

SIGNIFICANT UNCERTAINTIES AND RISKS REMAIN FOLLOWING U.S. GOVERNMENT'S EASING OF CUBA SANCTIONS TO AUTHORIZE NEW TELECOMMUNICATIONS-RELATED TRANSACTIONS

Kent Bressie, Cecil Hunt & Danielle Piñeres

Although the White House announced in December 2014 that it would take steps to normalize diplomatic relations with Cuba and further relax U.S. economic sanctions—in particular, those restricting telecommunications services, equipment, and investment transactions—considerable risks and uncertainties remain regarding the dividing line between authorized and prohibited transactions. These risks and uncertainties include:

- New agency regulations that appear inconsistent with statutory language regarding the permissibility of investment in Cuba's domestic telecommunications infrastructure;
- The willingness of U.S. courts to garner funds owned by or owed to Cuba but held by U.S. telecommunications companies and financial institutions;
- The specter of sanctions for “trafficking” in assets expropriated from U.S. investors more than 50 years ago;
- The lack of an agreed claims settlement process between the U.S. and Cuban Governments (such as those established for claims against Iran, Libya, and Vietnam);
- Agency policies and procedures not yet updated to reflect the President's stated policy; and
- The lack of any assurances from the Cuban Government that it would authorize Cuban enterprises and individuals to engage in such transactions, much less establish a legal framework to protect U.S. companies and investors in doing so.

Inaccurate reporting in the popular media has also created confusion and misunderstanding of the recent policy changes.

This advisory reviews existing changes in U.S. economic sanctions and export controls pertaining to the telecommunications industry. It then highlights areas where further legislation, agency action, and agreement between the U.S. and Cuban Governments may be needed to provide greater certainty for Cuba-related telecommunications transactions.

I. Background and Current Prohibitions

In 1960, the United States imposed an embargo on Cuba and in 1961 broke off diplomatic relations with the Cuban Government. To implement the embargo, the U.S. Government had long restricted trade with Cuba and travel to Cuba by both statute and regulation. In general, absent authorization—sometimes provided in the regulations themselves and sometimes provided through the issuance of licenses on a case-by-case basis—U.S. persons could not export goods or services to Cuba, import goods or services from Cuba into the United States, or travel to Cuba.

HWG REGULATORY ADVISORY
March 9, 2015

In April 2009, the Obama administration announced changes in U.S. policy to promote the free flow of information to Cuba. The changes—following implementation by the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”) and the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”)—authorized, among other things, the establishment of telecommunications facilities linking the United States and Cuba and entry into roaming agreements with Cuban telecommunications service providers. The revised regulations also authorized certain types of payments for telecommunications services rendered to individual Cuban persons and certain travel to Cuba related to commercial telecommunications transactions.

In January 2010, the U.S. Department of State revised its foreign-policy guidance regarding U.S.-Cuba telecommunications links, and the Federal Communications Commission (“FCC”) issued new procedural guidance to reflect State’s guidance, as well as changes in OFAC and BIS regulations. Relying on the State Department’s guidance, the FCC stated that it would apply its International Settlements Policy (“ISP”) and the appropriate settlement rate benchmark for U.S.-Cuba traffic while permitting waivers of the ISP as appropriate. The FCC retained Cuba on the Exclusion List for international section 214 applications, meaning that grants of global facilities-based or global resale authority do not authorize U.S.-Cuba telecommunications services. The FCC requires carriers to seek separate authority for U.S.-Cuba telecommunications services; such applications are not eligible for streamlined processing and are subject to State Department review. The State Department and FCC both expressly noted that their guidance should not be interpreted as authorizing investment in Cuba’s domestic telecommunications infrastructure. The State Department guidance and FCC procedures remain in place, even though they are both out of date.

In 2010, OFAC amended its regulations to authorize the exportation of certain services incident to the provision of personal communications over the Internet. In 2011, OFAC authorized expanded travel to Cuba for educational, cultural, religious, and journalistic purposes.

On December 17, 2014, President Barack Obama stated that, in addition to opening an embassy in Havana, the U.S. Government will reexamine Cuba’s designation as a State Sponsor of Terrorism, and will make changes to the sanctions and export controls regulations in an effort “to increase travel, commerce, and the flow of information to and from Cuba.”

