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BIS's 2024 Update Conference: Key Takeaways from Assistant Secretary for Export Enforcement Matthew Axelrod's Remarks

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April 10, 2024 – On March 28, 2024, Matthew S. Axelrod—Assistant Secretary for Export Enforcement at the U.S. Department of Commerce's Bureau of Industry and Security's ("BIS")—delivered [remarks](#) at [BIS's 2024 Update Conference on Export Controls and Policy](#). The Assistant Secretary used the occasion to send several clear signals to industry regarding what BIS expects regarding anti-evasion efforts and what to expect in future enforcement, including publicly announcing that more than 20 American companies have recently received "red flag" letters from BIS listing more than 600 foreign parties—identified through commercially available databases— "that have continued to sell dual-use items to Russia," challenging the sometimes-held perception that identifying the actors involved in evasion or diversion is not possible. We summarize the key takeaways below.

Companies on the Front Lines

The Assistant Secretary stressed that the stakes involved for U.S. export control compliance have never been higher. Current geopolitical challenges, the increasingly rapid development of technology (with the potential of providing asymmetric military advantage), and the world's growing interconnectedness have raised the prominence and impact of export enforcement in unprecedented ways. "Failure to prevent our adversaries from obtaining advanced U.S. technology carries not just significant reputational risk for individual companies but also serious consequences for our collective national security."

The Assistant Secretary highlighted the Bureau's Office of Export Enforcement ("OEE's") efforts to incentivize compliance while promoting effective enforcement, including extensive outreach to educate industry and academia and publishing best practice guidance, advisory notes and alerts in coordination with other U.S. government agencies like the Departments of Justice, the Treasury, Homeland Security, and State.

In case there remained any curiosity or skepticism still in industry or the defense bar whether BIS was serious about enforcement, the Assistant Secretary emphasized that 2023 saw a record number of convictions obtained by the

Department of Justice ("DOJ") with support from BIS, temporary denial orders ("TDOs"), and post-conviction denial orders from his office. The Disruptive Technology Strike Force that BIS recently launched with the DOJ brings together experienced agents and prosecutors in fourteen locations across the country—supported by an interagency intelligence effort in Washington, D.C.—to investigate the illegal acquisition and use of certain prioritized advanced technologies (e.g., artificial intelligence) by U.S. adversaries and to take criminal and/or administrative enforcement action as appropriate.

Further, as part of his remarks, Mr. Axelrod announced new updates and policies to help drive front-end compliance with U.S. export control rules, several of which we describe below.

Updated & Bolstered Guidance for Freight Forwarders Describing Roles, Responsibilities & Red Flags

The Assistant Secretary announced that BIS has updated its [Freight Forwarder Guidance and Best Practices](#). The updated guidance reflects feedback BIS received over the past year during meetings with trade associations, consolidators, and others within the global supply chain regarding issues specific to the freight forwarding and express carrier communities. Key updates include a more extensive and explicit description of the roles and responsibilities of freight forwarders, a new section containing an overview of the antiboycott provisions of the Export Administration Regulations ("EAR") and related best practices, and a list of red flags addressed to both freight forwarders and exporters (also known as U.S. Principal Parties of Interest). This guidance is the latest in a line of guidance from BIS and other U.S. agencies highlighting for industry and compliance teams "red flags"—which are relevant to awareness of a high probability of evasion under the EAR's definition of knowledge, and which BIS expects to trigger enhanced due diligence of parties involved in transactions.

Updated "Don't Let This Happen to You" Compendium of Case Examples to Reflect Recent Enforcement Activity and Preview More to Come

Given the significant enforcement activity by BIS in 2023, the updated "[Don't Let This Happen to You](#)" collection of case studies and lessons learned, announced by the Assistant Secretary, was long overdue. Key updates since the last version include, *inter alia*, the following case studies:

