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## RUSSIA DIVERSION RISK: NEW BIS BEST PRACTICE FOR SCREENING PARTIES AND NEW REQUIREMENT TO SCREEN ADDRESSES IN HONG KONG

On July 10, 2024, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") issued critical new guidance ("the Guidance") aimed at enhancing due diligence to prevent the diversion of Common High Priority List (CHPL) items to Russia.<sup>[1]</sup> A list of the CHPL items can be found on the BIS website.<sup>[2]</sup>

Most importantly, the Guidance announces a new best practice for identifying parties that present a high risk for diverting CHPL items to Russia, using a new database of parties that have exported such items to Russia since 2022. In addition, the Guidance explains BIS' use of "supplier list" letters, "Project Guardian" requests, "red flag" letters, and "is informed" letters to put exporters on notice about parties that present national security concern (including Russia diversion risk), even when they are not listed on public screening lists.

The Guidance comes after another important change to BIS practice regarding identification of parties that present a

national security concern: addition to the Entity List of eight addresses in Hong Kong (China) without an associated party name, with a requirement to obtain a license for transactions involving any party at one of those addresses for any items that are subject to the EAR and either on the Commerce Control List or designated as EAR99 and described in Supplement 7 to Part 746 of the EAR, as further explained below.<sup>[3]</sup>

### ENHANCED SCREENING FOR CHPL ITEMS

BIS expects exporters of CHPL items to screen counterparties using a free tool created by the UK's Open-Source Centre, and available on the Trade Integrity Project (TIP) website<sup>[4]</sup> in addition to the Consolidated Screening List. The TIP website identifies parties that have shipped CHPL items to Russia since 2022. The data can be searched online or downloaded. If a party is on the TIP list, BIS expects exporters to "closely scrutinize" the party

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<sup>1</sup> U.S. Dep't of Commerce, Bureau of Industry and Security, *Guidance for Complying with BIS Letters Identifying Transaction Parties of Diversion Risk* (v. 8) (2024), available at [https://www.bis.gov/sites/default/files/files/Guidance-for-Complying-with-BIS-Letters-Identifying-Transaction-Parties-of-Diversion-Risk\\_v8.pdf](https://www.bis.gov/sites/default/files/files/Guidance-for-Complying-with-BIS-Letters-Identifying-Transaction-Parties-of-Diversion-Risk_v8.pdf).

<sup>2</sup> Common High Priority List, available at <https://www.bis.gov/articles/russia-export-controls-list-common-high-priority-items>.

<sup>3</sup> See BIS Final Rule, 89 Federal Register 51644, 51647 (June 18, 2024), available at <https://www.bis.doc.gov/index.php/documents/federal-register-notice-1/3508-public-display-version-of-russia-and-belarus-sanctions-rule-on-public-display-and-effective-6-12-24-and-9-16-24-for-instruction-14-and-published-6-18-24/file>.

<sup>4</sup> Trade Integrity Project, available at <https://trade-integrity.org/#searchInput>.

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“to determine whether any red flags are present.”<sup>[5]</sup> Proceeding with a transaction with such a party without adequately resolving the red flag would be considered an aggravating factor in any enforcement action arising out of diversion of the products to Russia.

In addition to identifying parties that present a high risk of diversion to Russia, the TIP data may be useful for identifying countries that present an elevated Russia diversion risk. Extracting the country data produces the table below. BIS had previously indicated that certain

countries presented a high risk of transshipment to Russia (Armenia, Brazil, China, Georgia, India, Israel, Kazakhstan, Kyrgyzstan, Mexico, Nicaragua, Serbia, Singapore, South Africa, Taiwan, Tajikistan, Turkey, United Arab Emirates, Uzbekistan), and many of them appear on the TIP data list, as marked by an asterisk<sup>[6]</sup> below. Based on the TIP data, exports to at least some of the countries without an asterix (those with volumes of Russia exports equivalent to the countries previously called out by BIS) would also warrant careful review for Russia-related red flags.

