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U.S. Sanctions and Export Control Considerations for Suppliers of COVID-19 Relief Items to Latin American Jurisdictions

The COVID-19 pandemic has highlighted inherent tensions between U.S. trade control laws and the United States' interest in advancing humanitarian assistance programs. Pertinent to this discussion, the U.S. government has imposed broad-based restrictions against U.S. companies' dealings with Cuba and Venezuela, as well as some targeted restrictions with respect to Nicaragua. In addition, U.S. export controls—which are destination-, end user-, and product-specific—impose licensing requirements for the export of certain products to Latin America.

Attorneys
[Ama A. Adams](#)
[Brendan C. Hanifin](#)
[Emerson Siegle](#)
[K'sean Henderson](#)

Although enforcement of U.S. sanctions and export control laws continues to be active during the pandemic, there is an array of existing authorizations available to companies seeking to sell or donate COVID-19 relief items, such as personal protective equipment and medical devices. Collectively, these authorizations are intended to promote the United States' commitment “to ensuring that humanitarian assistance continues to reach at risk populations through legitimate and transparent channels” during the COVID-19 pandemic.¹ However, these authorizations must be considered carefully to avoid inadvertent violations of the regulations.

Do U.S. Sanctions and Export Restrictions Stymie Relief Efforts?

Currently, Cuba is subject to comprehensive sanctions, which prohibit U.S. companies (and their majority-owned or -controlled foreign affiliates) from engaging in most transactions that involve Cuba or Cuban counterparties. The United States also has imposed sanctions prohibiting most dealings with the Government of Venezuela and Venezuelan state-owned companies, which effectively operates as a partial embargo. Nicaragua is subject to less far-reaching sanctions, although the U.S. government recently has begun to increase pressure on Nicaragua (including by sanctioning key members of President Daniel Ortega's inner circle). In addition to sanctions restrictions, Cuba is subject to extensive export control licensing requirements, and licenses are required to export sensitive dual-use products and technology to other Latin American jurisdictions.

Some Latin American countries are struggling to obtain the necessary medical supplies to contain the COVID-19 pandemic, in part due to the breadth of U.S. sanctions. For example, Cuban government officials reported that “the six-decade U.S. embargo on the island has been an obstacle to purchasing the medicine and equipment [that Cuba] need[s] to fight to [the] coronavirus pandemic.”² According to public reports, even shipments of relief items such as facemasks, gloves, and ventilators, originating from wholly non-U.S. companies—not ordinarily required to comply with the Cuban sanctions—have been detained due to sanctions concerns.³ Similarly, Venezuela faces severe shortages of water, soap, gloves, masks, and intensive care beds, and international banks reportedly are sensitive about processing Venezuela-related payments in connection with supplies of such goods due to sanctions concerns.⁴

A growing chorus of economists, policy experts, and politicians has urged easing of sanctions on Latin American countries in light of the COVID-19 pandemic. For example, various economists, including those affiliated with think tank the Center for Economic and Policy Research, have urged the United States to lift sanctions, arguing that sanctions affect the ability of countries like Cuba and Venezuela to combat the outbreak.⁵ Similarly, a group of eleven U.S. senators sent a letter to the U.S. Secretaries of State and the Treasury urging waiver of certain sanctions targeting Venezuela (as well as Iran), including through the issuance of a new general license focused on humanitarian relief efforts.⁶

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Given the broad-based sanctions on Cuba, Venezuela, and (to a lesser extent) Nicaragua—and the potentially severe consequences for violations of U.S. sanctions and export control laws—some companies may assume supplying COVID-19 relief items to these Latin American jurisdictions is not worth the attendant regulatory risk.

The Solution – Careful Reliance on Exemptions Available Under Sanctions and Export Laws

Cognizant of the desire of companies to contribute relief items to countries hard-hit by COVID-19, the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”), responsible for administering U.S. economic sanctions, has published a fact sheet summarizing key general licenses and other authorizations that continue to permit transactions with Cuba, Venezuela, and other sanctioned jurisdictions.⁷

The following are illustrative avenues for providing COVID-19 relief items to sanctioned countries in Latin America, in compliance with U.S. trade laws. As always, if a contemplated transaction is not covered by an existing authorization, parties may seek a specific license from OFAC or the Bureau of Industry and Security (“BIS”) within the U.S. Department of Commerce.

