

Five Eyes on Sanction Enforcement: Joint Guidance on Russia Sanctions Evasion From U.S. and Allies Identifies Detailed Expectations for Export Control Diligence in Sensitive Transactions

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On September 26, 2023, U.S. export enforcement authorities, jointly with enforcement authorities in four allied countries (the Five Eyes), issued additional guidance in order to prevent the diversion of goods in violation of sanctions against Russia. The guidance is the most specific road map yet regarding both the types of goods and transactions that are the prime focus of enforcement and the diligence measures that these governments expect exporters to apply to transactions involving sensitive goods or destinations.

In light of this guidance, manufacturers might (1) check to see if they are exporting or facilitating the export of any of the sensitive products or other risk factors highlighted in the guidance; and (2) ensure that their current export diligence procedures are aligned with those recommended in the guidance.

Guidance From Five Eyes Nations

On September 26, 2023, the export control enforcement agencies

of the Five Eyes nations (Australia, Canada, New Zealand, the United Kingdom, and the United States) issued “Guidance for Industry and Academia” regarding Russia and Belarus sanctions evasion. The guidance specifies 45 types of goods, identified by the HS code, that the countries believe Russia seeks to use in its weapons systems.

What Types of Goods Are Mentioned?

The 45 types of goods are divided into four tiers.

- Tiers 1 and 2 consist of integrated circuits and electronics items related to wireless communication, satellite-based navigation, and passive electronics components.
- Tiers 3 and 4 consist of (among others) transformers, television cameras and apparatuses for voice or image transmission, certain electrical equipment, semiconductor devices, ball bearings and roller bearings, aircraft parts, navigational equipment, telescopic sights, and manufacturing, production, and testing equipment for electric components and circuits.

The Five Eyes Guidance identifies three scenarios (involving the 45 types of products of concern) that pose a particular risk of diversion to Russia:

1. exports to companies that never received exports before February 2022;
2. exports to companies that never received exports of Tier 1 or Tier 2 goods before February 2022; and
3. exports to companies that received exports of Tier 1 or Tier 2 goods before February 2022 and saw a significant spike in exports thereafter.

What Diligence Steps Are Recommended?

The Five Eyes Guidance also prescribes recommended diligence steps for all new customers located in countries that have not imposed export controls on Russia and Belarus since Russia's invasion of Ukraine, which are known as non-Global Export Control Countries or "non-GECC." Basically, this refers to all countries except for the Five Eyes countries, all EU countries, Iceland, Japan, Liechtenstein, Norway, South Korea, Switzerland, and Taiwan.

The recommended diligence steps include checking whether the company was incorporated after February 2022, evaluating whether the customer's business is consistent with the items ordered, and evaluating whether the customer's website or physical location reveals any red flags. Additionally, the Five Eyes Guidance lists specific red flags that it advises exporters to be on the lookout for, most of which involve changes in the customer's behavior since February 2022.

Guidance from the U.S. Department of Commerce

Concurrently with the Five Eyes Guidance, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) issued related guidance to U.S. exporters. Although both sets of guidance address diversion to Russia and Belarus, there are important differences between the two guidance documents.

First, the BIS Guidance states that U.S. enforcement authorities are prioritizing the nine types of goods in Tier 1 and Tier 2 of the Five Eyes Guidance. The BIS Guidance goes on to set forth recommended diligence steps specific to exports of items listed in Tier 1 and Tier 2. BIS recommends that, at least for these nine

types of items, U.S. exporters should seek written assurances of compliance with U.S. export controls when there are parties from non-GECC countries involved.

Second, the BIS Guidance also sets forth recommended diligence steps for such transactions, most of which focus on collecting “know your customer” information. This is a different emphasis compared to the diligence steps recommended in the Five Eyes guidance, which focus foremost on examining changes in customer behavior after the Russian invasion of Ukraine commenced in February 2022. The recommended diligence steps include:

- Collecting information about the customer’s name, address, website, and line of business;
- Obtaining information about what the customer intends to do with the products (e.g., consume, transform into a different item, maintain for stock, or resell);
- Obtaining the name and address of the end user (if than from the customer): and
- Obtaining attestations of compliance with specific provisions of U.S. export controls.

The BIS Guidance appends a two-page form for collecting this information. The form includes the recommended attestations of compliance.

Implications of Recent Guidance

The recent guidance from BIS and the Five Eyes nations constitutes the most specific guidance yet regarding what concrete steps enforcement authorities expect companies to adopt to prevent and detect diversion of goods to Russia and Belarus. In light of the guidance, companies may want to triage their own

export operations to assess whether their operations entail any of the diversion risk factors emphasized in the guidance. This could entail asking questions such as:

- Does our company deal in any of the products of concern identified in the guidance? If so, which products and which “tiers” are they located in?
- Does our company export products to or do business with entities located in non-GECC countries?
- How does the diligence we conduct for export transactions compare with the diligence steps identified in the guidance?

Companies that deal in the products of concern may wish to consider implementing changes to their diligence procedures for transactions within the scope of the new guidance. In the guidance, export enforcement authorities have articulated specific types of information they want companies to collect about transactions involving the products of concern. The Five Eyes Guidance focuses on the collection of information regarding potential red flags regarding the customer’s location and changes occurring after February 2022. The BIS guidance focuses on collecting complete know-your-customer information (such as end-use, end-user, and the customer’s corporate information) and assurances of compliance. The BIS guidance even prescribes a specific form (more detailed than the general BIS-711 form) for collecting this information. In enforcement actions, these authorities may use the tools identified in the guidance in evaluating the sufficiency of companies’ compliance programs, and may view failure to adopt the diligence measures set forth in the guidance as a negative factor in assessing compliance programs in the event that a prohibited export occurs. Companies which make changes to their diligence procedures, might also wish to consider documenting the changes made in their export compliance policies or other

applicable policies and procedures to ensure that written procedures reflect current operations.

This recent guidance reinforces that enforcement regarding Russian sanctions evasion remains a major priority for the U.S. and allied countries. Enforcement authorities continue to identify new diversion threats and tailor their enforcement priorities accordingly. The joint nature of this guidance also reinforces the continued high level of cooperation between allied governments in enforcing Russia and Belarus sanctions. It is worthwhile for all exporters to review the guidance in order to assess their risk and consider adopting the diligence procedures recommended in the guidance where appropriate to meet those risks.

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