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Legal Insight

Two Steps Forward? Re-Examining U.S. Sanctions Against Cuba

Michael E. Burke

On December 18, 2014, President Obama announced that the United States would reduce its comprehensive economic sanctions program against Cuba. The administration has concluded that the Cuba Sanctions Program is ineffective and has deterred the development of Cuban civil society and the Cuban private economic sector. The announcement portends significant change, but the specifics of that change are not yet known. It is important to note that until such time as the relevant U.S. government agencies act to amend the program, the Cuban Sanctions Program remains in force. This client update will review the current status of the Cuban Sanctions Program, the proposed changes, and some action items.

Overview of Cuban Sanctions Program

U.S. economic sanctions against Cuba are administered pursuant to the Cuban Assets Control Regulations and other regulations, primarily by the Office of Foreign Assets Control ("OFAC") at the U.S. Department of the Treasury. Unless and until changed, the Cuban Sanctions Program requires that any commercial transaction between a U.S. person (discussed below) involving Cuba or a Cuban company or person anywhere in the world must be licensed by OFAC (through a general or a specific license); it is OFAC's stated policy to deny applications for specific licenses, except for many travel-related requests. Therefore, U.S. companies currently may not directly or indirectly export any good or provide any service to an end-user or customer in Cuba or any Cuban company or person anywhere in the world. Further, U.S. companies and persons currently may not import anything of value from Cuba (and you know what I mean if you've ever tried to 'import' Cuban cigars).

The Cuban Sanctions Program applies to all persons (individuals and entities) subject to U.S. jurisdiction, including all U.S. citizens and permanent residents wherever located, all persons in the United States, and all branches and subsidiaries of U.S. organizations throughout the world – as well as all persons engaging in transactions that involve property in or otherwise subject to the jurisdiction of the United States. The latter part of that jurisdictional definition reaches the activities of non-U.S. persons and businesses where some part of a prohibited Cuba-related transaction, even something as 'small' as an email routed through a U.S.-based server, takes place in the U.S. Complicating matters further, the U.S. stands (mostly) alone on sanctioning Cuba. Our largest trading partners, such as Canada and European Union member states, do not sanction Cuba and have statutes that punish companies based in those jurisdictions if such companies abide by any part of the U.S. program.

Criminal penalties for violating the Cuban sanctions program are severe and range up to 10 years in prison, $1,000,000 in corporate fines, and $250,000 in individual fines. Civil penalties for violations of the sanctions program can reach $65,000 per violation.

Proposed Changes to Cuban Sanctions Program

The White House, on December 17, posted a fact sheet to its website that details some of the proposed changes to the Cuban Sanctions Program and U.S. relations with Cuba. They include:

- Establishing diplomatic relations with Cuba by re-establishing a U.S. Embassy in Havana and carrying out high-level exchanges and visits between the two governments.
- Facilitating an expansion of travel under general licenses for the 12 existing categories of travel to Cuba authorized by law.
- Remittance levels will increase from $500 to $2,000 per quarter for general donative remittances to Cuban nationals (excluding certain officials of the government or the Communist party); and donative remittances for humanitarian projects, support for the Cuban people, and support for the development of private businesses in Cuba will no longer require a specific license.
- Authorizing expanded commercial sales/exports from the United States of certain goods and services, including certain building materials for private residential construction, goods for use by private sector Cuban entrepreneurs, and agricultural equipment for small farmers.
- Licensed U.S. travelers to Cuba will be authorized to import $400 worth of goods from Cuba, of which no more than $100 can consist of tobacco products and alcohol combined.
- U.S. financial institutions will be permitted to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions.
- The commercial export of consumer communications devices, related software, applications, hardware, and services, and items for the establishment and update of communications-related systems that will contribute to the ability of the Cuban people to communicate with people in the United States and the rest of the world will be authorized.
- Telecommunications providers will be allowed to establish the necessary mechanisms, including infrastructure, in Cuba to provide commercial telecommunications and internet services, which will improve telecommunications between the United States and Cuba.
- U.S.-owned or -controlled entities in third countries will be generally licensed to provide services to, and engage in financial transactions with, Cuban individuals in third countries. In addition, general licenses will unblock the accounts at U.S. banks of Cuban nationals who have relocated outside of Cuba; permit U.S. persons to participate in third-country professional meetings and conferences related to Cuba; and, allow foreign vessels to enter the United States after engaging in certain humanitarian trade with Cuba, among other measures.
- The President has instructed the Secretary of State to immediately launch a review of Cuba's designation as a State Sponsor of Terrorism, and provide a report to the President within six months.

