

Which Way to Havana? Navigating Narrow Straights and Open Waters in U.S. Trade with Cuba

By Reid Whitten* and Fatema Merchant**

A stunning change from the course of the past sixty years has steered the ship of U.S. foreign policy to warmer waters. The United States has already lifted certain restrictions on trade with Cuba.¹ Even more channels may open soon for U.S. persons and businesses to navigate their way to communication and commerce with Cuba. In this article, we will briefly review the past half-century of U.S.-Cuba relations, plunge into the details of the latest changes to U.S. sanctions against Cuba, consider the potential opportunities for U.S. businesses in the wake of these changes, and examine the hazards and shoals that could sink a Cuban trade venture.

Looking Astern – The History of U.S. Cuba Relations

In 1959, when Fidel Castro seized power in Cuba, the United States began imposing sanctions against the island nation and, in 1962, had implemented an official embargo.² Over the next five decades, the United States reinforced its sanctions against Cuba, particularly in the 1990s, when the Helms-Burton act expanded the embargo to third countries that undertook import or export transactions with Cuba.³ The past fifteen years have seen a slight relaxation of the sanctions, as the U.S. reached an agreement to allow the sale of food and agricultural products to Cuba.⁴

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¹ *FACT SHEET: Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions*, U.S. DEPT TREASURY (Jan. 15, 2015), <http://www.treasury.gov/press-center/press-releases/Pages/j19740.aspx> [hereinafter *FACT SHEET*].

² Proclamation No. 344, 27 Fed. Reg. 1085 (Feb. 3, 1962), *available at* <http://www.presidency.ucsb.edu/ws/?pid=58824>

³ Helms-Burton Act, 22 U.S.C. §§ 6021-6091 (2006).

⁴ *See* Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. §§ 7201-7211 (2006).

The biggest change since the imposition of the Cuba embargo, however, began on December 17, 2014, when President Obama delivered a remarkable speech announcing a program to reduce U.S. sanctions against Cuba in three ways⁵:

1. Initiate the reestablishment of diplomatic relations, with a goal of establishing a U.S. Embassy in Havana;
2. Review the designation of Cuba as “state sponsor of terrorism,” which has been in place since 1982;⁶ and
3. Expand travel authorizations and commercial transactions.

It is the last of these three proposed changes that is taking the most immediate effect and will have the most important consequences for U.S. business in the near term.

Plumbing the Depths – The Details of the Changes to U.S. Sanctions Policy

Less than a month after the President announced proposed changes to the country’s Cuba policy, the U.S. Department of Commerce and the U.S. Department of Treasury issued regulations liberalizing the rules on private sector investment and transactions in Cuba.⁷ Previously, in order to export or re-export *any* U.S.-origin item or service to Cuba, a license was required.⁸ Any license application related to Cuba was subject to a general policy of denial.⁹ The revised regulations create new authorizations and also include a new exception to the Cuban licensing policy: License Exception for the Support of the Cuban People (“SCP”).¹⁰ The SCP exception provides authorization for export of items to Cuba to improve living conditions and support economic activity.¹¹ Items that fit the license exception criteria are authorized for export so long as they are designated EAR99¹² under the Export Administration Regulations (“EAR”) or are controlled under the EAR only for anti-terrorism reasons. This means that the authorization generally covers most commercial items that are not controlled for any potential security or military use that fall in the

⁵ President Barack Obama, Statement on Cuba Policy (Dec. 17, 2014), available at <http://www.c-span.org/video/?323375-3/president-obama-statement-cuba>.

⁶ See 15 C.F.R. §§ 730.1–730.10 (2014); 22 U.S.C. § 2778 (2006); Foreign Assistance Act of 1961, Pub. L. No. 87–195, 75 Stat. 424-2 (codified as amended in scattered sections of 22 U.S.C.).

⁷ Cuban Assets Control Regulations, 80 Fed. Reg. 2,291 (Jan. 16, 2015) (to be codified at 31 C.F.R. pt. 515).

⁸ See generally Resource Center, U.S. DEP’T TREASURY, <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#60> (last visited Mar. 27, 2015) (explaining licensing requirements in the broadest sense).

