



# FEDERAL CONTRACTS



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## REPORT

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### Export Controls

On July 30, 2004, the Department of the Treasury, Office of Foreign Assets Control (OFAC), and the Department of Commerce, Bureau of Industry and Security (BIS), issued regulations formally transferring licensing jurisdiction for exports and re-exports to Iraq from OFAC to BIS.<sup>1</sup> Those actions were the culmination of a series of regulatory changes, beginning in the Spring of 2003 when the U.S.-led coalition assumed governing control of Iraq, resulting in the lifting of the 13-year U.S. economic embargo against Iraq. The practical consequences for exporters and contractors are that: (1) U.S. companies can now do business in Iraq; (2) a great many products can be exported to Iraq without export licenses; (3) certain “license exceptions” are now available to ease the export licensing burden; and (4) BIS has created a new blanket Special Iraq Reconstruction License (“SIRL”), which in some circumstances may make it even easier to do business in Iraq.

This article provides an analysis of the current regulatory framework for the export/re-export of goods and technology to Iraq. Although the BIS regulation represents a significant easing of export/re-export controls on Iraq, it is in some respects complex, and represents a rather unique approach in BIS export licensing policies. It is important, therefore, that U.S. contractors working in Iraq have a grasp of the contours of the regulation.

### **Department of Commerce Revises Export Licensing Framework for Iraq: The Practical Impact on U.S. Government Contractors**

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## I. History of Iraq Sanctions

U.S. economic sanctions against Iraq were instituted during the Persian Gulf crisis, by presidential Executive Orders issued in August 1990,<sup>2</sup> and remained in effect until the overthrow of Saddam Hussein in May 2003. The first set of orders imposing sanctions, which were issued under the authority of the International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq.*), set forth a broad-based ban on the import, export, and re-export of goods, technology, or services to or from Iraq. The orders also prohibited any form of business activity in Iraq, investments, and travel to and from Iraq (subject to limited exceptions), and blocked the assets in the United States of the Iraqi government. The presidential orders were issued in tandem with U.N. Security Council Resolution 661, which imposed similar multinational import-export, transaction, and travel bans.<sup>3</sup>

In November 1990, Congress codified the U.S. embargo into statutory law with passage of the Iraq Sanctions Act of 1990 (“ISA”).<sup>4</sup> Among other restrictions, the ISA imposed independent prohibitions against the export/re-export to Iraq of items subject to licensing re-

quirements under the International Traffic in Arms Regulations’ (“ITAR”) United States Munitions List (“USML”) or the Export Administration Regulations’ (“EAR”) Commerce Control List (“CCL”).<sup>5</sup> The ISA authorized the President to waive those prohibitions, but only after the President certified to Congress that Iraq was in compliance with applicable U.N. resolutions (among other conditions), or that there had been a “fundamental change in Iraqi leadership.”<sup>6</sup>

Both U.S. law and applicable U.N. Security Council resolutions authorized humanitarian aid to Iraq, notwithstanding the embargoes. In 1996, the operating concept of what constituted “humanitarian aid” was expanded with the introduction of what became known as the Iraq “Oil-for-Food” program. Pursuant to U.N. Security Council Resolution 986, the U.N. embargo against Iraq was modified to allow the government of Iraq to sell Iraqi-origin petroleum and petroleum products, place the proceeds into a U.N.-controlled escrow account, and then use the proceeds to purchase and import food and medicine, in addition to certain materials and supplies for essential civilian needs. Exporters were paid for those commodities from the U.N. escrow fund.<sup>7</sup> To accommodate the Oil-for-Food program, the U.S. embargo was amended in late 1996 to authorize U.S. companies to apply to OFAC for specific licenses to purchase crude oil and petroleum products from Iraq, and to export humanitarian goods to Iraq.<sup>8</sup> Over time, the list of items that qualified for export under the Program grew to include materials such as housing construction equipment and oil and gas equipment necessary to maintain Iraq’s crude oil production. Numerous companies in the United States were active in Oil-for-Food exports throughout the duration of the Program,

<sup>1</sup> See 69 Fed. Reg. 46,069 (Dep’t Commerce July 30, 2004) (available at <http://a257.g.akamaitech.net/7/257/2422/06jun20041800/edocket.access.gpo.gov/2004/04-17532.htm>); 69 Fed. Reg. 46,089 (Dep’t Treasury July 30, 2004) (available at <http://frwebgate4.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=62756520945+2+0+0&WAIAction=retrieve>).

