



LEGAL EASE

Aviation Law Made Simple

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Exporting Avionics from the United States to Canada

I come from a long line of thieves. I bet you don't see that at the beginning of most lawyer's columns.

Actually, the "line of thievery" is not that long, but I do know that while many families emigrated to the "New World" to escape persecution, my ancestor, Roger Barton, came to the New World in the 17th century to escape prosecution as well. After fleeing most of the decent nations of Europe just one step ahead of the law, he finally ended up in Canada, where he was able to start an honest life. Despite his rehabilitation, the family tradition continued in a much more subdued fashion in the 1970s, when my relatives would smuggle cigarettes from the United States to Canada to escape the higher taxes.

So, perhaps it is a bit odd for me to write a column about how to comply with U.S. export laws when shipping avionics from the United States to Canada. Nonetheless, export questions have become a recurring theme among AEA members' inquiries, and AEA's Canadian members have requested we focus on the export of articles to Canada.

Canada enjoys a special place in the U.S. export laws. Because of the close relationship between the United

States and Canada, there are a number of exceptions that can apply to exports destined for the Great White North. This month's article focuses on ITAR-controlled items (defense-related articles) and the exceptions that could make it easier to export such articles to Canada.

In any export transaction, you need to distinguish the export article as either Commerce Department-controlled (subject to the Export Administration Regulations, or EARs) or State Department-controlled (subject to the International Traffic in Arms Regulations, or ITARs). This is particularly important for avionics bound for Canada, because most exports under the EARs do not require a license; whereas, many exports subject to the ITARs do require a license.

Distinguishing Defense Articles from Civil Articles

Aircraft components designed, manufactured or altered for use in defense-related aircraft generally are going to be considered defense-related articles, which are regulated for export under the State Department ITARs. Exporters must be wary of this definition because an article originally designed for defense-related purposes

but which subsequently has been used for civilian purposes still could be considered ITAR-controlled even if the article is no longer actively used for defense-related purposes.

Aircraft components that never have been made or altered for use in defense-related aircraft generally are going to be considered civil aircraft articles, which are regulated for export under the Commerce Department EARs.

But what about items used in both civil aircraft and defense-related aircraft? The fairly simple rule for these dual-use parts is: Any standard equipment component integral to an FAA type-certificated aircraft is considered a civil aircraft part subject to the EARs unless it falls explicitly into either Category VIII or Category IX of the United States Munitions List.

Think this is confusing? It gets worse. The law distinguishing civil aviation components from defense-related articles took a bizarre turn in late 2008, when the State Department and the Commerce Department traded dueling interpretations concerning the distinction. (See the Legal Ease column "State Department Guidance Makes Export Compliance More Difficult for Avionics Shops,"

Avionics News, October 2008, which can be accessed from the Avionics News online archives at www.aea.net/AvionicsNews.)

Perhaps the best way for those who export avionics to distinguish items as either civil or defense-related is to contact the manufacturer and rely on the manufacturer's determination. Ask for the manufacturer's export information concerning its product. If you are told it is an "ITAR item" or a "USML item," it is subject to State Department export rules. If you are given an ECCN, this indicates the article is subject to Commerce Department export restrictions.

Exporting Defense-Related Avionics

Generally speaking, exporting a defense article from the United States requires the exporter to register with the State Department's Directorate of Defense Trade Controls (DDTC) and to obtain a license covering the intended export.

Primarily, registration is a means to provide the U.S. government with necessary information as to who is involved in exporting activities. Registration does not confer any export rights or privileges; however, it is a precondition for the issuance of any license or other approval for export.

DDTC registration can be accomplished by downloading the documentation package from the DDTC website at www.pmdtdc.state.gov/registration/index.html, then completing it and returning it by mail.

Maintenance Exception to the ITARs

AEA members who intend to import defense avionics and inspect, repair or calibrate them before return-

ing them to the overseas customer who sent them might be able to make use of a special exception to the regulations.

