

Human Rights and Trade Controls

Kevin J. Cuddy
Government & Regulatory Affairs Executive
IBM Export Regulation Office

September 2023



Human Rights, Surveillance, and Trade Controls ...



Legal Restrictions



Reputational Risks



Risk Mitigation, Compliance,
and External Engagement

Human Rights and Trade Controls are Making Headlines...

The Washington Post

Democracy Dies in Darkness

Business

Biden administration places top Chinese military institute on export blacklist over its use of surveillance, 'brain-control' technology

The New York Times

U.S. and Others Pledge Export Controls Tied to Human Rights

A partnership with Australia, Denmark, Norway, Canada, France, the Netherlands and the United Kingdom aims to stem the flow of key technologies to authoritarian governments.

FINANCIAL TIMES

UK to begin crackdown on human rights abusers

Post-Brexit sanctions will target individuals from Russia, Libya and North Korea

The New York Times

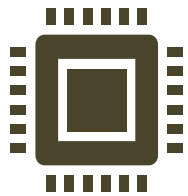
U.S. Blacklists Israeli Firm NSO Group Over Spyware

The ban is the strongest step an American president has taken to curb abuses in the global market for spyware.

Legal Restrictions Overview

PRODUCTS:

- 2013 Wassenaar Surveillance and Intrusion Software/Technology Rule
- 2021 EU Catch all controls on cyber-surveillance items



COUNTRIES:

- 2020 US BIS will consider human rights concerns when reviewing license applications for items controlled for reasons other than crime control
- 2021 EU recast says export controls will promote human rights compliance by addressing cyber-surveillance and other security threats from new technology



ENTITIES:

- U.S. Entity List designations; OFAC Magnitsky sanctions
- EU Magnitsky sanctions established a global human rights sanctions regime



Dutch Government Guidance to Exporters notes role of human rights in export license decisions...

Internal Compliance Programme

Guidelines for compiling an Internal Compliance Programme for Strategic Goods, Torture Goods, Technology and Sanctions



Ministry of Foreign Affairs

2.2 Cyber surveillance and human rights

The Netherlands, EU and UN alike attach great importance to respect for human rights. The Dutch government wants to prevent goods exported from Europe being used for purposes associated with the violation of human rights, democratic principles or freedom of expression, as described in the Charter of Fundamental Rights of the European Union. Goods falling into categories 4 and 5 of the Dual-use Regulation (EC No 428/2009) in particular can be used for such purposes.

The Dutch government has excluded a number of countries where there are concerns about potential human rights violations from global licences. This list of countries is dynamic and its composition depends on the global geopolitical situation. In addition to the excluded countries, there are also countries where the risks are not as high but where transactions of the goods in question still require careful monitoring, for example goods being sent to a government authority.

When implementing procedures relating to human rights, it is above all important to raise awareness and acquire knowledge.³ This includes knowledge about how the goods to be delivered could be used for purposes that violate human rights, and about which countries require extra vigilance. Further checks can then be carried out on, for example, a country's political situation and the role the end user plays in it. An additional declaration/condition relating to this should be included in the end-use statement.

³ Relevant sources include the 'Guiding Principles on Business and Human Rights', the 'ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights', the Digital Agenda for Europe, UN human rights reports, information from NGOs (such as Privacy International, Freedom House, OpenNet Initiative) and research institutes such as CitizenLab.

Export Control and Human Rights Initiative (ECHRI) Code of Conduct

A voluntary
Code of
Conduct with
political
commitments
to ensure
signatories:

- Take human rights into account when reviewing potential exports of dual-use items that could be misused for the purposes of violations of human rights.
- Consult with the private sector, academia, and civil society representatives on human rights concerns.
- Share information with each other on emerging threats and risks associated with the trade items that pose human rights concerns.
- Share best practices in developing and implementing export controls of dual-use goods and technologies that could be misused resulting in violations of human rights.

Albania, Australia, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Japan, Kosovo, Latvia, the Netherlands, New Zealand, North Macedonia, Norway, the Republic of Korea, the United Kingdom, and the United States

U.S. State Department Guidelines for Exports to Foreign Government End-Users for Products or Services with Surveillance Capabilities



Final Guidelines released on September 30, 2020.

State Department sought input from industry and human rights stakeholders.

Industry engaged with State Department and provided informal comments on the draft guidelines.

U.S. State Department Guidelines ...



Review the capabilities of the product or service in question to determine potential for misuse to commit human rights violations or abuses by foreign government end-users or private end-users that have close relationships with a foreign government.



