Do Proposed Changes in U.S./Cuba Trade Policies Signal Opportunities for the Coatings Industry?

By **Allen Irish**
American Coatings Association

Following the White House announcement of a significant change in longstanding U.S. policy on Cuba, the two primary agencies that govern trade and commercial relations with Cuba—the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) and the U.S. Department of Commerce's Bureau of Industry and Security (BIS) are acting to broadly facilitate commerce with Cuba. This article explores those changes, and details what they might mean for coatings manufacturers interested in the Cuban market.

BACKGROUND

Cuba has been subject to trade sanctions since the Kennedy administration. These are unilateral and comprehensive, have prohibited most exports and imports, and have generally precluded most interaction with Cuba by persons subject to U.S. jurisdiction, including travel and financial transactions.[1] This changed on December 17, 2014 when the White House announced a set of measures that it expects will put relations between the United States and Cuba on the track toward full normalization. There are a number of areas the administration addressed, including establishing diplomatic relations, removing some existing restrictions on travel, etc. A key element of the administration announcement includes the authorization of expanded commercial sales/exports from the United States of certain goods and services "to empower the nascent Cuban private sector." This expansion specifically includes "certain building materials for private residential construction, goods for use by private sector Cuban entrepreneurs, and agricultural equipment for small farmers."

The December announcement was followed by final rules issued by the the Office of Foreign Assets Control, and the Bureau of Industry and Security on January 16, 2015. These rules are intended to implement the policy changes previously announced by the White House.

OFAC REGULATORY CHANGES

Exports to Cuba by U.S. firms and their branches and subsidiaries have long been governed by the Cuban Assets Control Regulations administered by OFAC, in conjunction with the Export Administration Regulations (EAR) administered by BIS. These rules have generally prohibited trade with and travel to Cuba unless licensed or otherwise authorized by OFAC and/or BIS. Under the previous OFAC regulations,[2] all persons subject to U.S. jurisdiction, including branches and subsidiaries of U.S. companies, are prohibited from exporting to or importing from Cuba, or otherwise engaging in transactions involving Cuban interests, unless they are licensed by OFAC or authorized by BIS.

The new OFAC regulations[3] issued on January 16 facilitate travel to Cuba for authorized purposes, allow U.S. financial institutions to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions, authorize certain transactions with Cuban nationals located outside of Cuba, and allow a number of other activities related to, among other areas,

---

[1] In the case of Cuban regulations, U.S. persons (including U.S. citizens, permanent residents, and anyone physically present in the country, as well as U.S. corporations) are prohibited from engaging in any transactions with Cuba, its government, or specially designated nationals (SDN). U.S. persons must also review financial and commercial dealings and transactions and block or freeze assets in which a sanctioned country, government, or SDN has any interest, even if that asset or property is owned or controlled by someone else. These prohibitions apply not only to U.S. companies but also to foreign subsidiaries and other foreign companies owned or controlled by U.S. persons.

[2] Codified at 31 C.F.R. Part 515.

[3] The changes to the Cuban Assets Control Regulations are found at 80 Fed. Reg. 2291 (Jan. 16, 2015).

telecommunications, financial services, trade, and shipping.[4]

Travel restrictions for Cuba fall under the OFAC regulatory provisions. The newly announced regulations will significantly ease regulatory impediments to Cuba travel:

- OFAC has issued new general licenses for travel falling into 12 categories that previously were only permitted with a specific license. These changes include such things as professional research and professional meetings, along with exportation, importation, or transmission of information or information materials. What this means in practice is that if your travel falls under one of these categories, you do not need a license or other permission from OFAC. (Cuba does require a visa to travel there.)
- The limit on expenditures during travel to Cuba has been lifted, and authorized travelers will be allowed to engage in transactions ordinarily incident to travel within Cuba. This includes the use of U.S. credit and debit cards in Cuba.[5] The previously imposed per diem rate for authorized travelers will no longer apply, and there is no longer a specific dollar limit on authorized expenses.
- Authorized travelers may make arrangements through any service provider that complies with OFAC regulations governing travel services to Cuba.

