IRAQI RECONSTRUCTION: THE EARLY PICTURE

Initial efforts are now underway through the U.S. Agency for International Development (AID) and Department of Defense (DOD) to finalize a first-phase plan for the reconstruction of Iraq. However, U.S. persons and firms who wish to participate in Iraqi reconstruction or to do business in post-war Iraq remain subject to existing U.S. sanctions and export controls that prohibit such activity. The Departments of the Treasury and Commerce, which are the responsible agencies for these restrictions, advise that the restrictions continue to apply despite rapid progress in the ground war in Iraq, the apparent collapse of the regime controlling the ground and the prospect of eventual changes in U.S. Iraqi policy.

Moreover, the U.S. may not be able to lift all of these sanctions because some of them are based on U.N. Security Council resolutions, which remain in place. Pressure from France and other members of the Security Council on a variety of post-war matters, including the role to be accorded firms from their countries in lucrative Iraqi contracts, possibly could stall lifting or revision of the existing U.N. sanctions against doing business with Iraq. Until the U.N. Security Council modifies or lifts sanctions or the U.S. government finds other authority to lift its own sanctions issued under U.N. authority, business with Iraq remains unlawful for U.S. persons and companies except by specific license from the Treasury’s Office of Foreign Assets Control (OFAC). Limited exceptions appear to apply for contracts with DOD as part of the war effort.

For now, OFAC has signaled its intent to continue to enforce existing sanctions that prohibit U.S. persons and firms from doing business involving Iraq or Iraqi property. Those violating such sanctions face the possibility of significant civil and criminal penalties imposed by OFAC, as well as separate, additional civil and criminal sanctions for violations of the Department of Commerce’s export control regulations in the case of exports of goods or technology to Iraq.

Accordingly, for the present (and subject to rapidly changing events), firms that want to participate in post-war Iraqi reconstruction or business need to review their legal position to ensure that their activities respect existing sanctions and export control laws and

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1 Under current policy, in order to avoid duplication of controls, the Department of Commerce defers to the Department of the Treasury on Iraqi licensing decisions, with the licensing function being exercised solely by Treasury.
do not inadvertently cross the line into prohibited activities. Such legal review requires close attention to the specific activities involving Iraq under consideration, the application of existing sanctions and export control laws to those activities, and determination of whether a license is required from OFAC to make such activities lawful.

LEGAL ENVIRONMENT

To date, U.S. companies and U.S. persons remain subject to blanket prohibitions on doing business in or with Iraq. These prohibitions are based on a number of separate statutory authorities, including most prominently the Iraq Sanctions Act (ISA) and the International Emergency Economic Powers Act (IEEPA). In some cases, the prohibitions are redundant and overlapping. In the case of the IEEPA-based prohibitions, which are the statutory authority for the OFAC’s Iraqi Sanctions Regulations, 31 CFR Part 575, the prohibitions are based on a series of United Nations Security Council resolutions that seemingly will have to be rescinded or amended prior to lifting of the individual U.S. sanctions that are based on them.

On March 24 President Bush issued a Presidential Memorandum pursuant to Section 507 of the Foreign Operations, Export Financing and Related Programs Appropriations Act of 2003 determining that the provision of assistance and other financing for Iraq is important to the national security interest of the United States and authorizing the furnishing of this assistance and financing. This authority appears to be the basis for contracts currently being administered by AID. The only other apparent assistance going to Iraq at the present time is under contract with the DOD as a part of the war effort. DOD takes the position that it should direct all U.S. reconstruction efforts in Iraq, a position that, as of now, may be sustained over the objections of the Department of

