



# LEGAL EASE

## AVIATION LAW MADE SIMPLE

BY JASON DICKSTEIN  
AEA GENERAL COUNSEL

## Commerce Department Licensing Exceptions Vary for Exporting Avionics

**A**viation is a global industry, and even the general aviation community is experiencing an increase in international transactions. When avionics are exported out of the United States, the parties to the transaction need to be particularly careful to comply with U.S. export laws. This article examines the Commerce

Department's role in another non-U.S. location; there is a de minimis rule applying to re-export transactions. (For more information on this de minimis rule and recently proposed changes to the rule, read last month's "Legal Ease" column).

### Who Controls Export from the U.S.?

There are three departments of the U.S. government that have primary jurisdiction over export control laws.

The Treasury Department controls transactions involving assets, which includes goods and money. Treasury restrictions are designed to support specific policies of the U.S. government, such as restrictions against narcotics traffickers and restrictions against doing business with governments supporting terrorism.

In addition to the Treasury restrictions, either the State Department or the Commerce Department will be the lead agency with respect to the restrictions applying to the particular item being exported. The State Department controls the export of defense-related articles (Defense-related articles and dual-use articles will be a topic of a future column). The Commerce Department's regulations control the export of aerospace articles that are not controlled by the State Department.

### Commerce Department Export Restrictions

The agency in the Commerce Department that sets the export standards is known as the Bureau of Industry and Security, or BIS. Some readers might remember this agency as the Bureau of Export Administration, or BXA. The name was changed after the terrorist attacks of 2001.

The BIS regulates exports and issues licenses for exports requiring them — not all exports require licenses.

For most AEA members, it is in their best interests to avoid any requirements for licensing if at all possible. Obtaining appropriate licenses can be time-consuming.

The need to obtain an ad hoc license can significantly delay a transaction, and it requires a commitment of resources to make the application in the first place. When a license may be necessary, it is preferable to avoid the licensing requirement through an available licensing exception.

### Navigating the Export Rules

Let's take a look at a situation where a license might be needed. Imagine you just finished repairing a Honeywell attitude heading and reference system for use in a corporate jet

**There are three departments of the U.S. government that have primary jurisdiction over export control laws: the Treasury Department, the State Department and the Commerce Department.**

Department restrictions on exporting avionics and some of the exceptions to those rules that may permit an unlicensed export.

Avionics may be subject to the U.S. export laws:

- When they are needed by a repair station outside of the U.S.
- When they are being exported from the U.S. to an owner following service.
- When they are "re-exported" from one non-U.S. location (to which it previously had been legally exported) to

in the United Kingdom. For ease of analysis, let's assume the aircraft is registered in the U.K. and owned by a company in the U.K. You are about to export the article back from the U.S. to the U.K., and you want to be sure to comply with the appropriate export control laws.

The first step is to identify the export control classification number, or ECCN. The ECCN for this Honeywell AHRS is 7A101, which is an ECCN for certain accelerometers. Examining ECCN 7A101 on the Commerce Control List, you discover this article is export-controlled for two reasons: "MT" (missile technology) and "AT" (anti-terrorism).

The next step in the export analysis is to identify whether or not a license is required to export the AHRS to its specific destination. By examining the Commerce Country Chart, you discover articles controlled for missile-technology reasons cannot be exported to the U.K. without first obtaining a license.

This analysis appears to require a license to ship the Honeywell AHRS back to the owner in the U.K.

Many would argue a license seems unnecessary for shipping this article back to the U.K. when (1) it was originally shipped under a license (an additional license seems duplicative) and (2) it was returned only to the U.S. for the specific purposes of obtaining service before being returned to the owner in the U.K.

There are some laws that support these views and lend some opportunity for unlicensed export, notwithstanding the prima facie appearance of a licensing requirement. These

provisions are known as licensing exceptions.

### **Licensing Exceptions**

Licensing exceptions permit the non-licensed export of certain commodities, notwithstanding general regulations that appear to require a license for each export. The exceptions generally apply under narrow circumstances, and it is important to be certain the circumstances and conditions for the exception are met. This usually means reading the full text of the exception to confirm the conditions (not just this column).

Although the license exception permits unlicensed export, it does not exempt the exporter from other legal requirements, such as documentation of the export. In most cases, the licensing exception will be disclosed in the documentation.

Each Commerce Department licensing exception is identified by a three-letter symbol used for export clearance purposes. The three-letter code is entered on the required shipper's export documentation, which generally is prepared online using the automated export system.

The two exceptions discussed in this article — servicing and one-for-one replacement — both bear the three-letter code "RPL."

### **Returning Items Sent to the United States for Service**

If an item is returned to the U.S. for servicing and the replacement of defective or otherwise unacceptable U.S.-origin commodities and software, it may be able to take advantage of the "servicing" licensing exception

when it is exported once again.

To use this exception, the article must be the same as it was before the service — that is, there can be no improvement or alteration. In particular, the item should have no improvements or changes to its basic design characteristics implemented as an element of the servicing. If a service bulletin has called for a modification leading to a dash number change or other notation on the part, this is a sign the article is being altered and it is no longer identical to the original equipment.

Repair stations planning to make use of this licensing exception should carefully confirm the work scope does not include anything that would alter the basic characteristics of the component (as compared to the configuration at the time it was originally exported). Service that improves the equipment (such as a software upgrade) is not eligible for this licensing exception.

