U.S. State Department Makes it Easier to Determine Whether Aircraft and Aircraft Engine Parts and Components are ITAR-Controlled

As a result of a recent amendment to the International Traffic in Arms Regulations (“ITAR”), it is now easier to make a self-determination that a standard part or component installed on a civil aircraft or civil aircraft engine covered by a Federal Aviation Administration (“FAA”) type certificate is, with few exceptions, not ITAR-controlled.¹ This authority exists even if the original design intent of the part or component is unknown or it was originally specifically designed or modified for a military aircraft or military aircraft engine. Formal State Department commodity jurisdiction (“CJ”) determinations are not required to make these decisions except when there is doubt about the amendment’s applicability or if one plans to install on a civil aircraft or engine new items identified in the ITAR as “significant military equipment” that were not installed prior to August 14, 2008.

The amendment is a “Note” to the ITAR’s U.S. Munitions List (“USML”) subcategory VIII(h), a copy of which is attached.² Prior to its addition, subcategory VIII(h) had only one published criterion for determining whether a part or component was ITAR-controlled – whether it was specifically designed or modified for a military aircraft, a military aircraft engine, or a related military end-item. If so, as I explained during the training, the part or component required a license from the State Department to export or re-export regardless of its age, sophistication, size, spookiness, cost, similarity to other civil parts, or incorporation into a civil end-item.

¹ This memorandum is only a notice and a summary guide. It is not legal advice. You should consult with counsel or the appropriate empowered official before altering your export compliance procedures and jurisdictional determinations as a result of this amendment.

² It can also be read at http://edocket.access.gpo.gov/2008/E8-18844.htm.
A. Background

The growing realization that this criterion existed has had a significant impact on U.S. and foreign manufacturers because the incorporation of even one ITAR-controlled part or component into a civil end-item that otherwise does not require a U.S. Government license to export or re-export imposes a licensing obligation for the end item to authorize the export of the ITAR-controlled component. Technical data, software, and defense services directly related to such parts or components must be controlled under the ITAR as well.

Indeed, as I described during the training, there have been several instances over the years when a Boeing supplier belatedly discovered that one of the millions of parts and materials on a commercial airplane that had been treated for decades as a non-ITAR-controlled commercial item fell within the definition of an ITAR-controlled defense article. Because of the State Department’s licensing obligation, the presence of the “ITAR part” on Boeing’s commercial aircraft disrupted and had the potential for disrupting (a) the supply of commercial aircraft parts and components, (b) the supply of finished commercial aircraft, (c) support of in-service commercial aircraft, and (d) the cross-border operation of commercial aircraft.

Since 2004, Boeing has been incorporating in its commercial aircraft supplier general terms agreements provisions prohibiting suppliers from providing any item that is itself or contains a subcomponent that is ITAR controlled. This was often a difficult certification for aircraft and aircraft engine parts and components suppliers to make under the subcategory VIII(h) standard because they often did not have access to clear information regarding why such parts or components were originally designed or modified. Design intent information for legacy parts had been lost to history or the supplier was not the original designer, for example. The new Note did not change the long-standing rule that a part or component is not ITAR controlled if it was specifically designed for a civil aircraft or civil aircraft engine or designed to be used interchangeably without modification in civil and military aircraft or military aircraft engines. The process for determining whether a part or component used in a civil aircraft or engine is ITAR controlled is, however, now much easier if such design intent information is not available or even if it was originally specifically designed for a military end item.

B. The Five Basic Elements of the Note

According to the new Note to USML subcategory VIII(h), an aircraft or aircraft engine part or component is not ITAR controlled if it is:

1. “standard equipment;”
2. “covered by a civil aircraft type certificate (including amended type certificates and supplemental type certificates) issued by the [FAA] for a civil, non-military aircraft;”
3. “an integral part of [i.e., installed in] such civil aircraft;”
4. not new “significant military equipment” to be installed on civil aircraft or civil aircraft engines on or after August 14, 2008; and

3 This prong of the definition does not include military aircraft certified as restricted and any type certification of Military Commercial Derivative Aircraft.
5. not controlled by another category on the USML.

