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Bureau of Industry and Security Seeking Comments on 7 New Best Practices

The Department of Commerce's Bureau of Industry and Security ("BIS") is seeking comments from industry on seven new "best practices" designed to prevent the diversion of controlled items subject to the Export Administration Regulations ("EAR"). The Federal Register Notice describing these updated best practices is attached to this Advisory. Comments on the proposed best practices from industry are due by October 18, 2010. These new "best practices" will either replace or supplement those posted on BIS's website in November 2003.

Articles subject to EAR are generally "dual-use" items, meaning that they are for civilian use but may also have military applications, making them particularly susceptible to diversion from authorized to unauthorized end-uses, end-users or destinations. BIS is particularly interested in hearing from exporters, freight forwarders, carriers, consolidators, express couriers and other entities that are party to dual-use exports.

While noting that there is no legal requirement to comply with these best practices, BIS stated that "demonstrated compliance with [them] … will be considered an important mitigating factor in administrative prosecutions arising out of violations of provisions of the EAR that apply to transit, transshipment or re-export transactions."

Best Practice #1

BIS proposes that industry "[p]ay heightened attention to the Red Flag Indicators" listed on its website "with respect to transactions to, from, or through transshipment hubs." These "red flags" include:

- The customer or its address is similar to one of the parties found on the Commerce Department's [BIS's] list of denied persons.
- The customer or purchasing agent is reluctant to offer information about the end-use of the item.
- The product's capabilities do not fit the buyer's line of business, for example, -- an order for sophisticated computers for a small bakery.
- The item ordered is incompatible with the technical level of the country to which it is being shipped, -- for example, semiconductor manufacturing equipment being shipped to a country that has no electronics industry.
- The customer is willing to pay cash for a very expensive item when the terms of sale would normally call for financing.
- The customer has little or no business background.
- The customer is unfamiliar with the product's performance characteristics but nevertheless wants the product.
- Routine installation, training, or maintenance services are declined by the customer.
- Delivery dates are vague, or deliveries are planned for out of the way destinations.
- A freight forwarding firm is listed as the product's final destination.

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- The shipping route is abnormal for the product and destination.
- Packaging is inconsistent with the stated method of shipment or destination.
- When questioned, the buyer is evasive and especially unclear about whether the purchased product is for domestic use, for export, or for reexport.

According to BIS, when suspicious circumstances exist, a company "should inquire further and attempt to resolve any questions raised by the transaction." BIS's "Know Your Customer Guidance" (Supplement No. 3 to Part 732 of the EAR) states further that when "red flags" are encountered, a company has "a duty to check out the suspicious circumstances and inquire about the end-use, end-user, or ultimate country or destination."

Best Practice #2

Exporters should "utilize only those Trade Facilitators / Freight Forwarders that also observe these best practices and possess their own export management and compliance program."

Best Practice #3

Exporters should have information about their foreign customers, including whether the customer is a trading company or distributor and whether the customer resells to third parties.

Best Practice #4

When dealing with transshipment hubs, exporters should inquire about the end-user and whether items will be reexported or incorporated into an item that will be reexported.

Best Practice #5

When a freight forwarder is asked to ship to a different country or ultimate consignee, it should inquire about the details of the transaction.

Best Practice #6

Exporters should communicate the appropriate Export Control Classification Number ("ECCN") or other classification information (EAR 99) to the end-user or ultimate consignee.

Best Practice #7

Exporters should report ECCN or EAR 99 classifications to the Trade Facilitator / Freight Forwarder or enter them in the Automated Export System.

To enable our clients to implement effective export compliance programs - - including provisions to guard against diversion of dual-use items - - we will monitor industry's comments on these updated "best practices," and issue updated advisories to pass along the comments to you in a timely manner.