OFAC has been very clear that this new authorization does not cover travel to Cuba for tourist activities. Those traveling to Cuba under this new general license should take care not to schedule clearly recreational activities, such as sightseeing or spending time at the beach. The rules also require that persons who use this general authorization retain specific records related to the authorized travel transactions.

These changes essentially mean that individuals who meet the conditions laid out in the regulations will not need to apply for a license to travel to Cuba.

BIS REGULATORY CHANGES

BIS has simultaneously issued regulations addressing the areas of Cuban trade normalization that fall under its purview.[6] The amendments to the Export Administration Regulations create a new category called "License Exception Support for the Cuban People (SCP)," which is intended "to authorize the export and reexport of certain items to Cuba that are intended to improve the living conditions of the Cuban people; support independent economic activity and strengthen civil society in Cuba; and improve the free flow of information to, from, and among the Cuban people." Among the products specifically included in this new export authorization are "building materials, equipment, and tools for use by the private sector to construct or renovate privately-owned buildings, including privately owned residences, businesses, places of worship, and buildings for private sector social or recreational use." The BIS regulation also includes a category of "goods for use by private sector entrepreneurs such as auto mechanics, barbers and hairstylists, and restaurateurs; and tools and equipment for private sector agricultural activity." Items eligible for export and reexport to Cuba pursuant to this provision are limited to those designated as EAR99 (i.e., items subject to the EAR but not specified in any Export Control Classification Number (ECCN), along with those controlled on the Commerce Control List (CCL) only for antiterrorism reasons.[7] Most coatings products would fall into the EAR99 category, rather than the CCL, which tends to focus on high-technology items.[8]

While the new rules do relax some existing regulatory barriers to trade normalization with Cuba, the existing restrictions imposed by Helms-Burton, the Trading with the Enemy Act of 1917, along with restrictions on trade with state sponsors of terrorism, etc., still remain in place.[9] Only Congress has authority to lift the trade embargo provisions codified in legislation; for example, by making significant amendments to the Helms-Burton Act. Helms-Burton itself requires a showing of "demonstrable progress" in returning property expropriated by the Cuban government as a prerequisite for lifting the U.S. embargo. The announcement of trade normalization did not suggest any agreement by the Cuban government to address the expropriation issue, nor does that appear likely to occur.

OTHER AGENCIES

The Automated Export System (AES) is a joint undertaking of Customs and Border Protection (CBP), the Foreign Trade Division of the Bureau of the Census (Commerce), the Bureau of Industry and Security (Commerce), the Directorate of Defense Trade Controls (State), and other federal agencies. It is the central point through which export shipment data

[4]OFAC has published a list of "frequently asked questions" on these changes at http://www.treasury.gov/resource center/sanctions/Programs/Documents/cuba_faqs_new.pdf.

[5]Travel-related transactions set forth in § 515.560(c) and such additional transactions as are "directly incident to the conduct of market research, commercial marketing, sales negotiation, accompanied delivery, or servicing in Cuba of items consistent with the export or reexport licensing policy of the Department of Commerce are authorized, *provided that the traveler's schedule of activities does not include free time or recreation in excess of that consistent with a full time schedule.*"

[6]The changes to the Export Administration Regulations are found at 80 Fed. Reg. 2286 (Jan. 16, 2015).

[7]A Destination Control Statement is required on an invoice, bill of lading, air waybill, or other export control documents that accompany shipments (unless classified as EAR99). This must state: "These commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited."

[8]The Commerce Department has also posted a fact sheet on this issue, which can be found at http://www.commerce.gov/news/fact-sheets/2015/01/15/fact-sheet-us-department-commerce-and-us-department-treasury-announcement.

[9]The President has instructed the Secretary of State to review Cuba's designation as a state sponsor of terrorism, which has been in place since 1982. The removal of this designation would result in the easing of a variety of additional sanctions and export restrictions against Cuba.

required by multiple agencies is filed electronically to Customs, using an Electronic Data Interchange (EDI) platform. AES has incorporated some changes to accommodate the change in trade policy with Cuba.

AES has created a new license type (C62) SCP for the reporting of certain items exported and re-exported to Cuba that are intended to improve the living conditions of the Cuban people; i.e., products falling under the new SCP provision. United States Principal Parties in Interest (USPPIs) and their authorized filing agents (AES filers) must follow the following new reporting requirements regardless of value when using C62. Among the requirements: users must report the country of destination and ultimate consignee country must show Cuba (CU). As noted, products exported under License Exception SCP must be either EAR99 or be controlled for AT reasons only.

