



Transcript of a presentation by

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The Cuban embargo is the oldest economic sanctions program of the U.S. Government. It is also the most complex. Well into its fifth decade, it has shown a remarkable ability to survive by changing with the times and to adapt to a variety of political environments. True, it has picked up and still carries a multitude of legal and regulatory baggage, which is difficult to keep straight. Resilience and flexibility are the secrets to its longevity.

Earlier this year, the U.S. Treasury's Office of Foreign Assets Control (“OFAC”), the U.S. Government agency that administers and enforces the sanctions or embargo against Cuba, announced a new rule regarding the interpretation of “*payment by cash in advance*” for the licensed exports of agricultural commodities to Cuba.

This rule states that the exporter or its agent must receive payment before the goods are shipped from the U.S. port at which they are loaded.

Prior to this rule it was the practice of many exporters, and favored by Cuba, that payment could be received after the shipment leaves the US port and arrives in Cuba, but before title is transferred to Cuba.

Why did OFAC issue this more restrictive interpretation?

The reason, given by OFAC, goes back to the original statute, which authorizes commercial sales of agricultural commodities to Cuba, the *Trade Sanctions Reform and Export Enhancement Act of 2000* or TSRA.

The TSRA provides two payment options for agricultural exports to Cuba (1) payment of cash in advance, or (2) financing by a third country financial institution, including the use of letters of credit opened in such third country banks. Unfortunately, TSRA does not define what constitutes “payment of cash in advance.”

In 2003 the State Department requested OFAC to conduct a survey to find out how the “payment of cash in advance” requirement was actually implemented in actual practice. Most exporters who were contacted merely affirmed that they were getting cash in advance for their exports, but some further explained that they were getting paid after shipment from the U.S. port but before title passed to the Cuban purchaser.

OFAC realized that the alternative method used by some exporters did not correspond to the commonly understood meaning of “cash in advance,” but that instead, this method of payment closely resembled a financing mechanism called “documentary collection.” This method was not authorized by TSRA.

Prompted by the revelations of the survey, OFAC initiated extensive consultations within the Treasury Department, and with other executive branch agencies, including the State Department. While these consultations were ongoing, OFAC began to receive inquiries from banks questioning the permissibility, under OFAC interpretation of TSRA, of the alternative (documentary collection) method of payment that some exporters were using.

Finally, in February 2005 OFAC announced what it called a “clarification” of the “cash in advance” requirement, resulting in the new rule, the one that most exporters, and Cuba, do not like. Under the new rule the exporter or its agent must receive payment prior to the shipment of the goods from the U.S. port where it is loaded. In OFAC’s view, the new rule is more consistent with the commonly understood meaning of the “cash in advance” type of payment mechanism.

As a matter of technical interpretation of the TSRA “cash in advance” requirement, I believe that OFAC is legally on solid ground. At the same time, I also believe that it would be quite within the scope of OFAC’s administrative discretion to adopt, should it so choose for policy reasons, the more permissive previous practice.

Obviously, the reason why OFAC adopted the new, stricter interpretation was prompted by the Administration’s Cuba Policy.

The topic of our “Cuba Policy” takes us into a very subjective and contentious realm. What is the Administration’s Cuba Policy?

In its simplest formulation it is one that it shares with all previous administrations since the administration of President Kennedy: 1. Economic pressure on the Castro regime; 2. Support for the Cuban people. A

3rd policy goal emerged within the last 15 years or so: Encouraging peaceful transition to democracy and the development of civil society within Cuba.

The three foreign policy objectives are difficult to reconcile into a coherent and consistent economic sanction regime. The result is that the three policy objectives often produce sanctions measures, which are clearly contradictory to one another.

So it came about that over the years, administration after administration has stressed one aspect of the policy over the other, continually causing changes in the embargo from greater openness to the strictest possible rules. After all, economic sanctions are a tool of foreign policy. The Trading with the Enemy Act, which is the principal statutory authority for the embargo, gives the executive branch wide discretion to impose practically any set of sanctions measures, ranging from travel restrictions, assets blocking, trade restrictions, or the ability to relax the sanctions across the board by sweeping regulations or case by case licensing. Subsequent legislation by Congress did impose, however, some restrictions on the President's full control over the Cuban embargo.