⁹ Stanley Keller, *U.S. Export Laws & Related Trade Sanctions*, 11/17/2012, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG., <http://blogs.law.harvard.edu/corpgov/2012/11/17/u-s-export-laws-and-related-trade-sanctions/> (“Of course, an application for a license to export to those countries would almost certainly be denied.”).

¹⁰ Cuban Assets Control Regulations, 80 Fed. Reg. at 2,300 (modifying 31 C.F.R. § 515.574).

¹¹ See *id.*

¹² Under the Commerce Department’s Export Administration Regulations (“EAR”), items are categorized under Export Control Classification Numbers (“ECCN”) by the nature of the product, i.e. the type of commodity, software, or technology and its technical specifications. Any item that is subject to the EAR but does not meet the specifications of an ECCN, fall into the “basket” of EAR99 items. Generally EAR99 items may be exported without a license to most destinations.

categories listed below.¹³ The new regulations also authorize or remove prohibitions on certain travel and services to Cuba.¹⁴ Below is a brief summary of the newly allowed transactions:

- New General License for Exports of Goods to Entrepreneurs. The SCP includes specific authorization to export to Cuba of the following items:
 - (1) Building materials, equipment, and tools for use by the private sector;
 - (2) Tools and equipment for private sector agricultural activity; or
 - (3) Tools, equipment, supplies, and instruments for use by private sector entrepreneurs.¹⁵
- General License for Telecommunication Equipment. License Exception SCP also permits export of items for telecommunications, including access to the Internet, use of Internet services, infrastructure creation and upgrades.¹⁶
- Support for Civil Society. License Exception SCP also authorizes the export of *donated* items for use in scientific, archaeological, cultural, ecological, educational, historic preservation, or sporting activities and the *temporary* export of items by persons traveling to Cuba for their use in the same activities.
- Financial Transactions. Accepting payment for authorized exports is permitted. Under existing Office of Foreign Assets Control regulations, all transactions ordinarily incident to lawful exports are authorized.¹⁷
- Travel to Cuba. Transactions incident to travel within twelve categories are permitted, including travel for educational activities (including people-to-people travel), journalistic and religious activities, professional meetings, and humanitarian projects. The travel must fulfill all the explicit provisions of the general licenses set forth in the regulations. Travel for tourist activities remains prohibited by statute and will not be permitted under these general licenses.¹⁸
- Travel services. Travel agents and airlines may provide authorized travel and carrier services.¹⁹

¹³ See Cuban Assets Control Regulations, 80 Fed. Reg. at 2,300 (modifying 31 C.F.R. § 515.578).

¹⁴ See *FACT SHEET*, *supra* note 1.

¹⁵ See 31 C.F.R. §§ 515.574, 515.582 (2014).

¹⁶ See *FACT SHEET*, *supra* note 1 (noting the permissibility of “[t]he commercial export of certain items that will contribute to the ability of the Cuban people to communicate”).

¹⁷ See 31 C.F.R. § 515.584 (2014).

¹⁸ See *id.* § 515.560.

¹⁹ See *FACT SHEET*, *supra* note 1 (“Travel agents and airlines will be authorized to provide authorized travel and air carrier services without the need for a specific license from OFAC.”).

- Credit and Debit Cards. U.S. credit and debit cards may be used in Cuba for travel-related and other transactions, and U.S. financial institutions are permitted to enroll merchants and process such transactions.²⁰
- Per Diems. The per diem limitation on authorized travelers' spending in Cuba has been eliminated.²¹
- Imports. Authorized travelers may import up to \$400 worth of goods from Cuba into the United States (including up to a total of \$100 in alcohol or tobacco products).²²
- Microfinancing. Microfinancing projects for humanitarian purposes are permitted, so long as they do not violate the existing ban on certain loans that involve Cuban government-confiscated property.²³
- Family Remittances. Remittances of up to \$2,000 in any consecutive three-month period are now permitted. Authorized travelers to Cuba may carry up to \$10,000 in total remittances. Additionally, banking institutions, including U.S.-registered brokers or dealers in securities and U.S.-registered money transmitters, are authorized to provide services in connection with the collection or forwarding of remittances to Cuba.²⁴
- Correspondent Accounts. U.S. depository institutions are authorized to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions.²⁵
- "Cash in Advance" Interpretation. The regulatory interpretation of "cash in advance" is revised from "cash before shipment" to "cash before transfer of title or control" to allow expanded financing options for authorized exports to Cuba.²⁶
- Telecommunications. Transactions to provide commercial telecommunications services that link third countries to Cuba and within Cuba are generally authorized.²⁷
- Transactions with Cuban Nationals Outside of Cuba. U.S.-owned or -controlled entities in third countries may provide, with some limitations, services (and goods) to Cuban nationals in third countries. The accounts of Cuban nationals who have permanently relocated outside of Cuba are unblocked.²⁸