<sup>2</sup> See Executive Order No. 12772 (August 3, 1990) (available at <http://www.treas.gov/offices/enforcement/ofac/legal/eo/12722.pdf>), Executive Order No. 12724 (August 13, 1990) (available at <http://www.treas.gov/offices/enforcement/ofac/legal/eo/12724.pdf>).

<sup>3</sup> See S/RES/661 (August 2, 1990) (available at <http://www.un.org>).

<sup>4</sup> Pub. L. No. 101-513; 104 Stat. 1979 (H.R. 5114) (November 5, 1990) (available at <http://www.treas.gov/offices/enforcement/ofac/legal/statutes/isa.pdf>).

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<sup>5</sup> See ISA, Sec. 586G(a)(2). The USML, which is set forth at 22 C.F.R. Part 121, is a list of munitions-related commodities and technical data restricted for export and re-export under the ITAR (22 C.F.R. Part 120 *et seq.*) (the ITAR is available at <http://pmdtc.org>). The USML and ITAR are administered by the Department of State, Directorate of Defense Trade Controls (DDTC). The CCL, set forth in 15 C.F.R. Part 774 supp. 1 of the Export Administration Regulations (“EAR”), is a list of items that have been determined to constitute “dual-use” civilian-military items (the EAR is available at [http://w3.access.gpo.gov/bis/ear/ear\\_data.html](http://w3.access.gpo.gov/bis/ear/ear_data.html)). The item descriptions are arranged in the CCL according to five-digit alphanumeric codes, known as “export control classification numbers” (“ECCNs”), with items that are not classified with an ECCN falling under a catchall category known as “EAR 99.” The EAR and CCL, which are administered by BIS, set forth in detail the licensing requirements for CCL items, and more generally for all exports from the United States (or re-exports of U.S.-origin commodities and technology). See 15 C.F.R. Part 732 for a summary of the operation of the EAR and CCL.

<sup>6</sup> See ISA, Sec. 586H.

<sup>7</sup> See S/RES/986 (April 14, 1995) (available at <http://www.un.org>).

<sup>8</sup> See 61 Fed. Reg. 65,312 (Dep’t Treasury December 11, 1996) (available at <http://www.gpoaccess.gov/fr/retrieve.html>).

which ran from 1996 until the occupation of Iraq by Coalition forces in the Spring of 2003.

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**The new BIS regulation authorizes export and re-export of a great many U.S.-origin goods, software, and technology to Iraq without a license, and expands the availability of EAR license exceptions for Iraq exports where a license is required. In addition, the new regulation creates a new “Special Iraq Reconstruction License” for Iraq that could be of particular benefit to companies performing large government contracts in the country.**

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Following the overthrow of Saddam Hussein in April 2003, President Bush took the first step to remove the Iraqi embargo with the enactment of the Emergency Wartime Supplemental Appropriations Act of 2003.<sup>9</sup> The Act created a fund for Iraq’s reconstruction, and authorized the President to suspend the ISA. President Bush exercised that authority on May 7, 2003, by issuing a presidential determination.<sup>10</sup> Consequently, from May 7 until May 23, 2003, OFAC considered licenses for reconstruction-related exports to Iraq on a case-by-case basis.

On May 22, 2003, the U.N. Security Council enacted Resolution 1483, which lifted most of the U.N. embargo against Iraq, retaining only the prohibitions against exports of arms and related materials.<sup>11</sup> The following day, OFAC issued a general license authorizing the export to Iraq of commodities and technology not controlled for export to Iraq under the existing provisions in the EAR.<sup>12</sup> At that time, the EAR required exporters to obtain export licenses for all items on the CCL *except*: (1) items that the Department of Commerce deemed to warrant specific controls when exported to countries that have been designated as supporting terrorism; or (2) items that fell under an “EAR 99” designation. For items requiring licenses, OFAC reviewed applications on a case-by-case basis, in consultation with the Department of State.