C. Commentary on The Five Elements of the Note

1. “Standard Equipment”

The new Note defines “Standard Equipment” as “a part or component”

a. “manufactured in compliance with an established and published industry specification or government specification (e.g., AN, MS, NAS, or SAE),” or

b. “manufactured and tested to established but unpublished civil aviation industry specifications and standards.”

c. “Published Specifications”

The first prong of this definition is relatively clear: If a part or component was or is manufactured in compliance with an established, published specification, it is “standard equipment.” Significantly, the new Note cites “MS” – “mil-spec” – as an acceptable published specification standard to apply. Thus, merely manufacturing a standard part for an FAA-certified civil aircraft or civil aircraft engine to a military specification does not cause it to become ITAR-controlled or otherwise lose the benefits of the new Note to USML subcategory VIII(h). As described in the commentary submitted to the State Department regarding the draft of the Note, mil-specs are commonly used to manufacture parts and components for purely civilian applications. “AN” stands for “Army-Navy.” “NAS” stands for “National Aerospace Standards.” And “SAE” stands for “Society of Automotive Engineers,” now known simply as “SAE.” (The Department of State took the position when publishing the amendment that Technical Standard Orders (“TSOs”) may not be considered as published specifications.)

b. “Unpublished Specifications”

Almost all those who commented on the second prong of the definition in the draft Note during the review period asked that the Note be written more clearly, asserting that if a part or component is manufactured to an unpublished specification, then the specification, by definition, cannot be an “industry” specification. If it is unpublished, it is a “proprietary” specification of a particular company, wrote several commentators. During the review period, the State Department responded that the commentators’ concerns were “alleviated” when the two sentences in that portion of the Note “are read together.” Thus, according to the State Department, “[p]arts and components meeting . . . established but unpublished (e.g., proprietary) industry standards are considered standard equipment.” (Emphasis supplied). The supplementary information to the final rule explicitly adopted this interpretation, noting that parts and components meeting “proprietary” industry standards are considered “standard equipment.”

c. “Established” Specifications

Both prongs of the definition require that the specification be “established.” The State Department did not define this term. Thus, exporters are entitled to apply the generally accepted definitions of the term, a reasonable example of which is that it refers to any specification that is more than a one-off specification for a single item or for a single application. Another example would be a specification for a production part or component that is standard for a particular aircraft or engine
model or revision as opposed to specification for a developmental part or component that is approved by the FAA for installation on a provisional, non-interference basis. An implication of these examples is that if a part or component is covered by an FAA type certificate for use in an engine for a civil aircraft model, the specification for it is “established” because the part or component is within the scope of the aircraft’s type design and, thus, a fixed, “established” specification applicable to a model of aircraft or engine.

d. “Testing Requirements”

According to the Note, a “part or component is not ‘standard equipment’ if there are any performance, manufacturing, or testing requirements beyond such specifications and standards.” In the supplementary information to the final rule, the State Department stated that if “a part is required to exceed established standards, such requirements call into question whether it is the ‘standard part.’” The key word in the State Department comment is “requirements” because it means that voluntarily testing a part for whatever reasons beyond its required specifications and standards does not remove it from the definition of standard equipment. Support for this interpretation is in the State Department’s comment in the Note that “[s]imply testing a part or component to meet a military specification or standard for civil purposes does not in and of itself change the jurisdiction of such part or component.”

e. “Accessories,” “Attachments,” and “Associated Equipment”

The State Department wrote that “accessories,” “attachments,” and “associated equipment” may “not be considered standard equipment integral to the civil aircraft” or, implicitly, civil aircraft engines. The Note is, therefore, limited in scope to “parts” and “components.” Each of these terms is defined in ITAR section 121.8 as follows:

- “A part is any single unassembled element of a major or a minor component, accessory, or attachment which is not normally subject to disassembly without the destruction or the impairment of design use. (Examples: Rivets, wire, bolts, etc.)”