II. New Business Opportunities in Telecommunications

On January 16, 2015, OFAC and BIS amended their respective regulations to authorize a variety of new telecommunications and travel-related transactions relating to Cuba. Nevertheless, the embargo remains in place, so unless a transaction is exempted from licensing or authorized under a specific license, it is prohibited.

HWG REGULATORY ADVISORY

March 9, 2015

A. OFAC Regulations

Telecommunications Transactions. With respect to telecommunications transactions, as of January 16, 2015, OFAC's revised Cuban Assets Control Regulations ("CACR") permit the following telecommunications-related transactions without a specific license:

- Transactions incident to the establishment of U.S.-Cuba, Cuba-third country, and intra-Cuba telecommunications facilities, including but not limited to undersea fiber-optic cable and satellite facilities (although exportation and re-exportation of U.S.-origin goods and technology remain subject to separate BIS licensing).
- Transactions incident to the provision of telecommunications services (including data, telephone, telegraph, internet connectivity, radio, television, news wire feeds, and similar services, regardless of the medium of transmission) related to the transmission or the receipt of telecommunications involving Cuba, whether between Cuba and the United States or between Cuba and third countries.
- Payments to telecommunications service providers (including Cuban telecommunications service providers) or individuals to facilitate service to permitted individuals in Cuba, including monthly subscriptions, prepaid mobile or landline services, roaming, and termination charges.

Any person engaging in any of the three types of authorized telecommunications-related transactions described above must file with OFAC a commencement- or termination-of-service notification and semi-annual reports summarizing payments to Cuba and third countries relating to authorized transactions.

OFAC also authorizes the exportation or re-exportation of certain Internet-based services without a specific license, including:

- Services incident to the exchange of personal communications over the Internet, such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, blogging, web hosting (provided that it is not for the promotion of Cuba tourism), and domain name registration services.
- Services—including software design, business consulting, information technology management services (including cloud storage), and installation, repair, or replacement services—related to items exported or re-exported to Cuba under BIS's license exception for Consumer Communication Devices (discussed below).

Travel. OFAC previously listed twelve categories of travel that it would authorize on a case-by-case basis. In its most recent revisions to the CACR, OFAC eliminated case-by-case review and made a general license available for all such previously-listed travel categories (ranging from family visits to religious activities). It also clarified authorizations for travel relevant to telecommunications-related transactions:

HWG REGULATORY ADVISORY

March 9, 2015

- *Professional Meetings.* OFAC now permits persons subject to U.S. jurisdiction to engage in travel-related transactions to attend professional meetings that relate directly to the traveler's profession, professional background, or area of expertise. The traveler's schedule of activities may not include free time, tourism, or recreation in excess of that consistent with a full work schedule.
- *Travel Related to Exports Consistent with BIS Licensing Policy.* OFAC also permits travel-related transactions directly incident to the conduct of market research, commercial marketing, sales negotiation, accompanied delivery, or servicing in Cuba of items consistent with the export or re-export licensing policy of BIS. The traveler is subject to the same full-time schedule requirements applicable to professional meetings.

Travel to Cuba for tourism purposes remains prohibited. No advance notification or post-travel reporting is required. Nevertheless, for any Cuba travel, authorized travelers must keep detailed records of all travel-related expenditures, meeting schedules, and identities of meeting participants and retain such records for five years.

B. BIS Regulations

In the January 16, 2015 update to its regulations, BIS created one new license exception and expanded another.

- *License Exception Support for the Cuban People ("SCP").* License exception SCP covers the export and re-export to Cuba of certain items including building materials and equipment, tools and equipment for private agricultural or entrepreneurial use, donated items for use in scientific, educational, cultural or other similar activities, and telecommunications items. Eligible telecommunications items include: items "sold or donated, for telecommunications, including access to the Internet, use of Internet services, infrastructure creation and upgrades," and items used by news media personnel. The exception applies only to EAR99-designated goods or goods controlled on the Commerce Control List ("CCL") only for anti-terrorism reasons, but can still apply to a broad range of telecommunications goods.
- *License Exception for Consumer Communications Devices ("CCD").* License exception CCD previously applied only to donated communications devices, but the exception now covers items that are sold as well as donated. Qualifying items include commodities and software (except encryption source code) related to basic personal communications devices that are widely available for retail purchase in the United States, including computers, modems, network access controllers, wireless handsets, and SIM cards. This license exception does not authorize exports to designated Cuban Government and Communist Party officials.