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<sup>9</sup> Pub. L. No. 108-11, 117 Stat. 559, H.R. 1559 (April 16, 2003) (available at <http://www.gpoaccess.gov/plaws/index.html>).

<sup>10</sup> See Presidential Determination 2003-23 (May 7, 2003).

<sup>11</sup> See S/RES/1483 (May 22, 2003) (available at <http://www.un.org>). On June 8, 2004, the U.N. Security Council supplemented Resolution 1483 with Resolution 1546, which authorized the export of arms and related materials to the Iraqi Government or the Multinational Force in Iraq. See S/RES/1546 (June 8, 2004) (available at <http://www.un.org>).

<sup>12</sup> The OFAC general license is available at <http://www.treas.gov/offices/enforcement/ofac/actions/20030523.shtml>.

OFAC’s licensing jurisdiction for Iraq was understood from the beginning to be temporary in nature. The OFAC regime contemplated that BIS would issue a comprehensive regulation regarding exports/re-exports to Iraq, and that at that time jurisdiction would be transferred to BIS. Contrary to the expectations of exporters and export-control practitioners—and perhaps contrary to BIS’s own expectations—the interagency review process for the Iraq regulation lasted over one year, as the departments of Defense, State, and Commerce carefully evaluated how the EAR should be adapted to the changing political and security environment in Iraq.

## II. New BIS Licensing Regime for Iraq

The new BIS regulation authorizes export and re-export of a great many U.S.-origin goods, software, and technology to Iraq without a license, and expands the availability of EAR license exceptions for Iraq exports where a license is required. In addition, the new regulation creates a new “Special Iraq Reconstruction License” for Iraq that could be of particular benefit to companies performing large government contracts in the country. However, although the new BIS regulation generally represents a more liberalized export control policy toward Iraq than had existed previously, the regulation is much more complex than the interim framework that had been in place at OFAC since May 2003. In short, BIS has parsed out a series of dual-use items specified in the EAR that require an export license, and also has delineated different licensing policies depending on the export or re-export’s end-use and end-user.

### A. Commodities and Technology That Can Be Exported/Re-Exported to Iraq Without a License

The new BIS regulation provides that commodities and technology controlled under the EAR, but not subject to a specific Export Control Classification Number (“ECCN”) in the CCL—what the CCL identifies as “EAR 99” items—may be exported or re-exported to Iraq without a license. Such was the case under the preceding OFAC licensing regime, and is also consistent with the approach that BIS recently took with respect to Libya when the Libyan embargo was lifted.<sup>13</sup> In addition, items on the CCL and controlled for antiterrorism (“AT”) reasons (i.e., where only the term “AT” appears in the item’s ECCN description) may be exported and re-exported to Iraq without a license, subject to certain exceptions noted below.<sup>14</sup>

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<sup>13</sup> See 15 C.F.R. § 742.20 (this provision, and all subsequent EAR provisions cited herein, are available at [http://w3.access.gpo.gov/bis/ear/ear\\_data.html](http://w3.access.gpo.gov/bis/ear/ear_data.html)).

<sup>14</sup> This is in contrast to the U.S. export/re-export control regime for Libya which generally requires licenses for AT-controlled items being shipped to Libya, and the U.S. export control regime for Syria which generally requires licenses for EAR 99 and AT-controlled items, among others.

**The SIRL license authorizes exports, re-exports,  
and re-transfers to or in Iraq for civil and  
reconstruction projects funded by the U.S.  
government or any entity it designates, or by the  
United Nations, World Bank, International  
Monetary Fund, or their affiliated entities.**