Country	ISO Code	Total USD value of exports of CHPL items to Russia since 2022, according to the Trade Integrity Project (as of mid-July 2024)
*China, including HK	PRC	3,017,649,029.00
*Turkey	TR	283,880,898.00
*Serbia	RS	70,992,043.00
*UAE	AE	66,756,081.00
*India	IN	35,634,926.00
*Kyrgyzstan	KG	24,359,408.00
Seychelles	SC	15,545,377.00
Thailand	TH	14,951,011.00
*Singapore	SG	9,127,189.00
*Kazakhstan	KZ	7,710,952.00

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<sup>5</sup> U.S. Dep’t of Commerce *supra* note 1.

<sup>6</sup> See BIS, Russian Procurement Tactics and Techniques, available at <https://www.bis.gov/articles/russian-procurement-tactics-techniques-and-procedures>.

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Country	ISO Code	Total USD value of exports of CHPL items to Russia since 2022, according to the Trade Integrity Project (as of mid-July 2024)
British Virgin Islands	VG	5,642,737.00
Malaysia	MY	2,595,779.00
Azerbaijan	AZ	2,077,367.00
*Uzbekistan	UZ	1,955,325.00
Vietnam	VN	1,553,638.00
Belarus	BY	1,233,751.00
Mongolia	MN	1,101,643.00
Benin	BJ	822,398.00
*Armenia	AM	409,947.00
*Georgia	GE	403,457.00
*Tajikistan	TJ	377,783.00
Egypt	EG	372,558.00
Indonesia	ID	262,167.00
*Israel	IL	198,016.00
Bosnia	BA	86,594.00
Oman	OM	40,647.00
Turkmenistan	TM	19,576.00
Gabon	GA	16,600.00
Maldives	MV	12,113.00
Sri Lanka	LK	3,630.00
*South Africa	ZA	3,284.00
Macau	MO	2,851.00

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### TYPES OF BIS NOTIFICATIONS AND EXPECTED ACTIONS

Exporters may receive four types of non-public notification from BIS regarding diversion risk. The Guidance explains each type of notification and what BIS expects from exporters that receive such notifications, as follows:

- **Supplier List Letters:** Letters identifying foreign parties that are not on one of BIS' public screening lists (e.g., the Entity List) that have exported to, or facilitated transactions with, destinations or end users of national security or foreign policy concern. Parties receiving such letters "should closely scrutinize transactions with the identified "supplier list" parties to determine whether ... any of the red flags identified in Supplement No. 3 to Part 732 – BIS's "Know Your Customer" Guidance and Red Flags are present," as well as considering any "additional tailored guidance about red flags to look for as well as suggested due diligence tips" that BIS includes in the letter.<sup>[7]</sup>
- **Project Guardian Requests:** Letters asking the recipient to exercise caution with respect to transactions with a specific party or inquiries about a specific item and, if such a transaction or inquiry arises, to "deny (or at a minimum suspend filling) such order and contact their local Export Enforcement field office for guidance on how to proceed."<sup>[8]</sup> Proceeding without convincingly resolving the red flag will be treated as an aggravating factor in an enforcement action. Conversely, cooperation with a Project Guardian request will be treated as a mitigating factor "if an enforcement action is later brought against the [recipient of the letter], even for unrelated conduct."<sup>[9]</sup>
- **Red Flag Letters:** Letters that inform a company that a customer may have illegally transferred the same type of item it purchased from the company previously exported to that customer. A company receiving such a letter is on notice that transactions with that customer present "a high probability that an export violation may occur" and "should conduct additional due diligence to resolve and overcome the red flag identified by BIS before filling an order from the identified customer."<sup>[10]</sup>
- **Is Informed Letters:** Letters notifying a company that supplemental EAR license requirements apply to certain items going to specific entities or destinations, or to specific activities of U.S. persons. Parties receiving such letters must comply with the identified license requirements.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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BIS summarized the key facts about each type of notification in the following chart:

