

Client Alert

January 2017

Cuba: The Year in Review (2016)

Approximately two years ago, on December 17, 2014, President Obama announced a policy to increase contact and engagement with the people of Cuba with an ultimate goal of normalizing relations between the United States and Cuba. The initial announcement generated immense press coverage of and commercial interest in Cuba.

Since then and during 2015, the United States removed Cuba from the list of State Sponsors of Terrorism, the two countries reopened their respective embassies; the Department of Commerce's Bureau of Industry and Security (BIS) amended its Export Administration Regulations (EAR); and the Department of the Treasury's Office of Foreign Assets Control (OFAC) amended its Cuban Assets Control Regulations (CACR), on January 16, 2015, and September 21, 2015, to implement the policy change. For a more thorough discussion of the policy and regulatory changes in respect of Cuba in 2015, please see [Cuba: The Year in Review](#).

The year 2016 featured further regulatory changes and business developments in regard to US-Cuba relations, and a further loosening of the legal and logistical restrictions on travel to Cuba. For example, on January 27, 2016, the EAR and CACR were amended to, among other things:

- authorize US depository institutions to provide financing for exports and reexports of items other than agricultural commodities to Cuba, provided that such exportation is also approved by BIS; and
- further loosen restrictions on travel to Cuba, authorizing US persons to organize professional meetings, public performances, clinics, workshops and athletic and other competitions and exhibitions in Cuba, and to market such events.

Additionally, on March 16, 2016, the EAR and CACR were further amended to, for example:

- authorize US depository institutions to process fund transfers originating and terminating outside the United States (U-turn transfers), even if such transfers relate to activities that would not be permitted under the CACR, provided that neither the originator nor the beneficiary is a person subject to US jurisdiction;
- permit US banking institutions to accept, process and give value to US dollar monetary instruments presented by a banking institution located in a third country that is not a person subject to US jurisdiction or a Cuban national, provided that such third-country banking institution received such monetary instruments from a Cuban financial institution for which it maintains a correspondent account and the US dollar monetary instrument was received in connection with an underlying transaction that is authorized, exempt or otherwise not prohibited by the CACR;
- allow exporters of goods authorized for export or reexport to Cuba, entities providing mail or parcel transmission services authorized under the CACR, entities providing cargo transportation services in connection with trade involving Cuba authorized by or exempt from the CACR, and

providers of travel and carrier services authorized by the CACR to establish a business presence in Cuba; and

- authorize the payment of salaries or other compensation to Cuban nationals consistent with the individual's nonimmigrant status or nonimmigrant travel authorization, provided that such Cuban national is not subject to any special tax assessments by the Cuban government in connection with the receipt of the salary or other compensation.

On October 17, 2016, BIS and OFAC further amended the EAR and CACR, respectively. These additional regulatory changes, among other things:

- clarified the requirements for an authorized exportation or reexportation of items to Cuba;
- authorized persons subject to US jurisdiction to negotiate and enter into contingent contracts for transactions that are prohibited by the CACR, provided that the performance of such contract is made expressly contingent on receiving authorization from OFAC or such authorization is no longer being required;
- permitted persons subject to US jurisdiction to provide to Cuba or Cuban nationals services related to developing, repairing, maintaining and enhancing Cuban infrastructure that directly benefit the Cuban people, provided that the exportation of any materials to provide such services is authorized by BIS;
- allowed persons subject to US jurisdiction to engage in all transactions incident to joint medical research projects with Cuban nationals, to engage in all transactions incident to obtaining approval from the US Food and Drug Administration (FDA) of Cuban-origin pharmaceuticals, and to market, sell and distribute FDA-approved Cuban-origin pharmaceuticals; and
- lifted a restriction capping at \$100 the value of Cuban alcohol and tobacco products that could be imported into the US as accompanied baggage.

In addition to the formal amendments to the regulations governing US-Cuba relations, other changes and events have taken place over the last year in order to further promote interaction with and engagement of the Cuban people. For example:

- on March 20, 2016, President Obama visited Cuba, becoming the first US president to do so in 88 years;
- on May 1, 2016, cruise ships operated by Carnival Corporation's sub-brand Fathom began regularly scheduled voyages to Cuba; and
- in August of 2016, commercial passenger jet service to Cuba commenced after various US airlines were authorized to operate flights to Cuba, originating from various cities in the United States, including Atlanta, Charlotte, Fort Lauderdale, Houston, Los Angeles, Miami, Newark, New York, Orlando and Tampa.

Similarly, Cuba has directly or indirectly agreed to increased engagement and commerce by:

- choosing Bouygues Bâtiment and Aéroports de Paris SA for "exclusive talks" about modernizing, expanding and operating Cuba's José Martí International Airport in Havana under a concession agreement in order to cope with the boom in tourism caused by the easing of relations between Cuba and the United States and the authorization of commercial passenger jet service to Cuba;

- promulgating its third Portfolio of Foreign Investment Opportunities, featuring 395 projects worth over \$9.5 billion, in its quest to attract foreign investment; and
- announcing steps toward legalizing small- and medium-size private entities.

Conducting business in Cuba, however, continues to be subject to Cuban approval and discretion, while reform and market openness appear to continue to move slowly in the near future. For example:

- during the seventh Cuban Communist Party Congress held on April 16-19, 2016, it was reiterated that reform will continue “without haste but without pause”; and
- on October 28, 2016, the Cuban government formally rejected Cleber LLC’s proposal to build tractors in the Mariel Special Development Zone, after one year of discussions and negotiations.

In addition, various obstacles continue to prevent substantial engagement of and commerce with Cuba. These include:

- the Cuban embargo, which may be lifted only by an official act of Congress, and
- Cuba’s lack of access to credit and capital in the form of international finance from individual countries or multilateral institutions such as the World Bank.

The recent election of President-elect Donald Trump on November 8, 2016, and the subsequent death of Fidel Castro on November 25, 2016, make the future of US-Cuba relations uncertain. On the one hand, President-elect Trump has vowed to roll back many of the openings created by President Obama’s administration. In response, dozens of major US companies that have started or expanded operations in Cuba have urged President-elect Trump, a businessman himself, to reconsider. On the other hand, Fidel Castro’s recent death and Raúl Castro’s expected retirement as president of Cuba in 2018 may create an environment where more progressive and open market-oriented Cuban political leaders continue and expedite economic, political and social reforms that further promote US-Cuba engagement and commerce.

The Latin America group at Hunton & Williams LLP will continue to closely monitor related developments. Please contact us if you have any questions or would like further information regarding any of the regulatory changes in the past year, or any other regulation or sanction governing the Cuban embargo.

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