## B. Iraq Export/Re-Export License Requirements

The new BIS regulation requires an export license, absent a licensing exception, for items falling under most of the specific “reasons for control” set forth in the CCL.<sup>15</sup> The “reasons for control” specified in the Iraq regulation are: National Security (“NS”), Missile Technology (“MT”), Non-Proliferation (“NP”), Chemical Weapons (“CW”), Chemical and Biological weapons (“CB”), Regional Stability (“RS”), Crime Control (“CC”), Encryption Items (“EI”), Significant Items (“SI”), Computers (“XP”), Short Supply (“SS”), and items controlled for reasons relating to UN controls (“UN”).<sup>16</sup> The Iraq regulation also requires a license for eight specific categories of AT-controlled items, most of which relate to radioactive, chemical, or explosive materials. The specific ECCNs are 0B999 (specific processing equipment for use with radioactive materials), 0D999 (specific software for neutronic calculations, radiation transport calculations, and hydrodynamic calculations/modeling), 1B999 (specific processing equipment for fluorine production and particle accelerators), 1C992 (commercial charges containing energetic materials), 1C995 (certain mixtures and test kits), 1C997 (ammonium nitrate), 1C999 (specific materials, including certain ball bearings and steel plate, fluorine, nitric acid, and alpha-emitting radionuclides), and 6A992 (certain optical sensors).<sup>17</sup>

Exporters, re-exporters, and recipients of goods licensed by BIS should be aware that the new Iraq regulation imposes an explicit licensing requirement not only on the export/re-export of items to Iraq, but also on

<sup>15</sup> The EAR includes a series of specific “reasons for control,” described in 15 C.F.R. Part 742 and identified in the CCL by two-letter acronyms (e.g., “AT,” “NS”), which BIS applies to particular ECCNs in the CCL. The reasons for control are focused on specific national security concerns—for example, restricting access of certain goods to terrorist-supporting countries (thus the “AT” designation), or imposing more stringent licensing obligations for goods that BIS has deemed to pose a risk of being used in nuclear (“NP”) or chemical/biological weapons proliferation (“CB”). If any of the “reasons for control” are applied to a particular ECCN, commodities or technology falling within that ECCN may require an export license, depending on the country of ultimate destination and the availability of licensing exceptions.

<sup>16</sup> 15 C.F.R. § 746.3(a)(1).

<sup>17</sup> See 15 C.F.R. § 746.3(a)(3).

the *internal* transfer of items *within* Iraq.<sup>18</sup> Such would include not only goods, but also technical information exported or re-exported to Iraq.

Notably, the previous regulation in the EAR pertaining to Iraq, 15 C.F.R. § 746.4 (2003), which governed OFAC’s licensing policy for Iraq after the embargo was lifted last May, also set forth a series of specific ECCNs for which an export license for Iraq would be required. However, only one of the ECCNs listed in the new regulation (ECCN 1C997) is retained from the ECCNs listed in the previous version of § 746.4.<sup>19</sup> Accordingly, for the AT-controlled items specified in the new regulation, the new BIS framework imposes licensing requirements (and, as discussed below, in some instances a general policy of *denying* license applications) for products for which there was *no licensing requirement* in the post-embargo OFAC licensing regime. Companies that had previously been engaged in the export/re-export of those items to Iraq should be certain to ensure that all persons responsible for their exporting activities are aware of the tightening of restrictions for those products.

Finally, the BIS regulation includes a specific licensing requirement for the export or re-export of *any* item for which the exporter knows, or has reason to know, that the item is destined for a “military end-use” or “military end-user. The regulation defines “military end-use” as incorporation into any “military item” described in the USML or the Wassenaar Arrangement Munitions List,<sup>20</sup> and “military end-user” as any “person” whose actions or functions are intended to support “military end-uses.”<sup>21</sup> Notably, the military end-use/end-user restrictions do not apply to exports to agencies of the U.S. government, or to the “Interim Government of Iraq” or the “Multinational Force” in Iraq.<sup>22</sup> These provisions are unique within the EAR and, therefore, it is unclear how broadly BIS intends to interpret them.

## C. BIS Licensing Policy

The BIS regulation, and the associated BIS *Federal Register* notice, together set forth a fairly complicated set of licensing policies, depending on the end-use of the item, for all of the categories of exports/re-exports subject to licensing requirements. Part 746 of the EAR now sets forth a *general policy of denial* for license applications for Iraq falling into the following categories:

- If the item is destined for use in civil or military nuclear activities, regardless of the reason for the licensing requirement<sup>23</sup>;
- If the item is controlled for CC or UN, falls under an ECCN ending in the number “018,” or is a “machine

<sup>18</sup> See 15 C.F.R. § 746.3(a)(1)-(a)(4).

