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Doing Business in Cuba: New Guidance on Embargo Rules

On April 13th, U.S. President Barack Obama directed the Secretaries of State, Treasury and Commerce to ease the restrictions on trade with Cuba by removing ALL limitations on the ability of individuals to visit family members and many of the limitations on the ability to send funds as remittances to family members in Cuba. In an unexpected move, the President has also authorized U.S. telecommunications network providers to provide certain services in Cuba. Lastly, the administration added to the list of allowable humanitarian items that could be donated to Cuba.

The directives involving telecommunications services may provide some U.S. companies with the opportunity to do business in the Cuban market. While the governmental departments implementing these changes have not yet provided the specific rules and regulations that will reflect these new policies, U.S. companies should be aware of and prepared to take advantage of the new business opportunities that will be available and viable for them in Cuba.

Below, we have included a list of new business opportunities, particularly for telecommunications service and infrastructure providers, that will be allowed under the new directives.¹ More detail will be available once the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury, which administers and enforces economic and trade sanctions, and other governmental departments enact new regulations

pursuant to the President's directives (the "April 13th directives").

- U.S. telecommunications network providers will be authorized to enter into agreements to establish fiber-optic cable and satellite telecommunications facilities linking the United States and Cuba;
- U.S. telecommunications service providers will be eligible for licenses to enter into and operate under roaming service agreements with Cuba's telecommunications service providers;
- U.S. satellite radio and satellite television service providers will be eligible for licenses to engage in transactions necessary to provide services to customers in Cuba;
- Persons subject to U.S. jurisdiction will be eligible for licenses to activate and pay U.S. and third-country service providers for telecommunications, satellite radio and satellite television services provided to individuals in Cuba, except certain senior Communist Party and Cuban government officials; and
- Consistent with national security concerns, the export or re-export to Cuba of donated personal communications devices such as mobile phone systems, computers and software, and satellite receivers through a license exception will be authorized.

Current Restrictions on Doing Business in Cuba:

Until recently, U.S. policy toward Cuba had remained significantly the same as that in effect since 1962, when the Kennedy administration expanded a partial trade embargo initiated by the

¹ http://www.whitehouse.gov/the_press_office/Fact-Sheet-Reaching-out-to-the-Cuban-people/

Eisenhower administration the previous year. In 1963, the U.S. Government issued The Cuban Assets Control Regulations, 31 CFR Part 515, under the Trading With the Enemy Act, in response to certain hostile actions by the Cuban government. The intention was, and has remained, to isolate the Cuban government economically and deprive it of U.S. dollars.

Under the Cuban Democracy Act of 1992 (the "CDA") and the Trade Sanctions and Export Enhancement Act of 2000 (the "TSRA"), the Commerce Department provides licenses for the sale and export or re-export of certain medicine and medical supplies, food and agricultural commodities to Cuba. The list of agricultural commodities that may be licensed is narrowly defined. Eligible items include products such as tobacco, certain live animals, bamboo, wood charcoal, and fiberboard but not others such as certain fertilizers or cardboard boxes. Total U.S. agricultural exports to Cuba exceeded \$690 million in 2008, up from \$413 million in 2007, and the U.S. is the fifth largest exporter to Cuba.

Each transaction with Cuba must be licensed, although bundling of transactions under one license is allowed, and transactions must be paid in U.S. dollars and in advance of export. Although Section 515.559 of the CDA was added in the mid-1970s to allow the licensing of foreign subsidiaries of U.S. firms to trade other commodities, Section 1706(a) of the CDA now prohibits any such license unless a contract was entered into prior to enactment of the CDA or the exports fall into certain narrow categories.

In addition to the limitations on licensing sale and export to Cuba, the embargo prohibits any person subject to U.S. jurisdiction from otherwise dealing in any property associated with, contracting with, or providing services to Cuba or a Cuban national. As such, U.S. companies and even U.S. foreign subsidiaries may not purchase Cuban-made goods; sign a contract with a firm if the

contract terms include Cuba-related provisions (even if those provisions are contingent upon the lifting of the embargo); and may not provide accounting, marketing, sales, or insurance services to a Cuban company or to a foreign company with respect to the foreign company's Cuba-related business. As such, U.S. investors cannot make direct investments in Cuba. However, there is a *de minimis* exception for indirect investments. On several occasions, OFAC has offered the opinion: "Persons subject to the jurisdiction of the United States may invest in a third country company that has commercial activities in Cuba, provided that (i) such investment does not result in control in fact of the third country company, and (ii) the majority of the revenues of the third country company do not result from the commercial activities in Cuba."

Future of Embargo:

The Obama administration looks to begin opening Cuba for U.S. business investment, but has made it clear that business investment is not the primary goal and has not established a timeline for when this will happen. In a press briefing on April 13, Special Assistant to the President Dan Restrepo stressed that the current changes were intended to "advance the cause of freedom of the Cuban people" by providing them with humanitarian goods, access to their families, and access to information. He explained that the changes were a first step in helping Cuba become a democratic state but that the Obama administration did not have an agenda for lifting the rest of the embargo.

In a recent meeting with the President of Mexico, President Obama explained that if Cuba shows willingness to release political prisoners, allow more free speech, free practice of religion and free travel, there would be a further thawing of relations. Secretary of State Hillary Clinton has also stated that "the U.S. is ready to talk to Cuba." Cuban president Raul Castro, in a surprising

demonstration of his willingness to cooperate, has announced that he is prepared to discuss topics such as “human rights, freedom of the press, and political prisoners” in order to promote renewal of trade relations. However, the Cuban government has not yet made any overtures to begin any such discussions.

Congress has also recently made several attempts to ease the embargo on Cuba. In a provision of the 2009 Omnibus Appropriations Act, Congress directed the Treasury to provide greater access to licenses for travel to Cuba for the purpose of marketing and sale of certain agricultural and medical goods. The Treasury will likely implement this provision in the coming weeks. Until promulgation of new regulations, travel-related transactions must be authorized by

specific license as set forth in section 515.533(e) of Title 31 of the Code of Federal Regulations.

On March 31st, four members of the U.S. Senate introduced S. 4285, “The Freedom to Travel to Cuba Act.” A similar measure is expected to follow in the U.S. House of Representatives. The bill would forbid the President to “regulate or prohibit, directly or indirectly, travel to or from Cuba by United States citizens or legal residents,” and repeals all previous travel restrictions. However, such attempts have failed in the past and few analysts expect the embargo to be completely lifted any time soon.

Even if the embargo is not entirely lifted in the foreseeable future, considerable opportunities to do business in Cuba have been created by the April 13th directives.

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