So what drives policy at a given moment or in a given administration? There are a multitude of factors, and these factors are continually changing over time, as their significance or perception of their significance also changes from administration to administration.

First, there is the political philosophy of a given administration, and the philosophy of its key officials. Consider and compare, for example, the administrations of Jimmy Carter and George W. Bush, or Clinton and Reagan.

Then you need to consider the role of the Congress and the significant personalities in that body at a given time. Compare the Cuba policy of former Senator Jesse Helms with Senator Baucus, or compare Rep. Rangel of New York with Rep. Ross-Lathinen from Miami.

Then there are unexpected or dramatic events like the shoot-down of the private planes off Cuba, the boatlift of refugees, the Eleon Gonzales affair, or the Pope's visit to the island.

All these feed into the policy furnace and fuel changes up and down the spectrum from relaxation to tightening of the embargo.

Over the years there has also been a steady succession of domestic political and economic pressures ranging from electoral votes in key states to the sale of agricultural commodities.

There are humanitarian issues. Financial support for families of refugees left behind in Cuba, family visits, telecommunication, freedom of travel, cultural exchanges, religious activities, the free flow of information, and the concern over the Cuban regime's treatment of political dissidents.

Finally, I need to mention another factor which is often overlooked in the public debate over the Cuba Policy, but which in my opinion, is very much at the basis of everything.

Money. Huge amounts of wealth are at stake, whose ultimate allocation greatly depends on the embargo. Quite apart from the compensation for or restitution of nationalized or confiscated properties to emigrant Cubans living in the United States, there is the issue of future access to the huge potential of business opportunities in Cuba. Think of real estate, rum, tobacco, sugar, nickel, infrastructure development, etc. It is not hard to visualize who would not get preferred treatment if the sanctions were lifted while the Castro regime is still in power.

Bottom line: Do not expect fundamental changes in the sanctions in the absence of a fundamental political change in Cuba. The attitudes of the Cuban regime and of the U.S. government are essentially cast in stone. From our perspective nothing but "unconditional surrender", from the Cuban side nothing less than full recognition by the United States of the legitimacy of the social and political system in Cuba are acceptable. Obviously these are impossible conditions for both sides.

So the embargo continues, going through its ups and downs, changes and amendments, interpretations following interpretations, until very few people outside the Government, or within the Government, really fully understand all its intricacies. It is such a complex web of provisions, and obscure reasons for many of those provisions, that I truly doubt that anyone in the State Department, the National Security Council, the Commerce Department, in fact within OFAC itself, possesses a comprehensive knowledge of all its essential provisions.

Adding to the complexity is a multitude of agencies which have various roles in the administration of the sanctions: Treasury's OFAC, the State Department and various bureaus within State, the Commerce Department, the Federal Communications Commission, the Bureau of Customs and Border Protection, the Federal Aviation Administration (FAA), the FBI, the civil division of the Justice Department, the various U.S. Attorneys throughout the country, the Defense Department -- they all have a piece of the action. All these agencies and bureaus must coordinate with each other whenever there is a significant change or any change that affects their jurisdictions. Often it is difficult to know just exactly what their respective roles are. So don't be surprised if things sometimes move slowly when you request a ruling, a license, or try to effect a change in the Cuba Policy.

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In The Eren Law Firm is a leading boutique firm that specializes in the areas of economic sanctions, export controls, anti-money laundering, bank regulation and supervision, and related enforcement defense. The Firm also represents clients in courts and arbitration fora in connection with disputes involving banking, finance and investment matters. The Firm's select and diverse group of clients includes U.S. and non-U.S. financial institutions, U.S. and non-U.S. companies, U.S. NGOs, and a sovereign government.

Mr. Pinter and Mr. Eren of the firm served at the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) prior to joining the firm.

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