<sup>19</sup> The other ECCNs listed in the old § 746.4, which have not been retained for specific Iraq controls in the new BIS regulation, are nevertheless controlled for export to Iraq because they contain controls other than AT. See 15 C.F.R. § 774 Supp. 1, ECCNs 1C980 (SS control), 1C981 (SS control), 1C982 (SS control), 1C983 (SS control), 1C984 (SS control), 5A980 (license required to all countries), 0A980 (CC control), 0A982 (CC control), 0A983 (CC control), and 0A985 (CC control).

<sup>20</sup> The Wassenaar list is a multinational listing of dual-use military items. See <http://www.wassenaar.org>.

<sup>21</sup> See 15 C.F.R. § 746.3(a)(4).

<sup>22</sup> *Id.*

<sup>23</sup> See 15 C.F.R. § 746.3(b)(1).

tool” controlled for NS or NP, and “would make a material contribution to the production, research, design, development, support, maintenance, or manufacture of Iraqi weapons of mass destruction, ballistic missiles or arms and related materiel”<sup>24</sup>;

- If the item is controlled under the specific AT-controlled ECCNs noted above, and BIS determines that the exports/re-exports will not “contribute to the building of Iraqi civil infrastructure”<sup>25</sup>;
- If the export or re-export is destined for an end-user who is a designated terrorist or otherwise is specially-designated in the EAR for restrictions on acquisition of goods from the United States<sup>26</sup>; and
- Where the export/re-export is destined for a “military end-use” or “military end-user.”<sup>27</sup>

In addition to the denial policies set forth in the BIS regulation, the *Federal Register* notice announcing the new regulation sets forth a series of additional licensing policies based on the specific “reasons for control” in the CCL.<sup>28</sup> Those policies are summarized as follows:

Reason for Control	Licensing Policy
National Security (“NS”)	case-by-case review; general policy of denial for items related to arms-related materials, unless the export/re-export is related to the building of Iraqi civil infrastructure
Missile Technology (“MT”)	case-by-case review; general policy of denial for items related to ballistic missiles with a range greater than 150 km, unless the export/re-export is related to the building of Iraqi civil infrastructure
Non-Proliferation (“NP”)	case-by-case review; general policy of denial for subsystems/components of nuclear weapons-related facilities, unless the export/re-export is related to the building of Iraqi civil infrastructure
Chemical Weapons (“CW”)	case-by-case review
Chemical and Biological weapons (“CB”)	case-by-case review; general policy of denial unless the export/re-export is related to the building of Iraqi civil infrastructure
Regional Stability (“RS”)	case-by-case review
Crime Control (“CC”)	case-by-case review
Encryption Items (“EI”)	case-by-case review
Significant Items (“SI”)	case-by-case review
Computers (“XP”)	case-by-case review
Short Supply (“SS”)	case-by-case review
Restrictions imposed by the United Nations (“UN”)	case-by-case review

The licensing requirements and review policies for exports/re-exports to Iraq represent a unique approach for BIS under the regulations. The approach for Iraq is more liberal than for Libya, which has also seen an easing of BIS licensing requirements in recent months. However, the extensive policies of denial applicable to

Iraq are more stringent than those applicable to other countries in the Middle East region (including Jordan, Kuwait, and Saudi Arabia), except Syria and Iran, for which very tight restrictions remain in place.<sup>29</sup> It should be noted that a policy of denial does not render a license application a wholly lost cause—both BIS and OFAC have licensed the export/re-export of items subject to denial policies on numerous occasions in the past. However, license applications that face a general denial policy will generally have to contain detailed discussions of the underlying end-uses and end-users, and strong arguments advocating in favor of BIS granting an exception to the denial policy. Needless to say, preparing such applications would increase the time and cost necessary to export or re-export items subject to the denial policy.

