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U.S. Companies Must Temper Expectations for Changing Cuba Policies

On December 17, 2014, President Obama introduced several important changes to the Cuba-United States relationship, which has been cold and tense since the early 1960s. His announcement indicates a shift in the treatment of the original Cuban embargo, the Cuban Assets Control Regulations (“CACR”), 31 C.F.R. Part 515, first issued by the Treasury Department in July 1963, and designed to isolate Cuba’s communist government through comprehensive economic sanctions focused on trade and financial transactions. Although the president used executive action to authorize certain actions regarding travel to and trade with Cuba, congressional action is needed to officially “lift” the embargo.

Overview of the Cuban Embargo

Today, the Cuban embargo is a combination of several statutes, including the Cuban Democracy Act of 1992 (“CDA”), P.L. 102-484, Title XVII, and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (P.L. 104-114), which strengthened U.S. economic sanctions on Cuba. The Treasury Department’s Office of Foreign Assets Control (“OFAC”) enforces the U.S. economic sanctions through the CACR and its subsequent amendments (collectively, the “Regulations”).

As a general rule, the Regulations state that, without a license, any person subject to U.S. jurisdiction that engages in any Cuba travel-related transaction or a dealing with any property in which Cuba or a Cuban national has or has had any interest, including exports and imports, is subject to penalties. In addition to limits set by OFAC, the Commerce Department’s Bureau of Industry and Security (“BIS”) also implements export controls specific to Cuba. Although the Regulations will be updated in the coming months, the president’s words (<http://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>) and the White House’s published fact sheet (<http://www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba>) outline the anticipated changes, described below.

Establishment of Diplomatic Relations with Cuba

Currently, no American embassy exists in Cuba. The U.S. government is expected to bolster its existing U.S. Interests Section in Havana (currently providing consular services, public diplomacy services and refugee services) into a full American embassy, with an ambassador to be appointed. The presence of an official ambassador and embassy is expected to provide additional support for U.S. companies conducting business in Cuba and for U.S. persons traveling to Cuba. Changes to travel, remittance, trade and telecommunications policies, when implemented by the Regulations, are expected to ease transactions between the two countries in certain scenarios.

The U.S. State Department designates countries that have repeatedly provided support for acts of international terrorism. Designation as a State Sponsor of Terrorism implicates sanctions laws that penalize persons and countries engaging in certain trade with state sponsors. President Obama has tasked the U.S. Secretary of State to launch a review of Cuba's status on the State Sponsor of Terrorism list, a designation it has held since 1982. The Secretary of State will provide a report of this review within six months. Removal of Cuba from the State Sponsor of Terrorism list would further facilitate trade with Cuba and Cuban nationals.

Expansion of General Licenses for Travel to Cuba

Over the past decade, White House policies on travel-related restrictions have been eased and tightened on several occasions. Beginning in April 2009, the Obama administration began easing restrictions on travel and remittances to Cuba. The present sanctions allow for travel to Cuba for persons qualifying for at least one of twelve general licenses. If the traveler meets the criteria of a general license, no application to OFAC is required. A potential traveler may also apply to OFAC for a specific license if no general license is available. With the anticipated changes, general licenses will be expanded for the following existing categories of travel, with aims to assist the growth of the Cuban private sector and small farming operations.

- Family visits;
- Official business of the U.S. government, foreign governments, and certain intergovernmental organizations;
- Journalistic activity;
- Professional research and professional meetings;
- Educational activities;
- Religious activities;
- Public performances, clinics, workshops, athletic and other competitions, and

exhibitions;

- Support for the Cuban people (as defined in the Regulations);
- Humanitarian projects;
- Activities of private foundations or research or educational institutes;
- Exportation, importation, or transmission of information of information materials; and
- Certain export transactions that may be considered for authorization under existing regulations and guidelines.

Exports and Imports

With the intent of promoting a Cuban private sector in need of development, the U.S. government will allow the exportation of certain building materials for private construction activities, agricultural goods for small farming operations, and goods for use by Cuban entrepreneurs and the Cuban private sector. One unknown to be evaluated is the capacity of a truly private sector in a nation that has been under the control of a Communist regime for multiple generations. Some early involvement by the Cuban government in private development must be expected.

To increase access to the internet in Cuba, BIS is expected to authorize exports of certain consumer communications devices, related software, applications, hardware and services, and items for the establishment and update of communications related. Telecommunications providers will be able to establish the necessary infrastructure to provide the Cuban people with telecommunications and internet services. The Castro regime's history of preventing unfettered access to international information raises risks for potential U.S. investors. Furthermore, the Cuban government, beginning in 1960, seized and nationalized significant amounts of private property from U.S. companies and individuals as well as the Cuban private sector. American telecommunications providers would be justifiably weary to reinvest in the Cuba and may require assurances of an open exchange of information before agreeing to devote millions of dollars in the prerequisite infrastructure.

Regarding the converse flow of commerce, the United States will also allow licensed American travelers to import up to \$400 worth of goods from Cuba back into the United States. No more than \$100, however, may be in the form of tobacco and alcohol.

Financial Transactions and Remittances

In order to facilitate authorized transactions in Cuba, U.S. institutions will be allowed to open accounts, and Cuban financial institutions and U.S. credit and debit cards will be permitted for use in Cuba.



In addition to expenditures on the island, the United States will also authorize transactions between U.S.-owned or U.S.-controlled entities in foreign countries and Cuban nationals in foreign countries.

Beyond commercial transactions, the United States will increase the allowed amount of donative remittances, money sent as a gift, to Cuban nationals. Currently, remittances are limited to \$500 per quarter. The changes will raise the maximum to \$2000 per quarter. These remittances, historically used to send money to family members may be directed to any non-governmental Cuban nationals. Remittances for humanitarian projects, support for the Cuban people and support for the development of private businesses in Cuba, which currently require a specific license from OFAC, will become authorized under general licenses.

Conclusion

The anticipated changes to the Cuban embargo and the Regulations are expected to open certain avenues of trade with, and support for, the Cuban people. Because the changes in trade and travel and the capabilities of the Cuban private sector are all somewhat limited, how big of an impact these changes will have in enhancing the condition of human rights and the democratic process in Cuba is yet to be seen. U.S. companies must recognize that none of the announced changes take effect until the Regulations have been updated and released. U.S. companies must also understand that only Congress can officially lift the full embargo and its restrictions, therefore, caution must be used when evaluating trade with and travel to Cuba. Companies considering business with Cuba in light of the announced changes should monitor and become familiar with the updates to the Regulations.

Questions or Assistance?

If you have any questions regarding this alert, please contact Scott Cowperthwait at (860) 251-5134 or scowperthwait@goodwin.com or Alfredo Fernandez at (860) 251-5353 or afernandez@goodwin.com.

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