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BIS Issues Guidance Regarding Expectations for Companies and Universities Notified of Specific Export Diversion Risks

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On July 10, 2024, the U.S. Department of Commerce Bureau of Industry and Security (“BIS”) published, “[Guidance to Industry on BIS Actions Identifying Transaction Parties of Diversion Risk](#)” (the “Guidance”). The Guidance describes communications — beyond BIS’s public screening lists (i.e., the Unverified List, Entity List, Military End-User List, and Denied Persons List) — that BIS uses to notify exporters in industry and academia of parties and transactions that may pose a risk of diversion of items controlled by the EAR and its expectations regarding the actions recipients of those communications should take upon receiving such notification. BIS also recommends as a best practice that exporters of Common High Priority List (“CHPL”) items screen parties through the Trade Integrity Project (“TIP”) [website](#).

Notification Methods:

BIS outlines four tools that it uses to inform exporters of parties or transactions that pose a risk of diverting EAR items to restricted end uses or end users, particularly in Russia:

“Supplier List” Letters

- BIS may issue a letter identifying a foreign party “not on one of its screening lists that nevertheless [has] exported to, or facilitated transactions with, destinations or end users of national security or foreign policy concern.” The letters also contain tailored guidance regarding red flags and suggested due diligence.
- Recipients of “Supplier List” letters are expected to closely scrutinize transactions with the identified party to evaluate red flags and to resolve such red flags prior to proceeding with the transaction.

Project Guardian Requests

- BIS asks a company or university to be alert to inquiries or transactions related to identified parties or specific items.
- Recipients of Project Guardian requests are expected to deny (or at least suspend) such order or inquiry and notify their local Export Enforcement field office.
- Proceeding with such a transaction without obtaining an export license or adequately resolving the red flag will be considered an aggravating factor in any subsequent enforcement action.
- As an incentive, active cooperation with a Project Guardian request will be considered a mitigating factor if an enforcement action is later brought against the recipient, even for unrelated conduct.

“Red Flag” Letters

- BIS informs a company that a “high probability that an export violation may occur” exists, because one of its customers may have previously violated the EAR in the course of exporting, re-exporting, or transferring (in-country) an item similar to items the company previously exported to that customer.
- Recipients of “red flag” letters must conduct additional due diligence to resolve and overcome the red flag before filling subsequent orders from the identified customer.
- Proceeding with such a transaction without obtaining an export license or adequately resolving the red flag will be considered an aggravating factor in any subsequent enforcement action.

“Is Informed” Letters

- BIS informs companies and universities of “supplemental license requirements applicable to specific items going to specific entities or destinations, or to specific activities of U.S. persons” due to national security or foreign policy concerns.
- Recipients are expected to comply with the specified license requirements and non-compliance is subject to the same administrative and/or criminal penalties as a violation of any other EAR license requirement.

Recommended Best Practice - TIP Website Screening

In cooperation with the European Union, Japan and United Kingdom, BIS created the CHPL to identify by six-digit Harmonized System (HS) Codes the products that Russia uses for its weapons programs. TIP is an initiative of the UK-based Open-Source Centre, which monitors publicly available trade data to identify companies that have exported CHPL items to Russia. The TIP website includes a downloadable list and search function that identifies parties in third-countries known to export CHPL items to Russia since its invasion of Ukraine.

In the Guidance, BIS “strongly encourages” exporters of CHPL items to use the TIP website to screen transaction parties and to closely scrutinize parties identified on the website. The Guidance does not explicitly refer to the potential consequences for companies dealing in CHPL items that fail to use the TIP website, but companies should expect BIS to consider whether an entity was listed when evaluating whether to bring an enforcement action and whether an exporter was aware of a “high probability” of diversion.^[1]

[1] Brent Carlson & Michael Huneke, *How Not to Stand Out Like a Sore Thumb (Part 2): A Fresh Look at the “High Probability” Definition of Knowledge Applied to Export Controls and Sanctions Enforcement*, NYU Program on Corporate Compliance & Enforcement (“PCCE”) Blog (Feb. 21, 2024).

Brent Carlson & Michael Huneke, *BIS Primes the Corporate Enforcement Engine: A Fresh Look at What Recent BIS Actions & Statements Mean and a Proposed Framework for How U.S. Companies Can Best Prepare*, NYU PCCE Blog (May 30, 2024).

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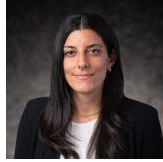
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