- “A component is an item which is useful only when used in conjunction with an end-item. A major component includes any assembled element which forms a portion of an end-item without which the end-item is inoperable. (Example: Airframes, tail sections, transmissions, tank treads, hulls, etc.) A minor component includes any assembled element of a major component.”

- “Accessories and attachments are associated equipment for any component, end-item or system, and which are not necessary for their operation, but which enhance their usefulness or effectiveness. (Examples: Military riflescopes, special paints, etc.)”

2. “Covered by a Civil Aircraft Type Certificate” for a Civil Aircraft

The second element of the Note is that a part or component must be “covered by a civil aircraft type certificate (including amended type certificates and supplemental type certificates) issued by the [FAA] for a civil, non-military aircraft (this expressly excludes military aircraft certified as restricted and any type certification of Military Commercial Derivative Aircraft).”
a. “Covered By a Civil Aircraft Type Certificate”

The Note does not require that the particular part or component at issue be itself certified by the FAA to be within the Note’s scope, only that it be “covered by a civil aircraft type certificate.” Indeed, the FAA issues type certificates only for aircraft, aircraft engines, and propellers. See 14 C.F.R. § 21.1. Rather, if, according to the Federal Aviation Regulations, a part or component is authorized to be included on a FAA-certified civil aircraft or civil aircraft engine that is authorized for installation on a FAA-certified civil aircraft then the part or component is “covered by” the type certificate. The bases for this conclusion are the following:

1. A “type certificate” includes, by definition, all parts and components that are within the scope of the aircraft’s type design. 14 C.F.R. § 21.14 (“Each type certificate is considered to include the type design, the operating limitations, the certificate data sheet, the applicable regulations of this subchapter with which the Administrator records compliance, and any other conditions or limitations prescribed for the product in the [FAA’s regulations]” (emphasis supplied)).

2. The “type design” includes drawings and specifications – and the listings of those drawings and specifications – that are “necessary to define the configuration and the design features of the product shown to comply with the requirements of the type certification.” Id. § 21.31(a). Such requirements include all the approved engineering.

3. In addition, the FAA issues Technical Standard Orders (“TSOs”), which describe the materials, parts, processes, and appliances that meet the minimum performance standards authorized for use on a civil aircraft. Id. § 21.601. (Although the State Department does not consider TSOs to be “published specifications,” a part or component listed on a TSO is authorized to be installed on the identified FAA-certified civil aircraft or engine.)

None of these conclusions applies to any military equipment certified in accordance with FAA Order 8110.101 regardless of the method of approval, such as (i) Full Approval (Equipment, Installation and Operation); (ii) Limited FAA Approval (Equipment and Installation); (iii) Safe Carriage (Equipment Approval); or (iv) Provisions-Only.

Parts that have a Parts Manufacture Approval (“PMA”) are not per se part of the type design (14 C.F.R. § 21.303), and the State Department has taken the position they cannot be considered per se “standard equipment” because some PMAs are for ITAR-controlled parts. If, however, a part with a PMA is, as discussed below, identical in terms of its form, fit, and function to that of a part that is standard equipment and within the scope of the type design of an FAA-certified civil aircraft or aircraft engine, one may, as discussed below, treat it as EAR-controlled as well.

b. How Civil Aircraft Engines are “Covered by” a Civil Aircraft Type Certificate

The FAA separately certifies aircraft, engines, and propellers. Because the Note applies only to “civil aircraft type certificates,” the FAA certification of an aircraft engine will not, as such, bring the engine and its parts and components within the scope of the Note. If, however, an FAA civil-type aircraft certification specifies an engine model covered by the certificate, then all parts and
components authorized for use on the engine for such aircraft will be “covered by” the aircraft type certificate. Covered engine models and applicable limitations are typically included on the Type Certificate Data Sheet (“TCDS”) for each certification.

c. FAA Certification

Several commentators asked the State Department to include authorizations issued by foreign civil aviation authorities, such as the European Safety Aviation Agency (“EASA”), within the scope of the new Note. The State Department rejected these requests on the grounds that the statutory provision that is the basis for the Note, section 17(c) of the Export Administration Act of 1979, is limited to certifications issued by the U.S. Federal Aviation Administration.

