



News from the Hill

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Part 4: Exporting for the Avionics Industry The Federal Aviation Administration Facilitates Exports

Scope of the Series

This is the last article in a four-part series addressing export issues from the United States to other countries. The first three articles addressed some of the laws and regulations applying to exports. This article takes a different direction by examining the ways the U.S. Department of Transportation facilitates exports.

Specifically, the first three articles have addressed:

- General prohibitions and limitations imposed by the U.S. Departments of Commerce, State and Treasury.
- How to determine if your avionics or other aircraft parts are subject to the International Traffic in Arms Regulations (ITARs), and some of the specific limitations applying to ITAR items.
- How to determine if your avionics or other aircraft parts are subject to Commerce Department restrictions.

Export Fines Can Be Staggering

Are you ready to export aircraft parts to another country? Whether your destination is Canada, the European community, one of the Asian nations, or anywhere else in the world, there are many laws and regulations that apply whenever you intend to engage in an export.

Failure to comply with these laws

and regulations can be very expensive. Fines for export violations by aviation companies have exceeded millions of dollars.

Does the FAA Restrict Exports?

It is a popular myth that the Federal Aviation Administration restricts exports. Nothing could be further from the truth. The FAA actually has a regulatory scheme facilitating exports.

The FAA facilitates exports by issuing airworthiness approval documents to help identify aircraft parts as acceptable to our trading partners. Without the FAA's assistance, many transactions involving the export of aircraft parts from the United States would not occur.

What are Export Airworthiness Approvals?

The FAA issues export airworthiness approvals as 8130-4 certificates, which certify the export airworthiness for an aircraft, engine or propeller. In addition, 8130-3 tags can be issued to certify the export airworthiness for other types of aircraft parts. The FAA can issue such tags, but generally, as a matter of practice, they are issued by designees, such as designated airworthiness representatives (DARs).

At present, export airworthiness approvals from the United States tell

the importing country two things:

- First, airworthiness approvals tell the importer the item in question is airworthy. This generally means the item is in a condition for safe operation and it conforms to an FAA-approved design configuration, such as type design. Because the 8130-3 tag only can be issued for new or newly overhauled parts, it is generally thought the airworthiness condition only can be truly verified in these situations. For complete aircraft, engines and propellers, it is possible to issue the 8130-4 when the product is not in new or newly overhauled condition as long as current airworthiness can be established.

- Second, airworthiness approvals tell the importer the item in question meets the special import characteristics of the importing nation. These are special characteristics formally "notified" to the U.S. FAA, and published by the FAA in an advisory circular. There are no special import characteristics for piece parts (described as Class III products), but there are many special import characteristics for aircraft and engines.

A Little History

The FAA's formal regulatory involvement in exports dates back to the 1960s. In 1963, the FAA proposed a rule allowing the agency to issue

export certificates of airworthiness and other export airworthiness approvals.

The purpose of these forms was to verify to our foreign trading partners that aircraft and major assemblies of aircraft were airworthy, and to inspire confidence in our foreign trading partners about the safety of the aircraft and assemblies in question.¹

How could the FAA justify such forms under its safety mandate? First, in the 1960s, the FAA still had a mandate to foster aviation. More importantly, even in the 1960s, it was recognized that good records — and traceability records — helped ensure aircraft were airworthy and, being able to ensure an aircraft was airworthy, helped everyone ensure civil aviation remained safe.

The original proposal provided for the issuance of export certificates of airworthiness for Class I products (complete aircraft, engines and propellers). It also provided for airworthiness approval tags for Class II products, which were defined as major assemblies — the failure of which would jeopardize safety of flight.

Class II also was broadened to include article manufactured under “C” series (modern) technical standard order authorizations (TSOAs). Most modern avionics manufactured in the U.S. are made under “C” series TSOAs.

All other parts of an aircraft were considered Class III products, which were not to be eligible for export airworthiness approvals “because of the nature of these products.” The preamble to the notice of proposed rulemaking explained:

“In lieu of such an approval for Class

III products, exporters may use a certified statement, packing sheet, invoice, or bill of lading containing information required by the particular country. This exporter’s certificate is acceptable in many foreign countries.”²

The final rule, published in 1965, modified this approach slightly. One manufacturer responded during the comment period that it could foresee a need in the future for airworthiness approval documents for Class III parts. As a consequence of this one manufacturer’s comments, the final regulation also permitted manufacturers to apply for export airworthiness approval for Class III products.³

The approval was to be issued in the form of an airworthiness approval tag, the same form used for Class II products.⁴

This block of regulations, which came to be known as “Subpart L” because its position within that subpart of 14 CFR Part 21 was specifically promulgated to implement the reciprocal agreements in place at the time between the U.S. and a number of foreign countries governing the import and export of aeronautical products.

