



BIS Accepts \$301,000 to Settle Penalty for Unlicensed Exports of Thermal Imaging Cameras

On January 19, 2017 – the last full day of the Obama Administration – the U.S. Department of Commerce, Bureau of Industry and Security (BIS), settled a civil penalty case with Milwaukee Electric Tool Corporation for 25 violations of the Export Administration Regulations (EAR). 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 (2) years.

In the Settlement Agreement and Proposed Charging Letter, BIS alleged that on 25 occasions, from 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 (CCL) under Export Control Classification Number (ECCN) 6A003.b.4, which controls thermal imaging cameras incorporating certain focal plane arrays. Reasons for control are National Security (NS) and Regional Stability (RS). 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 manufacturers, distributors, exporters and reexporters of thermal imaging cameras that are controlled on the CCL, this significant penalty settlement should be reason for concern, particularly in light of recent amendments to the EAR.

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 (USML). The effective date of the Final Rule was December 31, 2016.¹ In the 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.²

Another revision of importance to manufacturers, distributors, exporters and reexporters of thermal imaging cameras controlled under ECCN 6A003 is found in the amendment to the End-Use/End-User Controls in § 744.9

- ¹ Revisions to the Export Administration Regulations (EAR): Control of Fire Control, Laser, Imaging, and Guidance Equipment the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 81 Fed. Reg. 70320 (Oct. 12, 2016). This Final Rule and the companion U.S. Department of State Final Rule, Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XII, 81 Fed. Reg. 70340 (Oct. 12, 2106), do not appear to be affected by the Memorandum for the Heads of Executive Departments and Agencies, issued on January 20, 2017 by Reince Priebus, Assistant to the President and Chief of Staff, as both final rules were effective prior to issuance of the Memorandum.
- ² 81 Fed. Reg., at 70324, 70334 (Oct. 12, 2016); Commerce Control List, Supp. 1 to Part 774, Cat. 6, ECCN 6A003, at 13 (Dec. 31, 2016).



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of the EAR. Section 744.9 now “requires a license for the export or reexport to any destination other than Canada for cameras controlled by” certain parts of ECCN 6A003, “when the exporter or reexporter 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.”³

Manufacturers, distributors, exporters and reexporters of a wide range of optical items should note that this 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 adjust, as necessary, current export compliance practices and procedures to avoid potentially costly BIS Office of Export Enforcement investigations and penalties, such as the recent settlement reached by Milwaukee Electric.

A final, related note that companies should be aware of is the Notice of Inquiry with request for comments, published by BIS on January 13, 2017.⁴ The Notice of Inquiry seeks

comments on the impact of imposing additional license requirements for certain transactions, including the effects on national security or foreign policy interests of the U.S. and the competitiveness of U.S. companies, and whether these changes may impact assembly and integration activities both inside and outside of the U.S. Importantly, submitted comments should state whether or not foreign availability exists for items that are subject to potential additional controls, including providing specific details about the foreign items. Comments are due by March 14, 2017.⁵

Additional Assistance

For questions on and assistance with export control matters, representation in voluntary self-disclosures and investigations, as well as the submission of public comments to any Notice of Inquiry or Notice of Proposed Rulemaking, please contact Jon P. Yormick, Special Counsel, at [jyormick@phillipslytle.com](mailto: jyormick@phillipslytle.com), (716) 847-7006, or James Kevin Wholey, Partner, at [jwholey@phillipslytle.com](mailto: jwholey@phillipslytle.com), (202) 617-2714. ■

³ 81 Fed. Reg., at 70322 (Oct. 12, 2016).

⁴ See Increase of Controls: Infrared Detection Items, 82 Fed. Reg. 4287 (Jan. 13, 2017). On the same date, The U.S. Department of State published a Notice of Inquiry; Request for Comments Regarding United States Munitions List Category XII, 82 Fed. Reg. 4226 (Jan. 13, 2017).

⁵ The notices of inquiry appear to be affected by the Memorandum for the Heads of Executive Departments and Agencies; nonetheless, parties should prepare and submit comments by March 14, 2017.



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