

Client Alert

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FCPA: One of the Risks in Transacting Business in Cuba

The amendments to the Cuban Assets Control Regulations (CACR) since January 16, 2015 have expanded the scope of transactions that persons subject to the jurisdiction of the United States may undertake in relation to Cuba. In a continued effort to implement the policy changes announced by President Obama on December 17, 2014, the Office of Foreign Assets Control (OFAC) and the Bureau of Industry and Security (BIS) announced additional amendments to the CACR and Export Administration Regulations (EAR), respectively, which were published and became effective on Monday, September 21, 2015.

The September 21, 2015 Amendments

OFAC's amendments to the CACR provide general licenses that authorize completely new transactions, such as the ability to seek legal counsel in Cuba provided that such counsel is related to an otherwise authorized transaction. Additionally, the recent changes to the CACR authorize a person generally licensed to travel to Cuba to open and maintain a bank account at a Cuban financial institution.

OFAC's changes to the CACR also expanded the scope of transactions that may be undertaken in certain industries that were previously given preference under the CACR. For example, the January 16, 2015 amendments to the CACR generally licensed certain transactions relating to telecommunications and Internet-based services. The September 21, 2015 amendments expand those general licenses and now permit persons subject to US jurisdiction who engage in authorized transactions relating to telecommunications, Internet-based services and other specifically identified generally licensed transactions to establish and maintain a business presence in Cuba, including through subsidiaries, branches, offices, joint ventures and agency, or other business relationship with any Cuban individual or entity. The amendments also permit certain persons subject to US jurisdiction to establish a physical presence in Cuba by leasing physical premises, including offices, warehouses or retail outlet space; engage in marketing relating to such physical presence; and employ Cuban nationals.

Finally, the recent amendments to the CACR add an interpretive guidance that provides that, with certain limitations, any transaction ordinarily incident to a licensed transaction and necessary to give effect thereto is also authorized. This interpretive guidance explicitly provides that, for example, a person subject to the jurisdiction of the US who is generally licensed to import certain goods from independent Cuban entrepreneurs is also authorized to undertake funds transfers or payments that are ordinarily incident to such importation, including payments made using online payment platforms.

These recent amendments to the CACR provide completely new categories of generally licensed transactions and expand the scope of previously generally licensed transactions. However, with increased ability to transact business in the island also comes increased opportunity to run afoul of related laws and regulations other than those pertaining to the Cuban embargo.

The Foreign Corrupt Practices Act (FCPA)

The FCPA is a US federal law that prohibits bribery of “foreign officials” with anything of value for the purpose of obtaining or retaining business. It is broad enough to encompass not only successful bribes but also failed attempts and acts in furtherance of a bribe while in the territory of the US. “Foreign official” is defined broadly to include any officer or employee of a foreign government; any department, agency or “instrumentality” of a foreign government; any person acting in an official capacity on behalf of any department, agency or instrumentality of a foreign government; or any foreign political party official or candidate for foreign office. Although undefined in the FCPA, “instrumentality” has been defined broadly in US judicial opinions and includes an entity controlled by a foreign government, which control may be evidenced by the foreign government’s majority ownership of, ability to hire and fire the principals of, or benefit from the profits of and/or subsidy of the losses of such entity. Payments to foreign officials through intermediaries, such as agents, consultants or distributors, may also violate the FCPA.

The FCPA applies to all “issuers,” “domestic concerns” and persons, including foreign persons, that engage in any act in furtherance of a corrupt payment while in the territorial jurisdiction of the US. “Issuers” are companies that have a class of securities listed on a national securities exchange in the US or any company with a class of securities quoted in the over-the-counter market in the US and required to file periodic reports with the Securities and Exchange Commission. “Domestic concern” encompasses any individual who is a citizen, national or resident of the US or any entity that is organized under the laws of the US or its states or territories, or that has its principal place of business in the US.

The FCPA and Cuba

Cuba presents a new and different FCPA risk for US companies looking to transact business in the island. Although the Cuban government has recently permitted its citizens to start small businesses, most of the Cuban economy and resources continue to be government-owned and -controlled. As a result, US companies wishing to do business in the island are very likely to deal with Cuban foreign officials and therefore be exposed to FCPA liability arising out of doing business there.

Cuban public officials are compensated very modestly by the government — approximately \$30 per month. Paradoxically, some of these public officials are simultaneously charged with the task of managing multimillion-dollar contracts for the Cuban government. This combination, along with the fact that the majority of the Cuban economy continues to be controlled by the government, creates incentives for such public officials to solicit or for foreign investors to offer bribes in order to secure contracts and business.

In July of 2015, Emilio Enrique Cotter, an Argentinian citizen and representative for the Uruguayan company DFS, was sentenced to 10 years in prison in Cuba for paying bribes to high-ranking officials of a government-owned oil company in order to secure contracts. Additionally, Cotter allegedly bribed two specialists at Cuba’s *Centro de Investigaciones de la Industria Química* (Chemical Industry Investigation Center) to provide a false expert opinion relating to business in the island. Although Cotter may not be subject to the jurisdiction of the FCPA, the payment of similar bribes by US companies in Cuba would likely bring such actions under the scope of the FCPA and may expose such US companies to liability.

Conclusion

The regulatory changes that became effective on September 21, 2015 further loosen the restrictions placed on the ability of persons subject to US jurisdiction to engage in business relating to Cuba. These changes provide not only new general licenses to transact business in Cuba and expand previously existing general licenses, but also a broad interpretive guidance authorizing all “transactions ordinarily incident” to those generally licensed transactions. However, as the ability to transact business in Cuba increases so does the potential exposure to liability pursuant to the laws and regulations governing the Cuban embargo and other generally applicable laws, such as the FCPA.

The Latin America group at Hunton & Williams will continue to closely monitor related developments. Please contact us if you have any questions or would like further information regarding the changes to the CACR that were published on September 21, 2015, the FCPA or any other regulation or sanction governing the Cuban embargo.

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