Improvements in US-Cuban Relations Bring Business Opportunities and Challenges

by Geoffrey M. Goodale and Louis K. Rothberg

As soon as President Obama announced that the United States would pursue improved relations with Cuba on December 17, 2014, many US companies and law firms began to wonder what it would be like to do business with or in Cuba. While certain new opportunities have been created by amendments made to Cuban-related regulations administered by the US Department of Treasury’s Office of Foreign Assets Control (OFAC) and the US Department of Commerce’s Business of Industry and Security (BIS), many of the comprehensive sanctions imposed against Cuba by the US for decades remain in effect, and will continue unless Congress takes action.

Statutory Restrictions Limit Business Opportunities with Cuba
We must recognize that several US statutes currently in effect constrain the ability of the president – acting alone without Congress – to further substantially ease or lift many of the existing sanctions against Cuba. These statutes include: (1) the Cuban Democracy Act of 1992; (2) the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996; and (3) the Trade Sanctions Reform and Export Enhancement Act of 2000.

The Cuban Democracy Act of 1992 (CDA), among other things, prohibits foreign subsidiaries of US companies from engaging in trade with Cuba.¹ The CDA also prohibits entry into the US for any seagoing vessel to load or unload general freight if it has been involved in trade with Cuba within the previous 180 days.²
The LIBERTAD Act of 1996 codified the then-existing economic embargo against Cuba. This included all restrictions set forth under OFAC’s Cuban Assets Control Regulations (CACR). While possessing broad authority to amend the CACR, the president cannot eliminate those regulations without making a determination that a transition government is in power in Cuba pursuant to the provisions of the LIBERTAD Act, and no such transition government is expected to assume power in Cuba in the foreseeable future.

Moreover, the LIBERTAD Act also states that Congress must believe that a satisfactory resolution of property claims by a Cuban government recognized by the US remains an essential condition for the full resumption of trade and diplomatic relations between the US and Cuba. Talks between the US and Cuban governments on claims amounting to billions of dollars held by US nationals for property expropriated or nationalized by the Castro regime over the past 55 years began in December 2015, and the satisfactory resolution of these claims will likely take several years to implement.

While the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA) authorizes certain commercial exports to Cuba (e.g., relating to certain foods, medicines, and medical products), it also includes prohibitions on US credit extensions such as financing for purchases, and requires “payment of cash in advance” or third-country financing for the exports. The TSRA also prohibits tourist travel to Cuba.

Although some bills have been introduced in Congress that would end various aspects of the comprehensive sanctions referenced above since President Obama made his policy announcement, none of them have been able to garner much support, and in fact, numerous members of Congress have expressed opposition to them. Given this fact, it seems unlikely that these comprehensive sanctions will be eliminated anytime soon.

Easing of Certain Sanctions Under the CACR

However, OFAC has made numerous amendments to the CACR to ease certain sanctions during the past year. While these amendments create certain limited opportunities, many aspects of OFAC’s comprehensive embargo against Cuba remain in effect.

As a result of amendments made to the CACR in January 2015, US persons may now travel to Cuba under a general license (i.e., a self-executing regulatory authorization not requiring that an application be filed with OFAC) provided that the purpose of their travel falls within one of the twelve existing categories of travel for which a specific license could have been issued by OFAC in the past (e.g., professional research and meetings, educational activities, journalistic activities, religious activities, humanitarian projects, public performances, exhibitions, and athletic competitions) and all other applicable requirements. It is important to note that each traveler who relies on a general license for travel to Cuba must retain specific records for five years indicating that the travel was covered by the terms of a general license. Moreover, travel to Cuba for general tourist activities remains prohibited.

OFAC has also amended the CACR to make it easier for US persons traveling to Cuba to purchase items and to bring certain kinds of items back. Towards this end, the CACR have been amended to permit US persons to use US debit and credit cards to purchase items in Cuba and to open and maintain bank accounts in Cuba in order to access funds for authorized transactions, although actually doing so is somewhat impractical because no major US banks or financial institutions have entered the Cuban market as of this writing. Moreover, as a result of amendments to the CACR, US persons may now bring back up to $400 worth of Cuban items, including up to $100 worth of alcohol and tobacco products, provided that the items were purchased in Cuba and are for personal use.

In addition, OFAC has also amended the CACR to increase trade opportunities with Cuba. For example, the CACR have been amended to authorize persons subject to US jurisdiction to establish and maintain a business presence in Cuba, including through subsidiaries, branches, offices, joint ventures, franchises, and agency or other business relationships with any Cuban individual or entity, to provide authorized telecommunications and internet-based services. Furthermore, persons subject to US jurisdiction are now authorized to enter into certain licensing agreements and to market such services.