- **Seagate Technology LLC / Seagate Singapore International Headquarters PTE. LTD.** – Between 2020 and 2021, Seagate Technology LLC of Fremont, California and Seagate Singapore International Headquarters PTE. LTD ordered or caused the reexport, from abroad, or transfer (in-country) of more than 7.4 million hard disk drives valued at over \$1.1 billion to Huawei Technologies Co., Ltd. or other Huawei entities listed on the BIS Entity List without a license or other authorization from BIS. On April 19, 2023, BIS imposed a \$300 million civil penalty as part of a settlement agreement with Seagate Technology LLC and Seagate Singapore—the largest standalone administrative penalty in BIS history.
- **By Trade OU** – Beginning in 2018, operators of a Latvia-based corporation conspired with the operator of By Trade OU, an Estonia-based company, to violate U.S. export laws and regulations and smuggle a jig grinder—a high-precision grinding machine system—that was manufactured in Connecticut to Russia. On April 4, 2023, By Trade OU was sentenced in the U.S. District Court for the District of Connecticut to a forfeiture of approximately \$342,000 in addition to a March 29, 2023 forfeiture of \$484,696.
- **Johnny Tourino / Spectra Equipment, Inc.** – U.S.-based individual Johnny Tourino owned and operated Spectra Equipment Inc., a California-based computer support and services company. Between September 2015 and March 2017, Tourino negotiated the sale of five business-class computer servers valued at \$2.1 million and attempted to have them sent to Iran for use by two Iranian financial institutions. On December 8, 2023, Tourino was sentenced in the U.S. District Court for the Central District of California to 18 months in prison, three years of supervised release, a \$20,000 criminal fine, and a forfeiture of \$2,124,859.

Although the consequences for export control violations have historically lagged far behind those for violations of anti-corruption laws,¹ the Assistant Secretary has previously characterized Seagate as a “down payment” on enforcement actions to come in 2024.²

Additional Steps to Prevent Shipments of Western Components to Russia, including sending “Red Flag” Letters to U.S. Manufacturers and Distributors

One significant piece of hard news was the Assistant Secretary’s disclosure that BIS has sent “red flag” letters to more than 20 American companies identifying for them more than 600 foreign third parties believed by BIS to be diverting components to Russia.

These letters were the culmination of several months of outreach by BIS. Last year, BIS initiated efforts to identify customers of U.S. companies and distributors within supply chains that were continuing to ship high-priority items to Russia. The Assistant Secretary noted that U.S. companies had asked BIS for “more information to help them identify Russian front companies in third countries,” and so in the past few weeks BIS sent these “red flag” letters naming the specific parties identified through commercially available datasets. The letters asked the U.S. companies to use heightened due diligence for any transactions involving the identified third parties. BIS obtained some of the information from commercially available datasets of Russian imports and stated an expectation that U.S. companies should be consulting such datasets as well.

Importantly for industry, and for compliance teams tasked with assessing the significance of these letters, the letters specifically cautioned companies of the consequences of continuing with transactions while “knowing” (as defined in the EAR at 15 C.F.R. 772.1) of their participation in diversion of high-priority items to Russia. Given the elasticity of the definition of “knowing,” there is a significant risk to the letters’ recipients that—certainly in the eyes of BIS—they are now aware of a high probability of evasion or diversion for continuing with transactions involving those parties, at least absent the successful completion of risk-appropriate due diligence (in which, for example, obtaining a signed certification or running traditional Know-Your-Customer (“KYC”) screening would likely not be considered sufficient to overcome the letters’ information). Companies and compliance teams should seriously consider, if they have not already done so, implementing a “catch-and-release” due diligence program focused on high-priority items shipped to or through such third parties. Otherwise, continuing with transactions involving those parties is likely to carry significant enforcement risk.

Conclusion

The Assistant Secretary’s remarks highlight his office’s sustained efforts to encourage and incentivize industry to invest in compliance on the front end while also emphasizing the financial and reputational cost of facing an enforcement action on the back end. There is still time for companies to recalibrate risk assessments and due diligence efforts to reflect the new enforcement reality, but the Assistant Secretary’s remarks strongly suggest that now is the time to get ahead of the cresting enforcement wave.

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1. Brent Carlson & Michael Huneke, “From Peanuts to Prison Time – A Fresh Look at the Evolution of Export Controls Penalties” NYU Compliance & Enforcement Blog (November 14, 2023), https://wp.nyu.edu/compliance_enforcement/2023/11/14/from-peanuts-to-prison-time-a-fresh-look-at-the-evolution-of-export-controls-penalties/ (last accessed on April 5, 2024). ↵
 2. Michael Huneke, “BIS Goes Big Game Hunting with Further VSD Policy Changes – Suggesting that It’s Time to Recalibrate Corporate Assessments of Export Controls Evasion Risk,” NYU Compliance & Enforcement Blog (February 7, 2024), https://wp.nyu.edu/compliance_enforcement/2024/02/07/export-controls-experts-comment-on-enhancements-to-voluntary-self-disclosure-policies-for-export-control-violations/ (last accessed on April 5, 2024). ·

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