Cuba

The Cuba sanctions regulations incorporate several exemptions that allow U.S. companies to transact with Cuba (and could be relied upon to provide COVID-19 relief items to the Cuban people), including, *inter alia*:

- Exports Authorized by the U.S. Department of Commerce: OFAC authorizes all exports and reexports of U.S.-origin items to Cuba that have been approved by the BIS, provided that certain conditions are met; BIS, in turn, generally requires an export license before items may be shipped to Cuba, though there are exemptions.⁸ Of relevance here, certain donations may be permissible without any license, and license applications to ship medicine and medical devices to Cuba, in most circumstances, will be reviewed under a presumption of approval.
- Support for the Cuban People: Transactions that are “intended to provide support for the Cuban people” are authorized, provided that the activities are conducted by either recognized human rights organizations, independent pro-democracy organizations, or individuals or non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba.⁹ Accordingly, transactions conducted in support of such organizations may be authorized.
- Humanitarian Projects: Transactions related to “humanitarian projects in or related to Cuba that are designed to directly benefit the Cuban people,” including “[m]edical and health-related projects,” are authorized.¹⁰ A broad range of humanitarian health efforts to help the Cuban people combat COVID-19 may be authorized under this general license.
- Infrastructure Projects: Transactions intended to assist the Cuban people with “developing, repairing, maintaining, and enhancing Cuban infrastructure,” including Cuban hospitals, are authorized.¹¹ Accordingly, transactions intended to provide relief to Cuban hospitals may be authorized under this general license.

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Venezuela

The Venezuelan sanctions generally prohibit transactions between U.S. companies and the Government of Venezuela, but contain several exemptions that allow U.S. companies to engage in otherwise prohibited transactions involving Venezuela (and could be relied upon to provide COVID-19 relief items to the Venezuelan people), including, *inter alia*:

- Exports of Medicine and Medical Devices: General License 4C authorizes transactions related to the export of, *inter alia*, medicine and medical devices to Venezuela, including testing kits, respiratory devices, and personal protective equipment. General License 4C is the primary general license that authorizes the provision of supplies that may assist the Venezuelan people combat the coronavirus pandemic.
- Emergency Medical Services: A separate OFAC general license authorizes, among other activities, all transactions necessary to provide air ambulance and related medical services, including medical evacuations, from Venezuela. Accordingly, the provision of emergency medical services to persons in Venezuela, including those suffering from COVID-19, may be authorized.
- Activities of Non-Governmental Organizations or International Organizations: Finally, OFAC has issued general licenses authorizing (1) non-governmental organizations to engage in transactions involving the Government of Venezuela in support of humanitarian projects; and (2) official activities of the United Nations and related entities in Venezuela.

In contrast to Cuba, most exports of COVID-19 relief items that are permissible under U.S. sanctions also will be authorized under U.S. export control laws.

Nicaragua

The Nicaraguan sanctions target only specific individuals and entities within Nicaragua, and are not nearly as broad as U.S. sanctions targeting Cuba or Venezuela. Accordingly, so long as transactions do not involve entities and individuals that have been targeted by list-based sanctions, U.S. companies may generally supply relief items to the Nicaraguan people without violating U.S. sanctions or export control laws.

An Additional Consideration – Export Restrictions Imposed by FEMA

In April, the Federal Emergency Management Agency (“FEMA”), within the U.S. Department of Homeland Security, issued a rule (the “FEMA Rule”)—effective April 10—that restricts companies from exporting from the United States certain medical supplies, absent governmental authorization. Intended to help ensure an adequate domestic supply of equipment needed to confront COVID-19, the FEMA Rule creates an additional regulatory regime that companies seeking to export certain relief equipment to Latin American countries must consider.

