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Title 15 –Commerce and Foreign Trade

Subtitle B –Regulations Relating to Commerce and Foreign Trade

Chapter VII –Bureau of Industry and Security, Department of Commerce

Subchapter C –Export Administration Regulations

Part 732 –Steps for Using the EAR

Authority: 50 U.S.C. 4801-4852; 50 U.S.C. 4601 et seq.; 50 U.S.C. 1701 et seq.; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228.

Source: 61 FR 12740, Mar. 25, 1996, unless otherwise noted.

Supplement No. 3 to Part 732—BIS's "Know Your Customer" Guidance and Red Flags

"Know Your Customer" Guidance

Various requirements of the EAR are dependent upon a person's knowledge of the end-use, end-user, ultimate destination, or other facts relating to a transaction or activity. These provisions include the nonproliferation-related "catch-all" sections and the prohibition against proceeding with a transaction with knowledge that a violation of the EAR has occurred or is about to occur.

- (a) BIS provides the following guidance on how individuals and firms should act under this knowledge standard. This guidance does not change or interpret the EAR.
 - (1) **Decide whether there are "red flags".** Take into account any abnormal circumstances in a transaction that indicate that the export may be destined for an inappropriate end-use, end-user, or destination. Such circumstances are referred to as "red flags". Included among examples of red flags are orders for items that are inconsistent with the needs of the purchaser, a customer declining installation and testing when included in the sales price or when normally requested, or requests for equipment configurations that are incompatible with the stated destination (e.g., 120 volts in a country with 220 volts). Commerce has developed lists of such red flags that are not all-inclusive but are intended to illustrate the types of circumstances that should cause reasonable suspicion that a transaction will violate the EAR.
 - (2) **If there are "red flags", inquire.** If there are no "red flags" in the information that comes to your firm, you should be able to proceed with a transaction in reliance on information you have received. That is, absent "red flags" (or an express requirement in the EAR), there is no affirmative duty upon exporters to inquire, verify, or otherwise "go behind" the customer's representations. However, when "red flags" are raised in information that comes to your firm, you have a duty to check out the suspicious circumstances and inquire about the end-use, end-user, or ultimate country of destination. The duty to check out "red flags" is not confined to the use of License Exceptions affected by the "know" or "reason to know" language in the EAR. Applicants for licenses are required by part 748 of the EAR to obtain documentary evidence concerning the transaction, and misrepresentation or concealment of material facts is prohibited, both in the licensing process and in all export control documents. You can rely upon representations from your customer and repeat them in the documents you file unless red flags oblige you to take verification steps.

(3) **Do not self-blind.** Do not cut off the flow of information that comes to your firm in the normal course of business. For example, do not instruct the sales force to tell potential customers to refrain from discussing the actual end-use, end-user, and ultimate country of destination for the product your firm is seeking to sell. Do not put on binders that prevent the learning of relevant information. An affirmative policy of steps to avoid "bad" information would not insulate a company from liability, and it would usually be considered an aggravating factor in an enforcement proceeding.

(4) **Employees need to know how to handle "red flags".** Knowledge possessed by an employee of a company can be imputed to a firm so as to make it liable for a violation. This makes it important for firms to establish clear policies and effective compliance procedures to ensure that such knowledge about transactions can be evaluated by responsible senior officials. Failure to do so could be regarded as a form of self-blinding.

(5) **Reevaluate all the information after the inquiry.** The purpose of this inquiry and reevaluation is to determine whether the "red flags" can be explained or justified. If they can, you may proceed with the transaction. If the "red flags" cannot be explained or justified and you proceed, you run the risk of having had "knowledge" that would make your action a violation of the EAR.

(6) **Refrain from the transaction or advise BIS and wait.** If you continue to have reasons for concern after your inquiry, then you should either refrain from the transaction or submit all the relevant information to BIS in the form of an application for a license or in such other form as BIS may specify.

(b) Industry has an important role to play in preventing exports and reexports contrary to the national security and foreign policy interests of the United States. BIS will continue to work in partnership with industry to make this front line of defense effective, while minimizing the regulatory burden on exporters. If you have any question about whether you have encountered a "red flag", you may contact the Office of Export Enforcement at 1-800-424-2980 or the Office of Exporter Services at (202) 482-4532.

Red Flags

Possible indicators that an unlawful diversion might be planned by your customer include the following:

1. The customer or purchasing agent is **reluctant to offer information about the end-use of a product.**
2. **The product's capabilities do not fit the buyer's line of business;** for example, a small bakery places an order for several sophisticated lasers.
3. The product ordered is incompatible with the technical level of the country to which the product is being shipped. For example, semiconductor manufacturing equipment would be of little use in a country without an electronics industry.
4. The customer has little or no business background.
5. **The customer is willing to pay cash** for a very expensive item when the terms of the sale call for financing.
6. **The customer is unfamiliar with the product's performance characteristics but still wants the product.**
7. Routine installation, training or maintenance services are declined by the customer.

