Unlicensed export of thermal imaging cameras results in $301,000 penalty

On Jan. 19, 2017, the last full day of the Obama Administration, the U.S. Department of Commerce, Bureau of Industry and Security, settled a civil penalty case with Milwaukee Electric Tool Corp. for 25 violations of the Export Administration Regulations. The settlement total was $301,000, with $31,000 suspended, provided the company timely pays $270,000 and does not commit any further violations of the EAR for a period of two years.

In the settlement agreement and proposed charging letter, BIS alleged that on 25 occasions, between April 2012 and May 2014, Milwaukee Electric exported thermal imaging cameras from the U.S. to various countries—including Colombia, Ecuador, El Salvador, Hong Kong and Mexico—without the required BIS licenses.

The cameras were controlled for export on the Commerce Control List under Export Control Classification Number 6A003.b.4, which covers thermal imaging cameras incorporating certain focal plane arrays. Reasons for control are National Security and Regional Stability. The exports were valued at approximately $129,000. All 25 proposed charges were brought pursuant to 15 C.F.R. § 764.2(a), “Engaging in Prohibited Conduct.”

For the region’s manufacturers, distributors, exporters and their overseas re-exporters of thermal imaging cameras that are controlled on the CCL, this significant penalty settlement should be reason for concern, particularly considering recent amendments and potential revisions to Category 6 of the CCL.

In a final rule published by BIS in October 2016, ECCN 6A003 was revised, together with revisions to Category XII of the U.S. Munitions List. The effective date of each final rule was Dec. 31, 2016. In its final rule, BIS explained that it added a License Requirement Note to clarify what constitutes a “camera” for purposes of classifying items under ECCN 6A003. The License Requirement Note states:

Commodities that are not subject to the ITAR but are of the type described in USML Category XII(c) are controlled as cameras in ECCN 6A003 when they incorporate a camera controlled in this ECCN.

New requirement

Another revision of importance is found in the amendment to the End-Use/End-User Controls in § 744.9 of the EAR.

Section 744.9 now requires “a license for the export or re-export to any destination other than Canada for cameras” controlled by certain parts of ECCN 6A003, “when the exporter or re-exporter knows or is informed that the item is intended to be used by a military end-user or to be incorporated into a military commodity controlled by ECCN 0A919, in addition to other applicable license requirements in the EAR.”

To meet their compliance obligations, exporting companies may need to modify or create End-Use/End-User statements to include a request for information regarding military end-users of thermal imaging cameras. Where a military end-user is indicated, companies will need to apply for BIS export licenses using SNAP-R unless the end destination is Canada. Increased due diligence will serve the area’s regulated industry well. It is now more important to document that process and ensure recordkeeping requirements under the EAR are being met, in anticipation of increased frequency of BIS “outreach visits,” investigations and other enforcement activities.

Other Licensing Requirements

Manufacturers, distributors, exporters, and re-exporters of a wide range of optical items should note that the military end-user licensing requirement also applies to commodities controlled by ECCN 0A987, 6A002, 6A003, 6A990, 6A993.a (commodities meeting the criterion of Note 3.a to 6A003.b.4), 8A002.d.1.c, and 8A002.d.2.

This amended licensing requirement means that companies should review and modify, as necessary, current export compliance practices and procedures to avoid potentially disruptive and costly BIS Office of Export Enforcement investigations, voluntary disclosures and penalties, such as the recent case involving Milwaukee Electric.

Potential Revisions to Category 6

A final, related note that companies should be aware of is the notice of inquiry with request for comments, published by BIS on Jan. 13, 2017. Comments were due by March 14, 2017. The notice of inquiry sought comments on the impact of imposing additional license requirements for certain transactions, including the effects on U.S. national security or foreign policy interests and the competitiveness of U.S. companies and whether these changes may affect assembly and integration activities both inside and outside of the United States.

Several industry leaders and organizations submitted comments, including the International Society for Optics and Photonics. In general, the comments were critical of the potential revisions that would impose additional licensing requirements on infrared detection items. Several commenters argued that the proposed revisions would create a competitive disadvantage for U.S. companies, particularly given widespread foreign availability of the infrared detection items to be further controlled.

It appears the potential revisions will not be made at this time; however, companies should continue to monitor these developments.

For questions and assistance with export control matters, including representation in voluntary self-disclosures and investigations, please contact Jon P. Yormick, Special Counsel at Phillips Lytlle LLP. He can be reached at jyormick@phillipslytll.com or (585) 238-2000 x7006.