\[2\] DOD also is involved in the AID contracts, although the exact relationship between DOD and AID is unclear and fluid. The reconstruction planning to date has been primarily directed by three elements of the U.S. Government: AID, which has designed a $2 billion near-term reconstruction package for Iraq; the National Security Council (NSC), which commissioned the planning from AID, working with the Office of Management and Budget (OMB); and DOD civilian staff (led by Secretary Rumsfeld, Deputy Secretary Wolfowitz, et al.), who have played a substantial back-stage role in making final decisions and to whom the White House awarded overall responsibility for post-construction management in the initial days after the war. DOD has an Office for Reconstruction and Humanitarian Assistance, which in the early post-war days at least will govern Iraq’s 23 million people in the aftermath of war, provide humanitarian support and administer the business of reconstruction. Retired General Jay Garner, age 64, who is close to Rumsfeld, has been placed in charge of that office. A single U.S. contractor will likely manage most of the $2 billion total to be spent in the field, working closely with AID officials on fast-track infrastructure rebuilding programs, especially involving water, electricity, transportation, hospitals and schools. That contractor will subcontract to numerous other firms to accomplish the work promptly.

Former State Department officials also have been nominated to participate actively in this effort. Names that have surfaced to date include Barbara Bodine, ambassador to Yemen in 2000 when the U.S. destroyer USS Cole was attacked, to serve in central Iraq, and George Ward, former ambassador to Namibia, to oversee humanitarian aid. Others who have tentatively agreed to serve under Garner include Kenton Keith, former ambassador to Qatar and director of the Coalition Information Center in Islamabad, Pakistan during the Afghanistan war, Robin Raphel, former ambassador to Morocco, and Timothy Carney, former ambassador to the Sudan. However, DOD has objected to these nominations by State on the grounds that it wants to staff senior slots for administering and reconstructing Iraq. Their status is therefore unclear at the present time.
State. Accordingly, some U.S. companies are directing their efforts to DOD in order to participate in the reconstruction of Iraq.

**LEGISLATIVE ACTIVITY**

Last week the House and Senate passed differing versions of legislation (H.R. 1559 and S. 762) as part of the FY 2003 emergency supplemental appropriations bill that would respectively suspend or repeal the ISA and various other U.S. prohibitions on exports and assistance to Iraq that are independent of the U.N. Security Council’s resolutions. (The Bush Administration favors outright repeal, as does U.S. industry). The differing versions are going to conference in the very near future and are expected to be reconciled and pass by the time Congress recesses for the Easter/Passover break at the end of this week.³

The Senate version of the legislation also contains a provision (Section 506) that it is the “Sense of the Senate” that “to the maximum extent practicable, contracts (including subcontracts) and grants for relief and reconstruction in Iraq for funds appropriated under this chapter should be awarded to United States companies (particularly small and medium sized businesses) and organizations, and to companies and organizations located in the Near East region, and to those from countries which have provided assistance to Operation Iraqi Freedom.” This provision, however, is non-binding. It remains unclear the extent to which U.S. authorities will view themselves as guided by it.

**DIPLOMATIC FACTORS**

A more difficult picture is presented by the IEEPA sanctions, which are based on the U.N. Security Council’s resolutions and which are at the heart of U.S. prohibitions on doing business with or in Iraq. There is some apprehension among some U.S. companies that language, such as the above “Sense of the Senate” language contained in the Senate bill, will encourage France, Russia or China to threaten to exercise their veto power in the Security Council, at least for a while, on any measure lifting sanctions on Iraq. They thus could effectively block the lifting of sanctions unless the United States agrees to allow their companies to participate in the reconstruction of the country. Not only would such a move impede bids by U.S. companies for the reconstruction of Iraq, but it also could significantly complicate the overriding U.S. policy goal of stabilizing and reconstructing the country.

There are also proposals separately circulating in Congress that would flatly bar the award of Iraqi reconstruction contracts to companies in France, Germany, Russia and China. The White House reportedly opposes these measures. There is concern not only that such prohibitions might provoke a Security Council veto as described above,

³ The House and Senate are currently scheduled to recess at noon on Friday, April 11.
but also that they might violate U.S. obligations in the World Trade Organization (WTO). The Administration is carefully analyzing this question at the present time.

