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Trading with Cuba: The Cuban Democracy Act and Export Rules

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TRADING WITH CUBA: THE CUBAN DEMOCRACY ACT AND EXPORT RULES

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I. INTRODUCTION

I am honored to be asked to participate on this panel of experts on international law. My remarks in this essay will not focus on the issues of extraterritorial law covered by other panelists, but rather, will focus on the Cuban Democracy Act, 50 U.S.C. §§ 6001 et. seq., from the perspective of one who works with implementation of the law. I also will discuss the hypothetical problem of HOMETECH INDUSTRIES, INC., and its foreign affiliates, which was provided to all of the panelists.

First, I would like to provide some background on the Treasury Department's Office of Foreign Assets Control (OFAC) and its role, which should be helpful in putting the rest of my presentation into perspective. I am the primary Licensing Officer in the Office of Foreign Assets Control (OFAC), Licensing Division, who handles licensing matters related to Cuba. I handled all of the applications sent by companies seeking a license to permit a U.S. foreign subsidiary or affiliate to trade with Cuba, pursuant to section 515.559 of the Cuban Assets Control Regulations, 31 C.F.R. Part 515 (the CACR), which are administered by OFAC.

OFAC administers the U.S. Government's sanctions and embargo programs against designated foreign countries in furtherance of U.S. foreign policy and national security. OFAC acts under the President's authority granted by specific legislation to impose controls on transactions with targeted foreign countries. In addition to Cuba, OFAC currently administers asset freezes and trade embargoes against North Korea, Libya, Iraq, Haiti, and Yugoslavia, and import sanctions against Iran. OFAC also administers certain residual assets controls involving Iran, Vietnam, Cambodia, Panama, and the Baltic Republics, as well as restrictions on exports of strategic materials to certain former communist bloc nations.

In performing its mission, OFAC relies principally on the President's broad powers under the Trading With the Enemy Act (TWEA), 50 U.S.C. App. 5(b), and the International Emergency Economic Powers Act (IEEPA),

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50 U.S.C. §§ 1701-1711, to prohibit or regulate commercial or financial transactions involving specific foreign countries. These powers are employed in two principal ways.

First, they are used to freeze, or block, foreign assets by prohibiting transfers of those assets which are located in the United States or in the possession or control of U.S. persons. Second, the powers are used to impose economic sanctions against the designated nations, including prohibitions on financial transactions (such as bank lending), imports, exports, travel transactions, or any other transactions of an economic nature whatsoever. These embargoes may be either selective, prohibiting a specific class of economic transactions such as transactions with the government of the target country, or they may be comprehensive, prohibiting all unlicensed economic transactions involving the designated country or its nationals, as in the case of the Cuban embargo.

The embargo, as it existed before the Cuban Democracy Act (CDA), was promulgated under the Trading With the Enemy Act. Prior to the CDA there were four narrow exceptions permitting transactions with Cuba. Other than these four exceptions, all commercial, financial, and trade relations were prohibited by all persons subject to U.S. jurisdiction, which includes U.S. citizens and permanent residents, wherever they are located, all people and organizations physically located in the United States, and all branches and subsidiaries of U.S. organizations throughout the world.

The four exceptions to the embargo made provision for: (a) limited remittances to close relatives residing in Cuba; (b) limited travel-related transactions; (c) the export and import of informational materials; and, (d) trade by foreign subsidiaries of U.S. firms. The focus of this symposium is the last of these — trade by foreign subsidiaries of U.S. firms — an exception which was eliminated by the CDA.

From the inception of the Cuban embargo in July 1963 until October 1975, the CACR restricted trade transactions by foreign subsidiaries of U.S. firms with Cuba. However, in the mid-1970s, because of protests from foreign subsidiaries of U.S. firms coupled with diplomatic protests and a softened stand by the Organization of American States, which had formerly supported the embargo against Cuba, Treasury amended the CACR to allow the issuance of specific licenses for certain kinds of foreign subsidiary trade with Cuba, pursuant to section 515.559. The key requirements to obtain such a license were that:

> a. The transactions must have been by a U.S. subsidiary, defined as a foreign-incorporated firm operating in a third country with a separate foreign legal personality.
> b. No U.S. goods or technology or dollar accounts or dollar financing could have been involved.

c. No person within the United States could have been involved; the subsidiary must have acted on its own and have conducted the transaction completely offshore.
d. The subsidiary must have been generally independent of the U.S.-based parent firm in the conduct of transactions of the type for which the license was sought in such matters as decision-making, risk-taking, negotiation, financing, or performance.
e. The law or policy of the country in which the subsidiary was incorporated must have required or favored trade with Cuba.

