Simpson Thacher

Memorandum

A Thaw in Cuban Relations Portends Important Regulatory Changes

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On December 17, 2014, President Obama announced a number of changes designed to significantly ease existing regulations on travel and commerce involving Cuba. The Department of Commerce's Bureau of Industry and Security ("BIS") and the Department of the Treasury's Office of Foreign Asset Control ("OFAC"), the federal agencies that administer the regulations imposing restrictions on travel and commerce involving Cuba, have announced that they will implement the changes "in the coming weeks."

The announced changes portend a potentially material change in how U.S. companies, particularly those operating in foreign markets, engage in transactions or dealings with Cuban nationals, Cuban-origin goods and services, and other aspects of the Cuban economy. Thus, while the embargo against Cuba and Cuban nationals remains in effect, existing exceptions will soon be expanded and new exceptions added.

Background

OFAC issued the Cuban Asset Control Regulations, 31 C.F.R. Part 515 (the "CACR") in 1963. The CACR generally prohibits any person subject to U.S. jurisdiction (including foreign companies owned or controlled by U.S. persons), and all persons engaging in transactions that involve property subject to U.S. jurisdiction, from traveling to or transacting in Cuba. Violations of the CACR are punishable by criminal penalties including up to ten years in prison, $1,000,000 in corporate fines, and $250,000 in individual fines. Through two types of licenses, the CACR created limited exceptions to the general prohibition against transacting with Cuba: (1) General licenses permit specified transactions without first obtaining OFAC approval; and (2) Specific licenses for specified transactions may be granted on a case-by-case basis to specific individuals.

As a complement to the CACR, BIS administers the Export Administration Regulations, 15 C.F.R. Part 730 (the "EAR"), which regulate the exportation of goods to certain states (primarily states designated as a State Sponsor of Terrorism). Cuba has been subject to the EAR since 1982, when the State Department designated it a State Sponsor of Terrorism.

Limited Changes 2009 - 2011

Beginning in 2009, the Obama administration announced limited changes that eased travel and financial restrictions. To implement the changes, OFAC amended the CACR to allow general and unlimited travel licenses to persons visiting a "close relative" who is a Cuban national (31 C.F.R. § 515.561); eliminated caps on remittances to family members (31 C.F.R. § 515.570(a)); and granted general licenses to telecommunications providers to pursue licensing agreements (31 C.F.R. § 515.542(d)(1)). In addition, the Department of Commerce amended the EAR to create a general license to authorize the export of donated consumer communication devices that are necessary to provide telecommunications services between the United States and Cuba (17 C.F.R. § 746.2(a)(1)(xiii)), and permitted specific licenses to be granted to provide adequate telecommunications links between the United States and Cuba, including links established through other countries (17 C.F.R. § 746.2(a)(2)).

In 2010, OFAC amended the CACR to create a new general license that authorized the exportation of services incident to internet-based communication. (31 C.F.R. § 515.578). In 2011, the CACR was amended to permit U.S. persons to send limited remittances to non-family members for certain purposes (31 C.F.R. § 515.570(b)), to further ease restrictions on travel to Cuba for educational and religious purposes (31 C.F.R. § 515.560), and to authorize U.S. persons to engage in transactions with Cuban nationals who have established permanent residence outside Cuba (31 C.F.R. § 515.505(c)).

2014 Changes

On December 17, 2014, the Obama administration announced further changes to accompany the reestablishment of diplomatic relations with Cuba. As part of these changes:

- Certain items that support the Cuban private sector will be allowed for export, including certain building materials for private residential construction, goods for use by private sector Cuban entrepreneurs, and agricultural equipment for small farmers.
- Licensed American travelers will be able to import $400 worth of goods (including up to $100 in tobacco and alcohol products).
- United States institutions will be able to open correspondent accounts at Cuban financial institutions.
- Travelers to Cuba will be allowed to use American credit and debit cards.
- Certain items that support telecommunications in Cuba will be allowed for commercial export, including the sale of consumer communications devices, related software, applications, hardware, and services, and items for the establishment and update of communications-related systems.
- Telecommunications providers will be permitted to establish necessary mechanisms to provide commercial telecommunications and internet services.
- United States entities in third countries will be generally licensed to provide services to and engage in

financial transactions with Cuban individuals in third countries, and general licenses will permit U.S. persons to participate in third-country professional meetings and conferences related to Cuba.

- General licenses will unblock the accounts at U.S. banks of Cuban nationals who have relocated outside of Cuba.
- The Secretary of State will review Cuba's designation as a state sponsor of terrorism. If the designation is lifted, Cuba would no longer be subject to statutory sanctions applicable to state sponsors of terrorism. Those sanctions include prohibitions against arms-related exports; controls over dual-use items; restrictions on U.S. foreign aid; and restrictions on other financial assistance, including denying tax credits for income earned in countries designated as state sponsors of terrorism.

Implications for Companies Subject to U.S. Jurisdiction

Pending the issuance of OFAC regulations implementing the announced changes, it is not clear how or in what manner companies subject to U.S. jurisdiction will be permitted to expand their business in Cuba or with Cuban nationals. Nevertheless, once implemented, the changes announced on December 17 will enable companies subject to U.S. jurisdiction to engage in previously impermissible types of transactions involving Cuba. Of note, the changes will have direct effect on the following companies:

- *Companies subject to U.S. jurisdiction but located abroad.* Companies owned or controlled by U.S. persons but located abroad will generally be able to conduct business with Cuban nationals in third countries without fear of violating economic sanctions.
- *Financial institutions.* U.S. financial institutions will now generally be able to open correspondent accounts at Cuban financial institutions, which will enable U.S. financial institutions to offer services that will facilitate authorized transactions between U.S. and Cuban nationals.
- *Telecommunications and communications-related firms.* Manufacturers and distributers of telecommunications products and ancillary goods and services will generally be permitted to export to Cuba and build infrastructure necessary to establish and update communications services.
- *Manufacturers and distributors of goods for use by the Cuban private sector.* The changes will generally permit U.S. companies to export certain items "to empower the nascent Cuban private sector," including certain building materials for private residential construction, goods for use by Cuban entrepreneurs, and agricultural equipment for small farmers. Pending issuance of OFAC's revised regulations, it is not clear which export industries this will affect.

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