Responsibilities in Response to BIA Identification of Parties/Transactions of Concern					
	Supplier List	Project Guardian Request	"Red Flag" Letter	"Is Informed" Letter	Publicly Proscribed Party
Action	Identification of parties of diversion concern	BIS notification of red flag (i.e., knowledge of high probability that a violation may occur)		Individual notice of a license requirement	Dependent upon requirements of list (e.g., license requirement for parties on Entity List)
Who is impacted	Recipient of letter or other publicly available information	Recipient of BIS Project Guardian Request	Recipient of BIS "red flag" letter	Recipient of BIS "is informed" letter	Any person involved in a transaction subject to the EAR
Responsibility	Determine whether any red flags are present and if present, resolve before processing	Resolve red flags to proceed		Submit license application as required by letter	Submit license application if required by EAR or comply with other EAR requirements

**SCREENING OF STAND-ALONE ADDRESSES ON THE ENTITY LIST**

On June 18, 2024, BIS published a final rule that, among other Russia-related changes, adjusted the structure of the Entity List to enable BIS to list addresses with no associated party name, resulting in a license requirement for transactions involving any party at one of those

addresses.<sup>[11]</sup> As always, under the Entity List rules, the license requirement attaches whenever the affected party is "a party to a transaction as described in § 748.5(c) through (f)" - i.e., whether the affected party is the purchaser, consignee, intermediate consignee, or end user.

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<sup>11</sup> Final Rule, *supra* note 4.

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*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*

In the Rule, BIS exercised its new authority by adding eight addresses in Hong Kong (under the portion of the list for China) and imposed a license requirement for transactions involving parties at those addresses for any item that are subject to the EAR and either on the Commerce Control List or designated as EAR99 and described in Supplement 7 to Part 746 of the EAR. The addresses were added because BIS concluded that they “are associated with significant transshipment of sensitive goods to Russia” including “associations with parties on the Entity List or the Unverified List at the listed addresses.”<sup>[12]</sup>

### CONCLUSION

The Guidance and the changes to the structure of the Entity List to require screening for certain stand-alone addresses reflect U.S. Government’s ongoing focus on preventing diversion of restricted goods to Russia. BIS expects parties transferring items subject to US export controls to stay vigilant, leverage the provided tools, and adhere to BIS notifications to ensure compliance and mitigate the risk of diversion. Based on our experience, we can report that BIS (in collaboration with Homeland Security and CBP) has ramped up interdiction of suspicious shipments from the United States and outreach to U.S. and foreign companies about shipments of U.S. goods and foreign-origin products that may be subject to the EAR to third countries associated with a high risk of diversion to Russia. Failure to conduct

adequate Russia-related diligence is therefore associated with increasing enforcement risk.

All parties exporting, reexporting, or transferring items subject to the EAR and described on the CHPL should promptly update their due diligence practices to incorporate checking counterparties against the parties listed in the TIP data. Parties may also want to consider the relevance of this data to shipments of non CHPL items that are subject to the EAR license requirements for Russia or Belarus.

All parties exporting, reexporting, or transferring items subject to the EAR should also promptly update their due diligence practices to incorporate checking of purchaser, end user, consignee, and intermediate consignee addresses in Hong Kong against the eight stand-alone addresses in Hong Kong that have been added to the Entity List. Parties should also keep an eye on future developments, in case BIS adds more addresses, whether under China or additional destinations. Parties may also wish to consider address screening more generally, particularly for transactions involving CHPL items and countries that present a high risk of diversion to Russia.

For more information on the topics covered in this advisory or any other aspect of U.S. export controls or economic sanctions, contact partners **Tahlia Townsend**, or **Dan Goren** of Wiggin and Dana’s **International Trade Compliance Practice Group**.

<sup>12</sup> *Id.* at 51648.

<sup>13</sup> As noted above, BIS has explicitly flagged the following countries as presenting a high risk of transshipment to Russia: Armenia, Brazil, China, Georgia, India, Israel, Kazakhstan, Kyrgyzstan, Mexico, Nicaragua, Serbia, Singapore, South Africa, Taiwan, Tajikistan, Turkey, United Arab Emirates, Uzbekistan. Countries with a high volume of CHPL exports to Russia according to the TIP data would also present a significant risk and include a number of countries not explicitly identified in the BIS article referenced above, such as Azerbaijan, Benin, British Virgin Islands, Egypt, Indonesia, Malaysia, Mongolia, Seychelles, Thailand, and Vietnam.