POTENTIAL OPPORTUNITIES FOR THE COATINGS INDUSTRY

The intent of the new regulations from OFAC and BIS is to remove as many barriers as possible to trade and commercial relations with Cuba. The key point is the elimination of a licensing requirement: The OFAC General License does not require a license application and approval prior to export (but imposes certain conditions), and the new BIS license exceptions generally do not require a submission to BIS prior to export. This means in practice that businesses can travel to and export to Cuba (within the scope of these new parameters) without any pre-approval whatsoever.

In terms of the coatings industry itself, the inclusion of "building materials" clearly opens the doors to sales of paint, caulks, etc. Although BIS has not further elaborated on what products comprise "building materials," they have indicated that interested parties should look to the "plain meaning" of the term.[10] In addition, paint manufacturers may be able to take advantage of the other prong of the license exception, which is the provision covering "tools, equipment, supplies, and instruments for use by private sector entrepreneurs." This, particularly in light of the examples provided (e.g., auto mechanics), would appear to permit sales of such products as auto refinish coatings, along with tools and equipment, such as brushes and rollers, to private sector contractors. The other aspect that coatings manufacturers should be aware of is the restriction that such building materials are for use by the private sector to construct or renovate privately owned buildings, including privately owned residences, businesses, places of worship, and buildings for private sector social or recreational use."[11] Coatings manufacturers would be well advised to develop a means of documenting that the intended use for their products is in the private sector, rather than government-owned structures.

One key issue that firms should keep in mind is the restriction that such sales be restricted to the private sector. Given the pervasiveness of state-owned enterprises, this could be difficult to accomplish in practice. Finally, although the requirement of "cash in advance" has been somewhat liberalized, there is still a need to obtain payment before the transfer of title. Exporters can now ship to Cuba, but cannot sell on more typical credit terms, even with this new regulation. Note also that these changes would not appear to authorize direct investment in Cuba, so establishment of manufacturing in Cuba by a U.S. firm would not be allowed, nor would establishment of a retail establishment owned or operated by a U.S. entity. However, U.S. suppliers could potentially export to a Cuban entrepreneur manufacturing coatings under these new provisions.

STATE DEPARTMENT UPDATE

On February 13, the State Department posted its new "Section 515.582 List," which amends the existing ban on the importation of certain Cuban products in order to comport with other newly revised Cuba sanctions regulations designed to increase the flow of information and resources to Cuba's nascent private sector. This regulation now authorizes imports of certain goods and services produced by independent Cuban entrepreneurs. Persons from the United States importing goods or services under this new authority must obtain documentary evidence that demonstrates the entrepreneur's independent status, such as a copy of a license to be self employed issued by the Cuban government or evidence that demonstrates that the entrepreneur is a private entity that is not owned or controlled in whole or in part by the Cuban government. The new provisions, which are effective immediately, can be found at www.state.gov/e/eb/tfs/spi/cuba/515582/index.htm.

[10] In a recent public teleconference, BIS related to the participants that they had received an inquiry concerning the "exportation of raw materials to manufacture paints." The questioner asked, "Will [such raw materials] be allowed under the building materials prong of license exception SCP? That provision again states it authorizes the export of building materials, tools . . . to construct or renovate privately owned buildings." BIS answered as follows: "So based on the information in the question, we would not interpret raw materials used in the manufacture of paints to be building materials. But if the party who would manufacture the paint is a private-sector entrepreneur, the raw materials could be sent to that entrepreneur under paragraph (b)(3) of section 740.21, which is the license exception SCP." This exchange clearly suggests that BIS considers paint itself a building material.

[11] The private sector encompasses economic activity generated by private individuals and groups as enterprises for profit and also that which is generated by nonprofit organizations and charities. Companies and corporations that are government-owned, -operated, or -controlled are not considered private sector. Cuban government import agencies and other government owned, -operated, or -controlled companies and corporations may act as consignees to receive and effect delivery of eligible items to the private sector. Cuban government-owned, -operated, or controlled companies and corporations may not be end users of the items.