

Trade & Customs - USA

Omnibus Appropriations Act May Increase US Exports to Cuba

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The recently signed Omnibus Appropriations Act may increase sales to Cuba of agricultural commodities, medicine and medical products by reversing a 2005 interpretation of 'cash in advance', as set out in the Trade Sanctions Reform Act 2000. On December 16 2009 the president signed into law HR 3288, which provides fiscal year 2010 appropriations for several government departments. Section 619 of the act reverses a 2005 rule created by the Treasury's Office of Foreign Assets Control (OFAC), which defined 'cash in advance' as a requirement that US suppliers receive payment before goods are loaded onto a carrier for export to Cuba, thereby making trade with Cuba more difficult.

Section 619 states that during the fiscal year 2010, the term 'payment of cash in advance' shall mean "payment before the transfer of title to, and control of, the exported items to the Cuban purchaser". The aim is to allow US suppliers to export their products more easily by allowing payments to be made after goods have left the US port, but before title or physical control has passed to the Cuban buyer.

The Trade Sanctions Reform Act authorizes sales of agricultural commodities, medicine and medical devices to Cuba through either cash-in-advance sales or financing provided by third-country financial institutions. Sales on account are not permitted. US exporters originally interpreted 'cash in advance' to mean withholding documents that were required to claim and clear the goods in Cuba until the Cuban buyer had paid for the goods. In practice, US exporters often received payment once the goods were in international waters or shortly before they were unloaded in Cuba.

In 2005 OFAC issued a rule to clarify that 'cash in advance' required that US suppliers receive payment prior to shipment of the goods from the US port of loading. OFAC's 2005 interpretation has engendered controversy since its inception. US exporters claimed that the rule violated their right to contract with Cuba and would cost them future business. Cuba has reportedly purchased no US agricultural products on a cash basis since the 2005 rule took effect. As title to goods usually passes from seller to buyer when payment is received (under the 2005 rule, while the goods were still present in the United States), Cuban state-owned buyers feared that the rule would make their cash purchases vulnerable to seizure to satisfy US court judgments against the Cuban government. Some members of Congress have been sympathetic to the concerns of US exporters and on numerous occasions have sought to return the meaning of 'cash in advance' to mean payment before the transfer of title to, and control of, the exported items to the Cuban purchaser.

It is unclear how OFAC will react to this appropriations provision. By its terms, it applies only to the fiscal year 2010. It is unclear whether OFAC will amend its regulations in view of the potentially limited duration of the interpretation.

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