

International Law ADVISORY



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Today, the Department of the Treasury, Office of Foreign Assets Control (OFAC) and the Department of Commerce, Bureau of Industry and Security (BIS) issued regulations transferring licensing jurisdiction for exports and re-exports to Iraq from OFAC to BIS. (OFAC has held licensing authority for Iraq export/re-export activity since the embargo against Iraq was lifted in May 2003.) In the course of doing so, both agencies have implemented a number of important changes to the Iraq export licensing framework. The most important of those changes are summarized below. Please note that BIS has invited interested parties to comment on its regulation. Comments must be provided to BIS by August 30, 2004. However, these regulatory changes are effective as of today.

I. New BIS Licensing Regime

The new BIS regulations for exports and re-exports to Iraq were published today in the Federal Register at 69 Fed. Reg. 46,069 (available for download at <http://www.gpoaccess.gov/fr/index.html>). These regulations amend various provisions of the Export Administration Regulations (EAR).

A. Items That Can Be Shipped Without A License

The new BIS regulations provide that items controlled under the EAR but not subject to a specific Export Control Classification Number (ECCN) set forth in the Commerce Control List (CCL) -- i.e., "EAR 99" items -- may be exported to Iraq without a license. Such was the case under the preceding OFAC licensing regime. Likewise, as under the prior OFAC framework, items on the CCL and controlled for antiterrorism ("AT") reasons generally may be exported and re-exported to Iraq without a license. However, the new BIS regulations require a license for AT-controlled items falling under the following ECCNs: 0B999, OD999, 1B992, 1C992, 1C995, 1C997, 1C999, and 6A992.

B. License Requirements

Export licenses from BIS are required, absent a license exception, for items falling under the CCL controls set forth below. BIS has articulated, in the regulations, its licensing policy for license applications for each category.

- National Security ("NS"): case-by-case review; general policy of denial for items related to items arms-related materials, unless the 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;
- Non-Proliferation ("NP"): case-by-case review, general policy of denial for subsystems/components of nuclear weapons - related facilities;
- Chemical Weapons ("CW"): case-by-case review;

- Chemical and Biological weapons (“CB”): case-by-case review, general policy of denial unless the export is related to the building of Iraqi civil infrastructure;
- Regional Stability (“RS”): case-by-case review;
- Crime Control (“CC”): case-by-case review; general policy of denial for items related to items arms-related materials, unless the export is related to the building of Iraqi civil infrastructure;
- 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; and
- Items controlled for reasons relating to UN controls (“UN”): case-by-case review; general policy of denial for items related to items arms-related materials, unless the export is related to the building of Iraqi civil infrastructure.

Notably, the regulations also impose a new license 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” (as defined in the new 15 C.F.R. § 746.3), unless the end user of the item is the U.S. government or the Iraqi interim government.

A license also will be required for all exports and re-exports to terrorists or other designated persons, who are listed in the new 15 C.F.R. §§ 744.12, 744.13, 744.14, and 744.18.

C. License Exceptions

The new BIS regulations remove Iraq from Country Group E:1 (*see* 15 C.F.R. § 740 Supplement 1), and places Iraq in Country Groups D:1, D:2, D:3, and D:4. The consequence of that is that several of the license exceptions in 15 C.F.R. § 740, many of which were previously unavailable for exports and re-exports to Iraq, will now be available, including the following: CIV, CTP, TMP, RPL, GOV, GFT, TSU, BAG, AVS, ENC, and KMI. BIS has added Iraq to Computer Tier 3 under license exception CTP, which generally authorizes exports of computers with MTOPS ratings up to and including 190,000 MTOPS.

BIS also has created a Special Iraq Reconstruction License (“SIRL”) in 15 C.F.R. § 747. The SIRL license authorizes exports, re-exports, and re-transfers to or in Iraq for civil and reconstruction projects funded by certain government and international finance entities. Persons who apply for and receive an SIRL may export all items subject to the EAR without further licensing, except for items subject to MT, NP, and CB controls. The SIRL application process requires, however, that the applicant identify in advance the items that will be exported under the SIRL, and all end-users.

D. Revised De Minimis Rule for Iraq

The BIS regulation 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.

II. Changes to Previous OFAC Regime

OFAC also issued regulations today revising the economic sanctions relating to Iraq. The regulations were published in today's Federal Register at 69 Fed. Reg. 46,089 (also available for download at <http://www.gpoaccess.gov/fr/index.html>). They also are effective as of today.

The new OFAC regulations (and corresponding provisions in the new BIS rules) 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. The new BIS regulations impose specific recordkeeping requirements for OFAC Iraq licenses, set forth in 15 C.F.R. § 746.3(e). OFAC is no longer issuing licenses for Iraq exports, and *any export license requests filed with OFAC that have not yet been acted upon will be returned*. Moreover, the new BIS regulations provide that all re-exports to Iraq or internal re-transfer to new end users in Iraq *must be licensed by BIS*.

The new regulations also provide that OFAC will continue to block the property, and interests in property, of persons previously listed as blocked persons in the OFAC regulations. OFAC has also retained restrictions on dealings in cultural and artistic properties that were removed illegally from Iraqi museums. The OFAC regulations also authorize US persons to deal with certain entities that remain on the SDN List -- primarily the various Iraqi banks.

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We will advise you if we learn of any additional developments relating to the new Iraq export controls regime. Please note that although the BIS and OFAC regulations have been changed, the State Department retains licensing jurisdiction for items controlled under the International Traffic in Arms Regulations, and those regulations are not affected by today's changes. If you have any questions or would like to discuss the new regulations, please contact Ed Krauland (202-429-8083) or David Lorello (202-429-6757).

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