Client Alert

pillsbury

International Trade   Financial Services

December 18, 2014

A New U.S. Course for Cuba Relations: What Does It Mean for Business?

By Christopher R. Wall, Stephan E. Becker, Nancy A. Fischer, Aaron R. Hutman and Stephanie J. Rohrer

President Obama made an unexpected announcement this week signaling a "new course" for Cuba after more than fifty years of comprehensive U.S. sanctions. Reestablishing diplomatic relations is a major change. In terms of business impact, however, the announcement signaled small openings and incremental extensions of existing licensing policy. Existing legislation mandates the embargo and codifies the Cuban Assets Control Regulations at 31 C.F.R. Part 515 (CACR), limiting what the President can accomplish without support from Congress. Thus, major changes to U.S. sanctions and export control policy will not happen in the short term. However, the President does have limited licensing discretion and the signaled changes may open business opportunities for certain exports markets including telecommunications, building materials, agricultural equipment, and certain goods for use by Cuban entrepreneurs. Simplification of existing travel authorizations as well as authorization for certain banking and credit card services are also planned. None of these anticipated changes will be effective until regulations are issued by the relevant U.S. agencies.

Background on U.S. Cuba Embargo

The CACR, administered by the U.S. Department of Treasury, Office of Foreign Assets Control (OFAC) implements a comprehensive trade, investment, financial and travel embargo on Cuba prohibiting U.S. persons, including owned or controlled foreign subsidiaries of U.S. companies, from engaging in transactions in which Cuba or a Cuban national has a property interest. First implemented in July 1963 under the authority of the Trading with the Enemy Act (TWEA), the sanctions have been strengthened by the Cuba Democracy Act of 1992, which, among other things, prohibited the issuance of licenses for foreign U.S.-owned companies to trade with Cuba. The Cuban Liberty and Democratic Solidarity Act of 1996 (Helms/Burton) codified the CACR, requiring the President to instruct the Treasury and Justice

Departments to enforce fully the CACR and prescribing conditions for the termination of the embargo including a determination that a transition government in Cuba is in power.

However, despite these statutory provisions, OFAC has licensing authority under the CACR to permit certain transactions within the scope of the sanctions and the Commerce Department's Bureau of Industry and Security (BIS) has licensing authority for exports and re-exports of U.S. origin goods and technology to Cuba. This allows some limited degree of executive discretion which both OFAC and BIS have used to issue licenses and to establish license exceptions for certain travel transactions, temporary sojourns of aircraft, agricultural exports and telecommunications services for Cuba, among other activities.

Announced Changes in U.S. Policy

On December 17, 2014, President Obama announced his intent to make licensing changes for Cuba which include:

- **Expanded exports of goods/services to Cuba's private sector** – This authorization is expected to allow exports of building materials for private residential construction, goods for use by private sector Cuban entrepreneurs, and agricultural equipment for small farmers. Existing agricultural sales programs also may be expanded by loosening the definition of "cash in advance."

- **Telecommunications** – Additional exports relating to telecommunications and internet will be authorized. Although the scope is unclear, this change in policy will reportedly pertain to (a) certain consumer communications devices, related software, applications, hardware, and services, (b) items to establish and update communications-related systems; and (c) telecommunication infrastructure to provide telecommunications and internet services between the United States and Cuba.

- **Banking and Credit Cards** – U.S. financial institutions will be permitted to open correspondent accounts at Cuban financial institutions to support permitted financial transactions. Travelers to Cuba will be able to use U.S. credit and debit cards. This opening may permit U.S. companies to issue cards for use in Cuba and to establish merchant relationships.

- **Travel** – Tourist travel still will not be permitted, but general licenses will be available for twelve categories of travel. General licenses are already available for a number of these categories, which may be expanded (e.g., family visits; official business of U.S./foreign government and intergovernmental organizations; journalistic activities; professional research and meetings; educational activities; religious activities; and travel related to certain authorized transactions and business such as telecommunications, agricultural and medical sales). Other travel categories requiring specific licenses will be authorized under general licenses (e.g., public performances, clinics, workshops and competitions; support for the Cuban people; humanitarian; private foundations and research/educational institutes; and export/import or transmission of information or informational materials). There will be a new general license for travel service providers, although it is unclear how much this would expand OFAC's existing travel service provider licensing program. There have been no statements yet from the Administration regarding how or whether other licensing policies relating to travel, travel services and exports of aircraft and vessels may change.

- **Remittances** – Remittance levels will be raised from $500 to $2,000 per quarter (except for certain officials of the government or Communist party). Remittances for humanitarian projects, support for the Cuban people and support for the development of private businesses in Cuba will not require a specific license. Remittance forwarders will not require a specific license.

- **Application of Cuba Sanctions in Third Countries** – U.S. owned or controlled entities will be permitted by general license to engage in services and financial transactions with Cuban individuals in third countries. This permission would not apply to persons or companies in Cuba, but could ease business with the many Cubans who have moved to other countries. There would be additional allowances for Cuba-related meetings in third countries and foreign vessels engaging in humanitarian trade with Cuba.

Next Steps and Challenges

All of the proposed changes must be implemented and are not yet in effect. It will be important to review the specific language of the planned general licenses and regulatory updates. OFAC has announced that it intends to issue regulatory amendments to the CACR in the coming weeks, and BIS will implement changes to the Export Administration Regulations. Among these changes, President Obama has directed the State Department to review Cuba's status as a "state sponsor of terrorism" over the next six months, and removal from that list could open the path for potential relaxation of export control restrictions.

Congress is divided on Cuba sanctions reform. A number of legislators, including the chairs and ranking members of key committees, are opposed to the President's announcement. As discussed above, broader relaxation of the Cuba embargo will require congressional action. There are strong constituencies that will fight reform efforts, especially as the United States heads into a Presidential election cycle.

If you have any questions about the content of this client alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Christopher R. Wall (bio)
Washington, DC
+1.202.663.9250
cwall@pillsburylaw.com

Stephan E. Becker (bio)
Washington, DC
+1.202.663.8277
stephan.becker@pillsburylaw.com

Nancy A. Fischer (bio)
Washington, DC
+1.202.663.8965
nancy.fischer@pillsburylaw.com

Aaron R. Hutman (bio)
Washington, DC
+1.202.663.8341
aaron.hutman@pillsburylaw.com

Stephanie J. Rohrer (bio)
Washington, DC
+1.202.663.8009
stephanie.rohrer@pillsburylaw.com

About Pillsbury Winthrop Shaw Pittman LLP
Pillsbury is a full-service law firm with an industry focus on energy & natural resources, financial services including financial institutions, real estate & construction, and technology. Based in the world's major financial, technology and energy centers, Pillsbury counsels clients on global business, regulatory and litigation matters. We work in multidisciplinary teams that allow us to understand our clients' objectives, anticipate trends, and bring a 360-degree perspective to complex business and legal issues—helping clients to take greater advantage of new opportunities, meet and exceed their objectives, and better mitigate risk. This collaborative work style helps produce the results our clients seek.