Review the human rights record of the foreign government agency end-user of the country intended to receive the product or service.



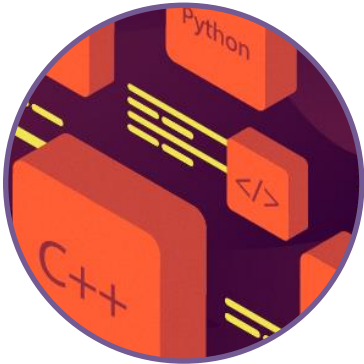
Review whether the foreign government end-user's laws, regulations, and policies that implicate products and services with surveillance capabilities are consistent with the UDHR.



Review stakeholders involved in the transaction (including end-user and intermediaries such as distributors and resellers).



U.S. State Department Guidelines ...



To the extent possible and as appropriate, tailor the product or service distributed to countries that do not demonstrate respect for human rights and the rule of law to minimize the likelihood that it will be misused to commit or facilitate human rights violations or abuses.



Prior to sale, strive to mitigate human rights risks through contractual and procedural safeguards and strong grievance mechanisms. Include Contractual and Procedural Safeguards and Grievance Mechanisms.



After sale, strive to mitigate human rights risks through contractual and procedural safeguards and strong grievance mechanisms. Include Contractual and Procedural Safeguards and Grievance Mechanisms.



Publicly report on sale practices (e.g., in annual reports or on websites).



Reputational Risk ...

It's legal ... but do you really want to be involved?



IBM Human Rights Statement of Principles (from IBM.com)

IBM is committed to high standards of corporate responsibility. Our definition of corporate responsibility includes environmental responsibility, as well as social concerns for our workforce, clients, business partners, and the communities where we operate.

Underpinning our corporate responsibility standards and practices is our dedication to respect human rights. IBM's stance on human rights is informed by international standards, including the UN Guiding Principles on Business and Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, and the UN Universal Declaration of Human Rights.

IBM has a strong culture of ethics and integrity, guided by a rigorous system of corporate governance that promotes transparency on a global basis and compliance with all applicable laws and regulations where we do business.

APPROACH AND IMPACT

Throughout its history, IBM has taken a thoughtful, comprehensive approach to corporate responsibility that is based on IBM's values and takes into account four areas of impact that are of particular interest to our stakeholders, i.e. support of our employees and communities; the impact of IBM's products and operations on the environment; the management of our global supply chain; and, the governance, ethics, and integrity of our company.

IBM's approach recognizes our vast network of stakeholders and the understanding that our work can impact not only our business success, but also the efficiency and innovation of countries, cities, governments, communities, and our planet's critical infrastructure.

Remember those headlines?



INSIDE THE VIDEO SURVEILLANCE PROGRAM IBM BUILT FOR PHILIPPINE STRONGMAN RODRIGO DUTERTE

Risk Mitigation and Compliance Best Practices



Restricted Party Screening



Understanding Your Products and Technology



Transactional Review Process

Developing and Implementing a Restricted Party Screening Program



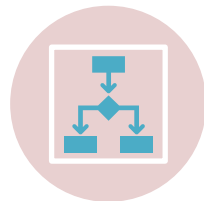
As many of the human rights sanctions are “list based” designations, your company needs to implement a screening program to manage those risks. Your program should include:



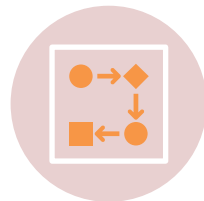
The individual or organization within your company responsible for overall Restricted Party Screening compliance.



Process details, such as tool used, how it is used, and what is screened and how often.



Processes and procedures for resolving potential matches to the Restricted Party lists.



An escalation process for identifying potential and true matches.



Response procedures to deal with true matches, including next steps and the procedure to follow if it is determined to report the match to government authorities.

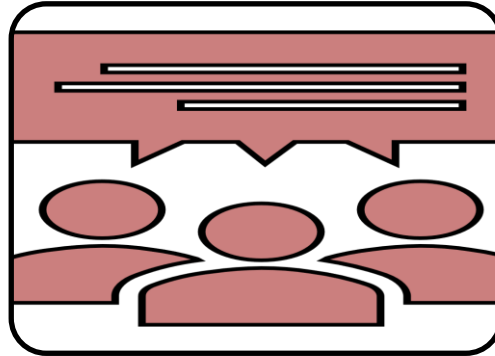


Training material that adequately provides individuals involved in the Restricted Party screening process with the needed information, understanding and tools to successfully accomplish their assigned responsibilities.

