine whether or not an item is a defense-related article, there is help. You can submit a commodity jurisdiction request to the State Department.

The purpose of a commodity jurisdiction request is to determine whether or not an item or service is covered by the USML, and therefore, subject to the related export controls. You also can use a commodity jurisdiction request to ask that an item on the USML be removed from the USML. This sort of change removes the item from the jurisdiction of the State Department and the ITARs, but be aware it shifts the item to the jurisdiction of the Commerce Department, which may require licensing to engage in the transaction. (This issue will be discussed in next month's installment of this series).

Although the State Department has stated a preference for commodity jurisdiction requests to come from the manufacturer of the article, there is no legal requirement restricting such a request to the manufacturer. Therefore,

any AEA member can submit a request. When the requester is not the manufacturer, the State Department generally asks the requester to coordinate with the manufacturer to ensure he or she can obtain the information necessary for the request.

A response from the State Department to a commodity jurisdiction request determines the proper licensing authority for an item or service. It is not, in and of itself, a license or approval to export. So, until and unless the commodity jurisdiction request identifies the disputed article as a non-USML item, you should treat it as arguably listed on the USML and seek out the appropriate registration and export licenses to ensure you remain in compliance with the law.

A commodity jurisdiction request is submitted to the State Department in the form of a letter and supporting documents. Once received, the request is assigned a CJ number; a letter informing you of this will be sent within two weeks of receiving your CJ request.

Copies of the request are sent to the appropriate U.S. government agencies for review, so you should include **nine** complete sets of the information, including:

- Cover letter that includes the information described below.
- Supporting documentation including sales data.
- If you are acting on another's behalf, a letter from the other party authorizing you to act as his or her agent.

Full details on submitting a commodity jurisdiction request is available at www.pmdtdc.state.gov/docs/cj.pdf.

My Export is on the USML — Now What Do I Do?

If you intend to export an item on the USML, then the item is covered under

Continued on following page

NEWS FROM THE HILL

Continued from page 27

the ITARs and cannot be exported freely. The exporter needs to (1) register and (2) obtain an export license.

If you want to export an item from the USML, you must be registered with the State Department's Directorate of Defense Trade Controls (DDTC). Registration is required for persons who manufacture, export or broker defense-related articles.

Registration is just the first step, however. Registration alone does not convey any special export privileges — a license also is required. More information on registration is available at www.pmdtcc.state.gov/registration.htm.

Although registration does not confer any export privileges, registration is a prerequisite to export licensing approval. After you are registered, you can apply for an export license. Licensing is required of any person or company intending to export or temporarily import a defense-related article.

The reason this applies to temporary imports is because the conclusion of a temporary import is an export back to the home base of the article. Even if it is going back to the same place it came from, it is still an export, and the exporter may need to obtain the approval of DDTC prior to the temporary import.

This is an important distinction for those AEA members who perform component-level repairs. It means components on the USML sent to a U.S. repair station for repair or overhaul may be subject to an export license requirement as a prerequisite to returning home after the repair. There are some exceptions under the regulations for aircraft parts sent to the U.S. for the sole purpose of being repaired.

The most convenient way to apply for an export license is through D-

Trade, which is a mechanism for applying for an export license for USML items. The D-Trade review process automatically includes a complete search on all databases to assess permissibility for the export. If the search operation triggers a database match, then greater scrutiny is applied. Therefore, knowing what might come up under the USML is to your benefit.

For more information about D-Trade, visit www.pmdtcc.state.gov/sl_dtrade.htm.

A Look at Treasury Regulations, Other Restrictions

Although the State Department is important in the analysis of potential defense-related articles, it is not the only relevant federal government unit. The Treasury Department also has regulations that can restrict exports. Treasury regulations often apply to transactions involving anything of value — any asset. Even if no money actually changes hands, Treasury regulations still may apply to the transaction.

