



News from the Hill

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Exporting Issues for the Global Avionics Industry Part One: Export Basics

This is the first in a four-part series addressing export issues, particularly as they relate to avionics and other aircraft parts. This series will explore basic rules and policies AEA members need to understand before engaging in an export transaction, and will outline a step-by-step plan for export compliance.

In November, part two of the series will address the rules for distinguishing defense-related articles, while the third installment, in December, will examine the rules for exporting non-defense-related aviation components. The final installment, in January, will examine the FAA's system for documenting export airworthiness.

Scope of the Series

This first installment in the series provides an overview of export laws as they apply to aircraft parts. This article is not meant to reflect legal advice. If you have a specific issue or question, you should seek specific advice about your actual fact pattern.

In addition, this article is focused on the export laws of the United States. It is valuable to AEA members outside the United States in that it provides them with useful information about the U.S. laws applying to goods shipped to them from the United States; however, it does not address non-U.S. export nor import laws.

The U.S. export laws apply to all sorts of items. They apply to com-

modities, ranging from raw materials and components like circuit boards or fasteners to finished products like aircraft parts and avionics. They also can apply to non-material items, such as software, and printed material, such as blue prints, design plans and technical information.

What is an Export?

What does it mean when something is referred to as an export? "Export" can be a difficult term to describe accurately even in the best of times — and for the aviation industry, the term becomes even more complicated.

Fundamentally, for the purposes of this article, the term "export" refers to an actual shipment or transmission of items out of the U.S. This means if an item crosses a border, then it must meet export legal requirements.

Specifically, the following events are all considered to be "transmissions" for export purposes:

- Items leaving the U.S. temporarily for repair.
- Items being loaned to someone in another country (such as international parts pools).
- Items going to a wholly owned U.S. subsidiary in a foreign country.
- Items sitting in warehouses in a foreign country and subsequently "re-exported" to another foreign country.
- Items originating in a foreign country and being returned from the

U.S. to the foreign country.

- Release of technology or source code to a foreign national in the U.S. according to the Department of Commerce's Export Administration Regulations.

For software purposes, "transmission" can include e-mailing or otherwise electronically transmitting software to either a foreign location or to a foreign national.

Identifying something as a transmission, however, is just the first step in this export analysis.

FAA Definition of an Export

The common definition of an export differs in some important ways from how the Federal Aviation Administration defines exports.

From the FAA's point of view, an item is exported when it shifts from the FAA's oversight responsibility to the oversight responsibility of a non-U.S. airworthiness authority.

For FAA purposes, an item is exported when it falls within the aviation safety jurisdiction of a foreign nation. This can mean installation of an item, such as avionics, on a foreign-registered aircraft located in the U.S. still can represent an export from the FAA's point of view even though the item has not yet been exported from the point of view of other U.S. regulatory authorities.

Furthermore, installation of a component on a U.S.-registered aircraft in

a foreign country may not be considered to reflect an export for FAA purposes. There are some exceptions to the export rules related to this, which will be addressed.

The basic reason for the differences between the way the FAA treats exports (based on oversight responsibilities) and the way other federal agencies treat exports (based on transmission over an international border) is rooted in the FAA's own obligations for aviation safety. The international treaties to which the United States is a signatory recognize the fact that aircraft regularly cross borders, and assign airworthiness responsibility to the nation in which the aircraft is registered — known as the “state of registry.”

Thus, the FAA retains jurisdiction over items subject to its regulatory oversight, and these items are not treated as “exported” for FAA purposes until they are subject to the safety jurisdiction of another nation.

Other agencies are concerned with using export policy to protect the interests of the United States. Thus, they promulgate export-related regulations to support and foster U.S. interests in diverse areas such as trade policy, technology policy, weapons policy and drug policy. These agencies include the Department of the Treasury's Office of Foreign Asset Control (OFAC), the Department of State's Directorate of Defense Trade Controls (DDTC) and the Department of Commerce's Bureau of Industry and Security (BIS).

An Analytical Approach to Exports

Our law firm has advised our client to break all of their exports down into five fundamental questions.

• The first question is, “Is this article treated as a defense-related article or as a non-defense-related article?” This

can be a more complicated question than it appears at first glance, especially for avionics. This query will be analyzed in the November installment of this series.

• The second question is, “Is this article regulated/restricted for export?” This is a bifurcated analysis. The exporter needs to check the U.S. munitions list and the International Traffic in Arms Regulations if the export item is a defense-related item. If the export item is a non-defense-related item, then the exporter must identify the appropriate Export Commodity Control Number (ECCN) and determine whether BIS has regulations applying to the transaction.

• The next question is, “Are you restricted from doing business with the customer?” Often, in a real-world analysis, this may be the first question you ask, but sometimes you need to know whether the item is defense-related or not to identify the correct set of restrictions that may apply to the transaction. The November and December issues of this series will examine the many state, treasury and commerce department lists maintained by the U.S. government of persons, businesses and nations with whom trade may be restricted.

• The fourth question is a colloquial: “Is there something funny going on here?” Under BIS standards and guidance, there are a series of so-called red flags — a list of unusual situations suggesting a need for greater inquiry into the legality of the transaction before the exporter undertakes the transaction. Where there are unusual circumstances giving rise to a belief the transaction may be unlawful, BIS standards (as well as good business sense) require the exporter to investigate the situation and address potential problems before they could blossom into full-scale legal violations.

• The fifth question is, “Do you need an export license?” If export is *prima facie* prohibited, then the exporter may be able to obtain a license to engage in the transaction after demonstrating to the U.S. government that the policies of the government are not being adversely affected by the transaction in question. Almost all exported defense-related items require the exporter to obtain an export license. There are a few exceptions, which will be addressed in the December issue. In order to obtain an export license for a defense-related item, the exporter must first be registered with the Department of State — a separate process that is a prerequisite to licensing, and does not take the place of licensing.

Finally, once the five questions have been asked and answered, do not forget to complete the appropriate paperwork. For commodities worth more than \$2,500, a Shipper's Export Declaration (SED) generally needs to be completed. Instructions on completing the SED are available online at www.census.gov/foreign-trade/regulations/forms/correct-way-to-complete-the-sed.pdf.

Online mechanisms have made it easier than ever to properly complete export paperwork, but failure to complete required paperwork can reflect a serious violation. Forms can be filled out at www.aesdirect.gov.

While there is a general exception to the SED requirement for export commodities worth \$2,500 or less, the exception does not apply if an export license is required. If you send out an item commodity worth \$2,500 or less without a SED, be sure to mark the bill of lading, air waybill or other loading documents with the text, “No SED required, FTSR Section 30.55(h).”

Shipments from the United States to Canada also are exempt from the SED requirement, except those United

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States/Canada shipments that:

- require a Department of Commerce export license,
- are subject to the Department of State ITARs (defense-related items),
- are subject to DEA export declaration requirements.

Be sure to keep copies of export shipping documents for at least five years.

Next month's article in this export series will look at how to distinguish items controlled by the State Department's export regulations, and offer an analysis on how to comply with those regulations. □