

Guidance to Industry on BIS Actions
Identifying Transaction Parties of Diversion Risk
July 10, 2024

The Department of Commerce’s Bureau of Industry and Security (BIS) administers and enforces controls on the export, reexport, and transfer (in-country) of dual-use and certain military items, as well as certain activities of U.S. persons, subject to the Export Administration Regulations (EAR). License requirements are determined by the control status of the items, destinations, end uses, and end users.

BIS generally administers controls on end users by designating them on one of its public screening lists – e.g., the Unverified List, Entity List, Military End-User List, and Denied Persons List – each of which imposes its own specific set of license or other EAR requirements involving listed parties. BIS uses a variety of additional mechanisms to notify companies and universities about other parties of national security concern, such as those that present a risk of diverting EAR items to restricted end uses or end users in Russia. This guidance outlines the different actions that BIS takes – through “supplier list” letters, Project Guardian requests, “red flag” letters, and “is informed” letters – to inform companies and universities about parties (beyond those identified on our screening lists) that present diversion risks. It also outlines the responsibilities of companies and universities to mitigate those diversion risks. Further, the guidance contains a *new recommended best practice* for companies and universities involved with the export, reexport, or transfer (in-country) of Common High Priority List (CHPL) items to conduct additional screening of parties to such transactions to prevent the diversion of EAR items to Russia through third countries.

“Supplier List” Letters

BIS sometimes learns information about foreign parties not on one of its public screening lists that nevertheless have exported to, or facilitated transactions with, destinations or end users of national security or foreign policy concern. In an effort to help targeted/at risk industry screen such parties, BIS may issue a letter to a company or university identifying such parties of diversion concern regardless of whether or not that company or university has previously engaged in transactions with the foreign parties. For example, in March 2024, BIS began issuing letters to companies containing a “supplier list” of foreign parties who, according to commercially available datasets, have been diverting CHPL items to Russia.

Upon receipt of such a letter, companies and universities should closely scrutinize transactions with the identified “supplier list” parties to determine whether any red flags are present. More specifically, letter recipients should determine whether any of the red flags identified in Supplement No. 3 to Part 732 – *BIS’s “Know Your Customer” Guidance and Red Flags* are present. To assist with that determination, BIS generally includes with its “supplier list” letters

additional tailored guidance about red flags to look for as well as suggested due diligence tips or screening to prevent unauthorized exports, reexports, or transfers (in-country) from occurring.¹

BIS Best Practice: Screening Export Transactions Against the Parties Identified on the Trade Integrity Project Website

The Trade Integrity Project (TIP), an initiative of the UK-based Open-Source Centre, has launched a website (<https://trade-integrity.org>) monitoring military and dual-use trade with Russia. The TIP website specifically focuses on trade in Common High Priority List (CHPL) items, and displays entities that have shipped CHPL items to Russia since 2023, according to publicly available trade data. BIS, in cooperation with the European Union, Japan, and the United Kingdom, has developed the CHPL, which currently includes 50 items identified by six-digit Harmonized System Codes that Russia seeks to procure for its weapons programs. See <https://www.bis.gov/articles/russia-export-controls-list-common-high-priority-items> for the list of CHPL items.

The TIP website includes both a search function and downloadable list of parties in third countries with a history of exporting CHPL items to Russia since its full-scale invasion of Ukraine.

BIS strongly encourages companies involved in the export, reexport, or transfer (in-country) of CHPL items to adopt as a best practice the screening of transaction parties against the list on the TIP website (in addition to the Consolidated Screening List).¹ Companies and universities that transact CHPL items should closely scrutinize parties identified on the TIP website to determine whether any red flags are present before proceeding with an export, reexport, or transfer (in-country) to them.

Project Guardian Requests and “Red Flag” Letters

BIS continuously reviews information from a variety of sources – e.g., industry, news reports, other open-source information, and government data – to identify efforts by foreign adversaries seeking to illicitly acquire EAR items. When possible, BIS shares such information with companies and universities to help prevent them from unwittingly exporting items to such parties. Two ways that BIS accomplishes this sharing is through Project Guardian requests and “red flag” letters.

In a Project Guardian request, BIS asks a company or university to be on the lookout for transactions with a specific party or for inquiries about a specific item. BIS further asks that if the company or university identify such a transaction or receive such a product inquiry, they

¹ For one such example, see BIS “Guidance to Prevent Evasion of Prioritized Harmonized System Codes to Russia” listing red flags and due diligence tips at https://www.bis.gov/sites/default/files/files/BIS%20Guidance%20to%20Prevent%20Evasion%20of%20Prioritized%20Harmonized%20System%20Codes%20to%20Russia_FINAL.pdf.

deny (or at a minimum suspend filling) such order and contact their local Export Enforcement field office for guidance on how to proceed.

