

## Trade & Customs - USA

### New rules ease US sanctions for agricultural exports and free speech

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The Treasury Department's Office of Foreign Assets Control (OFAC) has promulgated two final rules that ease sanctions against Cuba, Iran and Sudan with respect to key areas of authorized trade. The 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 the new rules create additional opportunities for them in these markets.

#### 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 US 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, US embargoes of countries like Cuba, Iran and Sudan have not extended to the import or export of informational materials, including publications, CDs, CD-ROMS, newswire feeds and artwork.

Second, the United States generally does not withhold the supply of food and medical items as a means of furthering US foreign policy goals. To that end, the Trade Sanctions Reform and Export Enhancement Act of 2000 authorizes the export of agricultural commodities, medicine and medical devices to otherwise embargoed countries under licences issued by OFAC (for Iran and Sudan) and the Commerce Department's Bureau of Industry and Security (for Cuba).

While compliance with Trade Sanctions Reform and Export Enhancement Act licences 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.<sup>(1)</sup>

Companies selling agricultural commodities to Cuba must receive payment of cash in advance or such sales may be financed by third-country financial institutions (ie, non-US, non-Cuban entities). In 2005 OFAC clarified that payment of cash in advance means that the seller must receive payment before shipment of the goods from the port at which they are loaded. As a practical matter, this interpretation made it difficult for US companies to transact business with Cuban buyers, as payment terms typically called for funds transfers only after items had cleared US 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 enables exporters to agree to the preferred payment terms of Cuban purchasers, which has the potential to boost exports of agricultural commodities

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to Cuba. This change applies to agricultural exports to Cuba only, not to all Trade Sanctions Reform and Export Enhancement Act 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 (i) delivered to Cuba between October 1 2009 and September 30 2010, or (ii) delivered pursuant to a contract entered into between October 1 2009 and September 30 2010 and shipped within 12 months of 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 arguably OFAC 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. Therefore, companies seeking to take maximum advantage of this more advantageous interpretation should 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.<sup>(2)</sup>

Exports from the United States or by US 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 licences issued by OFAC or the Bureau of Industry and Security, which have been difficult to obtain. OFAC's new rule creates a general licence authorizing exports of services incidental to the exchange of personal communications over the Internet (eg, 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:

- classified as 'EAR99' under the Export Administration Regulations;
- not subject to the Export Administration Regulations (ie, US jurisdiction); or
- classified as so-called 'mass market software' under export control classification number 5D992 of the Export Administration Regulations.

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 the Bureau of Industry and Security and not OFAC. It is unknown whether the Bureau of Industry and Security 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 presents 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 licences 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 licence but are directed at permitting the sharing of information over the Internet should consider requesting specific licences.

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### **Endnotes**

(1)

[www.sidley.com/files/News/4798f1a3-30f5-438f-9111-15d9accdda49/Presentation/NewsAttachment/96b695af-71c7-4814-9ce9-1b77ffaf2c54/c](http://www.sidley.com/files/News/4798f1a3-30f5-438f-9111-15d9accdda49/Presentation/NewsAttachment/96b695af-71c7-4814-9ce9-1b77ffaf2c54/c)

(2)

[www.sidley.com/files/News/4798f1a3-30f5-438f-9111-15d9accdda49/Presentation/NewsAttachment/8b8ceff5-02ac-4eef-a420-249a36755294/](http://www.sidley.com/files/News/4798f1a3-30f5-438f-9111-15d9accdda49/Presentation/NewsAttachment/8b8ceff5-02ac-4eef-a420-249a36755294/)

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