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Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation

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Exempting Food and Agriculture Products from U.S. Economic Sanctions: Status and Implementation

SUMMARY

Falling agricultural exports and declining commodity prices led farm groups and agribusiness firms to urge the 106th Congress to pass legislation exempting foods and agricultural commodities from U.S. economic sanctions against certain countries. In completing action on the FY2001 agriculture appropriations bill, Congress codified the lifting of unilateral sanctions on commercial sales of food, agricultural commodities, medicine, and medical products to Iran, Libya, North Korea, and Sudan, and extended this policy to apply to Cuba (Title IX of H.R. 5426, as enacted by P.L. 106-387; Trade Sanctions Reform and Export Enhancement Act of 2000, or TSRA). Other provisions place financing and licensing conditions on sales to these countries. Those that apply to Cuba, though, are permanent and more restrictive. TSRA also gives Congress the authority in the future to veto a President's proposal to impose a sanction on the sale of agricultural or medical products.

Codifying the food and medical sales exemption for Cuba generated controversy and delayed passage of the FY2001 agriculture spending bill. Exemption proponents argued that prohibiting sales to Cuba harmed the U.S. agricultural sector, and that opening up limited trade would be one way to pursue a "constructive engagement" policy. Opponents countered that an exemption would undercut a U.S. policy designed to pressure the Castro government to make political and economic reforms. Though top Cuban officials initially stated that no purchases would be made with TSRA's conditions in place, food stock losses caused by a hurricane and an apparent shift in Cuban strategy have led to $598 million in cash purchases by Cuba of U.S. farm commodities and food products from December 2001 through May 2004. Agricultural sales to Iran, Libya, and Sudan under TSRA to date total $153 million.

The interim rules issued to implement TSRA by the Department of Commerce's Bureau of Industry and Security allow for the commercial sale of eligible agricultural products to Cuba without an export license if other federal agencies do not object within 11 days. Related regulations issued by the Department of Treasury's Office of Foreign Assets Control still require an export license for agricultural product sales to Iran and Sudan.

Congressional opponents of TSRA's prohibitions on the private U.S. financing of agricultural sales, public financing of eligible exports, and tourist travel to Cuba introduced bills and amendments in the 107th Congress to repeal these provisions. These legislative efforts to repeal or mitigate certain TSRA provisions failed. The Bush Administration has signaled that while sales will be allowed under TSRA, its policy is not to change any aspect of the embargo until political and economic reforms occur in Cuba.

Congressional opponents of these restrictions are pursuing similar initiatives in the 108th Congress. H.R. 187, H.R. 188, H.R. 1698, H.R. 3342, H.R. 4457/S. 2449, and S. 403 reflect some of these proposals. Conferees on the FY2004 agriculture spending bill (H.R. 2673) dropped a Senate provision that would have eased the process of securing permission to travel to Cuba to promote and sell U.S. agricultural products, in response to the President's advisors' threat they would recommend a veto if included. Those opposed to relaxing restrictions filed H.R. 3670 to penalize those who engage in sales-for-lobbying for Cuban objectives in Congress.

Most Recent Developments

The Bush Administration recently reiterated its opposition to any weakening of existing sanctions against the Cuban government. Its statement of administration policy (July 13, 2004) on the FY2005 agriculture appropriations bill (H.R. 4766) stated that if a provision to direct the U.S. Treasury to issue "general" licenses for travel to Cuba related to commercial sales of agricultural and medical products is included in the final bill presented to the President, he would veto the bill.

Background and Analysis

1999-2001 Changes in U.S. Policy Allowing Agricultural Sales to Sanctioned Countries

The Clinton Administration on April 28, 1999, announced it would lift prohibitions on U.S. commercial sales of most agricultural commodities and food products to three countries — Iran, Libya, and Sudan. Moreover, it indicated that it would not include these products in announcing future sanctions on other countries. The Administration's decision reflected its view that food should not be used as a foreign policy tool and officials' acknowledgment that U.S. sanctions policy had hurt the U.S. farm economy. On July 27, 1999, the U.S. Department of Treasury issued country-specific export licensing regulations to exempt commercial sales of food and medical products by U.S. companies that meet specified conditions and safeguards to Iran, Libya, and Sudan. Licenses are issued by the Treasury's Office of Foreign Assets Control (OFAC). Regulations issued June 19, 2000, to implement a White House decision announced in September 1999 now permit sales of agricultural products to North Korea without an export license. Licensed agricultural sales to Cuba under a policy announced in May 1999 were restricted only to private and non-governmental entities (but were broadened under a statutory change that went into effect in July 2001).

Since the Clinton Administration's policy went into effect, Treasury has approved licenses that have resulted in U.S. sales of corn to Iran, durum wheat to Libya, and hard red winter wheat to Sudan. Also, President Clinton, in issuing executive orders in 1999 to impose U.S. economic sanctions on Serbia and the Taliban in Afghanistan, specifically exempted commercial sales of food and medical products from prohibitions imposed on all U.S. exports to these destinations.

The Trade Sanctions Reform and Export Enhancement Act of 2000 (Title IX of H.R. 5426, as enacted by P.L. 106-387 on October 28, 2000; referred to below as TSRA) codified the lifting of U.S. sanctions on commercial sales of food, agricultural commodities, and medical products to Iran, Libya, North Korea, and Sudan, and extended this policy to apply to Cuba. Such sales are subject to export licensing procedures laid out in regulations. In a significant policy move, this act also gives Congress veto power over a President's proposal to impose a unilateral agricultural or medical sanction in the future. Separately, P.L. 107-56 (enacted October 26, 2001) explicitly made Taliban-controlled areas of Afghanistan subject to TSRA's export licensing requirements, and added other clarifications to the law.

During the 2000 Presidential campaign, George W. Bush stated that food and medical exports should be exempt from unilateral economic sanctions. In one response published in

Farm Journal, he indicated that "if sanctions are used, they should be directed at the offending government, not at innocent populations." A Bush spokesman on October 18, 2000, following passage of the agriculture spending bill, stated that his candidate opposed "changing the sanctions against Cuba until Fidel Castro or the Cuban government allow free elections, free speech and freedom for political prisoners." This position has been reaffirmed in subsequent statements made by President Bush and by top Administration officials in appearances before congressional committees.