Potential Benefits to U.S. Companies and Suggested Action Items

Liberalization of the Cuban Sanctions Program could benefit U.S. companies (specifically those in the life sciences, infrastructure, and telecommunications sectors) in several ways:

- It will make it easier for employees of U.S.-based companies to travel to Cuba, including engaging in certain business-related travel. This change will not make travel to Cuba (which requires U.S. citizens to obtain an entry visa prior to departure) as easy as travel to, say, Canada, but it will reduce the compliance burden on, and the export-control risk facing U.S. companies as to Cuba-related travel.
- Revisions to the sanctions program will authorize expanded commercial sales/exports from the United States of certain goods and services. A specific list of 'authorized' U.S.-origin goods/products has not been developed, but life sciences companies whose product portfolios include agricultural or livestock products should see a specific opportunity, as should telecommunications and infrastructure companies.
- Facilitating authorized financial transactions between the United States and Cuba will make it easier, faster, and more efficient for U.S. companies to be paid on future Cuba business.
- Non-U.S. affiliates of U.S. companies will be allowed to provide services to, and engage in financial transactions with, Cuban individuals in third countries. Under the current version of the Cuban Sanctions Program, U.S. companies and their non-U.S. affiliates are prohibited from transacting with any Cuban national anywhere in the world.
- The policy revisions call for the issuance of general licenses to unblock the accounts at U.S. banks of Cuban nationals who have relocated outside of Cuba. This will enable U.S. companies to transact as to the unblocked assets.

- U.S. export controls on Cuba will become more consistent with those of our largest trading partners, including Canada and European Union member states. The controls will not be exactly the same, but the conflict between these control regimes will be reduced. Increased consistency will enable non-U.S. companies to coordinate their export compliance strategy more efficiently and will reduce the risk that they could violate (or be seen to violate) their home country's law by abiding by the U.S. sanctions program against Cuba.

The most important point to be taken from the various U.S. government announcements on this topic is from an update to Office of Foreign Assets Control ("OFAC") at the U.S. Department of the Treasury OFAC's sanctions FAQ webpage:

> OFAC will implement the Treasury-specific changes via amendments to its Cuban Assets Control Regulations. The Department of Commerce will implement the remainder of the changes via amendments to its Export Administration Regulations. OFAC expects to issue its regulatory amendments in the coming weeks. None of the announced changes takes effect until the new regulations are issued.

In other words, the timing, structure, and substance of amendments will take some time to develop. We don't yet know, for example, the precise list of products or goods that will be 'authorized' for export to Cuba from the U.S. under these revisions. We don't know whether potential U.S. exporters will have some form of notice or other screening requirement in order to avail themselves of the to-be-drafted authorization. It remains possible—probable even—that U.S. economic sanctions would remain in force against parts of the Cuban government and companies or persons closely associated with the Cuban government. It seems unlikely that the Cuban government, the Communist Party or the Castro brothers would be excluded from a future sanctions program. Congress will have to legislate to change certain aspects of the Cuban Sanctions Program, and it is not known whether they have the desire or political will to do so.

However, companies should do (at least) two things in the near term to position themselves to benefit from these proposed changes: (i) review your export compliance policy to determine what can or should be changed in light of potential changes to the Cuban Sanctions Program; and (ii) carefully evaluate how your company could begin to access the Cuban market.

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