

Implementing Human Rights Due Diligence

By **Megan Lew and Cristina Urquidi** (December 2, 2024)

Against the backdrop of ongoing wars and heightened competition among the great powers, the U.S. Department of Commerce's Bureau of Industry and Security has increasingly focused in recent years on restricting Russia's war efforts in Ukraine and threats from China, resulting in companies also prioritizing those areas when conducting due diligence on counterparties.

However, the BIS' work also encompasses promoting human rights, as evidenced by the recent addition and subsequent removal of a Canadian technology company from the Department of Commerce's Entity List.

In February, the BIS added Sandvine Inc. to the Entity List because its products were being used by the government of Egypt to censor news and speech by human rights activists on the internet.

In October, the BIS removed Sandvine from the Entity List because Sandvine decided to cease business with nondemocratic countries, including Egypt.

These listing and delisting decisions highlight how implementing human rights due diligence in transactions is a natural corollary to the U.S. government's use of export controls to advance human rights.

As Sandvine's experience shows, companies should understand whether their products may be used by customers for nefarious purposes. In particular, non-U.S. companies that sell products that could be used in a malicious manner should consider conducting due diligence focused on human rights to avoid being in the crosshairs of the BIS and other U.S. regulators.

This article discusses BIS' decision to list, and subsequently delist, Sandvine, and describes how companies can implement human rights due diligence.

Addition of Sandvine to the Entity List

Under the Export Control Reform Act and the Export Administration Regulations, the BIS may add foreign individuals, companies, organizations or addresses to the Entity List if they have been involved in, or present a significant risk of being involved in, activities that conflict with U.S. national security and foreign policy interests.[1]

A rule published by the BIS on Feb. 27 added Sandvine to the Entity List because Sandvine had engaged in conduct that was "contrary to the national security and foreign policy interests of the United States."[2]

Specifically, Sandvine's listing was based on information that it "supplies deep packet inspection technology to the Government of Egypt, where it is used in mass web-monitoring and censorship to block news as well as target political actors and human rights activists."[3]



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As a result of Sandvine's being added to the Entity List, the BIS imposed a license requirement on exports, reexports and in-country transfers of items subject to the EAR to Sandvine.[4] In reviewing any such license applications regarding Sandvine, the BIS announced that it would apply a presumption of denial.[5]

Removal of Sandvine from the Entity List

The EAR allows the BIS to remove an entity from the list "if it is no longer at significant risk of acting contrary to the national security or foreign policy interests of the United States." [6]

On Oct. 21, approximately eight months after Sandvine's listing, the BIS announced that it was removing Sandvine from the Entity List.[7] The BIS announced that its decision to delist Sandvine was based on significant changes the company implemented to its corporate governance and business practices.[8]

Importantly, Sandvine had decided to cease business in nondemocratic countries and, as of the date of the BIS' delisting announcement, had exited 32 countries, and was in the process of exiting an additional 24 countries, including Egypt, with an end-of-service date for the government of Egypt of March 31, 2025.[9]

According to the BIS' Oct. 21 press release, other changes include "fostering deeper relationships with civil society; dedicating profits to the protection of rights; adding human rights experts to its new leadership team; vetting business decisions through the newly created Business Ethics Committee; and closely monitoring technology misuse in countries in which they plan to remain." [10]

These changes are being made in conjunction with Sandvine's transition to a new ownership group, which was announced in September.[11] The BIS and the U.S. Department of State plan to monitor Sandvine's continued compliance with these changes following its delisting.[12]

In announcing Sandvine's delisting, the BIS emphasized that Sandvine's commitment to changing its business practices was "a clear example of how the Entity List may be used to shape corporate behavior in favor of human rights and digital safety," as well as "strengthening human rights due diligence" in the corporate sector.[13]

The BIS reiterated that the U.S. is committed to putting human rights at the center of U.S. foreign policy, and that the agency could continue to leverage the export-control regulatory framework to protect human rights and prevent the misuse of technology.[14]

How to Implement Human Rights Due Diligence

The BIS' announcement of Sandvine's delisting commended the company's adoption of human rights due diligence, but the announcement fell short of offering practical steps that could be adopted by other companies for implementing such diligence.

Here, we provide simple diligence steps for companies that seek to implement human rights due diligence in light of the BIS' recent focus on this subject.