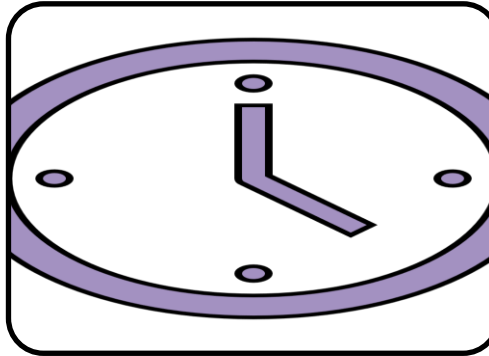
Screening Process Factors to Consider



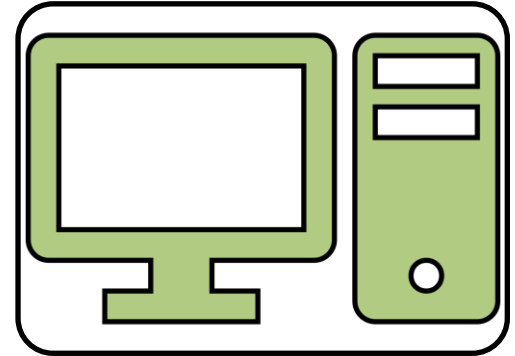
Which
lists to
screen?



Who to
screen?



When
to
screen?



How to
screen?

Understanding Your Products and Technology

Engagement with Product and Technology Teams



Export compliance teams need to understand all potential end uses of your company's products.



Controls can be placed internally at the product level to flag sensitive items for further reputational risk review.



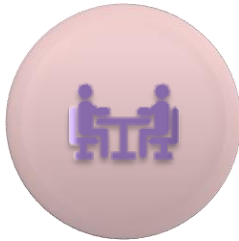
Establishing a Transaction Review Process for Sensitive Transactions Related to Human Rights Concerns



Define – What transactions are of a sensitive nature? End user? End use? Government entities? Product based? Define your risks!



Flag – Based on your definition of a sensitive transaction, flag or block certain customers, end users or products in your systems so that the export compliance team can review the particulars of the transaction, including the intended end use. Automate your process!



Educate – It's important to educate the business teams and regional legal/compliance on the sensitive transaction review process that you implement. Explain the reputational risks!

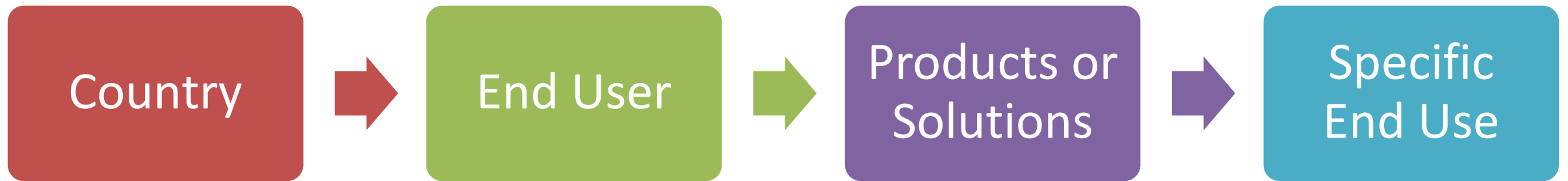


Involve – Key stakeholders in your company on implementation and management support for the sensitive transaction reviews. For example, this can include legal and compliance, government affairs, and public affairs/communications. Inclusive decision-making is key!



Engage – As appropriate, the team responsible for these types of sensitive transaction reviews should be up to date on current issues related to human rights. Monitoring of human rights group notices, press reports, and other publications on the subject is one way to achieve this goal. Knowledge is power!

The Key Elements of a Sensitive Transaction Review



Transaction Review Best Practices

Understand the technical parameters of your products and how they can be used for purposes against human rights.

Inquire with customers and end users about the specific end use for your products and services. Get the RFP from the customer!

Use end user certifications for additional documentation of due diligence.

Include additional limiting factors in end user certifications related to surveillance and other sensitive areas – make them specific to the transaction.

Make sure you have sufficient contract clauses related to legal and reputational compliance risks (e.g., future designation on restricted party lists or serious accusations of human rights abuses).

External Engagement

Government agencies involved in human rights, export controls, etc.

Human Rights NGOs

Industry partners

Trade groups

RightsCon human rights international conference



Thank you!

Kevin J. Cuddy
Gov't & Regulatory Affairs Executive
Export Regulation Office
IBM
kevin.cuddy@ibm.com