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International Trade Daily Bulletin™

Trade Policy

President Trump's Revised Cuba Policy: The Consequences for American Business

President Trump's announced changes to U.S.-Cuba policy seem limited in scope but could in fact have a large impact on U.S. companies looking to expand into the Cuban market. The authors of this Bloomberg BNA Insight explore the potential impact of Trump's rollback of certain regulatory changes made during the Obama Administration.

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On June 17, 2017, President Donald Trump announced his administration's policy toward Cuba. The announcement lifted a cloud of uncertainty that had hung over U.S.-Cuba relations since President Trump was elected last November. With Congress seemingly lacking the political will to ease the embargo against Cuba, the Trump administration's policy and ensuing regulatory changes will chart the course on U.S.-Cuba relations, at least in the near future.

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Since President Barack Obama announced on Dec. 17, 2014, that his administration would reset the U.S. relationship with Cuba, the U.S. and Cuba have reestablished diplomatic relations and expanded commerce. Five sets of regulatory changes were made by the Department of the Treasury and the Department of Commerce. These regulatory changes allowed increased travel between the U.S. and Cuba, and authorized business activities across numerous sectors, including telecommunications, technology, health and pharmaceutical, travel and cargo, and construction and infrastructure. They also made it easier for U.S. companies to export their products to Cuba and to import certain Cuban merchandise.

Cuba-Related Export Activities Authorized by the Obama Administration. The Cuban Assets Control Regulations (''CACR''), administered by the Office of Foreign Assets Control of the Department of the Treasury (''OFAC''), have not been revised since the inauguration of President Trump, despite the announced policy changes. The CACR generally authorize exportation of items from the U.S., or the re-exportation of items from a third country, to Cuba, so long as the export is authorized by the Export Administration Regulations (15 CFR § § 730-774) (''EAR'').

Pursuant to the EAR, an export license is required for exports and re-exports to Cuba of all items subject to the EAR. The Bureau of Industry and Security of the Department of Commerce (''BIS''), which administers the EAR, has traditionally maintained a general policy of denial for exports and re-exports to Cuba. An exception to this policy has existed for exports and re-exports of medicines and medical devices. However, the regulations issued by the prior administration modified the scope of some of the existing license exceptions for exports and re-exports to Cuba, and created numerous exceptions to the general policy of denial of export license applications for exports and re-exports.

Before the regulatory amendments made by the Obama administration, the license exceptions for exports and re-exports to Cuba included the majority of the license exceptions generally available for non-sanctioned countries, including temporary exports and re-exports (TMP); operation technology and software, sales technology and software updates for legally exported commodities or software (TSU); parts for one-on-one replacement in certain legally exported commodities (RPL); baggage (BAG); aircraft and vessels for certain aircraft on temporary sojourn (AVS); agricultural commodities (AGR); and consumer communication devices (CCD), among others. However, restrictions on exports and re-exports to terrorism sponsoring countries (E:1) were still applicable, since Cuba remained labeled as such. Thanks to the warming of U.S.-Cuba relations, Cuba was removed from the list of States Sponsors of Terrorism and consequently restrictions on license exceptions for exports and re-exports to E:1 countries ceased to apply.

In addition, in furtherance of the rapprochement, the regulations carved out various exceptions to the general policy of denial of export license applications for Cuba-bound exports and re-exports. The Obama administration also initiated a general policy of approval for exports and re-exports of telecommunication items; commodities and software intended for certain private organizations; agricultural items not deemed agricultural commodities; items to ensure the safety of civil aviation; and items necessary for the environmental protection of U.S. and international air quality, waters and coastlines.

Furthermore, a case-by-case review policy was established for license applications to export or re-export items to meet the needs of the Cuban people, including exports and re-exports of such items to state-owned enterprises, agencies, and other organizations of the Cuban government that provide goods and services for the use and benefit of the Cuban people.

This category is deemed to include: items for agricultural production, artistic endeavors (including the creation of public content, historic and cultural works and preservation), education, food processing, disaster preparedness, relief and response, public health and sanitation, residential construction and renovation and public transportation; wholesale and retail distribution for domestic consumption by the Cuban people; construction of facilities for treating public water supplies, facilities for supplying electricity or other energy to the Cuban people, sports and recreation facilities, and other infrastructure that directly benefits the Cuban people; and items that enable or facilitate export from Cuba of items produced by the private sector.

A case-by-case review policy was also established for applications for exports or re-exports of aircraft or vessels on temporary sojourn to Cuba to deliver humanitarian goods or services, or otherwise to engage in activity consistent with the foreign policy interests of the U.S.