Debate on Agricultural and Food Exports in U.S. Economic Sanctions Policy

Farm organizations, agricultural commodity associations, and agribusiness firms have favored changing U.S. policy to exempt export sales of agricultural commodities, food products, and agricultural inputs from the broad economic sanctions currently imposed on targeted countries. They argued that prohibitions only hurt U.S. farmers and business, undermine this country's reputation as a "reliable supplier," and do not change targeted countries' behavior. In recent years, these groups joined with firms in the pharmaceutical and manufacturing sectors to call for a comprehensive review of the economic impact of these sanctions and for limits on the executive branch's use of sanctions to restrict trade.

Opposition to exempting sales of agricultural commodities and food products from U.S. sanctions policy has been somewhat more diffuse. Opponents argued that current law gives the President sufficient flexibility to permit food to be shipped for humanitarian reasons, and that U.S. foodstuffs, if sold, could be misused by foreign governments or not made available to those in need. Some objected to the loosening of trade restrictions with certain countries, such as Cuba. Coming largely from the foreign policy and defense community, they viewed sanctions as a "legitimate and effective" policy tool, and drew little distinction between prohibiting sales of food and prohibiting exports of all other products.

Provisions Enacted in 2000 to Exempt Food and Medical Products from U.S. Economic Sanctions

Overview of TSRA. The most significant policy change made by the Trade Sanctions Reform and Export Enhancement Act of 2000 exempts commercial sales of agricultural and medical products to Cuba from the longstanding U.S. trade embargo on that country. At the same time, TSRA made permanent a prohibition on Cuba's access to U.S. private and other public financing to purchase exempted products. Though press coverage suggested that the debate was solely over a Cuba-specific measure, this act codified an exemption for sales of agricultural and medical products in the conduct of U.S. sanctions policy with respect to five countries and the terms under which this exemption operates. It further codified Clinton Administration policy (based on existing law) that prohibited making available U.S. government credits, credit guarantees, and other financial assistance to facilitate agricultural and medical product sales to certain sanctioned countries. Also, TSRA made changes to the food and medical products exemption-from-sanctions policy exercised administratively by the Executive Branch since mid-1999. This act (1) broadens the exemption to allow sales of non-food agricultural commodities and fertilizers, and (2) streamlines the process U.S. exporters follow to obtain licenses to sell exempted products to sanctioned countries.

The enacted exemption did not apply to Iraq, which until mid 2003 was subject to a multilateral sanctions regime to which the United States subscribed and which the United Nations implemented. Other TSRA provisions require the President to secure future congressional approval before he can impose for foreign policy or national security reasons a restriction or prohibition on the sale of agricultural and medical products, and limit the duration of any such approved sanction to not more than two years unless Congress approves an extension.

Status of Implementation. TSRA provisions with respect to countries currently subject to U.S. unilateral sanctions took effect on February 25, 2001. However, interagency differences between the Department of Commerce's Bureau of Industry and Security (BIS)[1] and Treasury's OFAC over how to interpret these provisions were not resolved until these were elevated for consideration and resolution by the White House's National Security Council. Both agencies issued their interim rules to reflect TSRA's statutory changes on July 12, 2001; these took effect on July 26, 2001. From August 2001 through May 2004, U.S. exporters have sold $751 million in agricultural products to Cuba, Iran, Libya, and Sudan under TSRA provisions. The $41 million in recorded agricultural exports to North Korea, and possibly some shipments to Sudan, likely were food donations and not commercial sales.

Extension of Food and Medical Exemption to Cuba. TSRA allows licensed commercial sales of agricultural and medical products to Cuba. This policy change reflects the new law's requirement that the President "terminate any unilateral agricultural sanction or unilateral medical sanction" 120 days after enactment. This provision effectively supersedes statutory provisions in the Cuban Liberty and Democratic Solidarity Act of 1996 (P.L. 104-114). That law codified the-then regulatory prohibitions on all U.S. export/import and other transactions under the comprehensive U.S. embargo imposed on Cuba beginning in the early 1960s. Under this embargo, commercial sales of U.S.-origin agricultural products (and medical products at times) to Cuba generally were prohibited. Separately, the Cuban Democracy Act of 1992 allowed some commercial sales of U.S. medical products to Cuba, but under tight conditions.

Though the Clinton Administration announced sanctions policy changes in 1999 and in 2000 to allow sales of agricultural and medical products to Iran, Libya, Sudan, and North Korea, it did not have legal authority to do the same with respect to Cuba. This explains why most of the congressional debate leading up to TSRA's passage revolved around whether this same exemption should be statutorily extended to apply also to Cuba. As House debate and a compromise unfolded in early summer 2000, those opposed to this opening in trade with Cuba succeeded in adding a number of Cuba-specific provisions.

Under TSRA, agricultural and medical sales to Cuba will be subject to various conditions and restrictions that are similar to those already in effect on similar product sales to the other sanctioned countries. U.S. exporters will be subject to an export licensing process before any product can be shipped. Further, a permanent prohibition is in place against the use of any U.S. government export program or financing provided by U.S. private banks or state and local governments to facilitate licensed sales.

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[1] Then known as the Bureau of Export Administration (BXA).

Debate on Proposed Regulations Governing Sales to Cuba. Members of the House who led the drive to exempt food and medical products from sanctions asserted that the draft regulations proposed by BXA and OFAC in early 2001 did not fully repeal the agricultural and medical sanctions in place with respect to Cuba. They challenged the Bush Administration's reported decision to retain restrictions on the sale of medicine to Cuba, arguing it would be contrary to their understanding of Section 903 of TSRA, which requires the President to terminate all medical product sanctions. In a letter to Treasury, these Members of Congress "strongly recommend[ed] that sales of medicine be permitted under the [Act's] liberalized framework" and emphasized the need to accommodate transactions related to permitted exports in the final regulations. The latter refers to their request that the new regulations include a waiver of the current legal restriction that prohibits any ship that docks in a Cuban port from entering a U.S. port for six months. Opponents of sales to Cuba, though, urged Administration officials to take a restrictive approach towards Cuba in finalizing the regulations.

Cuba-Related Regulations Issued. BIS's interim rules continue pre-2001 policy that requires medical product exports to Cuba be licensed, establish an expedited process for handling agricultural product sales to Cuba, and waive the restriction on the direct shipment of eligible products now permitted to be sold to Cuba.

