

**Amendment to the Export Administration
Regulations: Elimination of the De Minimis Rule
for Category 7A Commodities
73 Fed. Reg. 70322 (November 20, 2008)
Comments on the Notice of Proposed Rulemaking
Submitted by email to publiccomments@bis.doc.gov**

**Submitted by the
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January 20, 2009

U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
ATTN: 7A/De minimis
Room H-2705
Washington, DC 20230

Dear Sir or Madam:

Please accept these comments on the proposed rule, Amendment to the Export Administration Regulations: Elimination of the De Minimis Rule for Category 7A Commodities, which was offered to the public for comment at 73 Fed. Reg. 70322 on November 20, 2008.

Table of Contents

I. Who is AEA?.....	3
II. The De Minimis Rule and Avionics	3
III. The Proposal Would Impact Export/Re-Export of Avionics Parts and Products.....	4
IV. The U.S. Commodities the Proposed Rule Change Would Affect Are Readily Available from Foreign Manufacturers	6
V. The Aviation Exception will not help the Aviation Community.....	6
A. Avionics Shipped Separately Are Unprotected.....	7
B. The Term Transport Aircraft is Undefined, the Existing Defined Terms Appear Inadequate, and Transport Category Airplane Avionics May be Identical to Non-Transport Category Airplane Avionics	7

C. The Term “Standard Equipment” is Now Suspect Due to State Department Interpretation	8
VI. It is Economically Unrealistic to Buy US Avionics for Their Internal Components	9
VII. The Proposal Could Lead to Marketing Claims Favoring Products with No US Content	10
VIII. Conclusion	10

I. Who is AEA?

The Aircraft Electronics Association (AEA) is an international organization representing over 1,300 company members dedicated to the general aviation electronics industry. AEA recently celebrated its 50th birthday as a trade association – it has spent the lion’s share of that time based in Missouri (although it was originally formed in Texas). AEA’s membership includes avionics repair stations, manufacturers and distributors – and all of them are affected by the proposed rule.

AEA supports efforts to improve safety and regulatory awareness among its members and in the industry as a whole. AEA has proactively sought to raise awareness of the US export rules among both its domestic and its non-US members. To this end, AEA has published export compliance articles in its monthly magazine and has provided export compliance training at its Annual Convention and at Regional Meetings. AEA has provided export education to its members with respect to export regulations published by the Commerce State, and Treasury Departments.

AEA strongly opposes the proposed change in the *de minimis* standard. These comments address AEA’s issues with the proposed rule change, and explain why AEA believes that the rule change would be detrimental to the U.S. avionics industry.

II. The De Minimis Rule and Avionics

All of AEA's 1300 members buy and sell – whether it is manufacturers who buy components to use in their products and then sell them to installers or dealers, or repair stations who buy and stock avionics articles for installation in customers’ aircraft, and then sell the articles to the customer. AEA’s members represent a valuable part of the U.S. aerospace industry, which, as a whole, was responsible for a trade balance of \$60.4 billion in 2007. The export of aerospace parts

including general aviation electronics components makes up a vital piece of U.S. industry and trade.

The *de minimis* rule, as it currently exists in the Export Administration Regulations (EAR), allows entities to purchase U.S. articles and incorporate the U.S.-sourced parts into foreign-made items with the assurance that the foreign made items can then be exported to third-party nations without worrying about the effect of U.S. export regulations, as long as the foreign product contain less than 25% (or 10% for re-export to certain controlled countries) of U.S.-sourced parts.

The *de minimis* rule was added to the EAR in 1987, to, in the words of the Department of Commerce, “alleviate a major trade dispute with allies who strenuously objected to U.S. assertion of jurisdiction over all reexports of non-U.S. items that contained even small amounts of U.S. content” (Notice, Federal Register, Nov. 20, 2008, 73 Fed. Reg. 70332).

The proposal applies to category seven components subject to Missile Technology (MT) restrictions, but this would represent most modern avionics.

III. The Proposal Would Impact Export/Re-Export of Avionics Parts and Products

The *de minimis* rule applies to the avionics community in a number of ways. Non-US manufacturers who are seeking to purchase parts and raw materials from the United States are already mindful of the US re-export standards, and design their products to fall below US *de minimis* requirements in order to avoid being subject to the restrictions of US export regulations. As a practical matter, this already limits US content in certain designs to a maximum of 25% of the value of the finished product. For those manufacturers already relying on the *de minimis* rule as the basis for limiting US content, the elimination of the *de minimis* rule would mean that the foreign manufacturers would simply avoid US content altogether.

