

CLIENT ALERT

BIS Warns of Diversion of U.S. Goods to Russia

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On Wednesday, July 10, 2024, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") released [new guidance](#) to help U.S. exporters identify counterparties and avoid a diversion of U.S.-origin goods to Russia. This guidance highlights BIS's continued focus on preventing U.S. technology from finding its way into Russian hands and onto the Ukrainian battlefield by way of third countries. As discussed below, key takeaways for exporters from this guidance are: (1) a recommendation from BIS that certain companies screen transaction parties using open-source data gathered by a third-party NGO; and (2) a reminder of the restrictions or warnings BIS can impose upon exporters if they have concerns regarding diversion risk.

I. New Recommended Best Practice: Screen Parties with Trade Integrity Project

The most notable development from the July 10 guidance is the fact that BIS "*strongly encourages*" certain companies—namely, those involved in the export (or reexport or transfer) of items on the Common High Priority List ("CHPL")¹—to screen transaction counterparties on the [Trade Integrity Project](#) ("TIP") website to determine whether any red flags exist. TIP is a U.K.-based NGO that uses open-source data to track military and dual-use trade with Russia. Using that data, the database identifies entities that have shipped CHPL items to Russia since 2023.

Although the TIP data is not "official" government data, BIS's endorsement of the project in this context is notable and clearly demonstrates a level of confidence in the TIP's findings. It is not clear from BIS's guidance whether TIP's identification of a particular counterparty as a diversion risk would be enough, on its own, to give a U.S. exporter "an awareness of a high probability" of a violation of the Export Administration Regulations if the transaction proceeds

¹ The CHPL is a list of items that the U.S. and its allies have identified as particularly important for Russia's weapons programs, see *Common High Priority List*, BIS (Feb. 23, 2024), <https://www.bis.gov/articles/russia-export-controls-list-common-high-priority-items>.

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(implicating General Prohibition 10).² However, the fact that BIS has endorsed this data set in “Guidance to Industry” is a strong indication that exporters should integrate this list into their compliance procedures. We recommend that exporters who rely on third-party screening services confirm with those services whether this list will be incorporated, and, if not, add a manual check if possible and scalable.

II. Range of BIS Actions for Diversion Risks

The July 10 guidance also summarized the range of actions that BIS can take if it has concerns about exports presenting a diversion risk. The BIS actions include “supplier list” letters, Project Guardian requests, “red flag” letters, and “is informed” letters. These actions are all tools that BIS can use to communicate to an exporter that it may be engaged in conduct that exposes it to export control enforcement risk. However, each is also short of full civil or criminal enforcement action. Depending on the specific communication, an exporter may be obliged to evaluate a transaction for red flags (a “supplier list” letter), halt a transaction (Project Guardian requests or “red flag” letters), or apply for a specific license (an “is informed” letter). Failure to comply can, in each instance, either lead to a civil or criminal enforcement action or be considered as an aggravating circumstance in a future enforcement action. BIS’s reiteration of these possible communiques in the July 10 guidance is an indication that BIS may increase the use of such measures going forward.

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We expect that BIS will continue to focus its efforts on countering the circumvention of U.S. export controls and countering the diversion of export-controlled goods. This is particularly true with respect to Russia, where the results of such diversion may be felt in Ukraine on the battlefield. With the endorsement of the TIP data set, the July 10 guidance gives exporters a new tool to avoid becoming a party to such diversion and remaining in compliance with U.S. export control laws.

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² 15 CFR § 736.2(b)(10).

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