## D. EAR License Exceptions Available For Iraq Exports/Re-Exports

Section 740 of the EAR sets forth a series of license exceptions that are available for different varieties of exports and re-exports. Under the previous BIS export control regime applicable to Iraq, only two EAR license exceptions were available for exports and re-exports to Iraq—those relating to exports and re-exports of “baggage” (“BAG”) and exports/re-exports to officials of the U.S. government or multinational agencies (“GOV”).<sup>30</sup> Under the new BIS regulation, a variety of EAR license exceptions that were previously unavailable for exports and re-exports to Iraq are now available, including the following: CIV (covering specified items for civil end-users), CTP (covering certain computers), TMP (covering certain “temporary” exports), RPL (covering certain servicing and replacement parts), GFT (covering gift parcels and humanitarian donations), TSU (covering certain technology, software), BAG (covering baggage), AVS (covering aircraft and vessels on temporary sojourn), ENC (covering certain encryption software), and KMI (covering key management infrastructure).<sup>31</sup> In addition, the new regulation adds Iraq to Computer Tier 3 under license exception CTP, which generally authorizes exports/re-exports of computers with million theoretical operations per second (“MTOPS”) ratings up to and including 190,000 MTOPS.<sup>32</sup>

The broadened availability of license exceptions for Iraq represents a significant development for a number of product categories, including, most notably, computer software and hardware controlled for encryption reasons under ECCN 5D002 and 5A002. Those ECCNs include a variety of fairly standard “retail” commercial software, which is exportable without a license to most countries under license exception ENC.<sup>33</sup> Including Iraq within the scope of license exception ENC essentially will enable software companies and their customers, for the first time since the nascency of the software boom, to export or re-export many encryption products

<sup>29</sup> See 15 C.F.R. §§ 736 supp. 1 (Syria), 746.7 (Iran).

<sup>30</sup> See 31 C.F.R. § 575.507 (2003).

<sup>31</sup> See 69 Fed. Reg. 46,069, 46,072 (Dep’t Commerce July 30, 2004).

<sup>32</sup> *Id.* Such would include practically all standard personal computers. A 3 gigahertz computer with a Pentium 4 processor, for instance, normally runs at approximately 9,000 MTOPS.

<sup>33</sup> See 15 C.F.R. § 740.17.

<sup>24</sup> See 15 C.F.R. § 746.3(b)(2).

<sup>25</sup> See 15 C.F.R. § 746.3(b)(3).

<sup>26</sup> 15 C.F.R. §§ 744.12, 744.13, 744.14, and 744.18.

<sup>27</sup> See 15 C.F.R. § 746.3(b)(4).

<sup>28</sup> See 69 Fed. Reg. 46,069, 46,071-46,072 (Dep’t Commerce July 30, 2004).

to Iraq free of licensing requirements. Another newly available license exception of particular note is license exception TMP, which is available for “temporary” exports/re-exports to Iraq.<sup>34</sup> License exception TMP authorizes the export of certain categories of items for up to one-year, provided they remain within the custody of the person making the export, and they are subsequently returned to the United States or an extension/re-export license is granted by BIS. There are limits on the use of TMP, so an exporter should carefully review the actual text of this license exception before relying on it. However, the availability of license exception TMP should be a significant benefit to contractors working on a temporary basis on reconstruction or other commercial activities in Iraq.

### E. Special Iraq Reconstruction License

BIS also has created a Special Iraq Reconstruction License (“SIRL”).<sup>35</sup> The SIRL license authorizes exports, re-exports, and re-transfers to or in Iraq for civil and reconstruction projects funded by the U.S. government or any entity it designates, or by the United Nations, World Bank, International Monetary Fund, or their affiliated entities.<sup>36</sup> Persons who apply for and receive an SIRL may export or re-export all items subject to the EAR without further licensing, except for items subject to Missile Technology (“MT”), Non-Proliferation (“NP”), and Chemical-Biological (“CB”) controls.<sup>37</sup> However, the SIRL application process requires that the applicant identify in advance all items that will be exported/re-exported under the SIRL, and all end-users. Moreover, the applicant must provide a detailed description of the project, including the funding entity, and details regarding underlying contracts, identification numbers, and project codes. The applicant also must secure a written statement from one or more of the funding entities addressing whether the transaction “is likely to pose security issues,” and must certify that:

- (1) the items will not be used in prohibited proliferation activities;
- (2) non-consumed items will be returned upon completion of the project (absent BIS approval otherwise); and
- (3) the parties to the transaction will obtain BIS approval before re-exporting any products or transferring them to another entity within Iraq.<sup>38</sup>