Codification of Food/Medical Exemption. TSRA enacts as U.S. policy the principle that commercial sales of food, other agricultural products, medicine, and other medical products shall not be used as a tool to conduct foreign policy or to address national security objectives (see "Definition of Products Covered by Exemption"). This law stipulates that this principle apply to all countries now subject to U.S. unilateral sanctions; and require that a President in the future justify to Congress why sales of these products to a sanctioned country or foreign entity should be limited, and obtain congressional approval before taking such action. Limits on agricultural sales are defined to be "any prohibition, restriction, or condition on carrying out...any commercial export sale of agricultural commodities" or on using any U.S. Department of Agriculture (USDA) program authorized under 4 specified statutes or any U.S. government export financing ("including credits or credit guarantees") to facilitate such sales. For medical product sales, such limits are defined to be "any prohibition, restriction, or condition on exports of, or the provision of assistance consisting of, medicine or a medical device."

In immediate and practical terms, TSRA: (1) codified earlier Clinton Administration decisions to allow agricultural and medical product sales to four countries (Iran, Libya, North Korea, and Sudan) and (2) amended the laws and related regulations authorizing the U.S. embargo on Cuba to allow commercial sales of agricultural and medical products.

Exceptions to Exemption. TSRA provides four exceptions to this general principle. These are when the United States acts against a foreign country or entity to impose a sanction that includes these products pursuant to (1) its involvement in a multilateral sanctions regime or a mandatory decision of the United Nations Security Council; (2) a declaration of war, or specific statutory authorization for the use, or the imminent or actual involvement in hostilities, of U.S. armed forces; and (3) its export control to prevent potential military use under the Arms Export Control Act, the Export Administration Act, or other authority. President Bush tapped this exception authority in issuing Executive Order 13224 (September 23, 2001) to prohibit transactions with designated terrorists and their supporters. Section 4 states the determination that TSRA shall not affect the imposition or continuation of any unilateral agricultural or medical sanction on any individual or entity "determined to be subject to this order because imminent involvement of [U.S.] Armed Forces ... in hostilities is clearly indicated by the circumstances."

Export Licensing Requirement. Under TSRA's exemption, exports of agricultural and medical products to governments and other entities in sanctioned countries are allowed only under an approved export license. Section 906(a)(1) requires that this export licensing requirement apply to sales to those countries that the Secretary of State (exercising authority under three cited statutes) has determined "have repeatedly provided support for acts of international terrorism." In practice, this means that sales of eligible products to governments of countries currently so designated (Cuba, Iran, and Sudan), or to any other entity in each of these countries, must be licensed before any shipment can be made. Though the Secretary of State has determined that the governments of North Korea and Syria also are sponsors of international terrorism, Section 906(a)(2) explicitly states that the license requirement does not apply to sales to these two countries. The Secretary has discretion to drop this licensing requirement for Iran, Libya, and Sudan if the determination is made that its government no longer supports international terrorism.[2] No such discretion is permitted for Cuba, meaning this licensing requirement is made permanent for eligible sales to Cuba.

Relevant provisions in the act seek to streamline and simplify the type of license an exporter must obtain to sell permitted products to sanctioned countries. These address concerns expressed by U.S. agricultural exporters that the Treasury regulations governing the licensing of agricultural sales to Iran, Libya, and Sudan had been cumbersome and time consuming. Differences between the pre-2001 licensing rules and the relevant enacted provisions that modify the earlier rules are described below.

Previous Licensing Rules. For countries covered by the Clinton Administration's 1999 food and medical exemption policy (**Iran, Libya and Sudan**), the Department of Treasury's OFAC issued two types of export licenses — **general** and **specific**. The type required, and the relevant conditions and procedures that apply to each, depended on the nature of the product the exporter wanted to sell, the end user of the proposed sale, the details of the terms of a sales contract, the date of contract performance, and on how the sale would be paid for (see "Payment and Financing Terms of Exempted Sales" for important related conditions). A **general license** authorizes certain transactions without the need for an exporter to file an application providing all the details of each individual transaction. A **specific license** is issued on a case-by-case basis to an individual or company allowing an activity or transaction to take place.

OFAC's food exemption regulations set up two different procedures for obtaining licenses, depending on the product to be sold. The conditions that an exporter must meet varied according to which procedure is followed. An expedited licensing process applied to

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[2] In practice, the State Department under these statutes has rarely changed, or reversed, a "sponsor of international terrorism" determination made with respect to a foreign government. With the easing of most U.S. sanctions on Libya announced in April 2004, U.S. exporters of agricultural products do not need to secure licenses to sell to this country, even though it remains designated as a sponsor of state terrorism.

prospective sales of specified *bulk agricultural commodities*. A "specific license" authorized an exporter to enter into "executory contracts" (i.e., respond to requests for bids, enter into binding contracts, and perform against contract terms), and covered transactions over a specified time period. Certain conditions had to be met to obtain this license. For sales of all other *food products, medicines and medical equipment*, OFAC used a two-step licensing procedure to review each contract on a case-by-case basis. First, an exporter had to obtain a "general license" to enter into an executory contract that made performance contingent upon prior approval by OFAC, disclose all parties with an interest in the sale, and lay out all terms of the sale. Second, the exporter had to apply for a "specific license" permitting performance of the executory contract before the sale can be completed. OFAC issued these regulations under the authority of the Export Administration Act of 1979 (as extended) that requires a "validated license" to export any good to a country determined to be a sponsor of international terrorism.

For **Cuba**, Commerce's BIS administers different licensing rules applicable to shipments of eligible food and agricultural commodities, farm inputs, and medical products. Though various statutes and regulations prohibit most exports of U.S. origin to Cuba, there are some exceptions.[3]

TSRA's Changes to Licensing Rules. Section 906(a) of TSRA allows sales of exempted agricultural and medical products to sanctioned countries on terms that are less restrictive than under previous policy (see above). The law stipulates that such exports "shall only be made pursuant to one-year licenses ... for contracts entered into during the one-year period of the license and shipped within the 12-month period beginning on the date of the signing of the contract" and that "such one-year licenses shall be no more restrictive than license exceptions administered by the Department of Commerce or general licenses administered by the Department of Treasury." The wording's intent appears to require BIS and OFAC to consider license applications on a streamlined and less conditioned basis rather than on the present case-by-case and highly regulated basis. In other words, the aim is to move away from a complex and time consuming process that may require an exporter to walk through a multiple step process to seek approval for the several transactions involved