The purpose of human rights due diligence is to identify, mitigate and prevent the adverse human rights effects of a company's business. To that end, the primary question when

conducting such diligence is whether the company's operations, products or services have, or could have, a negative impact on human rights.

Human rights due diligence may be integrated into a company's existing counterparty due diligence through the addition of a few targeted questions. While a company may already be asking similar due diligence questions, human rights due diligence involves approaching the questions through a different lens.

While human rights due diligence questions should be tailored to each company's risk profile and business lines, a few questions that should be considered include:

1. Do any customers have a reputation for engaging in human rights abuses? For example, have they been involved in activities that limit free speech? Do they rely on forced labor?
2. Could customers use our products or services in a manner that promotes human rights abuses, such as, for example, blocking free speech or preventing free and fair voting in elections?
3. What is the customer's stated rationale for purchasing our products or services? Is this rationale credible in light of the response to the second question?
4. Do any customers conduct business with others who have a reputation for engaging in human rights abuses? Do customers plan to resell our products or services to such persons? Are there any other anticipated downstream effects, beyond resales, that might cause our products or services to adversely affect human rights?

When conducted correctly, human rights due diligence may result in companies confronting tough business decisions, especially if any high-risk sales are lawful.

Indeed, in the case of Sandvine, there was no indication in BIS' listing announcement that Sandvine's sales to the government of Egypt violated applicable laws, yet its addition to the Entity List undoubtedly had negative consequences for its business.

These diligence steps are important to avoid greater risks down the line, especially for non-U.S. companies, considering the BIS' numerous additions to the Entity List in recent years, including 519 additions in 2022 — the highest number ever — and over 465 in 2023, and increased focus on enforcement of violations of export controls regulations.[15]

It remains to be seen if the incoming Trump administration will maintain this pace or devote its resources to other export controls priorities. Nonetheless, regardless of the change in administration, the EAR makes clear that the protection of human rights is a foreign policy interest of the U.S., and provides grounds for additions to the Entity List.[16]

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[1] 15 C.F.R. §744.11 (2024).

[2] 89 Fed. Reg. 14403, 14404 (Feb. 27, 2024).

[3] Id.

[4] Id.

[5] Id.

[6] 15 C.F.R. §744.11 (2024).

[7] Press Release, Bureau of Industry and Security, "Commerce Removes Sandvine from Entity List Following Significant Corporate Reforms to Protect Human Rights" (Oct. 21, 2024), available at <https://www.bis.gov/press-release/commerce-removes-sandvine-entity-list-following-significant-corporate-reforms-protect>, (BIS Press Release); see also 89 Fed. Reg. 84460 (Oct. 23, 2024).

[8] Id.

[9] Id.; Press Release, Sandvine, "Sandvine Announces New Ownership and Capital Infusion" (Sept. 19, 2024), available at <https://www.sandvine.com/press-releases/sandvine-announces-new-ownership-and-capital-infusion>, (Sandvine Press Release).

[10] BIS Press Release.

[11] Sandvine Press Release.

[12] BIS Press Release.

[13] Id.

[14] Id. BIS' emphasis on deterring human rights abuses is notable because the U.S. government traditionally has used economic sanctions to further this objective. For example, the Office of Foreign Assets Controls implements the Global Magnitsky Sanctions Regulations, 31 C.F.R. Part 583, which allows OFAC to sanction persons who have been involved in "serious human rights abuse," regardless of where the abuse occurs. 31 C.F.R. §583.201; see also Exec. Order 13818 (Dec. 20, 2017). In addition, OFAC has authority to impose sanctions where such human rights abuse occurs in specific countries, including Ethiopia, Sudan and Libya. Exec. Order 14046 (Sept. 17, 2021); Exec. Order 14098 (May 4, 2023); Exec. Order 13566 (Feb. 25, 2011).

[15] Department of Commerce, "Export Enforcement: 2022 Year in Review," available at <https://www.bis.doc.gov/index.php/documents/enforcement/3205-bis-export-enforcement-year-in-review-2022-final-003/file>; Department of Commerce, "Export Enforcement: 2023 Year in Review," available at https://www.bis.gov/sites/default/files/files/BIS%20Export%20Enforcement_Year%20in%20Review%202023%20Final.pdf.

[16] 15 C.F.R. §744.11(b) (2024).