

AVIATION ADVISORY

Commerce Department Identification of Aircraft Exported to Russia in Violation of Export Controls Offers Guidance on Whether the Continued Leasing or Finance of Aircraft in Russia Violates US Law

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KEY POINTS

- A recent Commerce Department Press Release clarifies that the Department's restrictions on aviation exports to Russia issued in the wake of the invasion of Ukraine apply to whole aircraft, and not just to aircraft components, software, and technology.
- The Press Release identifies nearly 100 aircraft as having flown from third countries to Russia since the issuance of the restrictions. The Press Release states that because of such flights, such aircraft have violated such restrictions. However, the Press Release and related materials indicate that aircraft flying only domestically within Russia since the issuance of the restrictions violate those restrictions. The result in either case could be that the continued leasing or financing of such aircraft (among other activities with respect to such aircraft) is prohibited under US law.

Overview

On February 24, 2022, in response to the invasion by Russia of Ukraine, the US Department of Commerce, Bureau of Industry and Security (BIS) issued new rules (the "Rules"). (See <https://go.usa.gov/xzZAe>.) The Rules effectively prohibit the export, re-export, or in-country transfer of Boeing (or other US manufactured) aircraft (as well as other aircraft and aircraft components with at least 25% US content) to Russia without a license. On March 2, 2022, the BIS extended the Rules to Belarus. (See <https://go.usa.gov/xzZAz>.) On March 18, 2022, the BIS issued a press release (the "Press Release") identifying nearly 100 US manufactured aircraft (all Boeing except for one Gulfstream), most apparently on lease to Russian airlines, as having violated the Rules because such aircraft had since the issuance of the Rules flown from third countries into Russia. (See <https://www.commerce.gov/news/press-releases/2022/03/commerce-department-identifies-commercial-and-private-aircraft-exported>.) The effect of such violation is that such aircraft are thereafter prohibited from being sold, transferred, exported, reexported, financed, ordered, bought, removed, concealed, stored, used, loaned, disposed of, transported, forwarded, or otherwise serviced, by any person anywhere who has knowledge of the violation (which the BIS just notified the public of). 15 CFR § 736.2(b)(10). As such, the continued leasing and financing of such an aircraft by a person with knowledge of the violation would be prohibited without a license. Such prohibition is not limited to aircraft having flown into Russia since the issuance of the Rules. It extends also to aircraft flying within Russia since the issuance of the Rules.

Whether the Rules Apply to Whole Aircraft

The Rules implemented on February 24 and March 2 apply to whole aircraft by subjecting certain aircraft export commodity designations (ECCNs) to licensing requirements subject to a policy of denial when exported to Russia. The specification in the Press Release targeting whole aircraft also confirms the Rules do indeed apply to whole aircraft.

The Specification of Certain Aircraft Does Not Exclude Others

The Press Release identifies some 100 aircraft by owner or operator, registration mark, manufacturer's serial number, and aircraft type, as having apparently violated the Rules. The violations identified by the Press Release consisted of flights of such aircraft from third countries to Russia. The Press Release cautions that the list of violations is not exhaustive. Any other aircraft that has flown from a third country to Russia since the issuance of the Rules would be included. However, the transfer or use of any aircraft within Russia is also a violation of the Rules. Any violation described in this paragraph gives rise to prohibitions under the Rules against leasing, financing and other activities with respect to the affected aircraft by parties having knowledge of the violation. So unless an aircraft in Russia has remained grounded since the Rules were issued, the continued leasing or financing of that aircraft (among other activities) by a party having knowledge that it had operated within Russia may be prohibited by US law.

Conclusion

The Press Release makes clear that the Commerce intends to monitor and enforce the export restrictions by tracking movement of specific whole aircraft. While the Press Release identifies flights from third countries into Russia as trigger events for the application of the prohibition on leasing, financing and other activities proscribed by the Rules, the Press Release and related materials indicate that US export restrictions also cover flights within Russia. It is hoped that the BIS provides additional clarification on enforcement as well as clarifications on winding down current leases in the coming days. Please note that other rules may apply to leasing and financing of commercial aircraft in Russia including the rules of the Office of Foreign Assets Control (OFAC) of the US Department of Treasury, and the rules issued by the European Union in response to the Russian invasion. Lessee parties to a leasing transaction, including airline majority shareholders, require screening against sanction regimes to ensure OFAC violations do not occur separate from the export licensing issues covered here.

If you have any questions, please reach out to one of the professionals listed on the next page.

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