[3] Three exceptions until July 26, 2001, when TSRA took effect, allowed for the donation and sale of food and agricultural products only to individuals, eligible nongovernmental entities, and private businesses. First, regulations allow U.S. individuals to ship gift parcels of food, seeds, veterinary medicines and supplies, among other specified items, to individuals in Cuba without a license. Eligible U.S. charitable organizations with an established record in delivering humanitarian donations may also export food without license to non-government entities in Cuba. Second, BIS regulations require a **specific** export license to ship donated food (among five other permitted categories) for humanitarian purposes to eligible beneficiaries in Cuba. Third, President Clinton announced on January 5, 1999, that U.S. policy will now allow "the sale of food and agricultural inputs to independent non-governmental entities, including religious groups and Cuba's emerging private sector." BXA's final rule issued on May 13, 1999, authorizes **specific** export licenses for each sale of permitted products to these recipients in Cuba and spells the procedures permitted to transport such exports. Regulations specifically prohibit financing for such sales. The underlying rationale for these limited exceptions as set out in statute or regulation was to ensure that the Cuban government, operating through its import entities, did not receive any financial benefit from agricultural or medical products that it imports directly from the United States or from a U.S. firm operating in a third country.

in completing one sale. The new law removes executive branch discretion in determining the time period that applies to transactions covered by an export license, by placing a defined time parameter on the period during which an approved license covers eligible product transactions. One related provision is intended to ensure that other licensing conditions and procedures cover multiple types of transactions (e.g., an exporter submits one application providing the information required for all of the sales transactions covered by a license). Another requires that regulations must ensure procedures that will deny licenses for exports to any entity, or "end user," within an affected country that promotes international terrorism.

Debate over Proposed Licensing Regulations. BXA and OFAC had in early 2001 drafted licensing rules to implement the new law's exemption. These, reportedly, differed in some key respects. BXA proposed for the countries under its jurisdiction (Cuba, North Korea, and Syria) an "arrangement" to allow companies during a one-year period to export eligible products without the need to secure an individual license for each shipment. BXA reportedly would grant a "license exception" if a company agrees to monitor sales of eligible products using a prescribed set of parameters. Under this exception, sales would still be subject to a government audit. OFAC proposed for all affected countries (Cuba, Iran, Libya, North Korea, Sudan, and Syria) a case-by-case licensing system that includes end use verification. Its proposal was similar to rules already in effect for Iran, Libya, and Sudan. This two-step licensing process would involve first approving a license to allow an exporter to enter into negotiations to make sales, and then issuing another license to cover actual shipments. The reported differences in these draft regulations reflected conflicting views on how to interpret TSRA's provisions as well as language that some observers suggested was unclear and contradictory. As these differences became known during February 2001, Members of Congress and key interest groups weighed in with their views.

Regulations Published. BIS's rule allows for the sale of eligible agricultural products to Cuba without an export license (subject, though, to a review of a written contract) if other federal agencies do not object within 11 days. In other words, BIS will administer a licensing exception with respect to only those products that are covered by the regulation's definitions of agricultural and medical products. OFAC's rule requires an exporter to obtain a one-year export license for sales of agricultural and medical sales to Iran and Sudan. If a reviewing agency objects within 11 days, the license application is denied; if a "concern" is raised, OFAC has 30 more days to review the license request. Under the Bush Administration's Libyan sanctions policy change announced April 23, 2004, U.S. exports to Libya no longer require an export license.

Some agricultural exporters have since expressed concern that the requirement to have OFAC check each time that the end user (e.g., buyer) in Iran and Sudan is not involved in promoting international terrorism slows down the licensing process. They have urged that OFAC change its rules to reflect the more flexible licensing system implemented under Clinton's 1999 executive order.

Payment and Financing Terms of Exempted Sales. U.S. policy seeks to ensure that sanctioned countries do not receive any financial benefit from permitted, or licensed, transactions. It also prohibits such countries from accessing bank accounts and other assets that their governments, or organizations or firms in these countries, hold in the United States. The new law does not change current policy, meaning that U.S. banks cannot offer trade financing to facilitate export sales of exempted products to such countries. With respect to

Cuba, TSRA codifies two of the three types of financial transactions that OFAC regulations permit to facilitate licensed food and medical product sales to Iran and Sudan. Other provisions prohibit U.S. government support of such sales to all sanctioned countries (see "Prohibition on U.S. Government Assistance for Export Sales").

Current Prohibition and Restrictions. OFAC regulations specifically prohibit U.S. banks from extending financing to countries subject to U.S. unilateral economic sanctions. This policy is reflected in the current payment and financing rules that apply to licensed sales of agricultural and medical products to Iran and Sudan laid out initially by Clinton Administration policy, and to Cuba under embargo regulations. With respect to the first two countries, OFAC regulations allow only for payment of cash in advance to be made to the U.S. seller for a sanctioned country's purchase of exempted products. The two permitted trade financing, or credit, terms are (1) sales on open account[4] with certain limitations, and (2) financing by third country banks that are neither an overseas office of a U.S. bank nor entities of the governments of these three countries.[5] U.S. banks are permitted to advise or confirm letters of credit[6] issued by third country banks, but are prohibited from providing any trade financing. An exporter must obtain a general license from OFAC for each of these payment or credit terms. OFAC also will consider an application from U.S. banks for a specific license to participate in financing sales on a case-by-case basis, where such financing arrangements would not undermine overall compliance with U.S. sanctions.

Prohibition on U.S. Financing of Agricultural Sales to Cuba. Section 908(b) of TSRA prohibits the financing of agricultural sales "to Cuba or any person in Cuba" by U.S. banks, any state or local government, the federal government, or any other U.S. private person or entity. This prohibition effectively codifies a provision in the Cuban embargo regulations (31 CFR 515.533(f)) that does not allow trade financing for the commercial sale of food or agricultural commodities to non-governmental entities in Cuba that BIS is authorized to license under a 1999 policy change. TSRA language stipulates that licensed sales can occur only on a cash-in-advance basis, or if financed by a third country bank. In codifying this financing prohibition, the Executive Branch no longer has discretion to revise the financing rules should it determine the nature of the U.S.-Cuban relationship is changing. In practical terms, this financing policy treats Cuba no different than other sanctioned countries under pre-2001 regulations with respect to licensed sales.

