# Is It Time To "Friend" Iran?

This article first appeared in *International Trade Law360,* March 16, 2010.

*by Nancy A. Fischer*

**Nancy A. Fischer**
International Trade
+1.202.663.8965
nancy.fischer@pillsburylaw.com

Nancy Fischer is a Washington, DC, partner in Pillsbury's International Trade practice. She counsels clients in aerospace, agriculture, financial services, energy, technology and other industries on regulations governing export controls and embargoes and helps them develop comprehensive internal compliance programs.

The Obama administration's recent decision to let U.S. companies export communications and socia networking software to Cuba, Iran and Sudan is another move in what is seen as an effort by the administration to reach out directly to the individuals in the sanctioned countries to assist with efforts to bring about change in those regimes.

Noting the vast capability of Web-based tools for blogging, organizing and sharing multimedia files, the administration has enlisted the likes of YouTube, Facebook and Twitter in a campaign aimed at giving the Iranian, Cuban and Sudanese people free expression and wider access to the unfiltered Internet.

Fundamentally, the shift underscores technology's power and complexity for trade and national security policymakers. In amending security-minded sanctions formerly restricting the vast majority of state-of-the-art U.S. technologies, the White House, State and Treasury Departments now believe exempting U.S. pioneers in some of the hottest Web categories makes the nation more secure by fostering the free flow of information within repressive regimes.

Numerous U.S. companies now have new markets to evaluate, offering opportunities for growth and altruistic aims. However, eligible U.S. firms looking to embrace Cuban, Iranian and Sudanese users should review terms of the new exemptions carefully and consider how participation will affect their export compliance programs, as well as other users and operations.

As the world saw in the wake of last year's contentious Iranian elections, freedom of expression can be demonstrated in many ways as evidenced by opposition party supporters' repeated circumvention of media restrictions by posting content on Twitter and other Web forums. These Web-based outlets became primary news and coordination platforms, despite having no physical presence on the ground.

The separate but similar amendments to the Sudanese, Cuban and Iranian Sanctions Regulations exempt "certain services and software [see separate note below for Cuba on software] incident to the exchange of personal communications over the Internet such as instant messaging, chat and e-mail, social-networking, sharing of photos and movies, Web browsing and blogging" programs that are "publicly available at no cost to the user."

In doing so, the administration is formally inviting providers of these communications platforms to simply let their websites reach willing users eager to circumvent Havana, Khartoum and Tehran's near-monopolies on connectivity and information.

Compared to Cold War-era underground newspapers behind the Iron Curtain, today's remotely hosted dissident blogs and politically sensitive video clips cannot be silenced by simply seizing things like printing presses (which are unwieldy, few in number and hard to replace).

The ability to reach across borders to broadcast messages or connect with like-minded individuals has now been enhanced by access to such previously restricted software.

In many cases, the equipment and devices will still need to be obtained from non-U.S. embargoed sources. However, in the case of Cuba, the administration's relaxation last year of the restrictions on telecommunications devices as well as certain fiber-optic cable and satellite communications facilities provides significant expansion opportunities for companies to serve the Cuban people or their relatives in the United States.

Oddly enough, Cuban users will have to await action by Commerce to issue a general license for the export of Web software newly approved by Treasury's Office of Foreign Assets Control (OFAC) to reach Sudan and Iran, in light of separate export restrictions that Commerce manages and are applicable to Cuba.

From an international trade and business perspective, the opening of these countries' markets for online communications and media services affects scores of companies of all sizes with offerings fitting the exemption language.

Most vendors' free, publicly available Web services (the only type fitting the exemption) like Web-based blogging and e-mail portals, rely on advertising revenue pegged to audience size instead of users' paid subscriptions.

Targeting users in these formerly restricted countries could fit nicely with Web service providers' goals of community expansion and aggregating more users' tastes and preferences for demographic and marketing purposes. However, companies must take care to prevent targeted marketing from resulting in any otherwise unauthorized sales and technology transactions.

Then there are corporate and social responsibility motivators: U.S. Web firms positioned to act on these exemptions are likely to have corporate cultures stressing freedom of expression, the sharing of knowledge and technology's general potential to improve individuals' lives. Many are likely to perceive the prospect of reaching these regimes' citizens as a means to live their corporate values and potentially raise their own visibility in the process—in other words, a "win-win" for all.

Beyond intriguing human rights and business implications, regulatory and risk matters are the most pressing issues for U.S. entities suddenly weighing outreach to Iran, Cuba and Sudan after these amendments.

First, businesses need to carefully understand the different U.S. sanctions in place around each nation, in addition to the new amendments, to determine which "services and software" are eligible.

Not only are applicable restrictions tailored uniquely to each country, but each is also off-limits for a much longer list of hardware, software and IT support services.

Compliance is complex because the bans generally include equipment on which the potentially authorized software may run, and seemingly benign things like anti-virus software and assorted diagnostic tools that may qualify as "mass market" but may not be available for free as required by the new rules.

Second, significant challenges exist to segmenting what can and cannot be provided under the new general licenses as well as potential specific licenses.

Larger technology vendors are more likely to have diverse product and service portfolios where eligible free, Web-based software and services may normally be provided with other more restricted items. Vendors' software development, support and delivery teams may rely on shared data centers and network resources, making compliance with export controls even more challenging.

The task of segregating out which corporate IT systems—if any—could legally support users in Iran, for

example, is further complicated if the company or its subsidiaries hold U.S. government contracts or support sensitive government research.

Given that online video, social-networking and other relevant Web sectors are viewed as the leading edge of the Web, and therefore prone to M&A activity, what should potential acquirers bear in mind if their target counts Iranian, Cuban and Sudanese users among its community?

Moreover, the challenges of dealing with the court of public opinion even if the activity is otherwise legal can itself present public and investor relations issues, if not proactively managed in a positive way. In these scenarios and others, it is critical for stakeholders to reevaluate their compliance programs on an ongoing basis and consult with experienced advisers.

Even when applicable laws are followed to the letter, there are additional risks to weigh. The operator of a Web service popular with an outlawed foreign political party, for example, could be targeted for retaliatory activities jeopardizing the security and experience for other users.

This could be an orchestrated "denial-of-service" attack, for example, or focused attempts at hacking or otherwise impairing the service's functionality or users' anonymity. Of course this activity could occur regardless of companies' decisions.

Still, in the wake of Google's public charges that China allegedly fostered, facilitated, or otherwise benefited from attacks on their networks, more businesses and individuals worldwide are sensitive to how cross-border disputes over politics and technology can have far-reaching consequences on a global Internet relying on interoperability and uniform standards to run smoothly.

With its action, the administration's greater awareness and inclusion of trade and technology in its foreign policy gives welcome recognition that U.S. and other nations' goods and services have a more strategic role to play supporting human rights, free political processes, prosperity and stability.

These new exemptions to some of the largest U.S. sanctions programs could provide interesting test cases and help shape future policy decisions as leaders wrestle with how to both contain and expand American companies' reach in a digital world.

Pillsbury Winthrop Shaw Pittman LLP | 1540 Broadway | New York, NY 10036 | 1.877.323.4171