8. Delivery dates are **vague**, or deliveries are planned for **out-of-the-way destinations**.
9. **A freight forwarding firm is listed as the product's final destination.**
10. **The shipping route is abnormal for the product and destination.**
11. Packaging is inconsistent with the stated method of shipment or destination.
12. When questioned, the **buyer is evasive or unclear about whether the purchased product is for domestic use, export or reexport.**
13. You receive an order for "parts" or "components" for an end item in 9x515 or the "600 series." The requested "parts" or "components" may be eligible for License Exception STA, another authorization, or may not require a destination-based license requirement for the country in question. However, the requested "parts" or "components" would be sufficient to service one hundred of the 9x515 or "600 series" end items, but you "know" the country does not have those types of end items or only has two of those end items.
14. The customer indicates or the facts pertaining to the proposed export suggest that a 9x515 or "600 series" item may be reexported to a destination listed in Country Group D:5 (see supplement no. 1 to part 740 of the EAR).
15. The customer's website or other marketing materials prior to October 7, 2022, indicated that the company had advertised or otherwise indicated its capability for "developing" or "producing" "advanced-node integrated circuits."
16. The customer has made representations that the items in question are not intended for use in the "development" or "production" of "advanced-node integrated circuits," but the items that are being requested to be exported, reexported, or transferred (in-country) to this customer are typically exclusively or predominantly used for the production of "advanced-node integrated circuits."
17. The customer is "known" to "develop" or "produce" items for companies located in Macau or a destination specified in Country Group D:5 that are involved with "supercomputers."
18. The exporter has "knowledge" indicating this customer intends to "develop" or "produce" "supercomputers" or integrated circuits in the future that would otherwise be restricted under § 744.23(a)(1)(i) or (a)(2)(i).
19. The exporter has "knowledge" that it is or seeks to be producing at a facility where "production" of "advanced node ICs" occur, for a company headquartered in either Macau or a destination specified in Country Group D:5, an integrated circuit, or a computer, "electronic assembly," or "component" that will incorporate (A) more than 50 billion transistors and (B) high-bandwidth memory (HBM). This raises a red flag that needs to be resolved or a license may be required under the EAR for reexport or export from abroad of that direct product if destined to Macau or a destination specified in Country Group D:5 (see supplement no. 1 to part 774 and part 742 of the EAR for the CCL-based license requirements for items identified under § 734.9(h)(1)(i)(B)(2) and (h)(1)(ii)(B)(2) of the EAR), absent a determination that the item being produced is outside the product scope of these paragraphs under § 734.9(h)(1)(i)(B)(2) and (h)(1)(ii)(B)(2).

TECHNICAL NOTE TO (b) 19: To calculate the number of transistors within a die, a foundry has two options. First, the foundry may take the transistor density of the process node used to manufacture the die and multiply this density by the area of the die. This number may be significantly higher than the true transistor count, but if the result is below the relevant transistor threshold, then the foundry can be

confident that the die in question will not exceed that threshold. Second, to adjudicate edge cases, the foundry may use standard design verification tools to estimate the number of (both active and passive) transistors on the die using the GDS file. Regardless of approach, if the foundry has knowledge that multiple chiplets will be included in a single package, then the foundry should estimate the aggregate number of transistors in any chiplets the foundry is responsible for manufacturing. A foundry does not need to count the transistors of chiplets that it is not responsible for manufacturing itself.