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[4] Sales on open account refers to a transaction in which goods are released to a buyer prior to payment, or a promise of payment. Because the exporter bears all the risk of non-payment by the buyer, this type of transaction requires a high level of established trust between both parties. An exporter, however, may view sales on these terms as providing entry to a potential market that outweighs such risk. Such terms allow a buyer to delay payment until the imported products have been examined.

[5] An example of third country financing would be a French bank providing trade finance for a U.S. exporter's sale of wheat to Iran. This bank must not be an affiliate of a U.S. bank nor of any Iranian state financial institution.

[6] A *letter of credit* (L/C) is used when the importer/buyer's ability to pay is uncertain, or when the exporter/seller needs it to obtain financing. A L/C gives the buyer the financial backing of an issuing bank, which makes payment within a specified time period to the seller via the seller's bank upon presentation of certain documents (e.g., those that reflect the carrying out of a sales contract's terms).

Prohibition on U.S. Private Financing of Licensed Exports to Other Countries. Though the issue of prohibiting any U.S. private financing of agricultural exports to Cuba received much attention during the legislative debate, none of TSRA's provisions require any change in OFAC regulations that prohibit U.S. private financing of agricultural and medical product sales to Iran and Sudan.[7] With respect to these two countries, OFAC will continue to implement its current policy prohibiting U.S. private financing of licensed sales. Though some thought that TSRA would allow these countries to take advantage of U.S. private financing despite the statutory prohibition imposed on Cuba, no provision in the act explicitly addressed this issue in a way that would require a change to be made to existing regulations. Members supportive of the financing exemption argued that since Congress did not place in the law any restrictions on commercial financing for these three countries, new administrative regulations should not include restrictions that run counter to the congressional intent to eliminate sanctions on those tools (e.g., credit) that can facilitate eligible commercial sales. OFAC's reported view was that since the thrust of U.S. policy is to restrict currency flows to sanctioned countries, it would be burdensome to set up a mechanism to allow for the financing of agricultural and medical product sales, and thus better not to permit it.

Prohibition on U.S. Government Assistance for Export Sales. Section 908(a) of TSRA prohibits making available any U.S. government assistance (including foreign aid, credit or guarantees, and export assistance) "for exports to Cuba or for commercial exports to Iran, Libya, North Korea, or Sudan." Wording grants the President authority to waive this prohibition for humanitarian reasons, or if he determines it is in the national interest to do so with respect to Iran, Libya, North Korea, and Sudan. This waiver authority does not extend to Cuba. Statutory wording further differentiates among the 5 above-cited countries by applying this prohibition on all exports (and not just commercial exports) to Cuba. Clarifying language also stipulates that this U.S. government assistance prohibition does not "alter, modify, or otherwise affect" certain provisions of the Cuban Liberty and Democratic Solidarity Act of 1996 that authorize the President "to furnish assistance and provide other support for individuals and independent nongovernmental organizations to support democracy-building efforts for Cuba" and that require the President to "take all necessary steps to ensure that no funds or other assistance is provided to the Cuban Government."

In the regulations issued, the Bush Administration chose not to exercise Presidential waiver authority on this issue. Although some Members of Congress in 1999 and 2000 urged that credit guarantees be made available to facilitate agricultural sales to Iran, U.S. policy (reaffirmed by TSRA) is not to extend any government assistance in support of permitted commercial sales to a sanctioned country listed as a sponsor of international terrorism. This position is primarily based on the statutory prohibition found in Section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), which TSRA reaffirms.

Definition of Products Covered by Exemption. Compared to OFAC's 1999 policy, TSRA broadens the types of *agricultural products* covered by the enacted exemption (Sections 775 and 902(1)). Such products are defined to include "any agricultural commodity, food, feed, fiber, or livestock," and any derived product. Livestock is defined

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[7] Under the Bush Administration's Libyan sanctions policy change announced April 23, 2004, TSRA requirements no longer apply with respect to how sales of agricultural and medical products are to be paid for.

to include "cattle, sheep, goats, swine, poultry (including egg-producing poultry), equine animals used for food or in the production of food, fish used for food, ... other animals designated" by the Secretary of Agriculture, and insects. Conferees on October 5, 2000, accepted an amendment that added "fertilizer" and "organic fertilizer" to the definition of an agricultural commodity. Exports of these inputs are allowed, unless subject to export control under other specified statutes. Section 902(4) and (5) defines *medicine* and *medical devices* referring to terms used in statutes administered by the Food and Drug Administration.

Treasury regulations followed to implement the Clinton Administration's 1999 policy governing sales to Iran, Libya, and Sudan listed the bulk agricultural commodities and some food products eligible to be licensed. OFAC's list encompassed most of the products covered by the 2000-enacted definition, but did not allow for sales of non-food commodities like cotton (a fiber), tobacco, and wood products. Treasury's stated rationale for excluding these non-food commodities was that they could be used for military purposes. OFAC's regulations did not detail the other food products nor specify any medical product that could be sold, and thus required an exporter to apply for a license to ascertain whether a product could be sold. Concern about the use of fertilizer and agri-chemicals for military purposes was reflected also in OFAC regulations, which did not allow sales of these items (including insecticides and pesticides) as agricultural products to sanctioned countries.

Definitions in TSRA Regulations. Both BIS and OFAC agreed upon common definitions for agricultural and medical products in implementing their respective new export licensing exceptions and requirements. Based on the statutory language, the rules spell out that agricultural commodities include food commodities, feed, fish, shellfish and fish products; beer, wine, and spirits; soft drinks; livestock; fiber, including cotton, wool, and other fibers; tobacco and tobacco products; wood and wood products, including lumber and utility poles; seeds for food; reproductive materials such as fertilized eggs, embryos and semen; vitamins and minerals; food additives and supplements; and bottled drinking water. This definition also includes fertilizers and organic fertilizers, but *excludes* furniture made from wood; clothing manufactured from plant or animal materials; agricultural equipment (whether hand tools or motorized equipment); pesticides, insecticides, or herbicides; and cosmetics (unless derived entirely from plant materials). Both agencies require sales of 3 products to meet stringent export control rules: fertilizer, western red cedar, and live horses.

