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U.S. Policy on Cuba Could Create Business Opportunities

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Earlier this month, President Obama announced historic changes to U.S. policy and relevant regulations regarding diplomatic engagement, travel and trade with Cuba.¹ The White House's new policy represents the most dramatic shift in U.S. policy to Cuba since the enactment of the embargo in 1961. As a result of this new policy, a number of sectors of the U.S. economy are likely to see new opportunities in Cuban trade. As companies look to Cuba or other countries in the region, they need to carefully consider the commercial and legal risks of entering new markets. The measures, which are subject to adoption of new regulations, include, among other things, changes to U.S. policy on travel to Cuba, trade and commerce, and financial transactions.

Implications for U.S. Businesses

Although broad changes to U.S. sanctions and export control policy will not occur in the short term, the White House announcement indicated changes that are likely to open important new business opportunities in a variety of sectors. Set forth below is a short discussion of the most important aspects of how these changes may impact your business.

- **Agriculture**

Certain items are expected to be authorized for export, including agricultural equipment for farmers in Cuba. Existing agricultural sales programs may be expanded by loosening the current definition of cash in advance. Exporters of previously authorized agricultural products, such as Texas rice growers, will find their business eased by liberalization of cash in advance payment regulations. Agricultural-related companies will need to monitor developments from the U.S. Department of Commerce Bureau of Industry and Security (BIS), which will likely create new licensing and notification procedures for such equipment and determine which goods will be eligible for export to Cuba.

- **Banking**

U.S. institutions will be permitted to open correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions. The regulatory definition of the statutory term "cash in advance" will be revised to specify that it means "cash before transfer of title."² This change is expected to facilitate the financing of authorized trade with Cuba. In addition, U.S. credit and debit cards will be permitted for use by travelers to Cuba, thus easing any financial transactions related to authorized commercial and personal transactions.

¹ Press Release, The White House Fact Sheet: Charting a New Course on Cuba (December 17, 2014).

² *Ibid.*

- **Energy**

Previous agreements between the U.S. and Cuba delimit the maritime space between the two countries within 200 nautical miles from shore. The United States, Cuba, and Mexico have extended continental shelves in an area within the Gulf of Mexico where the three countries have not yet delimited any boundaries. The U.S. Government announced that it is prepared to invite the governments of Cuba and Mexico to discuss these shared maritime boundaries. Viewed in conjunction with the recently adopted [Mexican energy reforms](#), this could be another measure (albeit preliminary) which enhances the ongoing development of hydrocarbons in the Gulf of Mexico, and companies should remain mindful of developments in this area.

- **Telecommunications**

The announcement outlines a substantial easing of restrictions on telecommunications products and services. Given Cuba's low Internet penetration, the commercial export of certain items that will contribute to improved communications between Cuban citizens and the U.S. will also be authorized. This will include the commercial sale of certain consumer communications devices, related software, applications, hardware and services, and items for the establishment and update of communications-related systems. Moreover, telecommunications providers will be allowed to establish the necessary mechanisms, including infrastructure, in Cuba to provide commercial telecommunications and Internet services. The goal of these measures is to improve telecommunications between the U.S. and Cuba, and this could open up new doors through commercial exports to Cuba.

- **Travel, Hospitality and Leisure**

The announcement has the potential to significantly affect the travel, hospitality and leisure sector, including airlines, cruise lines, hotels and travel agencies, which are likely to perceive this news as an opportunity. U.S. aviation cooperation with Cuba may also grow as a result of increased trade and travel. Cooperation in this area is already more robust than generally recognized. There is frequent charter traffic between the two countries, and the air traffic control systems routinely handle a myriad of flights to and from the U.S., the Caribbean and points south. Over-flight rights are widely granted, and the revenue Cuba collects from over-flights is an important source of foreign exchange. It is possible that this cooperation could be expanded in the future into what is known in aviation law as a policy of "comity and reciprocity" or even eventually into a more formal bilateral agreement. First, however, the Office of Foreign Assets Control (OFAC) would have to amend its regulations, which currently significantly restrict the provision of air services between the United States and Cuba. The Obama Administration has not made any statements outlining how other licensing policies for travel services and exports of aircraft or vessels may be changed.