3. “An Integral Part” of Such Civil Aircraft or Civil Aircraft Engines

Only parts and components that are “integral” to a FAA-certified civil aircraft – or, as discussed above, civil aircraft engines covered by a civil aircraft certificate – are within the scope of the Note. The State Department defines “integral” as “a part or component that is installed in an aircraft” or, implicitly, a civil aircraft engine. In the aircraft and aircraft engine industry, “integral” parts are those that are production parts which are standard for a particular aircraft type or engine model or revision. The term does not include developmental parts or parts that are FAA-approved for installation on a provisional non-interference basis or those installed for testing purposes as data collection units.

In response to questions about whether the State Department’s definition of “integral” parts and components included spares for parts and components installed on civil aircraft, the State Department confirmed that it did.

4. Not “Significant Military Equipment”

a. Redesignation of Certain Articles as SME

SME articles are those “for which special export controls are warranted because of their capacity for substantial military utility or capability.” ITAR § 120.17(a). SME items are those that are preceded by an asterisk in the USML or are “classified” items identified on the USML. ITAR § 120.7(b). The vast majority parts or components that were specifically designed for military aircraft fall under USML subcategory VIII(h), which controls parts and components specifically designed or modified for military aircraft. Articles classified under subcategory VIII(h) are not designated as SME.

In adding the Note to USML subcategory VIII(h), however, the State Department re-designated under USML subcategory VIII(b) the following parts and components, which previously had been controlled under subcategory VIII(h):

-- “all specifically designed military hot section components (i.e., 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);” and

-- “[all specifically designed military] digital engine controls (e.g., Full Authority Digital Engine Controls (FADEC) and Digital Electronic Engine Controls (DEEC)).”
b. SME Parts and Components Integral to FAA-Certified Civil Aircraft Prior to August 14, 2008

The State Department declared in the new Note that all parts and components that are standard equipment integral to and covered by an FAA certification for a civil aircraft prior to August 14, 2008 are EAR-controlled even if the part or component would otherwise be considered SME. No commodity jurisdiction determination is required for an exporter to make this self-determination. One would only need a commodity jurisdiction to declare as EAR-controlled an otherwise SME part or component if (a) doubt existed regarding whether the other elements of the Note were satisfied or (b) one would like to install an SME part or component that was not authorized for installation on a FAA-certified civil aircraft or civil aircraft engine on or after August 14, 2008.

According to the State Department, this requirement “is needed to ensure the government has an opportunity to review proposals to use military equipment in a civil application and to avoid the removal of items from the United States Munitions List through company self-determinations.”

5. Not “Controlled by Another Category on the USML”

The Note does not require a commodity jurisdiction request to be filed regarding a part or component that, without a doubt, satisfies the elements described above, so long as the part or component is not described in a USML subcategory other than VIII(h). This excludes from the rule’s application, for example, structural materials controlled by USML subcategory XIII(f), military electronics controlled by USML Category XI, and avionics that may incorporate gyros controlled by Category XII.

D. Other Observations About the New Note

1. Identical Form, Fit, and Function

The State Department wrote that in determining whether the elements described in the Note are applicable to a particular part or component, one should “consider whether the same item is common to both civil and military applications without modification of the item’s form, fit, or function.” In addition, the State Department wrote that the Note is applicable to parts and components that “may be used on either civil or military aircraft” or, implicitly, either on civil or military aircraft engines. These are not formal elements to consider when making a self-determination, but they are an informal check on or a test of whether an EAR determination under the Note for a part specifically designed or modified for a military aircraft or a military aircraft engine would withstand scrutiny.

