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Exporters Beware: Recent BIS Settlements Forewarn Strict Adherence to Heightened Penalties—Even with Voluntary Disclosures!

Recent export enforcement actions at the U.S. Department of Commerce, Bureau of Industry and Security (“BIS”) illustrate some harsh trends for exporters of dual-use items. Corporate entities exporting dual-use items and export managers alike, should take note.

BIS’ Settlement Agreements from one day in August show:

- Marked increases in civil penalty amounts;
- Imposition of heightened penalties even in the face of voluntary disclosures; and,
- An expanding scope for potential alleged violators subject to such enforcement actions.

The signal is loud and clear: BIS expects U.S. exporters to have comprehensive and up-to-date export compliance programs as well as accurate and complete classification reviews of all exported dual-use items. On August 13, 2009 alone, two companies and one export manager were fined over \$800,000 in civil penalties for their errors.

- **U.S. v. RF Micro Devices, Inc. (“RFMD”)**: BIS settled with Greensboro, N.C.-based, RFMD, a manufacturer of high-performance semiconductor components for 41 violations of the Export Administration Regulations (“EAR”) for alleged exports to China of “spread-spectrum modems,” controlled under Export Commodity Classification Number (ECCN) 5A001 for reasons of National Security during 2002-2003.

While only 14 unlicensed exports allegedly occurred, BIS also penalized RFMD for 14 additional counts of acting “with knowledge” that a violation was occurring, based upon a memorandum to RFMD from outside export consultants concluding that the model at issue “may have required a license for export to PRC.” One of those counts covered an export of a model not identified in the memorandum, yet BIS nonetheless held that RFMD “had reason to know” it might also require a license. 13 counts of “false statements” on SEDs were also levied against RFMD.

RFMD was fined \$190,000 in civil penalties despite its submission of a voluntary disclosure. In doing so, BIS emphasized “companies that voluntarily disclose violations must provide truthful and complete information to investigators” and further warned that “self-serving, false or misleading statements only serve to further undermine corporate credibility.”

- **U.S. v. Carol Wilkins**: In a related action, BIS separately settled with RFMD’s export compliance manager, Ms. Wilkins, who was individually investigated. BIS settled with the export manager for one violation of a false statement to BIS in the course of an investigation, based upon her false statement to BIS that outside export control consultants had confirmed to RFMD that its products were not export-controlled to any region where the company marketed or sold its products. BIS investigation concluded, in fact, RFMD’s consultants had warned Wilkins that their “export control classification review [of all of products] was incomplete.” BIS fined Ms. Wilkins \$15,000 in civil penalties for her role.
- **U.S. v. FMC Technologies, Inc. (“FMC”)**: Closing the trifecta of export enforcement actions settled on August 13, 2009, BIS fined Houston-based FMC \$610,000 in civil penalties, despite its submission of a voluntary disclosure and “full cooperation” with the investigation.

BIS alleged that FMC committed 78 violations of the EAR between 2003 and 2007 for unlicensed exports of “butterfly and check valves” classified under ECCN 2B350, which are common products used in the oil and gas sector. BIS focused on the fact that a 2005 change to the EAR made exports of such products require a license to all countries, except the 40 Australia Group members. BIS Acting Asst. Secretary warned “an effective compliance program is only as good as its last revision.” According to the charging papers, only six direct exports occurred after this April 2005 rule was enacted. Violations 7-78 stemmed from prohibited unlicensed reexports of the valves from FMC’s warehouses in Singapore, UAE, and the United Kingdom to 18 different countries.

Remember, it’s not only unauthorized exports of defense and military articles that are the subject of significant export investigations. Rather, watch out: BIS also means business and wants its share of penalties.

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