A general policy of denial remained, however, for all other exports and re-exports, including those items for use by state-owned enterprises, agencies, and other organizations deemed to primarily generate revenue for the Cuban government, including those engaged in tourism and those engaged in the extraction or production of minerals or other raw materials, as well as of items destined to the Cuban military, police, intelligence or security services.

All transactions directly incident to authorized exports were also permitted by the new regulations. These transactions included traveling to Cuba, entering into contingent contracts, purchasing and providing insurance and transportation, and related activities. In addition, U.S. exporters were authorized to set up legal entities and establish offices, warehouses, and retail spaces in Cuba. U.S. exporters were also allowed to conduct marketing activities and employ Cuban nationals and U.S. persons to establish a physical and business presence in the island nation. These ordinarily incident activities exclude, however, financing of exports of agricultural commodities by U.S. financial institutions.

Cuba-Related Import Activities Authorized by the Obama Administration. Imports into the U.S., or by U.S. persons into third countries, of Cuban-origin merchandise are generally not permitted except for imports of information and informational materials, which are exempt from this general prohibition. Unlike the significant loosening of the restrictions on exports to Cuba, regulatory changes regarding imports of Cuban-origin items into the U.S. during the prior administration were conservative and targeted. Specifically, the new regulations authorized importation into the U.S. of goods produced by independent Cuban entrepreneurs (which include some agricultural goods, such as coffee and charcoal pursuant to a list published on the website of the Department of State); Cuban-origin pharmaceuticals; and Cuban-origin software and mobile applications. Other general licenses authorizing imports were issued, but they involve imports in non-commercial quantities or items previously exported or re-exported to Cuba for servicing and repair. All transactions ordinarily incident to said importations are also authorized.

President Trump's Policy on Cuba President Trump's new policy on Cuba, announced June 17, leaves in place the vast majority of the regulatory changes made by the Obama administration and focuses its attention on the following three areas: (1) prohibition on dealings with Cuban military-run companies; (2) reversal of general license authorizing individual people-to-people travel; and (3) stricter regulatory enforcement. This rollback will be prospective from the date of issuance of the forthcoming regulations, and will not affect existing contracts and licenses. Furthermore, under the new policy, the administration will not issue additional regulations fostering engagement with Cuba unless the Cuban government shows concrete steps towards democracy, including legalization of all political parties, freeing of political prisoners, recognition of freedom of speech and freedom of assembly, and free internationally supervised elections. The policy memorandum signed by the President requires the appropriate federal

   ISSN 0000-0000

agencies, particularly the Department of the Treasury and the Department of Commerce, to begin the process of issuing new regulations within 30 days. However, the White House fact sheet on Cuba acknowledges that the process of issuing these new regulations may take several months.

(1) Prohibition of Dealings With Entities Run by the Cuban Military. For the uninitiated, prohibiting dealings with affiliates of the Cuban military may seem targeted and limited in scope, requiring only an additional layer of due diligence to ensure compliance with U.S. law. However, this policy effectively excludes dealings with the military-run conglomerate Grupo de Administracion Empresarial, S.A. (GAESA), the single largest player in the Cuban economy, with dozens of companies under its umbrella across numerous sectors, particularly hospitality, retail and trade. For example, GAESA's Almacenes Universales S.A., is the ''go-to'' company at the container terminal in the Port of Mariel—which receives most of the cargo that once arrived at the Port of Havana—for port logistics, customs, warehousing, land transportation, and similar services.

Although other, non-military run companies do exist, this new policy represents a significant obstacle for U.S. companies interested in Cuba, since some of the most attractive business opportunities are now off-limits. Conceivably, the Cuban government could dodge this hurdle via a series of corporate restructuring transactions or transfers of assets to non-military government-run companies. However, given the current regulatory enforcement environment, it seems unlikely that these efforts will take place.

The State Department is expected to publish a list of Cuban entities with which direct transactions will *not* be permitted. It is not clear, though, whether unlisted parties will be conclusively considered permissible or whether U.S. parties will still need to conduct due diligence to determine such unlisted parties' affiliation with the Cuban military. It is also unclear whether a *bona fide* divestiture by the Cuban military of ownership and control over a particular entity would result in removal from the State Department list, and whether there will be a process to seek delisting.

US exporters may continue their export activities as authorized by the prior administration, but must ensure that they do not deal with entities run by the Cuban military. A silver lining to this recent restriction is that most U.S. exports to Cuba consist of agricultural commodities, and the only authorized purchaser of U.S. agricultural commodities in the island is Alimport S.A., which is under GECOMEX, a holding company which in turn is regulated by the Cuban Ministry of Foreign Trade and Investment.

