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CLIENT ALERT

ITAR Criminal Case Challenges the Constitutionality of Specially Designed

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A criminal case involving the International Traffic in Arms Regulations (ITAR) concerns a dispute over specially designed, a defined term that qualifies whether certain items are defense articles. In this case, the focus is on the specially designed release in paragraph (b)(3) and a magnetic part for the F/A-18 Super Hornet, which the defendants assert is a type of magnet used in or with many commercial items. The dispute centers on how the release affirmatively or negatively applies, as information on whether a comparable part exists (or existed) may be unknowable.

Regarding parts, the ITAR's specially designed definition initially catches all parts "for use in or with a defense article." That catch, standing alone, would capture far too much. Therefore, to narrow the control, there are five releases available. "In this way," the catch and releases "are [inextricably linked](#) and are intended to work together to identify the parts, components, accessories, attachments, and software that need to be treated as specially designed." The (b)(3) release provides that a part is not specially designed if it "[h]as the same function, performance capabilities, and the same or equivalent form and fit as a commodity or software used in or with a commodity that: (i) Is or was in production (*i.e.*, not in development); and (ii) Is not enumerated on the USML [U.S. Munitions List]." Additionally, the relevant USML entry concerning unspecified parts for the F/A-18 Super Hornet permits the release to apply to parts common to any ITAR-controlled aircraft not listed in Category VIII(h)(1). Thus, it is possible here for parts to be used in or with only defense articles and still be released.

The issue concerns how to satisfy the question posed by the release: whether there is a comparable part. The defendants assert that the "only way to know" if the release applies "is to check every neodymium or samarium-cobalt magnet ever used in a commercial product" and "by every non-defense entity." The government contends that it interprets the release differently, to impose a standard that when "the potential exporter is not aware of, or cannot find, another part that is a potential commercial equivalent, then they are left with no doubt that the part they intend to export is controlled under the USML." The government also says that the Directorate of Defense Trade Controls (DDTC) interprets the release "to require consideration of the evidence submitted to DDTC through the commodity jurisdiction procedure and a reasonable search under the circumstances." The defendants respond that the release's "plain text contains no such limitations," the government cites no support for its interpretation, "and the government is not free to revise the text to suit its litigation positions."

This dispute occurs in the context of the vagueness doctrine, according to which a law is unconstitutional under the Fifth Amendment if it fails to provide fair notice or encourages

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arbitrary or discriminatory enforcement by lacking permissible standards. The defendants argue that applying the law here is vague because “it requires reference to unknowable facts” whether there is a comparable part and thereby uses “indeterminate metrics.” Thus, they claim that specially designed, “as applied to these magnets, requires resort to information that neither the government nor the regulated party has, so enforcement under those circumstances violates due process.” The government counters, among other arguments, that laws are not vague “because it might be ‘difficult to prove an incriminating fact but rather [only when] it is unclear what fact must be proved.’” The defendants respond that the issue here is not over the difficulty in proving an incriminating fact but that it “will *always* be indeterminable” whether the release applies.

The court case is *United States v. Quadrant Magnetics LLC et al.*, in the Western District of Kentucky. A copy of the defendants’ opening brief is [here](#); a copy of the government’s opposition brief is [here](#); the defendants’ reply brief is [here](#). We will continue monitoring these developments.

Contact Information



[Christopher B. Stagg](#)

With the unique experience of writing and heavily influencing U.S. export control laws, companies turn to Christopher Stagg as their go-to counsel for practical and strategic advice.

chris@stagg.law
(202) 771-7579

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