BIS will also review requests for licenses to export other telecommunications items not covered by the license exceptions described above on a case-by-case basis.

III. Continuing Risks and Uncertainties

The U.S. Government has privately expressed disappointment that U.S. carriers and investors did not rush into Cuba following the 2009 change in policy authorizing U.S.-Cuba telecommunications services and infrastructure. According to FCC licensing records, only two carriers have sought new authority to serve Cuba since the 2009 policy change. U.S. Government officials are therefore particularly keen to encourage U.S. carriers and investors to engage in new transactions following the December 2014 change in policy. While new opportunities have opened up, significant risks and uncertainties remain. Some of the risks will abate only when the U.S. Congress changes the law. In the interim, the U.S. Government can take clarifying actions to address some of the uncertainties and inconsistencies in existing regulations and guidance.

The Cuban Democracy Act's Ban on Investment in Cuba's Domestic Telecommunications Networks. The Cuban Democracy Act of 1992 prohibits U.S. persons from investing “in the domestic telecommunications network within Cuba,” and defines such investment to include “the contribution (including by donation) of funds or anything of value to or for, and the making of loans to or for, such network.” The law does not expressly authorize the President or Executive Branch agencies such as OFAC and BIS to waive this restriction. This prohibition appears to conflict with new OFAC regulations authorizing the very same types of transactions. U.S. carriers and investors considering making such investments would be wise to consult with OFAC and the State Department regarding such potential investments.

Continuing Risks of Garnishment of Settlement Funds and Related Cuban Government Retaliation. U.S. carriers hold in U.S. bank accounts settlement funds owed to the Cuban carrier ETECSA for termination of U.S. telecommunications traffic in Cuba. These funds—and other funds, blocked by OFAC, relating to other sanctioned countries—have long made U.S. carriers (and their banks) targets for plaintiffs in U.S. courts seeking to satisfy judgments against the Cuban, Sudanese, and Syrian Governments, among others. Under the Terrorism Risk Insurance Act (“TRIA”), which creates an exception under the Foreign Sovereign Immunities Act to the principle that foreign sovereign states are generally immune from suits in U.S. courts, plaintiffs have sought to execute judgments for compensatory damages against blocked assets of terrorist parties, which include countries such as Cuba that the United States has designated as State Sponsors of Terrorism. Some courts have permitted garnishment of settlement funds, while others have rejected such garnishment. New transactions with payments coming directly from the Cuban Government or entities it controls could create new garnishment risks. U.S. carriers have also worried that the Cuban Government would, in retaliation for U.S. garnishments, seize funds from any new U.S.-Cuba transactions that they might conduct. The risk of retaliation has likely lessened, given the initial response of the Cuban Government to the Obama Administration’s change in policy, but the risk of garnishment remains significant.

HWG REGULATORY ADVISORY

March 9, 2015

The Shadow of the Helms-Burton Act. The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (known more commonly as the “Helms–Burton Act”) makes any person who “traffics” in property confiscated by the Cuban Government liable to any U.S. national who owns the claim to such property, absent authorization of the U.S. national holding the claim. (The law also bars entry into the United States by such traffickers, their executives, and dependents.) Although the term “traffics” does not include “the delivery of international telecommunications signals to Cuba,” activities relating to the acquisition or disposition of ownership of confiscated telecommunications-related property of U.S. nationals could still pose risks under the Helms-Burton Act. The Helms-Burton Act contributed to the termination of a 1994 investment by Mexico’s Grupo Domos in ETECSA, the successor to the Cuban Telephone Company, which had been expropriated from U.S. investor International Telephone & Telegraph (“ITT”). The State Department targeted Grupo Domos for sanctions under the Helms-Burton Act, which further impaired Grupo Domos’s ability to finance its investment. Grupo Domos then sold its investment in ETECSA to Italian carrier STET (now Telecom Italia), which negotiated a settlement with, and paid compensation to, ITT in 1997.