Avionics packages represent a significant part of the value of a new aircraft – it can represent 1/3 of the value in a new business jet. Today, foreign repair stations purchase avionics incorporating U.S.-sourced parts with the assurance that they can then install the components into an aircraft from a third nation and not have to be concerned about complying with U.S. export regulations as long as the foreign product contain less than 25% (or 10% for re-export to certain controlled countries) of U.S.-sourced avionics. Such avionics parts move relatively freely within Europe (for example) due to the common market. With the

elimination of the *de minimis* rule, there is a worry that such avionics cannot be moved freely, even within the common market of Europe, because of the re-export rule that might apply to them.

EXAMPLE: Imagine that an avionics component is manufactured in the United Kingdom today with 20% US content. The component is an inertial reference units (IRU) meant for use in a small business aircraft manufactured (not a transport aircraft). Such an article would be subject to either ECCN 7A003 or 7A103 depending on functionality (both ECCNs are subject to missile technology restrictions). Under today's rules, it can move freely to distributors throughout the European Community. But if the *de minimis* standard was changed as proposed, then the UK company would need a US export license to send it to a distributor in France or any other EC nation. In light of the fact that th transactions are not 'touching' the United States, the manufacturer is far more likely to find alternative sources for the US content, then to accept US jurisdiction over the intra-EC movement.

The elimination of the *de minimis* rule would impact the ability of foreign repair stations to make the purchase of avionics containing U.S.-sourced parts outlined above. For example, a repair station in Germany might purchase a avionics component from a U.K. manufacturer, unaware that it contains 20% U.S.-sourced avionics. Under the current *de minimis* rule, the repair station could install this avionics component into an aircraft owned by a French company, and the aircraft could fly back into France. However, if the *de minimis* exception was eliminated, the German repair station could have just re-exported the U.S.-sourced pieces of the avionics component (even if the percentage of U.S.-sourced material in the piece was low) and would come under U.S. export jurisdiction. Additionally, the original transaction between the U.K manufacturer and the German repair station would also come under U.S. jurisdiction due to the small amount of U.S.-sourced avionics parts in the end product.

Thus, the *de minimis* exception encourages foreign repair stations to buy avionics with U.S.-sourced parts, and encourages foreign manufacturers to create these avionics using parts they buy from U.S. avionics shops. No foreign manufacturer wants to expose themselves to U.S. export law when selling a product with a minimal amount of U.S.-sourced content, and manufacturers certainly don't want to make their parts unappealing to their target audience, the repair stations, distributors and end-users. The buyers are unlikely to want to risk the re-export limits imposed on avionic articles with U.S.-sourced parts in them when there are a plethora of readily available alternatives that will not subject them to U.S. jurisdiction. Removing the *de minimis* exception would make it much more difficult for foreign manufacturers to export their products if the products contained **any** amount, no matter how minimal, of U.S.-sourced avionics, which would discourage them from using any US source parts.

If the proposed change goes forward, the U.S. avionics industry would suffer the impact of reduced sales for export, and foreign manufacturers of avionics would find new (non-US) sources to provide them with parts formerly sourced in the U.S. Current US policy is to promote aerospace exports. Exporting US-manufactured avionics is a great way to help promote a healthy balance of trade, and elimination of the *de minimis* rule would negatively impact this balance.

IV. The U.S. Commodities the Proposed Rule Change Would Affect Are Readily Available from Foreign Manufacturers

The Category 7A commodities whose export would be affected by the proposed elimination of the *de minimis* rule are readily available from foreign manufacturers. In essence, the U.S. would be promoting trade from other nations by encouraging foreign manufacturers and repair stations to get their 7A avionics and parts from non-U.S. sources.

Some examples of foreign manufacturers of parts that foreign companies may turn to if the *de minimis* rule is eliminated to avoid becoming subject to U.S. export laws include: CORRSYS-DATRON, a German company manufacturing accelerometers (7A001) and gyros/angular rate sensors (7A002); Siemens, a German company manufacturing accelerometers (both 7A001 and 7A101) and gyros/angular rate sensors (7A002); Murata, a Japanese company manufacturing accelerometers (7A001) and gyros/angular rate sensors (7A002); and BAE, a UK company manufacturing accelerometers (7A101).