**OFAC ENFORCEMENT POSITION**

Senior OFAC staff has indicated that OFAC sanctions will remain in place for the foreseeable future, only to be lifted at such time as U.S. policy “justifies” lifting, at which point OFAC will “act quickly.” OFAC may at some point, when the “political situation justifies it,” issue a General License to authorize activities by U.S. contractors in Iraq. However, as of today, OFAC views such issuance as “premature.” OFAC has advised that the timing and content of any eventual General License it may issue will depend on the progress of the war on the ground. OFAC has only begun to think about the content of such a General License, and it does not appear that OFAC has yet drafted language setting forth its scope or particulars.

Existing OFAC sanctions continue to prohibit, among other things, any U.S. company or U.S. person from dealing in property in which Iraq has a direct or indirect interest. They also prohibit U.S. persons, including U.S. person attorneys, from exporting goods, technology or services to Iraq. **Further, they prohibit executory contracts by U.S. persons involving property in which Iraq has an interest, such as sales to or projects in Iraq, except in certain limited circumstances spelled out in OFAC regulations, such as for the sale of food or medicine pursuant to specific U.N. Security Council resolutions.** This prohibition has often proved to be a trap for the unwary in the past, as U.S. persons and firms have unintentionally violated the law by agreeing to take certain actions later if they should become legal. Such non-exempt executory agreements, undertaken without a prior license authorizing the agreement from OFAC, can violate Iraqi sanctions and be subject to substantial penalties.

Current OFAC regulations also prohibit transactions by any U.S. person that are incidental to a third country national’s activities under the Oil for Food Program pursuant to U.N. Security Council Resolution 986 without a prior specific OFAC license. Thus, they prohibit a U.S. person from undertaking activities in support of humanitarian sales by a non-U.S. person or company.

Clearly, this is an area that requires great caution. OFAC remains a robust enforcement agency, and, based on past practice, it will prosecute violations even if sanctions are later lifted.

**EXPORT CONTROL ISSUES**

The Department of Commerce is separately working on guidance on humanitarian licenses that it will release at some point in the future governing exports of food, medicine, medical products, telecommunications equipment and other essential humanitarian items under a resumed Oil for Food Program. In the meantime, even this limited Program has been suspended since the initiation of hostilities. Hence, no items may currently
be exported to Iraq by the private sector. Notably, Commerce does not contemplate lifting its export controls on the export of dual-use goods or technology to Iraq at any time in the near future. Even if licensing is handed back to Commerce from OFAC at some point in the future as part of a loosening or lifting of sanctions, Commerce will likely handle licensing on a case-by-case basis.

TRAVEL RESTRICTIONS

Travel by U.S. persons to Iraq remains generally forbidden. The Department of State continues to require validation of passports prior to such travel. The Department of State has indicated that it will not revise this requirement until the situation is stabilized in Iraq.

CONCLUSION

Despite the U.S. Government’s preliminary post-war Iraqi reconstruction planning, no decisions have yet been made that would authorize private sector persons and entities in the U.S. to undertake wide-scale activities involving Iraq or Iraqi property. To the contrary, OFAC has advised that it will continue to enforce existing U.S. sanctions until either the U.N. Security Council has taken action to lift sanctions or the Administration has determined that it otherwise has the legal authority to lift U.S. sanctions unilaterally and has in fact done so. The existing U.S. sanctions on Iraq are very broad and prohibit the export of services to Iraq, as well as most agreements by U.S. persons or firms to undertake action in the future involving Iraqi property. Export control laws also separately continue to prohibit export of controlled goods or technology to Iraq. Travel restrictions have a similar inhibitory impact on U.S. civilians. Thus, whether a U.S. person or firm needs to move information, goods or people, absent specific licenses from the U.S. government, activities involving even a post-war Iraq remain generally prohibited.

This regulatory environment suggests that U.S. persons or firms contemplating participation in post-war Iraqi reconstruction or other post-war business involving Iraq need to review their activities carefully in order to comply with the panoply of legal restrictions remaining on U.S. private sector activities involving Iraq. In some cases, proposed activities may fall within limited exceptions to the prohibitions or it may be feasible to obtain specific licenses to authorize activity.

However, this regulatory situation is rapidly evolving, and the U.S. Government may soon provide clearer guidance on what is permitted. We will provide an update as developments warrant.
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