Absence of a Claims Settlement Process. Garnishment claims and U.S. Government actions to enforce the Helms-Burton Act highlight the fact that the U.S. and Cuban Governments have not yet agreed to a claims settlement process covering claims for physical injuries or deaths or compensation for expropriation of a vast array of assets from U.S. investors. The Cuban Claims Program of the Foreign Claims Settlement Commission (“FCSC”) has certified almost 6,000 claims for compensation for expropriated property. The FCSC has not reviewed wrongful death claims, for which a number of U.S. plaintiffs hold substantial default judgments (as in the case of the families of pilots for the Cuban exile group Brothers to the Rescue, whose planes were shot down by the Cuban air force in 1996 and of an ex-U.S. Marine executed in Cuba in 1960). Depending on the terms of a claims settlement process that might be agreed with the Cuban Government, however, the U.S. Government could establish an FCSC program to address such wrongful death claims. The U.S. Government did so in the case of Libya, providing compensation to the families of the Pan Am flight 103 bombing over Lockerbie, Scotland, in 1988 and the Berlin discotheque bombing in 1987, while granting Libya immunity from further claims.

To resolve claims against the Cuban Government, the United States could negotiate a lump-sum settlement with the Cuban Government, with settlement funds to be disbursed to certified claimants by the U.S. Department of the Treasury’s Bureau of the Fiscal Service, in consultation with the Foreign Claims Settlement Commission (as was done with claims against Vietnam and Libya). Alternatively, the United States and Cuba could establish an international tribunal to adjudicate certified claims, similar to what the United States and Iran did under the terms of the Algiers Accords, the 1981 agreement to resolve the Iran hostage crisis. Without a Cuban claims process, however, U.S. persons transacting business in Cuba or with Cubans remain subject to risks of garnishment actions and of sanctions for trafficking in expropriated property.

HWG REGULATORY ADVISORY

March 9, 2015

Continued Designation of Cuba as a State Sponsor of Terrorism. Until the United States revokes its designation of Cuba as a State Sponsor of Terrorism—an action President Obama has promised to consider—U.S. companies must ensure that their Cuba-related transactions comply with reporting and disclosure requirements administered by the U.S. Securities and Exchange Commission’s Office of Global Security Risk (“OGSR”). OGSR monitors disclosures by issuers of publicly-traded securities or debt of business activities in or with State Sponsors of Terrorism and takes the position that any such activities are “material” under U.S. securities laws (even when licensed by OFAC and/or BIS) and therefore require disclosure in public filings. OGSR requirements can also trigger investigations of an issuer’s internal controls for transactions with State Sponsors of Terrorism or attract unwanted publicity for Cuba-related transactions.

Outdated Foreign-Policy Guidance from the State Department and Procedural Guidance from the FCC. As noted in part 1 above, the State Department and FCC have yet to update their guidance for Cuba-related telecommunications services and infrastructure. The agencies’ stated prohibitions on investment in Cuba’s domestic telecommunications infrastructure are inconsistent with OFAC’s new regulations, even if they are consistent with the Cuban Democracy Act. The FCC’s retention of Cuba on the Exclusion List, requirement for separate authority to provide U.S.-Cuba services, and provision for State Department review of applications all seem inconsistent with President Obama’s stated policies and OFAC’s new regulations. Such disparities are not new, however. Industry intervened in 2009 to persuade both the State Department and the FCC to update their guidance documents.

* * * * *

For more information regarding Cuba sanctions or Harris, Wiltshire & Grannis LLP’s international trade and investment practice, please contact **Kent Bressie** at +1 202 730 1337 or by e-mail at kbressie@hwglaw.com, **Cecil Hunt** at +1 202 730 1309 or by e-mail at chunt@hwglaw.com, or contact the HWG lawyer with whom you regularly work.

This client advisory is not intended to convey legal advice. It is circulated to our clients as a convenience and is not intended to reflect or create an attorney-client relationship as to its subject matter.