The FEMA Rule provides that certain categories of equipment¹² must be detained by U.S. Customs and Border Protection (“CBP”) before being exported from the United States. After detaining the goods, CBP will, in coordination with other agencies as appropriate, notify FEMA. FEMA will then determine whether to (1) return the products for domestic use; (2) issue a rated order for part or all of the shipment; or (3) allow the shipment to proceed. The FEMA Rule is subject to exemptions, though the application of any exemption must be carefully assessed.

The FEMA Rule introduced an additional wrinkle that U.S. companies seeking to export COVID-19 relief items to Latin American jurisdictions (whether sanctioned or not) need to consider. While some transactions may be exempt (*e.g.*,

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shipments to Mexico, shipments by nongovernmental organizations, etc.), others could be detained by CBP and ultimately allocated by FEMA for domestic use (and therefore not reach the intended recipient in Latin America).

Conclusion

While U.S. economic sanctions and export control laws can increase the burden on U.S. companies seeking to export items to Latin America—particularly to jurisdictions subject to sanctions—a broad range of transactions that may help these countries confront the COVID-19 pandemic were, and remain, permissible. Providing relief to Latin American jurisdictions hard hit by COVID-19 is possible, though careful consideration of U.S. trade laws should accompany all such efforts to offer assistance.

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RGLatinAmericaInbox@ropesgray.com.

1. OFAC, Fact Sheet: Provision of Humanitarian Assistance and Trade to Combat COVID-19 (Apr. 16, 2020), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/covid19_factsheet_20200416.pdf [hereinafter “OFAC Fact Sheet”].
2. Carmen Sesin, *Cuba says U.S. embargo is ‘obstacle’ to getting coronavirus-fighting supplies. Not so, says U.S.*, NBCNews (Apr. 11, 2020, 10:27 AM), <https://www.nbcnews.com/news/latino/cuba-says-u-s-embargo-obstacle-getting-coronavirus-fighting-supplies-n1181711>.
3. *Id.*
4. Julian Borger, *US ignores calls to suspend Venezuela and Iran sanctions amid coronavirus pandemic*, The Guardian (Mar. 31, 2020, 10:43 AM), <https://www.theguardian.com/world/2020/mar/31/us-ignores-global-appeals-suspend-sanctions-coronavirus-pandemic-iran-venezuela>.
5. *US Government Should Immediately Lift Economic Sanctions to Avoid Causing Deaths From Pandemic, Economists Say*, CEPR (Mar. 18, 2020), <https://cepr.net/press-release/us-government-should-immediately-lift-economic-sanctions-to-avoid-causing-more-deaths-from-pandemic-economists-say/>.
6. Letter from Sen. Chris Murphy et al. to Sec’y Mike Pompeo and Sec’y Steve Mnuchin (Mar. 26, 2020), *available at* <https://www.murphy.senate.gov/download/sanctions-letter->.
7. OFAC Fact Sheet.
8. 31 C.F.R. § 515.533; 15 C.F.R. § 746.2.
9. 31 C.F.R. § 515.574(a)(1)(i)-(iii).
10. 31 C.F.R. §§ 515.575(a), (b).
11. 31 C.F.R. § 515.591.
12. The full list of equipment covered by the FEMA Rule includes (1) N-95 Filtering Facepiece Respirators, including devices that are disposable half-face-piece non-powered air-purifying particulate respirators intended for use to cover the nose and mouth of the wearer to help reduce wearer exposure to pathogenic biological airborne particulates; (2) Other Filtering Facepiece Respirators, including single-use, disposable half-mask respirator protective devices that cover the user’s airway (nose and mouth) and offer protection from particulate materials at or above an N95 filtration efficiency level, per 42 C.F.R. § 84.181 (e.g., those designated as N99, N100, R95, R99, R100, P95, P99, or P100); (3) Elastomeric, air-purifying respirators and appropriate particulate filters/cartridges; (4) PPE [personal protective equipment] surgical masks, including masks that cover the user’s nose and mouth and provide a physical barrier to fluids and particulate materials; and (5) PPE gloves or surgical gloves, including those defined at 21 C.F.R. §§ 880.6250 (exam gloves) and 878.4460 (surgical gloves), and other gloves intended for the same purpose.