Section 6005(a) of the CDA now prohibits the issuance of licenses that would have been granted pursuant to section 515.559 of the CACR. This prohibition is generally referred to as the "Mack Amendment," in reference to its long-time sponsor, Senator Connie Mack of Florida. The CDA does recognize contract sanctity, however. There is a clause providing that the Mack Amendment "shall not affect" contracts entered into before the date of the law's enactment. OFAC has the discretion to issue licenses where the foreign subsidiaries are bound to perform because of a contract entered into prior to October 23, 1992, the date the CDA became law.

As you know, the governments of Canada and the UK have issued blocking orders, as they promised they would do, when the Mack Amendment was being debated in Congress. These orders prohibit companies organized under the laws of the respective countries from complying with U.S. law with regard to prohibitions on trade with Cuba. In addition, the Canadian order requires Canadian companies to report any instruction, directive, or advice it receives from its parent corporation concerning trade with Cuba to the Canadian government.

Prior to the CDA, our office issued about 245 subsidiary trade licenses annually. This does not mean that 245 different companies received licenses, as some companies applied for several licenses within a year. The procedure for obtaining a license required the parent firm to make the application on behalf of its foreign subsidiary. The administrative processing of the application by the parent firm was not considered to be involvement of the parent in the transaction itself. As long as the transaction conformed to the provisions set forth in section 515.599 of the CACR, the license was granted.

While tightening the sanctions on Cuba on the one hand, the CDA also includes several provisions under the category of "support to the Cuban people." Two of these have significance for companies, because they are the only areas in which we can issue licenses to them or their foreign subsidiaries to trade with Cuba. These provisions deal with the establishment of telecommunications between the United States and Cuba and the exportation of medicines and medical supplies to Cuba. The latter will be discussed first.

Under section 6004(c) of the CDA, exports of medicines and medical

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supplies are allowed, subject to certain licensing requirements. Subsection (d)(2) of section 1705 requires the U.S. Government to specifically license exports of medicines and medical supplies when certain provisions are met. Both commercial sales and humanitarian donations can be licensed. For donations to non-governmental organizations, the following four provisions must be met:

a. the item(s) being donated would be permitted under section 203(b)(2) of the International Emergency Economic Powers Act ("IEEPA"), which restricts the misuse of such donations;
b. there is a reasonable likelihood that the item(s) to be exported will not be used for torture or human rights abuses;
c. there is a reasonable likelihood that the item(s) to be exported will not be re-exported;
d. the item(s) to be exported could not be used in the production of any biotechnological product.

Commercial shipments of medicine and medical supplies to Cuba, in addition to satisfying the four requirements listed above, must also satisfy a requirement in the law calling for onsite verification that the exported goods will be used for the purpose for which they were exported, and that they will be used for the benefit of the Cuban people.

To the best of my knowledge, the commercial medical sales licensed to date have been sales made by foreign subsidiaries. The provision for onsite verification would be especially difficult to arrange in connection with a sale from a direct U.S. company. Furthermore, the foreign subsidiaries that have had licenses to sell medicines and medical supplies to Cuba prior to the CDA appear to have established relationships with Cuban buyers during those years, which may make it easier for the Cubans to return to the subsidiaries rather than seek out a direct U.S. company.

I found the HOMETECH hypothetical problem very interesting. It does indeed mirror some of the fact situations presented by real companies in telephone inquiries OFAC receives. There have been a large number of inquiries about the CDA prohibitions. Few of the callers are seeking information on how to obtain a license. This may be for two reasons. First, the language in subsidiary licensing prohibition is specific. It does not leave room for legal interpretation as some other sections of the law may. OFAC simply may not issue licenses pursuant to section 515.559 of the CACR unless there is a contract entered into before the CDA's effective date. The second reason may be that Cuba's total trade with U.S. foreign subsidiaries was beginning to fall in 1992. The total licensed trade (exports and imports) hit a historical peak of $718 million in 1991. The 1992 dollar total by the time the CDA was enacted was about $400 million with a large portion of that number representing purchases of Cuban sugar rather than sales of goods to Cuba.

Some of the inquiries we have received have focused on whether the foreign subsidiary is a "person subject to the jurisdiction of the United States" as defined in the CACR, and, thus, subject to the prohibitions of the CDA. In order to make this determination, we must be furnished information concerning the organization and management of the company, similar to the information provided in the HOMETECH INDUSTRIES hypothetical problem, and we make a determination on a case-by-case basis.