In particular, these agreements — commonly known today as the “bilaterals” — provided for the mutual validation or acceptance of export certificates of airworthiness issued for aeronautical products manufactured in, and meeting the airworthiness requirements of, the country of export and any special requirements of the importing country. In plain English, this meant the importing country would accept the airworthiness certificate from the exporting country and would treat the item as if it were airworthy under the

rules of the importing country.

In promulgating Subpart L, the FAA tailored the rule to the commercial realities of the day. The agency proved itself open to reasonable suggestions from the industry. While the FAA originally saw no need to issue export airworthiness approvals for Class III products, once the industry brought such a need to the agency’s attention, the FAA accommodated that need by permitting manufacturers to be eligible for such documentation.

The 1963 assumption that Class III products could be exported with only a certified statement, packing sheet, invoice or bill of lading from the exporter is no longer commercially valid.

Today, there is clearly a need for wider eligibility for export airworthiness approvals for Class III products.

The industry has evolved in such a way that manufacturers are no longer the only parties seeking to export Class III products — repair stations and distributors now represent a majority of the participants in the global aftermarket for aviation parts. And repair stations and distributors often find there is a commercial requirement for documentation confirming airworthiness.

International Requirements for Documentation

Further exacerbating the need for these types of documents, a number of countries have passed documentation laws requiring imported parts to be accompanied by airworthiness documentation.

The best known of these laws is EASA 145.A.42, which requires most aircraft parts entering the European

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¹ NPRM: Export Airworthiness Approval Procedures, 28 Fed. Reg. 3728 (Feb. 17, 1963).

² Id. at 3729.

³ 14 C.F.R. § 21.323(b).

⁴ Final Rule: Export Airworthiness Approval Procedures, 30 Fed. Reg. 8464, 8465 (July 2, 1965).

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community to be accompanied by airworthiness documentation.⁵ This regulation requires most airworthy parts to be accompanied by an EASA Form One or equivalent. EASA has held that the FAA Form 8130-3 is considered equivalent because a number of individual European community member nations have bilateral airworthiness agreements with the FAA, under which they have agreed to accept the 8130-3 tag as an equivalent document.

The reason these documents are said to be facilitators of trade is because they are not issued to meet FAA regulations — FAA regulations generally do not restrict exports. Instead, they are issued to help the U.S. exporter meet the import requirements of his or her destination nation.

In order to support the continued acceptance of the 8130-3 by our major trading partners, the FAA has negotiated bilateral agreements with many nations to verify the trading partner will accept U.S. airworthiness documentation as acceptable documentation under the importing nation's own airworthiness laws.

The Future of Airworthiness Documentation

The United States is in the process of negotiating its first multilateral airworthiness agreement between the FAA and EASA. Industry rumors suggest it will be signed and in effect this year. This will help cement the role of the 8130-3 and 8130-4 forms as facilitators of exports to Europe.

More importantly, however, the FAA has issued a notice of proposed rulemaking to eliminate some of the artificial boundaries beginning to

impede trade. It would eliminate the distinction between Class II and Class III parts, finally permitting all airworthy parts to be equally eligible under the regulations for airworthiness approval.

Another import change would be the elimination of the requirement for the issuer to verify the special import conditions of the importing nation. Instead, that responsibility would fall on the shoulders of the exporter — which is the way it is done in other nations. This would allow companies to obtain airworthiness approval without knowing where the part was ultimately destined, allowing the part to be exported at will without further involvement of a designee or FAA.

This also raises the value of verification of airworthiness findings made by repair stations for new parts (as currently permitted by FAA Order 8130.21E) because their findings would be factually little different from the findings made by designees. Thus, some foreign business partners who trust your repair station's findings concerning a new part as presented on an 8130-3 tag may be able to accept those findings. The final form of the EASA agreement may affect this ability.

The proposal includes other important details. For example, it eliminates the requirement for an exported part to be new or newly overhauled, and merely requires it be airworthy as discussed earlier. This opens the door to the export of as-removed items if they can be verified airworthy. You can bet this provision will get a diverse reading throughout the U.S. and will be subject to multiple conflicting interpretations.

One thing is certain, however: The

8130-3 and the 8130-4 will continue to have value as facilitators of commerce throughout the entire world. □

This series 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 series focuses on the export laws of the United States. 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., but 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 commodities, ranging from raw materials and components, such as circuit boards or fasteners, to finished products, such as aircraft parts and avionics. They also can apply to non-material things like software and printed materials, including blueprints, design plans and technical information.

⁵ Commission Regulation (EC) 2042/2003 (Nov. 20, 2003) (on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations [sic] and personnel involved in these tasks).