This abundance of foreign availability will hurt U.S. companies such as Cool City Avionics, of Texas. Cool City is a young company that is entering the avionics marketplace with the expectation that they will sell a significant quantity of their products internationally over the next few years. This proposed rule change will hurt companies like Cool City and American industry as a whole, without eliminating foreign access to 7A commodities made by non-U.S. companies.

V. The Aviation Exception will not help the Aviation Community

While the proposed rule change in question appears to contain an exception for the aviation community pertaining to 7A commodities, this exception is illusory. The language of the proposed rule indicates that the exception would apply only where “the commodities are incorporated as standard equipment in FAA (or national equivalent) certified civilian transport aircraft”. There are three reasons that this language would fail to provide an adequate remedy.

A. Avionics Shipped Separately Are Unprotected

This exception would apply only to avionics already installed in transport category aircraft. The exception would not cover avionics shipped separately in a container (instead of being installed in an aircraft). There is a significant business that is current being done in avionics and avionics upgrades and such avionics are often shipped outside of the context of an installed article.

B. The Term Transport Aircraft is Undefined, the Existing Defined Terms Appear Inadequate, and Transport Category Airplane Avionics May be Identical to Non-Transport Category Airplane Avionics

The term “Transport Aircraft” is not defined in the commerce regulations nor in the FAA’s regulations. Therefore this is a vague term that cannot be usefully relied upon for interpreting the scope of the exception.

In the FAA’s regulations, an aircraft is a device used for flight – this includes airplanes and rotorcraft.¹ Although the FAA’s regulations do not define the term “transport aircraft,” the FAA’s regulations do provide two Parts in its regulations that are identified as “Airworthiness Standards: Transport Category Airplanes” (14 C.F.R. Part 25) and “Airworthiness Standards: Transport Category Rotorcraft” (14 C.F.R. Part 29). One may assume that the term “transport aircraft” as used in this proposal was meant to apply to aircraft in those two categories.²

There is no policy basis for distinguishing Part 25 and Part 29 aircraft (which can be thought of, colloquially, as larger aircraft) from Part 23 and Part 27 aircraft (which may be thought of as smaller aircraft). Creating a distinction between transport category aircraft and non-transport category aircraft for purposes of defining an exception to the re-export rules simply does not make sense. Any exception that applies to aircraft ought to apply to all aircraft.

One reason that there should be no distinction between transport category aircraft and non-transport category aircraft is that they may use the same avionics. It is not at all unusual to find the same avionics package installed in both Part 23 (non-transport category) and Part 25 (transport category) airplanes. Under the exception as proposed, the package that was installed in a Part 25 airplane might be excepted from the new standard, but the identical equipment in the Part 23 aircraft would not. This distinction creates a situation that contradicts basic tenets of equal protection.

¹ 14 C.F.R. § 1.1.

² It is important to note that the terms “transport category aircraft” and “transport aircraft” are not defined in the FAA’s regulations, but that the scope of 14 C.F.R. Part 25 is generally interpreted to reflect all airplanes that did not meet the scope of 14 C.F.R. Part 23, which includes better defined terms and scope at 14 C.F.R. § 23.3.

C. The Term “Standard Equipment” is Now Suspect Due to State Department Interpretation

Under the proposal, the exception for transport aircraft avionics applies only to articles defined as “standard equipment.” Unfortunately, due to the State Department’s recent redefinition³ of “standard equipment,” virtually no aircraft avionics fitting into category 7 will meet this exception.

The Note to 22 C.F.R. § 121.1 Category VIII(h) defines “standard equipment” in the context of aircraft parts to be:

“a part or component manufactured in compliance with an established and published industry specification or an established and published government specification (e.g., 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,” e.g., 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.”⁴

This definition was specifically meant to apply to the “standard equipment” language of section 17(c) of the Export Administration Act. One problem with this definition arises in the preamble to the rule, which explains that

“An ‘accessory,’ an ‘attachment,’ and ‘associated equipment’ are not considered standard equipment integral to the civil aircraft.”⁵

Most avionics are produced under Technical Standard Order Authorizations (TSOAs).⁶ Thus, their certification basis falls outside the scope of the certification basis for the aircraft. As such, they may potentially be considered to be articles that do not meet the definition of standard equipment. Furthermore, they are manufactured to meet the standards published by the governments that publish Technical Standard Orders (TSOs), but those designs are not identical to the TSOs because the TSOs merely serve as performance standards and not as production standards or conformity standards.

Finally, TSOA articles may be thought of as analogous to PMA articles in the sense that they are manufactured under production authority separate from the design and production authority associated with an aircraft. PMAs are approvals

³ Amendment to the International Traffic in Arms Regulations: The United States Munitions List Category VIII, 73 Federal Register 47523 (August 14, 2008).