Thus, considering the Note’s referenced definitions of “form,” “fit,” and “function” in ITAR § 120.4(d), one can test that such an EAR-determination is consistent with the policy of the Note by confirming that it is interchangeable between civilian and military aircraft or between civilian and military aircraft engines without modifying its

- “form,” i.e., its geometrically measured configuration, density and weight or other visual parameters that uniquely characterize it;

- “fit,” i.e., its ability to interface or interconnect physically with or become an integral part of another item” in the aircraft; or

- “function,” i.e., the action or actions it is designed to perform in the aircraft.
For example, merely painting a part with industry-standard paint one color for a military aircraft and another color for a civilian aircraft would not cause it to fall outside the scope of the Note because the modification does not change the part’s form, fit, or function. Similarly, using one part number when the part is sold for installation on a military aircraft or military aircraft engine and a different part number for the same item when sold for installation on a civilian aircraft or civilian aircraft engine would not alone cause it to fall outside the scope of the new Note.

2. The Note is Applicable Retroactively

The State Department wrote in its introduction to the Notice publishing the new Note that the amendment “is intended to clarify the control of aircraft [and, as explained above, aircraft engine] parts and components, and does not remove any items from the USML, nor does it change any CJ determinations.” (Emphasis supplied.) The Note is therefore applicable to parts and components that existed prior to and after the Note’s publication date so long as they satisfied the Note’s elements, with the only limitation being the need to submit a commodity jurisdiction request before installing new SME items on civil aircraft or civil aircraft engines on or after August 14, 2008, as described above.

This means that companies are entitled to review and reverse any past internal determinations that an aircraft or aircraft engine part was ITAR controlled if it satisfies the various elements of the Note. In other words, if a company had designated a part or component as ITAR controlled under USML subcategory VIII(h) because it was specifically designed or modified for a military aircraft or a military aircraft engine, the company may now – without needing to secure a commodity jurisdiction determination from the State Department – self-determine that the part is not (and never was) ITAR-controlled if it satisfies all the elements of the Note. The only limitation on this point applies if such a determination appears to conflict with a previously issued commodity jurisdiction determination. If so, then one must submit a new commodity jurisdiction request explaining why the part or component meets all the elements of the new Note and should, thus, not be ITAR controlled.

3. The Note Affects The Jurisdictional Status of Technical Data (including Software) and Services

Reversals of earlier jurisdictional self-determinations for parts and components based on the rules in the Note also will result in the reversal of internal jurisdictional determinations of technical data directly related to such parts and components. Under USML subcategory VIII(i), technical data (which includes software) and services are ITAR controlled only if they are “directly related” to a defense article. If the data, software, or service now directly relates to a part or component that is no longer ITAR controlled by virtue of the Note, then the technical data, software, or service is, by definition, no longer ITAR controlled either.

4. Internal Jurisdictional Determination Records and Procedures

As a result of the Note’s addition to Category VIII, suppliers should modify their internal jurisdictional determination procedures to state that a part or component (but not an accessory, attachment, or associated equipment) is not subject to the ITAR if it:

a. is specifically designed for civil applications unrelated to spacecraft or satellites (or other USML Category XV items);
b. is specifically designed to be used interchangeably without modification in military and civilian aircraft or aircraft engines; or

c. satisfies the elements of the Note as described above.

Absent a commodity jurisdiction determination to the contrary, all other parts and components should be presumed to be ITAR controlled under USML subcategory VIII(h) if they were specifically designed or modified for military aircraft, military aircraft engines, or any other item identified in USML Category VIII, such as cartridge-actuated devices utilized in emergency escape of personnel and airborne equipment; launching and recovery equipment; inertial navigation systems; developmental aircraft, engines, and components thereof specifically designed, modified, or equipped for military uses or purposes or developed principally with U.S. Department of Defense funding; ground effect machines specifically designed or modified for military use; or other ITAR-controlled components, parts, accessories, attachments, and associated equipment.