If there is no alteration, the scope of work is not critical. The exception may be applied to articles sent to the U.S. for inspection, testing, calibration or repair, including overhaul.

There are limits and special conditions attached to different country groups. The lists of countries to which the limits are applied can be found in the Country Group lists in Supplement No. 1 to 15 CFR, Part 740. If your export destination is in Country Group D:1, you should examine the limits found in 15 CFR, §740.10. Those limits include the fact that only the original exporter of the

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article can use this licensing exception.

Let's say your repair station originally exported the Honeywell AHRS to a customer in Armenia (Armenia is a group D:1 country). Your company obtained the appropriate license for the original sales transaction.

When the article is returned to your company for repair, you, as the original licensed exporter, could service it and return it to your customer in Armenia using the "servicing" license exception. However, it must be sent to the same customer in Armenia (it cannot be sent to a different party in Armenia).

If the Armenian customer chooses to send it to a competitor (a different U.S. repair station), the customer

returned to the customer in the U.K. without an export license under the "servicing" license exception.

The export documentation prepared via AESDirect ([www.aesdirect.gov](http://www.aesdirect.gov)) should indicate the article is exported subject to licensing exception "RPL."

It is important to note, the "Servicing" licensing exception cannot be used to export aircraft parts to countries in the Commerce Department's Country Group E:1. These are nations that have been identified as supporters of terrorism. The list currently includes Cuba, Iran, North Korea, Sudan and Syria.

### Exchange Agreements

Exchange agreements are common in the aerospace industry. Under an exchange agreement, a customer sends a used article to a repair station, then receives an overhauled article in

design characteristics. This is similar to the application of the licensing exception rule for "servicing."

Repair stations making use of this licensing exception should carefully confirm the exchange unit is identical to the core unit with respect to part number and other identifying criteria.

The article offered as a core, or returned article, needs to have been exported legally. It is advisable for the exporting U.S. repair station to obtain a copy of the original export documentation for the core, or for the aircraft from which the core was taken (assuming the core was part of the original export), to validate the original export was legitimate. When examining the original export documentation, be sure to confirm the original license did not include a condition requiring any subsequent replacement parts must be exported only under a license.

The core must be either returned promptly or destroyed. This is an important provision because usually the exchange part is sent to the customer before the core is returned and most exchange agreements allow for the possibility of the core never being returned.

Commercially, this option is acceptable because the customer simply pays the "outright price," which is the full sales price for the overhauled or new exchange part (instead of the discounted price reflecting the value of the returned core). However, paying the "outright price" alone may be inadequate once the exchange part has been exported under the "one-for-one" licensing exception. Because the core must be returned or destroyed, a customer who intends to pay the "outright price" also must provide proof the core was destroyed (such as a certificate of destruction and potentially a return of the data plate if there was one).

**The AEA will provide export training at this year's AEA International Convention & Trade Show, which takes place April 1-4, in Dallas, Texas.**

would not be able to take advantage of the "servicing" license exception because Armenia is a group D:1 country and the competitor was not the original licensed exporter. However, your competitor could obtain its own license (or possibly take advantage of another licensing exception, such as the one-for-one replacement exception).

Returning to our earlier hypothetical situation, we anticipated an export of a Honeywell AHRS to the U.K. following servicing. The U.K. is in Country Group B, according to Supplement No. 1. If the service did not alter the basic qualities of the part (such as no upgrades or changes in the way it functions), it can be

return. When the customer is outside the U.S., the U.S. repair station is making an export with respect to the article being sent to the customer; however, there is a licensing exception applying to such transactions.

Properly structured exchange agreements often take advantage of the "one-for-one replacement of parts" licensing exception. This exception applies to replacement parts offered to the customer for the immediate repair of equipment — in other words, not for stock.

To use this exception, the exchanged articles must be identical, except for the condition. In particular, the exchanged item should have no improvements or changes to its basic

In our hypothetical situation, we anticipate an export to the U.K.; however, as with the “servicing” license exception, the “one-for-one” licensing exception cannot be used to export aircraft parts to countries in the Commerce Department’s Country Group E:1.

### **Recordkeeping**

Even when you make use of a licensing exception, you still are required to file export information through AESDirect and maintain records of your export.

Records must be maintained in accordance with the recordkeeping requirements of the regulations. This means they must be retained for at least five years.

The exporter is required to maintain

the following records: export control documents; memoranda; notes; correspondence; contracts; invitations to bid; books of account; financial records; and restrictive trade practice or boycott documents and reports

### **Conclusion**

Aviation is a global marketplace and export transactions can be a lucrative way to diversify your customer base. But compliance with U.S. export laws is important for both U.S. and non-U.S. parties. The penalties for non-compliance can be very high, and the United States has brought export law enforcement actions against both U.S. and non-U.S. parties.

In addition to complying with the appropriate export control laws, you also need to comply with the laws of

the importing country. The importing nation might have import restrictions, import tariffs and airworthiness requirements — including limits on what entities are permitted to do the work and how the work must be documented.

The AEA remains committed to supporting its members’ efforts to comply with the regulations and laws applying to them. To that end, the Association will provide export training at this year’s AEA International Convention & Trade Show, which takes place April 1-4, in Dallas, Texas.

For more information, visit [www.aea.net/convention](http://www.aea.net/convention). □

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