Congressional Role in Future Sanctions on Exempted Products. TSRA, in effect, gives Congress veto power over a President's proposal to impose a unilateral agricultural or medical sanction in the future. Section 903(a) requires a President to first secure congressional approval before he can restrict or prohibit the sale of agricultural and medical products on a targeted country for foreign policy or national security reasons. It requires the President report to Congress not later than 60 days *before* he plans to impose a sanction, describing the proposed sanction and the activities by the foreign country or entity that justify the sanction. Section 904 specifies that the requirement for the President to report to Congress on a proposed sanction does not apply when the United States is at war or involved militarily against a target country, when the sanctioned product is controlled under specified export control laws or could be used to facilitate the development or production of a chemical, biological, or nuclear weapon, or when it is imposed as part of a multilateral sanctions regime or a mandatory decision of the United Nations Security Council. Section 905 provides that any unilateral agricultural or medical sanction approved by Congress (described above) automatically ends not later than two years after it goes into effect. The President may request that Congress extend the sanction for another two years.

Sales to Cuba under TSRA's Policy

Though sales to Iran, Libya, and Sudan under the Clinton Administration's 1999 exemption policy were small relative to their total agricultural imports, U.S. farmers, commodity groups, and agribusiness eyed Cuba as a promising market. Calling for a broadening of U.S. policy to also exempt food from sanctions in Cuba, they argued that U.S. agriculture had lost out to foreign competitors in making sales to a sizable, nearby market.

Cuban agricultural imports have averaged about $750 million annually in the late 1990s. Leading commodities imported were wheat, rice, lentils, flour, and corn. Food and agricultural imports represented 18% of total Cuban merchandise imports, and have declined as a share of total imports since the early 1990s. Top suppliers were France, Argentina, Canada, Spain, and China, which accounted for some two-thirds of Cuba's food imports. In addition, Cuba's tourism industry reportedly imports an additional $100 to $250 million in food products to cover the needs of visiting tourists.

U.S. agricultural interests argued that exempting agricultural exports from the U.S. embargo on Cuba would result in an opening that yields substantial sales. Various studies projected annual sales could range from $100 million to over $1 billion, depending on the time frame looked at and the extent of liberalization that occurred in U.S.-Cuban trade. These interests also held that such a policy change will give U.S. exporters (particularly of rice and wheat) a competitive edge if Cuba takes advantage of its proximity to buy from its nearest supplier in order to save the cost of transporting commodities and food from its current suppliers (France, Canada, Argentina) located much farther away. Cuba reportedly could save up to $100 million in transportation costs if officials decided to buy primarily from U.S. agricultural exporters.

Expectations in 2000 of large immediate U.S. sales to the island were viewed as unrealistic, according to other analysts. Analysts pointed to Cuba's limited financial resources, its reliance on barter and credit transactions to finance agricultural imports, its denial of access to U.S. government programs and to all U.S. public and private financing, and the possible application of other restrictive rules under current embargo regulations that could hamper such sales. They also suggested that it was uncertain that Cuba would purchase from the United States, pointing out there may be pressure to maintain trade ties with some of its "socialist partners" supplying such key commodities as rice, as well as resistance to relying on just one single supplier. Some also observed that the Cuban government may not be prepared for or interested in taking advantage of this possible U.S. trade opening. Top Cuban officials, including Castro himself, initially rejected the enacted measure. They strongly criticized its financing, travel, and other prohibitions as "unworkable" and "insulting," viewing it as a tightening rather than an easing of the embargo, and stated that Cuba will not buy any U.S. product with such conditions in place.

Sales Activity to Date. Notwithstanding this position, the Cuban government on November 13, 2001, signaled interest in buying U.S. agricultural commodities to quickly rebuild food reserves damaged or lost due to the devastation caused by Hurricane Michelle. This move followed an earlier U.S. government offer of humanitarian assistance, to which Cuba responded on November 8 with a request that the United States temporarily suspend TSRA's licensing requirements to purchase foodstuffs and allow Cuban vessels to transport them from U.S. ports. The State Department agreed only to speed up the licensing process, and noted some problems might arise if Cuban ships were used.

Negotiations between several U.S. agribusiness firms and Alimport, Cuba's food import agency, in late November and early December 2001 led to the signing of contracts to sell U.S. wheat, corn, soybeans, soymeal, soyoil, poultry, and rice and other food products valued at $35 million. The first shipment of corn and poultry arrived in Havana on December 13, 2001. U.S. farm groups, agribusiness firms, and anti-embargo groups hailed these sales under the new sanctions policy, and hoped they would lead to additional sales and represent a symbolic beginning of a changing relationship, respectively. Though top Cuban officials initially stated these cash purchases were a one time event, this stance changed in the following months. Additional export sales occurred in spring 2002, and have since continued on a regular basis. Altogether, from December 2001 through May 2004, U.S. exporters have shipped to Cuba $598 million in agricultural and food products.

Developments in the 107th and 108th Congresses

107th Congress

Members introduced several bills and amendments in 2001 and 2002 to revise U.S. policy on how food products are handled in sanctions regimes. Most sought to repeal the export financing and travel prohibitions imposed on Cuba by TSRA; conferees dropped one such provision included in the Senate's 2002 farm bill.The Bush Administration continued to reiterate that any bills with provisions that relax the Cuban trade embargo will be vetoed. Two bills revisited the broader issue of the parameters and process to be followed to exempt agricultural sales in U.S. sanctions policy. Bush Administration's efforts to amend TSRA in light of the September 11th terrorist attacks were reflected in compromise language included in anti-terrorism legislation.

Cuba-Specific Bills and Provisions. Proposals varied in approach and in scope. H.R. 173 and Section 335 of S. 1731 (the Senate Agriculture Committee's farm bill) simply would have repealed the prohibition on private U.S. financing of agricultural sales to Cuba. Seven measures (Section 2(h) of H.R. 174; H.R. 797/S. 402; Section 3(f) of H.R. 798/S. 400; Titles I and II of H.R. 2138/S. 1017; Section 1(f) of H.R. 2662; S. 171; and S. 239) were broader in their coverage, proposing to drop 3 provisions in TSRA. These are (1) the requirement that eligible exports to Cuba be licensed in advance, (2) the prohibitions on U.S. government assistance/financing of food and medical product sales and on private financing of agricultural sales to Cuba, and (3) the prohibition on tourist travel to Cuba. Some bills would have repealed specific provisions; S. 239 broadly stated that irrespective of TSRA, "the prohibition or restriction on trade or financial transactions with Cuba shall not apply" to the export of agricultural and medical products, or to travel related to the sale or delivery of these products, to Cuba. Additional language found only in H.R. 797/ S. 402; H.R. 798/S. 400; and S. 239 effectively would have repealed the current restriction that ships entering Cuba cannot enter a U.S. port for six months. This would allow such vessels to transport U.S. agricultural and medical shipments to Cuba. Some bills would have retained restrictions or prohibitions on agricultural/medical product exports to Cuba to meet broader export control and national security objectives. In most of these bills, the referenced provisions were part of broader legislative efforts to modify or terminate some or all aspects of the U.S. embargo on Cuba. Among other recommendations offered to change U.S. policy toward Cuba, the bipartisan House Cuba Working Group on May 15, 2002, proposed (1) allowing the private financing of U.S. agricultural and medical exports, and (2) repealing the statutory ban on any ship that visits Cuba from calling on an American port for 180 days.

