Locke Lord QuickStudy: ?BIS Issues New Guidance to Financial ?Institutions on Best ?Practices for Compliance With ?the EAR

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On October 9, 2024, the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") issued its first-ever guidance to financial institutions ("FIs") on best practices to comply with the Export Administration Regulations ("EAR"). BIS notes that export violations are usually facilitated by payments through FIs. The BIS guidance provides recommendations to help FIs minimize the risk of inadvertently violating General Prohibition 10 ("GP 10") and other aspects of the EAR.

General Prohibition 10

Under GP 10, FIs and other persons (regardless of location, country in which they are headquartered or registered, or nationality) may not finance or otherwise service, in whole or in part, any item subject to the EAR with knowledge that a violation of the EAR has occurred, is about to occur, or is intended to occur in connection with the item. In addition, U.S. persons, wherever located – including FIs – may not support (e.g., finance or facilitate) certain specified activities that they know involve certain WMD or military-intelligence programs. "Knowledge" includes not only actual knowledge that a violation exists or is substantially certain to occur but can also include awareness of a high probability of its existence or future occurrence. Prosecutors can also demonstrate awareness by showing a conscious disregard of facts or from a person's willful avoidance of facts.

Key Takeaways for Financial Institutions

The BIS guidance underscores that financial institutions play a critical role in preventing EAR violations, especially when transactions involve exports, reexports, or transfers of dual-use items or less sensitive military items. GP 10 prohibits FIs from financing or servicing any transactions involving EAR-regulated items with knowledge—actual or inferred—that a violation is occurring or is intended to occur.

To manage this risk, BIS provides a comprehensive set of best practices focusing on EAR-related due diligence, ongoing transaction monitoring, and real-time screening, all of which are vital in preventing violations and ensuring compliance with the EAR.

Due Diligence and Risk-Based Compliance

BIS recommends incorporating EAR-related due diligence into standard FI risk management processes. This should be done both before onboarding new customers and continuously throughout the relationship. FIs are advised to:

- **Screen customers against restricted-party lists** such as BIS's Denied Persons List, the Entity List, and the Military End-User List. The U.S. Department of Commerce's Consolidated Screening List integrates these lists, making it a valuable tool for FIs.
- **Review transaction data for red flags**, including customers' involvement in exporting high-priority controlled items or goods destined for embargoed or restricted countries, such as Russia, Belarus, and Iran.
- **Certify customers' export compliance** by asking clients engaged in international trade to confirm they have processes in place to ensure compliance with the EAR, particularly when the customers are involved in controlled industries like microelectronics and defense-related goods.

Transaction Monitoring for Red Flags

BIS encourages FIs to monitor transactions continuously for signs of export control violations. While real-time screening is not always expected, BIS emphasizes the importance of ongoing reviews, including post-transaction, for any red flags that might signal export control evasion, such as:

- A customer's refusal to provide information about end-users or intended uses of goods;
- Transactions with parties whose names match those on restricted lists or involve addresses linked to high-risk countries; and
- Last-minute changes in payment routing that redirect funds from high-risk regions.

If such red flags are identified, FIs are expected to investigate further and potentially suspend or terminate their involvement in the transaction to avoid potential liability under GP 10.

Real-Time Screening Recommendations

Although real-time screening is not mandated across all transactions, BIS advises FIs to implement real-time screening in certain high-risk circumstances, such as cross-border payments likely related to exports or reexports. Key screening lists include, the BIS Denied Persons List, Military- End User List (for countries like Russia, China, and Iran), and certain persons designated on the Entity List, namely entities subject to Foreign Direct Product rules, which impact a broad array of foreign-manufactured goods containing U.S. components.

For these types of transactions, BIS recommends immediate suspension of activity if there is a match on any of these lists, until further due diligence can confirm compliance with the EAR.

Increased Reporting Obligations

Consistent with BIS and the U.S. Department of the Treasury's Financial Crimes Enforcement Network prior guidance, FIs are expected to report suspicious activity related to potential EAR violations via Suspicious Activity Reports ("SARs"). For Russia and Belarus-related export control evasion attempts, FIs should use the key term "FIN-2022-RUSSIABIS," while for global export control evasion, "FIN-2023-GLOBALEXPORT" should be included in SAR filings.

Conclusion

The BIS guidance serves as a reminder for financial institutions to stay vigilant in their role within the global export control framework and to ensure that their compliance programs are robust and up to date with the latest regulatory developments. By adopting these best practices and incorporating EAR compliance into their due diligence, screening, and monitoring processes, FIs can mitigate the risk of violations and align with U.S. national security priorities. FIs should also consider filing Voluntary Self-Disclosures ("VSDs") if they suspect any EAR violations, as VSDs can serve as a key mitigation tool for potential liabilities.

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