Nonetheless, U.S. exporters must now conduct due diligence to ensure compliance with this new restriction on business with Cuban-military run entities. It must be noted, however, that the general license authorizing contingent contracts with Cuban parties subject to obtaining authorization from OFAC and any other competent agency remains authorized.

US importers will likely endure minimal impact from this recently announced prohibition since independent Cuban entrepreneurs are not affected and Biocubafarma—the potential exporter of pharmaceutical products to the U.S.—has not been publicly linked to GAESA.

(2) Prohibition of Individual People-to-People Travel. The surge in the number of U.S. visitors to Cuba has been one of the main effects of the rapprochement. As noted previously, the Obama administration authorized travel to Cuba under 12 categories of general licenses, including family visits, religious, cultural and educational activities, professional research, and people-to-people exchanges. One of the most widely used general licenses was the one authorizing individual people-to-people travel.

This general license authorized U.S. travelers to visit Cuba on cultural trips without the need to purchase often-costly guided tours. Over the past couple of years, these general licenses effectively allowed hundreds of thousands of Americans to visit Cuba, requiring them only to maintain travel records supporting the applicability of a particular general license for a period of five years.

President Trump's policy would revoke the general license for individual people-to-people travel. The revocation of this general license will not affect those travelers who have made at least one travel arrangement (such as purchasing airfare or reserving accommodations) prior to the President's announcement on June 16, 2017. Moving forward, commercial passenger carriers will need to revise their procedures and business processes affecting Cuba travel to ensure compliance with these regulatory changes.

Other existing categories of authorized travel would remain in place. Therefore, travel related to export and re-export transactions, and travel for professional meetings (which includes business meetings) are still authorized.

(3) Stricter Regulatory Enforcement. In his June 17 speech, President Trump stated that his administration will enforce the tourism ban, and will enforce the embargo, thus announcing a stricter regulatory environment. Travelers returning from Cuba should expect questioning at the ports of entry regarding their visit and should keep records of their visit for at least five years.

US exporters and importers with interests in Cuba should work closely with counsel to make sure that their proposed activities and travel to Cuba are authorized or should seek a specific license when in doubt as to the permissibility of their Cuba projects under existing general licenses. For companies already operating in Cuba under specific licenses, those licenses will remain in effect, but the prospects for extending the scope or duration of a current license are more doubtful than they were before the change in policy.

The Outlook for U.S.-Cuba Relations. Since the onset of the rapprochement, numerous U.S. companies of all sizes and across multiple sectors have made investments in or otherwise entered the Cuban market, relying on the warmer relations between the two countries. Notably, several U.S. commercial airlines are flying from American cities to Cuba; various U.S. telecommunications companies have entered into direct voice and roaming agreements with Cuba's national telecom company; and U.S. hospitality companies are operating in the island nation. In addition, a prominent cancer institute in the U.S. has begun the clinical trial of a groundbreaking Cuban lung cancer vaccine; a Florida-based bank has begun offering credit cards for use in Cuba;

and numerous American cruise ship companies have included Cuban ports in their itineraries.

Given President Trump's announcement, many of these companies, and their competitors who may now feel left out, will likely press Washington to protect their business interests. Furthermore, the policy change has been criticized by numerous members of Congress, business organizations, and some parts of the Cuban-American population.

Cuba, for its part, swiftly responded to President Trump's announcement with a declaration that emphasized Cuba's sovereignty and right to self-determination, and warned of the alleged futility of the Trump administration's policy. However, Cuba's declaration left the door open to arms-length dialogue. Furthermore, most decisions and investments in Cuba by foreign and national companies over the past two years have likely been made on the premise of improved U.S.-Cuba relations. In search of new business partners to boost economic development, a more receptive, practical Cuban leadership is conceivable.

It remains to be seen whether future dialogue between the two governments develops with an eye to reaching a middle ground while saving face. If not, President Raul Castro's scheduled exit from power on Feb. 24, 2018 will likely present yet another period of intense speculation and, possibly, progress towards normalized relations.

Conclusion. President Trump's new policy on Cuba will no doubt have a chilling effect on many U.S. companies and individuals interested in doing business in, or traveling to, Cuba. U.S. exporters and importers that are already beyond the starting line should promptly assess the effects of this new policy and make adjustments as needed, while remaining attentive to the upcoming regulatory changes that will delineate the rules of the road.

ISSN 0000-0000