



SANCTIONS UPDATE

The Sanctions Practice of Sidley Austin LLP

Lawyers in our Sanctions Practice advise companies on the applicability of U.S. sanctions programs to corporate and banking transactions, insurance contracts and the sale of goods and services. We handle license applications for agricultural commodities, medical devices and medicines under the Trade Sanctions Reform and Export Enhancement Act of 2000. We also represent companies in enforcement actions involving U.S. sanctions, assist with internal investigations and the development of compliance programs, and counsel clients on voluntary disclosures.

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New Rules Ease U.S. Sanctions for Agricultural Exports and Free Speech

The U.S. Treasury Department's Office of Foreign Assets Control (OFAC) promulgated two final rules this week that ease sanctions against Cuba, Iran and Sudan with respect to key areas of authorized trade. OFAC's new rules will make it easier for exporters to supply agricultural commodities to Cuba, as well as to support Internet-based personal communications in Cuba, Iran and Sudan. Companies in the agricultural and communications industries should consider whether OFAC's new rules create additional opportunities for them in these markets.

U.S. Embargoes Are Highly Restrictive But Not Absolute

Although the United States maintains strict embargoes of Cuba, Iran and Sudan, the prohibitions on trade with these countries are not absolute. For example, many companies are surprised to learn that the United States permits the import from and export to Iran of numerous items, despite ongoing tensions between the two countries. The nature of the trade permitted with Iran, as well as Cuba and Sudan, reflects two key principles of U.S. foreign policy:

- First, the United States generally promotes the free flow of information and freedom of speech through its foreign policy. Since enactment of the so-called Berman Amendment in 1988, U.S. embargoes of countries like Cuba, Iran and Sudan have not extended to the import or export of "informational materials," including publications, compact disks, CD-ROMS, news wire feeds and artwork.
- Second, the United States generally does not withhold the supply of food and medical items as a means of furthering U.S. foreign policy goals. To that end, the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) authorizes the export of agricultural commodities, medicine and medical devices to otherwise embargoed countries under licenses issued by OFAC (for Iran and Sudan) and the U.S. Commerce Department's Bureau of Industry and Security (BIS) (for Cuba).

While compliance with TSRA licenses and adherence to the scope of the "informational materials" exemptions can be complex, these efforts can yield opportunities in Cuba, Iran and Sudan for companies that export eligible items.

“Cash In Advance” Requirement Eased for Cuba

OFAC’s **first rulemaking** enhances the business opportunities available to companies interested in exporting agricultural commodities to Cuba.

Companies selling agricultural commodities to Cuba must receive payment of “cash in advance” or such sales may be financed by third-country financial institutions (*i.e.*, non-U.S., non-Cuban entities). In 2005, OFAC clarified that payment of cash in advance means that the seller must receive payment prior to shipment of the goods from the port at which they are loaded. As a practical matter, this interpretation made it difficult for U.S. companies to transact business with Cuban buyers, as payment terms typically called for funds transfers only after items had cleared U.S. ports and were in international waters en route to Cuba.

Under OFAC’s new rule, payment of cash in advance is now interpreted to mean “payment before the transfer of title to, and control of, the exported items to the Cuban purchaser.” This change therefore enables exporters to agree to the preferred payment terms of Cuban purchasers, which has the potential for boosting exports of agricultural commodities to Cuba. This change applies to agricultural exports to Cuba only, not to all TSRA exports.

However, this regulatory change may be short-lived. OFAC’s rulemaking provides that the new meaning of payment of cash in advance applies only to sales of agricultural items (1) delivered to Cuba between October 1, 2009 and September 30, 2010 or (2) delivered pursuant to a contract entered into between October 1, 2009 and September 30, 2010 and shipped within twelve months from the signing of the contract. For subsequent sales of agricultural commodities, OFAC will revert to its prior interpretation of the term “payment of cash in advance.”

The reason for this reversion lies in the fact that OFAC was directed to change its interpretation of payment of cash in advance by the Omnibus Appropriations Act for 2010. By its

terms, this act applies to government operations in fiscal year 2010 only, although OFAC arguably could have read the act as providing broader guidance on the meaning of “payment of cash in advance.” In light of OFAC’s narrow reading, it is unclear whether Congress will extend its interpretation of the term “payment of cash in advance” through later legislation. Companies seeking to take maximum advantage of this more advantageous interpretation should therefore carefully structure their contracts with Cuban purchasers during 2010.

Enhanced Internet-Based Communications with Cuba, Iran and Sudan

OFAC’s **second rulemaking** enhances the opportunities available to companies interested in supporting Internet-based personal communications in Cuba, Iran and Sudan.

Exports from the United States or by U.S. persons to these countries of services and software related to the exchange of personal communications over the Internet have historically been prohibited unless authorized by licenses issued by OFAC or BIS, which have been difficult to obtain. OFAC’s new rule creates a general license authorizing exports of services incident to the exchange of personal communications over the Internet (such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing and blogging). To qualify for this authorization, such services must be publicly available at no cost to the user, relate to personal (not commercial) communications, and not be intended for use by government officials of the sanctioned regimes.

OFAC’s new rule also permits the export of software necessary to enable the provision of the communications services described above, provided that certain conditions are met. The software must be (1) classified as “EAR99” under the Export Administration Regulations (EAR), (2) not subject to the EAR (*i.e.*, U.S. jurisdiction), or (3) classified as so-called “mass market software” under export control classification number 5D992 of the EAR. Further, the software must be publicly available at no

cost to the user, relate to personal (not commercial) communications, and not be intended for use by government officials of the sanctioned regimes.

Importantly, the export authorization for personal communications software applies to exports to Iran and Sudan but not Cuba. This is because physical exports to Cuba are regulated by BIS and not OFAC. It is unknown whether BIS is also contemplating a similar rule change to encompass personal communications software exports to Cuba.

Companies in the personal communications industry may wish to assess whether OFAC's rulemaking opens new opportunities. For companies whose Internet communications services and software are not authorized for export under the new rule, OFAC has indicated that it may issue specific licenses for such exports on a case-by-case basis, taking into consideration the classification of any communications software at issue. Thus, companies whose proposed transactions do not fit squarely within the new general license but are directed at permitting the sharing of information over the Internet should consider requesting specific licenses.

If you have questions about any of these items, please contact your regular Sidley Austin LLP contact.

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