OFAC has further amended the CACR to authorize certain persons subject to US jurisdiction to establish a physical presence, such as an office or other facility, in Cuba, to facilitate authorized transactions. This
authorization covers news bureaus, exporters of goods authorized for export pursuant to sections 515.533 or 515.559, providers of authorized mail and parcel transmission services and cargo transportation services, providers of telecommunications or internet-based services, entities organizing or conducting certain educational activities, religious organizations, and providers of travel and carrier services. OFAC has also amended the CACR to authorize such individuals and entities to open and maintain bank accounts at financial institutions in Cuba for authorized transactions, and to close such accounts.

Most recently, OFAC amended the CACR on January 27, 2016. Significantly, pursuant to these amendments, restrictions on payment and financing terms for authorized exports and re-exports, except for agricultural commodities and agricultural items, have been removed, and US depository institutions may now provide financing, including, for example, issuing a letter of credit for such exports and re-exports. These latest amendments also expand certain existing general licenses to authorize certain additional travel-related transactions that are directly incident to the conduct of market research, commercial marketing, sales or contract negotiation, accompanied delivery, installation, leasing, or servicing in Cuba of items consistent with the export or re-export licensing policy of the Department of Commerce. Use of these expanded general licenses is subject to the condition that the traveler’s schedule of activities does not include free time or recreation in excess of that consistent with a full-time schedule.

Liberalization of Certain Export Controls Relating to Cuba

Since President Obama made his historic policy announcement in December 2014, BIS has made numerous amendments to the Export Administration Regulations (EAR) to liberalize certain Cuban-related export controls. However, many items still require an export license to be sent to Cuba.

BIS has liberalized export controls by expanding certain license exceptions under the EAR, pursuant to which certain items can be exported to Cuba provided that all of the requirements of the specific license exception are satisfied. For example, BIS expanded License Exception Consumer Communications Devices (License Exception CCD) to remove the donation requirement and to update the list of eligible items. BIS has also expanded License Exception Gift Parcels and Humanitarian Donations (License Exception GFT) in 15 CFR § 740.12 of the EAR to permit the export and re-export of multiple gift parcels in a single shipment. BIS has also expanded the availability of License Exception Aircraft, Vessels and Spacecraft (License Exception AVS) to pertain to Cuba, so that certain categories of seagoing vessels, when engaged in specified activities eligible for the license exception, can remain in Cuba for no more than fourteen consecutive days before returning to the US or departing for a country to which it may be exported without a license.

BIS has also created a new License Exception Support for the Cuban People (License Exception SCP). It permits, among other things, the export and re-export of the following types of equipment:

- 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;
- Tools and equipment for private-sector agricultural activity; and
- Tools, equipment, supplies, and instruments for use by private-sector entrepreneurs.

Items eligible for export and re-export to Cuba pursuant to this portion of License Exception SCP are limited to those designated as EAR99 or that are specifically identified on the Commerce Control List (CCL) and controlled only for anti-terrorism [AT] reasons.

License Exception SCP also authorizes the export and re-export of items for use by US persons to establish, maintain, or operate a physical presence in Cuba. In addition, License Exception SCP authorizes certain temporary (not to exceed one year) exports and re-exports to Cuba of certain EAR99 items and items controlled on the CCL only for AT reasons under some circumstances (e.g., commodities and software as tools of trade for use by exporters or their employees to install, service, or repair items that are subject to the EAR and that have been exported or re-exported to Cuba under a license or license exception).

Most recently, on January 27, 2016, BIS issued guidance indicating that it will generally approve license applications for exports and
re-exports of some kinds of commodities and software to certain Cuba entities. This new licensing policy applies to items controlled on the CCL that relate to the following areas: civil society, news gathering, agriculture, telecommunications, civil aviation safety, and meeting the needs of the Cuban people.

Conclusion

In summary, OFAC has relaxed numerous sanctions against Cuba, and BIS has liberalized export controls relating to many kinds of items that can be exported and re-exported to Cuba. However, many aspects of the comprehensive US embargo against Cuba remain in effect and will continue unless Congress passes new legislation to amend or rescind existing statutes, which seems unlikely to occur in the foreseeable future. Accordingly, careful analysis of the amendments that have been made to the CACR and the EAR is critical to ensure that law firms and businesses comply fully with all applicable requirements.

Endnotes:

1 The Cuban Democracy Act of 1992, Pub. L. No. 102-484, Title XVII.
2 See id.
4 See id. The Cuban Assets Control Regulations are codified at 31 C.F.R. Part 515.
5 See id.
6 See id.
8 See id.
10 See 31 C.F.R § 515.560.
11 See id.
12 See 31 C.F.R. §§ 515.542 and 515.578
13 See id.
14 See 31 C.F.R. § 515.573.
15 See id.
16 See id.
17 See 31 C.F.R. § 515.584.
18 See 31 C.F.R. §§ 515.533, 515.545, and 515.567.
19 See id.
20 The Export Administration Regulations are codified at 15 C.F.R. Parts 730-774.
21 See 15 C.F.R. § 740.19.
22 See 15 C.F.R. § 740.12.
23 See 15 C.F.R. § 746.2.
24 See 15 C.F.R. § 740.21.
25 See id.
26 See id.
27 See id.
28 See id.
30 See id.

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