

Farm Bill Opens the Door to Federal Aid to Market Agricultural Exports to Cuba

by Dave Townsend and Lawrence Ward

As part of the Agriculture Improvement Act of 2018 (2018 Farm Bill) signed into law by President Trump today, Congress authorized the U.S. Department of Agriculture (USDA) to use federal funds to assist in the marketing of agricultural commodities to Cuba. The change signals Congress's willingness to reverse, in part, the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA), which authorized agriculture exports to embargoed locations such as Cuba, but only under limited conditions that did not include federal assistance for such transactions. In addition, the federal assistance, which totals nearly \$200 million annually for global promotion of U.S. agricultural exports, could provide momentum for agricultural exports to Cuba, which have faltered over the last several years.

We provide below answers to basic questions concerning the 2018 Farm Bill change to the U.S. Cuba sanctions.

Who is Eligible for the Funds and for What Purpose Can the Funds be Used?

The 2018 Farm Bill allows eligible organizations to receive Market Access Program (MAP) and Foreign Market Development (FMD) Program funds for marketing efforts to sell agricultural commodities to the Cuban market. The funds are intended to offset costs for promotional efforts to encourage the purchase of U.S. agricultural commodities and products in non-U.S. markets. According to USDA, dozens of agriculture organizations have benefited from MAP and FMD funds. Moreover, agricultural commodities eligible for shipment to Cuba under TSRA include many raw and processed agricultural commodities and products.

For MAP funds, USDA limits eligibility to non-profit entities, cooperatives or state agencies or trade groups. MAP funds can be used to promote brand-specific products, although they must be spent in a way to ensure equal promotion for like U.S. products. In fiscal year (FY) 2018, USDA spent \$174 million in MAP funds.

FMD funds are for non-profit agricultural trade organizations. The FMD funds are

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designed to create, expand or maintain non-U.S. markets for agricultural products. FMD funds are not intended to promote items that are exclusively or predominantly for one company or one brand. In FY 2018, USDA spent \$26 million in FMD funds.

How Does the Farm Bill Change MAP and FMD with Respect to Cuba?

Under TSRA, Congress authorized the Office of Foreign Assets Control (OFAC) to license shipments of agricultural commodities, medicine and medical devices to embargoed destinations, such as Cuba. In doing so, however, Congress specifically prohibited federal funds from being used to assist in the transactions with the embargoed destination, even if the transactions were pursuant to an OFAC license.

The 2018 Farm Bill reverses TSRA with respect to the use of federal funds to Cuba, and allows USDA to use federal funds to assist in marketing U.S. agricultural exports to Cuba. Under the current embargo on Cuba, U.S. agricultural commodities may be shipped pursuant to authorization from OFAC and the U.S. Department of Commerce Bureau of Industry and Security (BIS). Companies need to carefully examine the dual licensing requirements of OFAC and BIS to determine whether they can conduct business with Cuba consistent with the OFAC and BIS regulations. Dorsey & Whitney attorneys, who are familiar with these regulations, can assist with doing this efficiently and effectively.

Did Congress Make Other Changes to Cuba Sanctions?

No, the changes enacted in the 2018 Farm Bill are limited to USDA funds for marketing activities under MAP and FMD. The 2018 Farm Bill did not change the requirements relating to financing and payment terms for agricultural products to Cuba. Under TSRA, shipments of agricultural products to Cuba only may be financed or pursuant to strict terms, such as payment of cash in advance or financing by a third-country financial institution. U.S. agricultural producers and their trade associations have identified this as a significant impediment to U.S. trade with Cuba. Many observers believe that U.S. agricultural commodities lose market share in Cuba because of the TSRA limitations.

Is the 2018 Farm Bill Compatible with the Trump Administration's Cuba Policy?

The 2018 Farm Bill requires that USDA implement the change in law consistent with the Trump Administration's policy towards Cuba, as announced in the President's Memorandum Titled "Strengthening the Policy of the United States Towards Cuba," which was released on June 16, 2017. In that memorandum, President Trump prohibited, among other things, U.S. businesses from having transactions with entities designated as part of the Cuban military, intelligence or security services, as determined by the U.S. State Department.

USDA will need to implement the law, therefore, in a manner that avoids marketing activities that involve entities designated by the U.S. State Department as owned or controlled by the Cuban military, intelligence or security services. Notably, the State Department list includes hotels, commercial enterprises and other entities that would not

obviously be connected with the Cuban government's military or security services, and that could be involved in marketing activities in Cuba. For example, MAP or FMD funds likely could not be used to help finance U.S. participation at a trade show at a hotel designated by the State Department.

This limitation could cause USDA to be reluctant to authorize assistance for marketing activities unless the applicant can definitely show that it would (or did) not involve entities designated by the U.S. State Department. It remains to be seen how USDA will implement the law, and to what extent it relies on the private sector to avoid running afoul of the embargo against Cuba.

Can U.S. Persons Lawfully Travel to Cuba?

Yes. OFAC's regulations provide a general license for U.S. persons to travel to Cuba, but only if the travel is done consistent with certain conditions. For example, OFAC regulations permit business travel to Cuba if the travel relates to business authorized by OFAC, and the travel is otherwise consistent with OFAC's regulations.

Does this Change Signal That Further Liberalization is Imminent?

The 2018 Farm Bill change is significant in that it represents Congressional action to liberalize trade with Cuba, and to reverse, in part, its previous policy towards Cuba as enacted in TSRA. Given the limited action Congress took, however, this likely was the furthest that Congress was willing to go to liberalize U.S.-Cuba trade, at least in the near term. There may be further room for changes to the Cuba sanctions with a new Congress set to begin in January 2019. Moreover, pressure for increased agricultural trade with Cuba may grow as a result of trade frictions with other countries, which have decreased global U.S. exports of agricultural commodities and products.