BIS issues a “red flag” letter to inform a company that one of their customers may have, in violation of the EAR, reexported or transferred (in-country) the same type of item that the company previously exported to that customer. In other words, a “red flag” letter lets a company know that it needs to beware of dealing with a particular customer because the customer’s reexport or in-country transfer history creates a high probability that an export violation may occur. Sample text of a red flag letter appears in the text box [to the right]. A company that receives a “red flag” letter should conduct additional due diligence to resolve and overcome the red flag identified by BIS before filling an order from the identified customer.



BIS “red flag” letter (excerpt)

Supplement No. 3 to Part 732 provides guidance on how companies and universities should address transactions where there are red flags, including those affirmatively raised by BIS through a Project Guardian request or “red flag” letter. Specifically, companies and universities have a duty to evaluate red flags and determine whether they can be explained or justified. For example, if BIS provides a company or university a list of parties known to have likely reexported items in violation of the EAR, that company or university should identify affirmative information that the party is no longer engaged in reexport or transfer (in-country) activities in violation of the EAR before exporting to them. If then exporting to such a party, the company or university should keep detailed records of the information received, the steps taken to verify such information, and documentation of the decision-making process that led to the conclusion that the customer’s activities with respect to the proposed transaction was explained or justified. In the absence of being able to resolve the red flag, the company or university should either refrain from the transaction or seek BIS authorization by submitting a license application.

Should a company or university proceed with a transaction without obtaining an export license with knowledge² that a red flag exists or could not be explained or justified, especially when BIS affirmatively identified that red flag through a Project Guardian request or a “red flag” letter, BIS

² Knowledge is defined in the EAR as knowledge of a circumstance (the term may be a variant, such as “know,” “reason to know,” or “reason to believe”) includes not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person’s willful avoidance of facts. See Part 772 of the EAR.

will consider such conduct an aggravating factor in any subsequent administrative enforcement action.³

Conversely, should a company or university cooperate with a Project Guardian request by voluntarily providing information to BIS, BIS will take such cooperation into account as a mitigating factor if an enforcement action is later brought against the company or university, even for unrelated conduct.⁴

“Is Informed” Letters

BIS has the authority to notify individual companies and universities of supplemental license requirements applicable to specific items going to specific entities or destinations, or to specific activities of U.S. persons. BIS administers this authority through the issuance of “is informed” letters. A company or university receiving such a letter “is informed” of license requirements for specific transactions because of U.S. national security or foreign policy concerns, including concerns related to weapons of mass destruction, military end uses or end users, or involvement in other activities contrary to U.S. national security or foreign policy interests.

Each “is informed” letter specifies the scope of items or U.S. person activities subject to a license requirement, the license review policy that BIS will apply in reviewing such license applications, and the process for submitting such license applications to BIS.

A recipient of an “is informed letter” who engages in a transaction covered by the letter without the required authorization violates the EAR. From an enforcement perspective, non-compliance with an “is informed letter” is treated the same as non-compliance with any other license requirement under the EAR and is subject to administrative and/or criminal penalties.

Conclusion

In an effort to address the evolving tactics of our adversaries to circumvent U.S. export controls, BIS uses multiple tools to alert companies and universities about parties of diversion concern or transactions that could violate the EAR. These tools include the identification of lists of suppliers that warrant heightened scrutiny, Project Guardian requests and “red flag” letters notifying companies of additional due diligence responsibilities prior to proceeding with an export without BIS authorization, “is informed” letters imposing license requirements on recipients related to exports, reexports, and/or transfers (in-country) of specific items and/or parties, and the public identification of parties on BIS proscribed party lists (e.g., the Entity List) that mandate specific actions by all exporters, reexporters, or transferors involving items subject to the EAR. See the below table outlining these BIS actions and the responsibilities of affected companies and universities.

³ See, for example, III.B of Supplement No. 1 to Part 766 of the EAR—Guidance on Charging and Penalty Determinations in Settlement of Administrative Enforcement Cases.

⁴ See III.G.4 of Supplement No. 1 to Part 766 of the EAR.

Responsibilities in Response to BIS Identification of Parties/Transactions of Concern					
	Supplier List	Project Guardian Request	"Red Flag" Letter	"Is Informed" Letter	Publicly Proscribed Party
Action	Identification of parties of diversion concern	BIS notification of red flag (i.e., knowledge of high probability that a violation may occur)		Individual notice of a license requirement	Dependent upon requirements of list (e.g., license requirement for parties on Entity List)
Who is impacted	Recipient of letter or other publicly available information	Recipient of BIS Project Guardian request	Recipient of BIS "red flag" letter	Recipient of BIS "is informed" letter	Any person involved in a transaction subject to the EAR
Responsibility	Determine whether any red flags are present and if present, resolve before proceeding	Resolve red flags to proceed		Submit license application as required by letter	Submit license application if required by EAR or comply with other EAR requirements

Companies or universities that have questions about addressing red flags or license requirements should contact BIS – see <https://www.bis.gov/contact-us> for more information about the options for requesting assistance. Additionally, companies or universities may reach out to their local BIS Office of Export Enforcement field office or local representative by visiting <https://www.bis.gov/enforcement/leadership#maps>.