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## State Department Proposes Clarification of Export Jurisdiction Over Aircraft Components

by Thomas M. deButts and Michael J. Noonan

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*On April 11, 2008 the Department of State, Directorate of Defense Trade Controls (DDTC) published a proposed change to the International Traffic in Arms Regulations (ITAR). The notice of proposed rulemaking would add language intended to clarify the application of Section 17(c) of the Export Administration Act of 1979 (EAA) to the implementation of the ITAR and the Department of State's obligations under the Arms Export Control Act (AECA). The proposed change would affirm that jurisdiction over exports of certain civil aircraft parts and components lies with the Department of Commerce under the Export Administration Regulations (EAR), and not with the Department of State under the ITAR. Comments on the proposed amendment will be accepted by the Department of State through May 12, 2008.*

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### **Export Administration Act Section 17(c)**

Section 17(c) provides that any product (1) which is standard equipment, certified by the Federal Aviation Administration (FAA), in civil aircraft and is an integral part of such aircraft, and (2) which is to be exported to a country other than a controlled country, shall be subject to export controls exclusively under the EAA and not the AECA. As defined in that legislation, a "controlled country" included members of the (then) Soviet Bloc and other countries subject to national security export restrictions.

The EAA originally lapsed in 1989, was briefly renewed, and lapsed again in 2001. Many of its provisions nonetheless remain in effect through a Presidential Executive Order issued under the International Emergency Economic Powers Act. However, Section 17(c) has not been referenced in the ITAR since 1996, and the Department of State has not consistently applied Section 17(c) in making commodity jurisdiction determinations. The end result of having legislation with an uncertain legal foundation and unpublished agency practices has caused confusion and forced companies to request agency rulings to determine whether State or Commerce has export jurisdiction over a number of components that are used as stan-

standard equipment in civil aircraft. The goal of the amendment is to reduce that confusion and clarify which civil aircraft parts and components can be deemed controlled by the EAR without the need to request rulings from the Department of State.

Industry and certain Members of Congress have urged that the scope of the ITAR as applied to civil aircraft parts be clarified, because DDTC's assertion of jurisdiction over even minor components contained in civil aircraft parts results in the aircraft themselves being regulated as military equipment. The uncertainties created by DDTC's current policy have caused significant regulatory burdens and operational difficulties for aerospace manufacturers and airlines.

### Proposed Clarification to USML Aircraft Component Coverage

The proposed rule would clarify that the EAR applies when an aircraft part or component is (a) standard equipment; (b) covered by a civil aircraft type certificate (including amended type certificates and supplemental type certificates) issued by the Federal Aviation Administration for civil, non-military aircraft (expressly excluding military aircraft certified as restricted and any type certification of Military Commercial Derivative Aircraft); and (c) is an integral part of such civil aircraft. Any such part or component that is not designated as Significant Military Equipment (SME) on the U.S. Munitions List would not require an agency ruling to determine jurisdiction, unless the exporter is doubtful as to whether all three criteria have been met. Where the part or component is designated as SME, a ruling would be required, although the ruling requirement for SME items would not be applicable to parts and components that were integral to civil aircraft prior to the effective date of the rule.

In order to protect its jurisdiction over certain dual-use aircraft engine components developed from military technology after the proposed rule goes into effect, the Department of State would shift all military "hot section" engine components and digital engine controls from their current non-SME designation to SME. Examples of such hot section components include combustion chambers and liners; high pressure turbine blades, vanes, disks and related cooled structure; cooled low pressure turbine blades, vanes, disks and related cooled structure; cooled augmenters; and cooled nozzles. Digital engine controls include Full Authority Digital Engine Controls (FADEC) and Digital Electronic Engine Controls (DEEC).

The proposed Note to USML Category VIII(h) would provide some guidance for determining whether the three proposed criteria for EAR control have been met. The exporter would have to evaluate whether the part or component, without modification, is common to both civil and military applications. The proposed rule provides the following examples of parts and components that DDTC does not consider common to both civil and military aircraft applications: tail hooks, radomes, and low observable rotor blades.

The proposed Note would define the first criterion, standard equipment, as "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)." It also includes as standard equipment parts and components that are manufactured and tested to established but unpublished civil aviation specifications and standards, and provides as examples pumps, actuators and generators. Parts and components would not be considered standard equipment if there are any performance, manufacturing or testing requirements beyond established civil aviation industry or government standards. Mere testing of standard civil parts and components for military requirements would not change the determination, unless the parts or components were designed or modified to meet the military requirement. Finally, the Note defines "integral" as a "part or component that is installed in the aircraft."

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Although the intent of the proposal is to clarify and simplify the current rules, the proposed regulation, as drafted, contains a number of ambiguities and leaves many questions unanswered, and therefore may not accomplish its stated goal. Aerospace industry companies may wish to consider submitting comments providing suggested improvements to the proposed rule to the Department of State by May 12, 2008.

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