The licensing process for SIRL licenses are, therefore, somewhat more onerous than is the case of a standard license application under 15 C.F.R. Part 748. However, the SIRL process provides two principal benefits to companies engaged in projects in Iraq. First, the SIRL provision limits BIS to a 40-day period to process the application, considerably shorter than the 90-day period set forth for standard license applications.<sup>39</sup> And second, SIRL licenses will be valid until completion or discontinuation of the project detailed in the application

(or otherwise determined by BIS), whereas standard BIS export licenses generally are available only for a two-year period.<sup>40</sup>

### F. Revised De Minimis Rule for Iraq

It is important to realize that items produced outside the United States may still be subject to the EAR, depending in part on their U.S. origin content. The new BIS regulation also amends the de minimis rules applicable to Iraq. Foreign-produced products are now subject to the EAR only when the U.S.-origin controlled content in such items exceeds 25 percent; the threshold under the previous export control regime was 10 percent.<sup>41</sup>

## III. Relationship to Previous OFAC Export Licensing Provisions

OFAC issued a regulation on July 30, 2004, essentially removing the licensing regulation that had been in effect since May 2003 and transferring licensing jurisdiction for exports/re-exports to BIS.<sup>42</sup> Consequently, OFAC’s involvement with Iraq now is limited to: (1) its jurisdiction over property (and interests in property) of certain Iraqi nationals that had been blocked under previous regulations; (2) enforcement of restrictions remaining in the OFAC regulation relating to dealings in cultural and artistic properties that were removed illegally from Iraqi museums; and (3) prohibitions on dealings with Iraqi specially-designated nationals (“SDNs”).

Both the revised OFAC and BIS regulations provide that licenses previously issued by OFAC for Iraq exports will remain in effect for one year, until July 30, 2005, unless the license itself specifies an earlier termination date.<sup>43</sup> The new BIS regulation imposes specific recordkeeping requirements for OFAC Iraq licenses, set forth in 15 C.F.R. § 746.3(e). It should be noted that OFAC is no longer issuing licenses for Iraq exports; accordingly, OFAC will return to the applicant all license applications that OFAC did not act upon by July 30, 2004. Those applications will have to be re-filed with BIS if a license is required for the export in question. Moreover, the new BIS regulation provides that all re-exports to Iraq or internal re-transfers to new end-users in Iraq *must be licensed by BIS*.<sup>44</sup>

## IV. State Department Controls Under the ITAR

Notably, the State Department, Directorate of Defense Trade Controls (“DDTC”), retains licensing jurisdiction for items controlled under the ITAR; those regulations were not affected by the revisions to the EAR and OFAC regulations.

## V. Conclusion

The BIS regulation for Iraq represents a significant easing of export and re-export controls on Iraq. For

<sup>34</sup> See 15 C.F.R. § 740.9.

<sup>35</sup> 15 C.F.R. Part 747.

<sup>36</sup> 15 C.F.R. § 747.2(a).

<sup>37</sup> 15 C.F.R. § 747.3.

<sup>38</sup> 15 C.F.R. § 747.4(b).

<sup>39</sup> See 15 C.F.R. §§ 750.4(a), 747.5(a).

<sup>40</sup> See 15 C.F.R. §§ 748(f), 747.5(c).

<sup>41</sup> See 15 C.F.R. § 734.4.

<sup>42</sup> See 69 Fed. Reg. 46,089.

<sup>43</sup> See 15 C.F.R. § 746.3(e)(1), 69 Fed. Reg. 46,089.

<sup>44</sup> See 15 C.F.R. § 746.3(e)(3).

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most products, including a number of items specified in the CCL, exports to Iraq will not require a license. Indeed, because there are now a number of regulatory exceptions applicable to Iraq, the licensing burden for many contractors working in Iraq will clearly diminish. In cases where a license is required, however, BIS's fairly expansive use of a policy of denial for applica-

tions may make the licensing process more difficult, and perhaps reduce the likelihood of succeeding in obtaining a license, at least for some exporters. While the SIRT may afford a holistic strategy to some contractors, the burden associated with obtaining and maintaining a SIRT will present the contracting community as a whole with new challenges.