Establishing Diplomatic Relations with Cuba

The Secretary of State will immediately initiate discussions with Cuba on the re-establishment of diplomatic relations. In the coming months, the White House plans to re-establish an embassy in Havana and carry out high-level exchanges and visits between the two governments as part of the normalization process.

Facilitating Expansion of Travel under General Licenses for 12 Existing Categories of Travel to Cuba

The White House also announced that general licenses will be made available for all authorized travelers in the following existing categories: (1) family visits; (2) official business of the U.S. government, foreign governments, and certain intergovernmental organizations; (3) journalistic activity; (4) professional

research and professional meetings; (5) educational activities; (6) religious activities; (7) public performances, clinics, workshops, athletic and other competitions, and exhibitions; (8) support for the Cuban people; (9) humanitarian projects; (10) activities of private foundations or research or educational institutes; (11) exportation, importation, or transmission of information or information materials; and (12) certain export transactions that may be considered for authorization under existing regulations and guidelines. Travelers in the twelve categories of travel to Cuba authorized by law will be able to make arrangements through any service provider that complies with the U.S. Treasury's Office of Foreign Assets Control (OFAC) regulations governing travel services to Cuba, and general licenses will authorize provision of such services. Although changes in this area represent an important development, travel to Cuba remains restricted and is not open to U.S. persons whose activities do not fall within one of the twelve categories above.

Facilitating Remittances to Cuba by U.S. Persons

The White House also announced that remittance levels will be raised from \$500 to \$2,000 per quarter for general donative remittances to Cuban nationals (except to certain officials of the government or the Communist Party). Moreover, 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. Moreover, remittance forwarders will no longer require a specific license.

Authorizing Expanded Commercial Sales/Exports from the United States of Certain Goods and Services

The White House will seek to strengthen the early stage Cuban private sector by authorizing for export certain building materials for private residential construction, goods for use by private sector Cuban entrepreneurs, and agricultural equipment for small farmers.

Authorizing American Citizens to Import Additional Goods from Cuba

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.

Updating the Application of Cuba Sanctions in Third Countries

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.

Review of Cuba's Designation as a State Sponsor of Terrorism

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. Cuba was placed on the list in 1982. Removal from this list could allow Cuba access to additional trade benefits.

Policy Announcement Subject to Adoption of New Formal Regulations

It is important to remember that the current embargo rules remain in effect. The announced changes are expected to be implemented via amendments to regulations of the Departments of the Treasury and Commerce. Businesses and individuals should closely review these regulations prior to entering into transactions with Cuba. Changes in the regulations are expected to take several weeks or months. Moreover, the White House will not be able to revoke statutorily based sanctions, such as the Helms Burton Act which addresses foreign entities that deal in property expropriated by Cuba from U.S. persons. Congressional action would also be needed to amend or rescind the Trading with the Enemy Act, the statute which authorizes much of the U.S. sanctions regime against Cuba. Finally, the leadership of the incoming, Republican-majority Congress has already announced its opposition to such measures.

Internal Cuban Reforms

It is also worth remembering that Cuba is not an easy place to do business in its own respect. The country has a very closed economic system characterized by a dual currency system, restrictions on ownership of private property, complex and ambiguous regulations, and a restricted labor market requiring foreign companies to do business with the government rather than hiring employees directly. Over time, Cuba will need to adopt a more economically competitive model in order to attract greater foreign investment around the world.

Haynes and Boone's Cuba Team

As part of its Americas Practice Group, Haynes and Boone has formed a Cuba Team focused on international regulatory, transactional and dispute related areas to help clients monitor and prepare for new opportunities related to trade with Cuba. Haynes and Boone serves clients from 12 offices with more than 50 members in its Americas Practice Group and is recognized by industry observers such as *Chambers and Partners*, *Latin Lawyer*, and *Latinvex* as having one of the leading Latin American practices. We have worked in more than 30 jurisdictions in the Caribbean/Latin America and through such work we have developed a strong network of Latin American law firms.

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