



Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW | Washington, DC 20037-1122 | tel 202.663.8000 | fax 202.663.8007

Thomas M. deButts
Phone: 202.663.8872
debutts@pillsburylaw.com

May 12, 2008

Via E-Mail: DDTCResponseTeam@state.gov

Ann Ganzer, Director
Office of Defense Trade Controls Policy
Department of State
Directorate of Defense Trade Controls
ATTN: Regulatory Change, ITAR Section 121
SA-1, 12th Floor
Washington DC 20522-0112

Re: RIN 1400-AC47 – Comment to Proposed Change to ITAR § 121.1
Implementing Language to Clarify Application of Section 17(c) of the
Export Administration Act of 1979 (73 Fed. Reg. 19778)

Dear Ms. Ganzer:

Thank you for the opportunity to comment on the Department of State's proposed rule change to the International Traffic in Arms Regulations ("ITAR"), Section 121.1, Category VIII, clarifying the implementation of criteria from Section 17(c) of the Export Administration Act of 1979 ("EAA") and published in the Federal Register on April 11, 2008. I am writing on my own behalf as an export control practitioner and not on behalf of any other entity or organization.

I welcome the effort to provide additional guidance to the public in determining the scope of the U.S. Munitions List ("USML") as applied to civil aircraft parts and components. The proposed guidance, when further refined in ways suggested by industry, will no doubt provide a useful analytical tool to permit jurisdictional self-determinations on the reach of USML Subcategory VIII(h). However, the proposed Note to USML Subcategory VIII(h) fails to directly confront the unpublished policy implemented by the Directorate of Defense Trade Controls ("DDTC") through non-reviewable civil penalty actions during the last five years.

In particular, DDTC has implemented an unpublished "see-through" rule with respect to incorporated USML components in domestically manufactured civil aircraft

engines, parts and components. Under this unpublished policy, as implemented against the Boeing Company, Goodrich Corporation, and L-3 Communications Corporation in 2006 enforcement actions and consent agreements, a USML component, no matter how small or inconsequential, retains its USML status no matter how much it is transformed, how firmly it is attached to another item, how feasible or difficult it is to extract from the domestic civil aircraft component, or how contrary the policy is to U.S. law in EAA § 17(c).

If the proposed Note is implemented, the unpublished domestic “see-through” policy would appear to be partially lifted if one applies the three-part test to a civil aircraft component (which incorporates a USML part) and concludes that a Commodity Jurisdiction (“CJ”) determination is unnecessary. If this is DDTC’s intent, then it should state this intent clearly so that the public will freely apply the three-part test in the proposed Note without fear that the unpublished domestic “see-through” policy will result in DDTC second guessing a domestic export jurisdiction decision using the three-part test.

If DDTC’s intent is *not* to implement a regulatory exception to the unpublished “see-through” policy for civil aircraft components, then it should clearly state that a “see-through” policy exists with respect to any USML component incorporated in a civil aircraft part, component or subsystem that otherwise meets the three-part test. DDTC has made very clear in ITAR § 123.9 that a “see-through” rule exists for foreign manufactured items. However, it has never published (either formally or on its website) a “see-through” rule for domestically manufactured civil products. If such a rule was published, it would correctly reside in ITAR § 120.3 or 120.6 and would state that a defense article does not lose its identity as such no matter how it is transformed or incorporated into another product.

The problem created by DDTC in leaving this question unanswered in the proposed Note (or elsewhere in the ITAR) is that domestic manufacturers of civil aircraft components could be exposed to civil penalty action for acting fully in good faith in applying the three-part test to make a jurisdiction decision on a manufactured civil aircraft component. For example, a newly-hired export administrator, who is unaware of DDTC enforcement actions surrounding the incorporated QRS11 sensor, carefully reads USML Subcategory VIII(h), including the proposed Note providing a three-part test. The administrator applies the three part test to a newly-designed civil aircraft stall warning system, asking the company engineers whether any items of Significant Military Equipment (“SME”) are incorporated into the system. The engineers diligently review the incorporated items that could be designated as SME and determine from the suppliers that none of these items are included on the USML. The engineers do not ask or require that every supplier of minor components such as

Ms. Ann Ganzer
May 12, 2008
Page 3

integrated circuits provide export jurisdictional status and the suppliers do not routinely provide such information to their domestic customers. The engineers are unaware that a particular integrated circuit, which they have incorporated into the system, is correctly included under USML Subcategory XII(e). Under the three-part test, the export administrator could self-determine jurisdiction of the civil aircraft component as subject to the jurisdiction of the U.S. Department of Commerce under the Export Administration Regulations ("EAR"). If the "see-through" policy is applied in this case, the company would be subject to civil penalties for the export of a USML item.

Even changing the facts above so that the company engineers in the above case were aware that the integrated circuit was a USML Subcategory XII(e) item, a correct application of the three-part test would still lead to a conclusion that the stall warning system is not included in USML Subcategory VIII(h) and that a CJ request is not required.

In summary, the proposed rule ignores the "elephant in the room," which is that the proposed Note to USML Subcategory VIII(h) represents an exception to DDTC's newly-minted but unpublished domestic "see-through" policy. The "see-through" policy is the cause of the Congressional pressure that forced DDTC to publish the proposed rule. As such, the proposed rule needs to specifically address whether it does or does not provide an exception to the "see-through" policy.

Sincerely,



Thomas M. deButts