

Post-Election Update on Cuba

March 08, 2017

Federal Policy

New Administration's Cuba Policy Plans

Prior to President Trump's inauguration, and in an effort to continue normalizing U.S.-Cuba relations, President Obama ended the "wet-foot, dry-foot" policy which since 1995 has granted Cubans who touch American soil the right to stay and get on a faster track to U.S. citizenship. It is unclear what effect this policy change will have on commercial opportunities in Cuba. However, in the short run we expect little impact.

Although the Trump administration has not yet acted with respect to federal law on Cuba sanctions, action appears imminent. Secretary of State Rex Tillerson said all of President Obama's executive orders on Cuba will be reviewed. On February 3, 2017, the status of U.S. relations with Cuba was drawn into question due to Cuba's increased commercial relationship with Iran and its support of Iran's nuclear development program. Indeed, White House Press Secretary Sean Spicer recently indicated that the Trump administration was conducting a full review of all U.S. policies toward Cuba, with a focus on human rights policies.

If President Trump were to reverse the easing of sanctions, he could do so easily and quickly, as President Obama's steps were all taken through executive action and could be undone in the same fashion. However, numerous U.S. companies have begun legally operating on the island, including major U.S. hotel chains and airlines. Thus, President Trump would risk a likely business backlash with minimal political gain if all of President Obama's policies were undone. Nevertheless, eased economic restrictions and sanctions will not likely occur as rapidly under this administration.

The U.S. Department of the Treasury's Office of Foreign Assets Control Continues Enforcing Violations of U.S. Sanctions Against Cuba

Recently, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) announced a \$516,000 settlement with a Canadian bank for several violations of U.S. sanctions against Iran and Cuba. These included the maintenance of bank accounts in Canada for Cuban nationals.

On November 14, 2016, OFAC also announced it had reached a settlement with National Oilwell Varco, Inc., a U.S.-based oil and gas company, and two of its Canadian subsidiaries, Dreco Energy Services, Ltd. and NOV Elmar (collectively, "NOV") for, among other things, alleged violations of the Cuban Assets Control Regulations. Almost all the sales to Cuba and other countries subject to U.S. sanctions and regulations occurred outside the United States. Nonetheless, NOV faced an enforcement action in part because the company's Canadian subsidiaries exported non-U.S.-origin goods to Cuba.

These resolutions are reminders that OFAC's enforcement reaches violations of varying proportions – even those beyond the U.S. border. Moreover, the penalties imposed by OFAC demonstrate that entities must comply with U.S. sanctions regulations when transacting with, or in, the United States.

Provision of Legal Services Regarding Cuba

After receiving recent inquiries from foreign companies, OFAC released a memorandum of "interpretive guidance" as to whether U.S. persons, including U.S. attorneys and compliance personnel, may provide certain services to covered persons regarding the requirements of U.S. sanctions laws. In the memorandum, OFAC clarified that U.S. attorneys and compliance personnel may provide information or guidance regarding the requirements of U.S. sanctions laws administered by OFAC, including statutes, regulations, and executive orders; and opine on the legality of specific transactions under U.S. sanctions laws regardless of whether it would be prohibited for a U.S. person to engage in those transactions.

International businesses, especially those based in the United States, have relied on attorneys to counsel and negotiate enforceable contracts in Cuba to an extreme degree. Simply put, and notwithstanding contrary representations by certain U.S. lawyers, foreign counsel cannot practice in Cuba, and finding a disinterested attorney who can represent non-Cuban interests is a challenge. Moreover, U.S. attorneys are generally restricted in facilitating transactions in Cuba due to OFAC's general prohibition against doing business there.

We have found the two following alternatives available, though neither is highly desirable or particularly efficient

1. directly engaging a "bufete," i.e., law office, in Cuba. Privately-owned law firms are not permitted in Cuba. These "bufetes" are subsidiaries or affiliates of government-owned and operated entities. For example, we have previously contacted Bufete Internacional, a subsidiary of a Cuban tourism-related company. It is very difficult to communicate directly with these "bufetes" and to obtain any useful information from them on a timely basis.

or

2. engaging a foreign (non-U.S.) law firm or lawyer with experience and contacts in Cuba. Based on our discussions with several foreign lawyers with experience in Cuba, this seems the most viable alternative. These lawyers are familiar with and have worked with "bufetes" in Cuba. Based on the project's subject matter, they engage the most suitable local counsel (i.e., one of the "bufetes") and serve as the liaison between the U.S. client and Cuban counsel. Based on the information we have gathered, using this type of "liaison" seems to be the customary way of doing business with local Cuban lawyers.

General Information Regarding Doing Business in Cuba

The most important business developments have been limited to the areas of telecom and internet access. Internet service is now being provided in Cuba, albeit on a limited basis, with approximately 240 Wi-Fi hot spots set up by the government throughout the island. Also, a limited home internet pilot program has been instituted. Even so, it is important to note that Cuba's level of internet connectivity is among the world's lowest. More than half of those who access the internet in Cuba do so from hotels and tourist centers because internet access is prohibitively expensive for most citizens and connections can be patchy and slow.

Google recently struck a deal with the Cuban government to improve Cuba's technology and internet access. However, many Cuban citizens and dissidents refer to this partnership as a "Trojan Horse" that will help the Cuban government monitor its citizens' internet use, providing the regime with detailed reports of users' searches and profiles.

This builds on prior telecommunications agreements between AT&T, Verizon, Sprint, T-Mobile, and the Cuban government to offer roaming services to U.S. travelers.

Overall, however, we see these limited efforts as further indication of Cuba's lack of critical infrastructure, which limits potentially profitable business opportunities.

State of Florida Policy

On January 25, 2017, Florida Governor Rick Scott announced that he would ask state lawmakers to pass legislation restricting financial support for ports that "enter into any agreement with the Cuban dictatorship" citing "[s]erious security/human rights concerns." This came a day after the first legal cargo from Cuba in more than half a century arrived in Fort Lauderdale's Port Everglades. Days later, Governor Scott added language to his proposed budget which states that no money will be "allocated to infrastructure projects that result in the expansion of trade with the Cuban dictatorship because of their continued human rights abuses." It is unclear whether this will have any effect on trade in services, such as cruises or ferry service to the island.

The port authorities previously indicated that these agreements could lead to joint marketing studies and training. Port Tampa Bay, on the other hand, indicated that it would not reach any agreements with the Cuban government citing "ambiguity" in Cuba policy right now.

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