Debate on Farm Bill Provision. The Bush Administration "strongly opposed" the Senate-passed farm bill provision (Section 355 of S. 1731) that would have repealed the prohibition on private U.S. financing of U.S. sales of agricultural commodities to Cuba. The Administration based its stance on its view that Cuba continues to deny basic civil rights to its citizens and rejects global efforts to combat terrorism. Reflecting this perspective, Senator Smith during floor debate offered an amendment to require the President to certify to Congress that Cuba's government is not involved in supporting acts of international terrorism before the Cuba-specific prohibition is repealed. A second-degree amendment offered by Senator Torricelli to also require Presidential certification that all convicted felons living in Cuba have been returned to the United States before the prohibition is removed fell when the Senate on December 18, 2001 tabled the Smith amendment (61-33). The Senate provision was a contentious issue in the farm bill conference held to resolve differences with the House measure, which did not contain a comparable provision. With reports surfacing that the House leadership would make the final decision on this matter, Representative Dooley (one conferee from the House Agriculture Committee) on April 17, 2002, offered a motion to instruct House conferees to accept the Senate position. Following debate on the motion on April 18, the House on a roll call vote of 273-143 agreed to this motion to instruct (non-binding on conferees) on April 23. In final action, Senate conferees receded to the House position, meaning the prohibition remains in effect.

Amendment to FY2003 Treasury Appropriations Bill. Representative Jerry Moran on July 23, 2002, proposed an indirect approach to relax the prohibitions and stipulations on private commercial agricultural and medical product sales to Cuba. His amendment (Section 646 to H.R. 5120, FY2003 Treasury Appropriations), accepted by voice vote, would have effectively cut off funding for one year to Treasury's OFAC for administering only those tasks involving the private financing prohibition and current shipping restrictions, among other Cuban embargo regulations that apply to agricultural and medical product sales. It would not apply to TSRA's licensing requirements that cover agricultural sales to Cuba, because they are administered by Commerce's BIS which is not funded by the Treasury appropriations bill. Final action on this measure did not occur before Congress adjourned. In the 108th Congress, House and Senate leadership dropped last year's OFAC provision in H.J.Res. 2, the omnibus spending bill that also funds Treasury operations in FY2003, in sending this measure to the floor for action in January 2003.

Administration's Position. President Bush on May 20, 2002, in a major Cuba policy speech reiterated his opposition to any repeal of the prohibition on private financing of agricultural sales, stating it "would just be a foreign aid program in disguise, which would benefit the current regime." Bush stated he would veto legislation that relaxes the embargo in any way until the Cuban government introduced a series of specified reforms. Secretary of State Powell and Treasury Secretary O'Neill followed up in a July 11, 2002, letter to House appropriators to state they would recommend a presidential veto of any bill that eased restrictions on trade and travel to Cuba.

Bills Dealing with Other Sanctioned Countries. One measure seeking to amend TSRA was broader in the range of countries to be covered. S. 171 would have repealed the TSRA's prohibition on U.S. government assistance and financing of sales not just with respect to Cuba, but also with respect to Iran, Libya, North Korea, and Sudan. Focusing on just one country, H.R. 742 stipulated that U.S. restrictions and prohibitions imposed under the Iraq Sanctions Act of 1990 or other laws could not apply with respect to the export of food, agricultural commodities, and medical products, or to travel related to their sale or delivery, to Iraq.

Proposed Changes to Overall Food Sanctions' Exemption Policy. Three measures addressed broad U.S. policy on the issue of exempting agricultural exports from export control or sanctions regimes. Title IV of S. 149, as introduced, proposed to exempt agricultural commodities, medicine, and medical supplies from export controls imposed for foreign policy reasons. Language specified that this exemption would not apply to any such items subject to national security export controls imposed under Title II of this bill or listed on the U.S. Munitions List, nor to their export to a country against which an embargo is in effect under the Trading With the Enemy Act (Cuba and North Korea). During Senate Banking Committee markup on March 22, 2001, all of Title IV was deleted. Concerned the Executive Branch might exercise the bill's broad authorities in ways that undercut TSRA's intent to exempt food and medical products from unilateral sanctions, Senator Roberts succeeded in including language in a manager's amendment that addressed this issue. Section 603 (as adopted by the Senate in early September 2001) stated that S. 149 does not authorize export controls on food for national security purposes. It also stated that such controls cannot be used to restrict food exports for foreign policy reasons, unless Congress in advance approves such action following TSRA's provisions, and explicitly stated that nothing in S. 149 authorized the exercise of authority to restrict agricultural and medical product exports contrary to any TSRA provision.

Amendments to TSRA in Anti-Terrorism Legislation. The package of anti-terrorism measures (P.L. 107-56; H.R. 3162) signed into law on October 26, 2001 amended some TSRA provisions. The compromise struck between the Bush Administration and key Senators modified one circumstance under which TSRA's food/medical exemption would not apply, codified that agricultural and medical product sales to the Taliban-controlled area of Afghanistan are subject to TSRA's export licensing requirements that apply to Cuba and to governments of other countries determined to be sponsors of international terrorism, and expressly allows eligible export sales to be made also to any other entity in Syria or North Korea without the need for an exporter to secure a license. Other provisions stated that no TSRA provision limits the application of criminal or civil penalties on those who unlawfully engage in the export of agricultural and medical products to designated foreign organizations, groups, persons, or entities, nor affects the statutory prohibitions against providing material support or resources to designated foreign terrorist organizations.