20. A non-advanced fabrication facility orders equipment designed for "advanced-node IC" production, (e.g., § 742.4(a)(4) ECCNs) that it would not need given its technology level. This technology mismatch indicates the fabrication facility produces or intends to produce "advanced-node ICs," and it requires resolution before the exporter, reexporter, or transferor proceeds with the transaction.
21. An exporter, reexporter, or transferor receives an order for which the ultimate owner or user of the items is uncertain, such as a request to ship equipment for developing or producing integrated circuits to a distributor without a manufacturing operation, when the item is ordinarily customized for the end user or installed by the supplier. Because the distributor would never be the end user of such equipment, the ultimate owner or beneficiary is unknown to the exporter, reexporter, or transferor. This uncertainty raises a Red Flag that needs to be resolved before the exporter, reexporter, or transferor proceeds with the transaction, in particular for items where such information would typically be known to an exporter, reexporter, or transferor, such as for advanced computing items, supercomputers, or SME.
22. An exporter, reexporter, or transferor receives an order or request related to an item that would require an export, reexport, or in-country transfer license from BIS or another jurisdiction that maintains controls on the item, and there is uncertainty about the license history for the item. For example, there is information known to the exporter, reexporter, or transferor indicating that a required license was not, or would not have likely been obtained by the end user, such as where the end user or end use, or the ECCN and end-user destination triggers a license review policy of a presumption of denial. These uncertainties raise a Red Flag that needs to be resolved before the exporter, reexporter, or transferor proceeds with further transactions related to the item to avoid the risk of violating § 764.2(e) ("Acting with knowledge of a violation."). This would include acting on requests to service, install, upgrade, or otherwise maintain the item of concern.
23. An exporter, reexporter, or transferor receives a request to service, install, upgrade, or otherwise maintain an item that was altered after export, reexport, or transfer by a third-party for a more advanced end use that would normally require a license for the destination. This scenario raises a Red Flag that the item is employed in a prohibited end use that would need to be resolved before proceeding further with the transaction.
24. An exporter, reexporter, or transferor receives a request for an item or service from a new customer. The new customer's senior management or technical leadership (e.g., process engineers that are team leaders or otherwise leading development or production activities) overlaps with an entity on the Entity List in supplement no. 4 to part 744 of the EAR, particularly if the supplier previously provided the same or substantially similar item or service to the Entity List entity, most likely prior to the listed entity being added to the Entity List. This scenario would raise a Red Flag that the entity requesting the item or service is engaged in or supporting the same prohibited end use as the Entity List entity, and the supplier would need to conduct additional due diligence before proceeding with the transaction with the new customer.
25. An exporter, reexporter, or transferor receives a request from a new customer for an item or service that was designed or modified for an existing or former customer that is now designated on the Entity List. This scenario would raise a Red Flag that the new customer has assumed the operations for which the

item or service is still needed to engage in or support the same prohibited end-use for which the Entity List entity was listed. The exporter, reexporter, or transferor must resolve this Red Flag before proceeding with the transaction.

26. For purposes of analyzing the scope of the Entity List FDP rule for Footnote 5 entities described in § 734.9(e)(3) and the SME FDP rule in § 734.9(k), if a foreign-produced item is described in the relevant Category 3B ECCN in § 734.9(e)(3)(i) or § 734.9(k)(1) and contains at least one integrated circuit, then there is a Red Flag that the foreign-produced item meets the product scope of the applicable FDP rule. The exporter, reexporter, or transferor must resolve this Red Flag before proceeding.
27. The end user is a "facility" that is physically connected to a "facility" where "production" of "advanced-node ICs" occurs. This scenario raises a Red Flag that the end user is also a "facility" where the "production" of "advanced-node ICs" occurs, and the supplier would need to conduct additional due diligence before proceeding with the transaction. For example, if an exporter, reexporter, or transferor receives an equipment order from a company that is engaged in "production" of non-"advanced-node ICs" in a building with a bridge, tunnel, or other connection to another building where the "production" of "advanced-node ICs" occurs, then both buildings would be subject to the controls under § 744.23 of the EAR. However, if the exporter or fabrication facility has received an Advisory Opinion from BIS confirming that the "production" technology node for the relevant facility does not qualify as an "advanced-node IC" technology node, that would resolve the Red Flag of the connection to the advanced facility. Unless the Red Flag is resolved through an Advisory Opinion, the two buildings are treated as a single "facility" for purposes of § 744.23 of the EAR.
28. You will be providing Infrastructure-as-a-Service (IaaS) products or services, or other computing products or services, to assist in training an AI model with model weights captured by ECCN 4E091 for an entity headquartered, or whose ultimate parent is headquartered, in any destination other than those listed in paragraph (a) of supplement no. 5 to part 740 of the EAR. Such assistance creates a substantial risk that such AI model weights, due to their digital nature, will be exported or reexported to a destination for which a license is required and, if a license is not obtained, that the IaaS provider will have aided and abetted in a violation of the EAR. In such cases, the IaaS provider should inquire if the customer intends to export the model and if so, apply for a license as required or inform the customer of their obligation to do so prior to export.
29. When an exporter, reexporter, or transferor has "knowledge" that a foreign entity that is a party to the transaction has one or more owners that are listed on the Entity List or the MEU List, or that are unlisted entities that are subject to license requirements or other restrictions based upon their ownership, it has an affirmative duty to determine the percentage of ownership by those entities and if that is not possible, to obtain a license from BIS if required under the Entity List or MEU List based on the requirements for the owner or owners of that foreign entity, unless a license exception is available.

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