U.S. Bureau of Industry and Security, Office of Foreign Assets Control Impose Fines on Texas Manufacturer and Its Foreign Affiliates for Unlawful Exports

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Reminder: Any Commodity, Software, or Technology in the U.S. is subject to U.S. Export Control Regulations

An enforcement action announced by the U.S. Commerce Department's Bureau of Industry and Security (BIS) on September 15 has provided another reminder that all exports of items, software or commodities from the U.S. are subject to the U.S. Export Administration Regulations, whether or not the item is specifically classified under the U.S. Commerce Control List. This case also demonstrates the importance of frequent training and internal auditing of export compliance – simply having a compliance policy in place may not prevent violations.

Thermon Manufacturing Company ("Thermon"), a Texas firm, manufactured and exported heat tracing equipment that was classified "EAR99" for U.S. export control purposes - that is, the items are not the type of high technology or sensitive equipment or software that companies may generally assume require compliance with the U.S. export control regime.

With only a few very limited exceptions, however, any commodity, software, or technology in the United States, or which is of U.S. origin, is subject to U.S. export control regulations. Those items with specific Export Control Classification Numbers as determined by the Commerce Control List are subject to more stringent restrictions, but end-user restrictions and certain sanctions regimes nonetheless apply to all exports from the United States, regardless of whether the export occurs by physical shipment, electronic download, or merely the provision of information.

In this case, Thermon itself did not violate the Export Administration Regulations, but five of its foreign subsidiaries did. They exported or re-exported from abroad the heat tracing equipment to Iran, Syria, Libya and certain prohibited entities in India without a license, despite having been instructed by Thermon that products manufactured by Thermon could not be sold to countries on U.S. sanctions lists without a license. Although Thermon discovered and voluntarily disclosed the violations to the BIS, the foreign subsidiaries were subject to civil penalties totaling $176,000.

Thermon had previously entered into a separate agreement with the Department of Treasury's Office of Foreign Assets Control (OFAC) to settle charges (arising from the same transactions) that it had violated the Sudanese Sanctions Regulations by "facilitating" the exports to Sudan. Thermon also voluntarily disclosed the violations to OFAC and reported corrective measures that it had taken in response to its discovery of those violations. Under many of the sanctions regimes administered by OFAC, nearly any business activity by a foreign subsidiary with a sanctioned entity will usually expose a U.S. parent to liability for facilitating the transaction.

Those companies relying on their freight forwarders for compliance with export controls should also exercise caution, and review filings made on their behalf. An exporting company may still be liable for export control violations if they occur, even if the company instructs its freight forwarder to review export control issues. Moreover, freight forwarders themselves make errors. Recently, DPWN Holdings (USA) Inc., formerly known as DHL, agreed to pay a civil penalty of $9.4 million as a result of its role as a freight forwarder in aiding and abetting illegal exports of goods to Syria, Iran and Sudan, and its failure to comply with the record keeping regulations of the Export Administration Regulations.

Companies can reduce the risk of running afoul of the U.S. export control regime by implementing appropriate internal compliance safeguards (tailored to the nature of the business), and exercising due diligence and supervision of others such as freight forwarders on whom they rely. In the event that errors occur, prompt internal investigation and voluntary disclosure can be an effective way to mitigate the penalties to be imposed.

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