²⁰ See 31 C.F.R. § 515.584.

²¹ See *FACT SHEET*, *supra* note 1 ("The per diem rate previously imposed on authorized travelers will no longer apply.").

²² See 31 C.F.R. § 515.582 (2014).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

- Insurance. A new interpretation permits the provision of health insurance, life insurance, and travel insurance and related services to authorized travelers.²⁹

Scanning the Horizon – A Sea of Opportunities

Although the legal particulars are important, the question for U.S. companies and their partners is, “how do these changes help me grow my business?” The revised regulations provide clear prospects for the construction and telecommunications industries. A U.S. business might supply building materials to construct new residences, and another might provide the phones and wireless internet for those residences.³⁰

Less evident opportunities also lie just under the surface of the regulations. If certain travel by U.S. persons to Cuba is authorized, then perhaps there is a niche travel insurance industry waiting to offer protection against the risks of planning travel to a country where unexpected issues might arise at any point. With new financial transactions authorized, a new banking sector may be waiting to burgeon to serve the needs of travelers to Cuba, families of Cubans, Cuban merchants accepting U.S. credit cards, and others working to finance newly authorized activities.³¹

Even more obscure openings in the market may appear to creative entrepreneurs. For instance, cultural activity authorized under SCP could lead to increased U.S. interest in Cuban art and performance, creating a market for Cuban pieces that might be displayed, performed, or sold in the United States if political conditions allow.³² If items for sporting activities may be donated, a U.S. company could donate American footballs to the (currently baseball-crazed) Cuban people to cultivate a market for the sport in anticipation of a time when the company might sell pads and helmets on the island. The possibilities are numerous and varied for a legal pedant to dream up, but the list of changes is plenty to inspire an enterprising business person.

Testing the Winds – A Word of Pragmatism

Though U.S. businesspeople may be excited about the potential wealth of opportunities, the reality is that substantive changes to the business environment may be years away. While certain changes have immediate impact, such as the authorizations for exporting certain telecommunication equipment and easing of certain travel restrictions discussed above, complying with the authorizations may be a real challenge. For example, the exceptions generally relate to transactions that will “support” the “Cuban people.” But in a country where most industry is owned or controlled by the state, showing that transactions benefit the people may not be so easy.³³ Additionally, these immediate changes will not likely translate into big business opportunities because of how narrow these exceptions are. Other more drastic changes in the sanctions regulations, like allowing for general tourism, will take congressional action, and the hurdle of partisan politics might be too great to overcome.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *See id.*

³³ *See generally id.*

While the United States has been walled off from Cuba, other Western countries have not. U.S. businesses will be competing in a marketplace where their counterparts, such as France and Canada, have been for decades. In an impoverished country of only eleven million people, the actual business rewards might not be worth the risks.

Coming Ashore – A Final Thought

Nonetheless, it is a rare opportunity that escapes the notice of the American entrepreneur. U.S. companies will inevitably push southward in the coming months and years. Whether they succeed will depend in no small part on how attentive they are to the swells and breaks of U.S. export and sanctions regulations. To quote a far better writer,

“There is a tide in the affairs of men, Which taken at the flood, leads on to fortune. Omitted, all the voyage of their life is bound in shallows and in miseries. On such a full sea are we now afloat. And we must take the current when it serves, or lose our ventures.”³⁴

³⁴WILLIAM SHAKESPEARE, JULIUS CAESAR act 4, sc. 3.