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## INTERNATIONAL LAW ALERT

### US-CUBA "DÉTENTE": REVISED US REGULATIONS AND NEW OPPORTUNITIES FOR ENGAGEMENT

On December 17, 2014, US President Barack Obama announced the commencement of high-level talks between the US and Cuba, initiating the process of re-establishing diplomatic relations with Cuba, and "taking steps to increase travel, commerce, and the flow of information to and from Cuba."<sup>1</sup> President Obama emphasized this commitment in his 2015 State of the Union, calling upon Congress to "begin the work of ending the embargo."<sup>2</sup>

The importance of Cuba as a potential investment, trading and tourism partner for the US is enormous – there are approximately 11 million Cubans, residing just 90 miles from the approximately 2 million Cuban-Americans residing in the US. Academic and business experts estimate the value of post-embargo trade between the US and Cuba to be anywhere from \$2 billion - \$5 billion annually. New York Governor Andrew Cuomo announced in his 2015 State of the State address that within the next 45 days, he will lead the first high-profile trade mission from the US to "America's newest economic partner, Cuba."<sup>3</sup>

Although the embargo cannot be lifted without Congressional approval, the Obama Administration, through the Treasury Department's Office of Foreign Asset Control ("OFAC"), has already issued its amended Cuban Assets Control Regulations ("CACR"), 31 CFR §515 (effective January 16, 2015)<sup>4</sup> as well as amendments to the Commerce Department's Export Administration Regulations ("EAR"), 31 CFR §740 (effective January 16, 2015).<sup>5</sup> These amendments eviscerate many of the embargo-related sanctions, promote export activity, and establish the basis for increased social and economic engagement between the United States and Cuban peoples. Some key points are summarized below.

#### **Travel Restrictions Eased; Scheduled Airline Service on the Horizon; Credit Cards Accepted; Cigars and Rum**

Building on the modest 2009 amendments to the CACR, the 2015 amended regulations further simplify the requirements for private US citizens to travel to Cuba. Although travel for "tourism" is still prohibited, Americans will now be able to obtain individual "general" travel licenses, rather than applying for specific case-by-case licenses. These licenses include travel for journalistic activity, professional research and meetings, educational activities, religious activities, public performances and athletic competitions, human rights and humanitarian work, and for permitted business purposes (e.g., permitted US export transactions).

Although US-based airlines are seeking to provide scheduled air service to Cuba, this will probably take 6-12 months to occur, as the US Department of Transportation needs to establish procedures, and state-owned airline Cubana will undoubtedly seek reciprocal access. Until these changes are implemented, Americans will continue to travel through OFAC-licensed operators of charter flights, or via indirect flights through other countries. Americans are likely to be able to obtain "general" travel licenses through a "check the box" process while booking flights online.

While visiting Cuba, Americans will also be able to use credit cards issued by US financial institutions in Cuba, and the amended CACR eliminates the former \$188 *per diem* spending limit for accommodations, meals, local transportation and similar expenses. American travelers are now permitted to return from Cuba with up to \$400 of Cuban merchandise, including up to \$100 in tobacco and alcohol products; the prior limit was \$100 of Cuban merchandise in any 6-month period.

#### **Business Opportunities: Finance, Internet and Telecom, Trade**

Under the old OFAC regulations, money transfers between the United States and Cuba were prohibited except through certain identified third-country banks; violations (whether intentional or inadvertent) were subject to severe penalties. The amended CACR now allows American institutions to open accounts at Cuban financial institutions to facilitate authorized transactions. However, Cuban banks are still not licensed to open correspondent accounts at US banks.

*continued next page*

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The old regulations prohibited US individuals and companies from entering into business contracts, except as permitted under specific licenses; US exports to Cuba were strictly limited, and any exceptions were generally tied to humanitarian purposes (e.g., agricultural products, medicines). The amended EAR regulations allow the export to Cuba of a broad array of items that support the Cuban private sector, including: building materials, equipment and tools; agricultural tools and equipment; and other tools, equipment, supplies, and instruments for the increasing number of Cuban entrepreneurs.

Since the Obama Administration has established greater social engagement and the free flow of information to the Cuban people as a priority, products related to telecommunications and the internet now receive favorable treatment for export. The amended EAR regulations establish a new general export license for the sale of certain consumer communications devices, related software, applications, hardware, and services, and related infrastructure equipment; these items can be sold to Cuban government companies and agencies as well as private entities.

### **Cuban Legal Reform: Joint Ventures, Tourism, Real Estate**

During the 1990s, the Cuban government entered into many joint ventures with non-US based partners, including national and multinational companies involved in industries such as manufacturing, consumer goods, real estate development and hospitality industries. Since 2004, however, the Cuban government pulled back from private-sector endorsed *perfeccionamiento empresarial* ("business improvement") programs in favor of investments from politically-aligned governments, especially Venezuela.

The combination of Venezuela's economic decline and the need to attract foreign capital has led to an effort over the last few years to modernize Cuba's foreign investment laws; amendments adopted in March 2014 eliminated taxes on profits for the first 8 years of a joint venture, with taxes reduced by 50% thereafter, and allow Cubans living abroad to invest. The anticipated shift to a single Cuban currency is expected to create new interest in Cuban joint ventures, especially in agriculture, tourism and real estate. We anticipate real estate development opportunities in multi-family residential, hotels and resorts, golf courses, infrastructure and project development. There will also be project finance, infrastructure and trade opportunities in the Mariel special economic development zone, where a container port modernization project is underway.

### **More Cuban Stars in Major League Baseball?**

After cigars and rum, many Americans think of baseball players as the most prominent Cuban export. In 2014, there were 16 Major League Baseball players from Cuba. Sports analysts believe that with the extreme popularity of baseball in Cuba, the number of Major Leaguers might easily double – and a MLB team might decide to play some of its games there. Some even speculate that the Tampa Bay Rays might eventually seek to relocate to Havana.

### **Conclusions and Recommendations**

The amended regulations are the first step in expanded social and economic interaction between the US and Cuba, and create immediate opportunities for US export in areas such as internet and telecommunications as well as streamlined licensing to ease restrictions on travel to Cuba. US-based businesses can engage in strategic planning in anticipation of continued liberalization of Cuban private sector economic activity.

At the same time, US individuals and businesses must be conscious of the fact that while the Obama Administration has opened the door for Cuban engagement, the embargo remains in effect, as do Cuban laws and regulations relating to private investments. Given the severe penalties for violations, it is essential to consult with legal counsel before taking action.

<sup>1</sup> <http://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>

<sup>2</sup> <http://www.nytimes.com/2015/01/21/us/politics/obamas-state-of-the-union-2015-address.html>

<sup>3</sup> <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2015OpportunityAgendaPresentation.pdf>

<sup>4</sup> [http://www.treasury.gov/resource-center/sanctions/Programs/Documents/31cfr515\\_new.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/31cfr515_new.pdf)

<sup>5</sup> [http://www.bis.doc.gov/index.php/forms-documents/doc\\_download/986-740](http://www.bis.doc.gov/index.php/forms-documents/doc_download/986-740)

We are able to provide counsel and guidance in matters of international law, including those specifically related to the continuing developments of U.S.-Cuban foreign relations. For additional information, please contact the attorney named below or the attorney with whom you have a primary relationship.

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