108th Congress

Members have introduced seven measures, and offered an amendment to a spending bill, to amend TSRA's Cuba-applicable provisions. H.R. 187 would repeal TSRA's prohibition on the use of private financing for agricultural and medical product exports to Cuba. H.R. 188 and S. 403 are broader in scope, repealing the private financing prohibition, ban on travel, and licensing requirement provisions, among numerous provisions intended to end the U.S. trade embargo on Cuba. H.R. 1698 and H.R. 3422 would repeal or supersede all TSRA provisions that apply to Cuba, respectively. H.R. 4457/S. 2449 would terminate TSRA's restrictions with respect to Cuba (among other features of the U.S. embargo on Cuba) unless Congress passes a resolution to renew them. Opponents of liberalizing trade with Cuba introduced H.R. 3670 to penalize U.S. exporters and others who sell products or services to Cuba if such trade is explicitly conditioned on their lobbying Congress to remove trade and travel restrictions on Cuba. The bill's intent is to address a reported case of a U.S. farm organization agreeing in a memorandum of understanding to press Congress to engage with Cuba and to seek repeal of these restrictions in return for Cuban purchases of $15 million worth of agricultural products from Indiana-based businesses.[8]

Conferees on the FY2004 agriculture appropriations measure (H.R. 2673), part of the FY2004 omnibus spending package, in mid November 2003 dropped a Senate amendment (Section 760 of S. 1427) that would have facilitated the process of securing permission to travel to Cuba under TSRA's opening to promote and sell U.S. agricultural and medical products there. Added by voice vote on July 17, 2003 during Senate Appropriations Committee markup of the agriculture spending bill, Senator Dorgan's stated intent was to address such situations as OFAC's decision in June 2003 to deny the license application of a firm seeking to organize a food and agribusiness exhibition in Havana in January 2004. The White House opposed this provision, arguing that it would weaken current sanctions imposed against the Cuban government. Its position, laid out in its "Statement of Administration Policy" on S. 1427, is that "travel to Cuba should be further policed to ensure that those traveling [there] are doing so for legal purposes and not simply using legal categories to disguise travel for other purposes."

Also during the first session, other members indicated they planned to introduce later in 2003 related bills, or offer amendments, to amend TSRA to (1) allow farm machinery sales to Cuba on a cash-only basis, and (2) repeal U.S. travel restrictions (viewed by U.S. agricultural groups among others as a way for Cuba to generate dollar earnings to purchase U.S. food products). For background on legislative efforts to amend TSRA's restrictions on travel to Cuba, see Cuba Sanctions in the CRS Electronic Briefing Book on Trade.

These proposed changes reflect some of the recommendations made by those seeking a change in U.S. policy toward Cuba. The Cuba Policy Advisory Group of the Center for National Policy on January 23, 2003, issued recommendations for steps the United States should initiate immediately as part of beginning a "negotiated normalization" process with the Cuban government. These include, among others: streamlining or eliminating U.S. export licensing and reporting requirements, shipping restrictions, and other bureaucratic regulations to make it easier to sell food, medicine, and medical products to Cuba; expanding the types of products that may be sold to include agricultural equipment and supplies; and permitting private (but not public) financing for commercial transactions (e.g., food sales) now allowed on a cash-only basis. The House Cuba Working Group on March 10, 2003, reiterated its interest in expanding two-way trade with Cuba and ending the travel ban — its top priority. Members of the Group also are reportedly considering statutory changes to allow Cuba (1) to use U.S. dollars to complete cash purchases of U.S. food purchases (rather

[8] *Cuba Trader*, "House Members Seek to Punish Trade-for-Lobby Deals Between Cuba and U.S. Entities," December 8, 2003.

than incur currency exchange fees to pay U.S. exporters), and (2) to address the additional costs Cuba incurs as exports wait to be unloaded from ships until U.S. firms actually receive payment from the Cuban buyer.

Legislation

H.R. 187 (Serrano)

Amends the Trade Sanctions Reform and Export Enhancement Act of 2000 to allow for the financing of agricultural sales to Cuba. Introduced January 7, 2003.

H.R. 188 / S. 403 (Serrano / Baucus)

Cuba Reconciliation Act / United States-Cuba Trade Act of 2003. To lift the trade embargo on Cuba, and for other purposes. These similar measures include (1) Section 2(h) of **H.R. 188** — introduced January 7, 2003, which amends TSRA's Cuba-specific provisions; and (2) Section 3(f) of **S. 403** — introduced February 13, 2003, which similarly amends TSRA's Cuba-specific.

H.R. 1698 (Paul)

To lift the trade embargo on Cuba, and for other purposes. Section 1(f) repeals TSRA provisions that apply to Cuba. Introduced April 9, 2003.

H.R. 2673 (Bonilla)

FY2004 Agriculture , Rural Development, Food and Drug Administration, and Related Agencies Appropriations. Section 760, added as an amendment to S. 1427 during full Senate Appropriations Committee markup on July 17, 2003, requires the Secretary of Treasury to issue regulations under which travel-related transactions are authorized by general license for travel to, from, or within Cuba, for the purpose of conferring, exhibiting, marketing, planning, sales negotiation, delivery, expediting, facilitating, or servicing commercial export sale of agricultural and medical goods. Conferees dropped Section 760 of S. 1427 in the conference report on H.R. 2673 filed November 25 (H.Rept. 108-401).

H.R. 3422 (Serrano)

Bridges to the Cuban People Act of 2003. Section 101(c) ends TSRA's prohibitions and restrictions on trade and financial transactions with respect to Cuba. Section 103 requires USDA to study how agricultural export promotion and credit programs can promote the use of U.S. agricultural commodities in Cuba, and to report with recommendations, if any, on how these programs could be serve this objective. Introduced October 30, 2003.

H.R. 3670 (Deutsch)

Anti-Communist Cooperation Act of 2003. To amend the Internal Revenue Code of 1986 to impose a 100% tax on amounts received from trading with Cuba if the trading is conditioned explicitly or otherwise on lobbying Congress to lift trade or travel restrictions on Cuba. Introduced December 8, 2003.

H.R. 4457 / S. 2449 (Otter / Baucus)

Cuba Sanctions Reform Act of 2004. Provides for the expiration of trade and travel restrictions (including TSRA's prohibitions) imposed on Cuba unless renewed annually by a renewal resolution passed by both the House and Senate. H.R. 4457 introduced May 20, 2004. S. 2449 introduced May 19.