⁴ Id. at 47526.

⁵ Id. at 47524.

⁶ See, e.g., 14 C.F.R. § 21.601 et seq. (US FAA TSOA rules); e.g. Automatic Pilots, FAA TSO-C9c (September 16, 1960) (the US TSO that established performance standards for autopilots).

issued by the FAA to authorize the manufacture of civil aircraft components (they are purely for civil aircraft). The State Department explicitly refused to include PMA articles within the scope of the term “standard equipment”:

Two (2) commenting parties recommended part (b) of the second sentence of the explanatory note add Parts Manufacturer Approval (PMA). As a PMA may be issued for an exclusively USML item, inclusion of PMA is not appropriate here.⁷

Thus, the ‘standard equipment’ term arguably may not apply to avionics, and therefore avionics manufacturers, dealers, and exporters around the world would be unable to rely on that provision to exempt avionics.

Although we appreciate the contrary (and much more reasonable) interpretation of the term “standard equipment” published by the Commerce Department in the December 5, 2008 Federal Register, that guidance does not eliminate the language of the State Department interpretation.

VI. It is Economically Unrealistic to Buy US Avionics for Their Internal Components

No reason for this proposal is advanced in the language of the proposal. One conceivable basis would be to forestall terrorists and foreign powers from obtaining missile components from civilian avionics. However, in light of the fact that such components are available from non-US sources, it does not make good economic sense to purchase avionics that incorporate the components.

Avionics are much more expensive than their component parts would be, because they are manufactured under strict quality control systems that are overseen by the FAA and other foreign aviation authorities. This assures a level of reliability that helps to instill public confidence in commercial aviation. But it also makes the avionics components more expensive because of the certification and testing regimes.

It is extremely unlikely that terrorists would purchase aircraft avionics for their component parts, because of the mark-up associated with compliance with regulatory airworthiness standards.

⁷ Amendment to the International Traffic in Arms Regulations: The United States Munitions List Category VIII, 73 Federal Register 47523, 47524 (August 14, 2008).

VII. The Proposal Could Lead to Marketing Claims Favoring Products with No US Content

In the software world, you can already find software that is promoted with claims that it is not subject to the United States export administration regulations.⁸ If the De Minimis rule is revoked for section seven articles, then foreign manufacturers may begin to use the fact that they use no US content as a marketing feature. This would represent the sort of negative promotion that would undercut US export goals by casting US content into a negative light, and promoting as a positive thing the fact that a product is disconnected from the United States. Such promotion would be contrary to US export policies with respect to the promotion and increase of US exports.

VIII. Conclusion

The proposed rule change is contrary to American interests, in light of the fact that the stated reason that the *de minimis* rule was added to the EAR was to allow trade with our allies to flow by limiting application of U.S. re-export rules to those situation nin which the US content in aerospace products is significant. Historically, the US has not see a need to apply its re-export rules to goods made overseas with very minor amounts of U.S.-sourced product.

This proposed rule change would punish both U.S. and foreign avionics manufacturers while providing no benefit.

It is AEA's position that the *de minimis* rule should not be eliminated. If the government chooses to eliminate the *de minimis* standard despite industry objections, then AEA asks that the aviation exception in the proposal be expanded to include all civil aircraft components in Category 7 (not just 'transport category' components).

Thank you for affording industry this opportunity to help improve the proposal to make it better serve the needs of the U.S. export community. We appreciate the efforts of the Commerce Department in this regard.

Your consideration of these comments is greatly appreciated.

⁸ See, e.g., Gray, [GNU launches free encryption tool](http://www.cnn.com/TECH/computing/9909/09/gnupg.idg/index.html), CNN.com (September 9, 1999) (announcing the release of GnuPG, which was promoted for its freedom from US export controls due to the fact that it was developed outside the United States) (<http://www.cnn.com/TECH/computing/9909/09/gnupg.idg/index.html>); see also a list of privacy and encryption software packages found at <http://www.afn.org/~afn21533/rgdprogs.htm>, which announces which packages are not subject to US EAR restrictions.

Respectfully Submitted,

A handwritten signature in black ink that reads "Jason Dickstein". The signature is written in a cursive style with a large, looped "J" and "D".

Jason Dickstein
Washington Counsel
Aircraft Electronics Association

for

Ric Peri
Vice President of Government Affairs
Aircraft Electronics Association