If the part (or a product on which it was installed) was exported legally, it might be eligible for an exception from the export regulations if it is intended to be imported and inspected, repaired or calibrated, then re-exported to the same customer who sent it for work. The end-user/customer must intend for the part to be used for the same purpose as the purpose originally associated with the original legal export.

In a sense, the essence of this exception is that it permits a part in need of repair or calibration to be returned to the condition associated with its original export, then returned to the original importer.

To meet the conditions of this exception, the part cannot be upgraded or altered by the work performed. This would include software upgrades that change functionality. For example, a TCAS software upgrade that newly permits operation in RVSM space changes the functionality.

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The article also must be “unclassified” and of U.S. origin.

An important key requirement to meet this exception must be addressed at the time the article is imported into the United States for service. The import documentation must identify the part as being subject to the maintenance exception. It should include the phrase: “This shipment is being imported in accordance with and under the authority of 22 CFR §123.4(a)(1).”

Failure to include this phrase in the import documentation can preclude you from using the maintenance exception to avoid licensing requirements when returning the article to your customer. This can seriously delay your return if the export license is delayed or refused.

Canadian Exception to the ITARs

Under the right circumstances, ITAR-controlled articles being shipped to Canada can enjoy an exception to the normal licensing requirements for exports. I have developed a short checklist to address this exception, although anyone planning to use the exception should verify its eligibility against the actual regulatory requirements, which are found in the U.S. regulations at 22 CFR §126.5.

To be able to use the exception, you must be able to check off all the boxes. If you cannot check off all the boxes, look for another exception or obtain an export license:

☐ The export article (the term “article” includes software and technical data for purposes of this checklist) must fall within the scope of the U.S.

Munitions List, which is the list of items subject to the State Department export regulations.

☐ The export article must be destined for end-use in Canada. This means it cannot be intended for subsequent re-export beyond Canada.

☐ The export article must be destined for one of the following acceptable end-uses:

- Used by Canadian federal or provincial governmental authorities acting in an official capacity.
- Used by a Canadian-registered person (registered under the Canadian Defense Production Act).
- For temporary use in Canada (such as repair in Canada) and subsequent return to the United States.

☐ If it is significant military equipment, the exporter must obtain written non-transfer and use assurances. (Significant military equipment is denoted by an asterisk next to the article where the article is listed in the U.S. Munitions List).

☐ The article must not be on the list of exceptions, which includes the following (all exceptions continue to require a license, even when shipped to Canada). The following is a summary of the list; the full list can be consulted in the regulations at 22 CFR §126.5(b)(17)):

- Classified articles, technical data and defense services
- Missile Technology Control Regime (MTCR) annex items
- Technical data and defense services for gas-turbine engine hot sections
- Certain firearms and ammunitions
- Nuclear weapons-related equipment
- Complete defense-related aircraft
- Infrared focal plane array detectors and image intensification equip-

ment specifically designed, modified or configured for military use

- Certain chemical and biological agents
- Nuclear radiation measuring devices manufactured to military specifications
- Spacecraft, except commercial communications satellites
- Restricted global positioning system (GPS) receiving equipment, except items for end-use by the federal government of Canada exported directly or indirectly through a Canadian-registered person
- Radiation-hardened microelectronics
- Certain antennas and certain other components for items restricted under this list

There are a number of exceptions that can make it easier to export ITAR-controlled avionics to Canada; however, if you cannot meet an exception and you need to ship ITAR-controlled avionics to Canada, you need to register and obtain a license appropriate to the articles being shipped.

Non-compliance can be quite expensive because of legal fees and penalties; so, an in-house compliance program can be well worth the investment.

As always, if you intend to export, you should consult with an attorney who understands the process to ensure your company remains in compliance with the regulations. If you have questions about the licensing process or the exceptions, contact the AEA offices for more information. ☐

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