Review the Treasury limitations carefully because some Treasury limitations on exporting to certain countries are drawn very narrowly so that some transactions are permitted, while other regulations may be drawn very broadly so that nearly all transactions involving a particular nation are prohibited.

Can I Do Business With This Party?

The first step is to identify whether or not you can do business with a party in question at all. You should check the country of export to make sure there are no restrictions forbidding or limiting transactions with that country. The Treasury Department publishes a number of restrictions.

As of press time, the Treasury

Department's Office of Foreign Assets Control (OFAC) had established embargoes affecting trade with:

- Balkans
- Belarus
- Burma (Myanmar)
- Cote D'Ivoire
- Cuba
- Iran
- Iraq
- Liberia
- North Korea
- Sudan
- Syria
- Zimbabwe

An updated version of this list can be found at www.treas.gov/offices/enforcement/ofac/programs/index.shtml. You should check this list every time you export because the list does change.

The Department of State also publishes an "Embargo Reference Chart," which can be found at www.pmdtcc.state.gov/country.htm. This is a list of countries with which trade is restricted.

The "Embargo Reference Chart" includes restrictions on doing business with:

- Afghanistan
- Burma
- Belarus
- China (People's Republic)
- Côte d'Ivoire
- Cyprus
- Democratic Republic of the Congo
- Eritrea
- Haiti
- Iran
- Iraq
- Liberia
- Libya
- North Korea
- Rwanda
- Somalia
- Sudan
- Syria
- Vietnam
- Yemen
- Zimbabwe

Restrictions on Your Business Partners

You also should check the persons with whom you are doing business. The federal government publishes a number of lists of forbidden persons and entities with whom export transactions are restricted.

The lists include the following:

- Specially Designated Nationals List: Provides alphabetical master list of specially designated nationals and blocked persons found at www.treas.gov/offices/enforcement/ofac/sdn/index.shtml.
- Narcotics Trafficking: No trading with drug kingpins listed at www.treas.gov/offices/enforcement/ofac/programs/narco/drugs.pdf.
- Weapons of Mass Destruction Trade Control: Prohibited parties found at www.treas.gov/offices/enforcement/ofac/programs/wmd/wmd.pdf and www.state.gov/t/isn/c15233.htm.
- Terrorists: List of prohibited parties found at www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf.
- Department of State: Statutorily and Administratively Debarred Parties List found at www.pmdtc.state.gov/debar059intro.htm.

If a Treasury Department regulation prohibits your transaction, you may be able to apply for a license. There are general OFAC licenses authorizing certain transactions with countries without the filing of a case-by-case application with OFAC.

There are also specific OFAC licenses issued on a case-by-case basis. These authorize specific activities otherwise prohibited by an embargo or sanctions program. Generally, you need to explain in the license application why your effort does not undermine the legitimate U.S. interests protected by the applicable OFAC restrictions.

A summary of OFAC laws and regulations is available at www.treas.gov/offices/eotffc/ofac/regulations/t11facei.pdf.

License Exceptions

In some cases, a license is not required. It is possible, for example, to get blanket permission for up to four years for the temporary export of certain articles. An important condition to remember is, the export itself is temporary, and so title to articles exported under this provision may not be to the foreign receiver of the article.

No DDTC license is required for certain small shipments — particularly, this applies to components and spare parts where the total value is less than or equal to \$500. The shipments must be exported to support a defense-related article previously authorized for export (for example, an aircraft). They must be destined for the previously approved end-user of the complete assembly (not a distributor), and the parts may not enhance the capability of the complete assembly. An exporter using this exception must certify “22 C.F.R. 123.16(b)(2) applicable.” □

Next month, in the third installment of this series on export control regulations, rules for exporting non-defense-related aviation components (civilian components) will be examined. Finally, in January, the FAA’s system for documenting export airworthiness will be examined.

Jason Dickstein
AEA General Counsel
The Washington Aviation Group
734 15th St. N.W., Suite 705
Washington, D.C. 20005
Phone: 202-628-6776