

Reproduced with permission from International Trade Reporter, 32 ITR 2158, 12/19/2015. Copyright © 2015 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Bilateral Agreements

This BNA Insights article by John P. Barker, John B. Bellinger III, Arturo Caraballo and Raul R. Herrera of Arnold & Porter LLP examines new regulations that took effect in September, which further ease restrictions on commerce and financial activity between the U.S. and Cuba and can be seen as the most comprehensive to date. The authors discuss the possible impact of these changes on U.S.-Cuba exchanges in a variety of activities, how economic relationships could be expanded and what legal and practical hurdles still remain.

Obama Administration Expands Opportunities for Economic Engagement and Other Exchanges Between the U.S. and Cuba



**BY JOHN P. BARKER, JOHN B. BELLINGER III,
ARTURO CARABALLO AND RAUL R. HERRERA**

On Dec. 17, 2014, President Obama announced a policy to begin to normalize relations between the U.S. and Cuba. In January 2015, the administration promulgated an initial set of changes to the Cuban

John P. Barker, Raul R. Herrera and John B. Bellinger III are partners in Arnold & Porter in Washington. Arturo Caraballo is counsel based in Washington. John P. Barker can be reached at John.Barker@aporter.com. Raul Herrera can be reached at Raul.Herrera@aporter.com. John B. Bellinger III can be reached at John.Bellinger@aporter.com. Arturo Caraballo can be reached at Arturo.Caraballo@aporter.com.

Assets Control Regulations ("CACR") and the Export Administration Regulations ("EAR") designed to advance the president's announced policy.

On Sept. 18, 2015, the Obama administration announced a series of additional changes to the CACR and the EAR. The new regulations, promulgated just eight months after the initial rule changes announced in January, are designed to further loosen restrictions on commerce and financial interactions, among other things, between the U.S. and Cuba. In many ways, these rule changes, which took effect on Sept. 21, 2015, are even more comprehensive than the changes that were announced in January.

This article discusses the new rule changes and their potential impact on commerce, banking and other exchanges between the U.S. and Cuba.

Telecommunications, Internet Based Services. In an effort to promote the free flow of information to and from Cuba, the changes effected by the administration under

the new rules have the potential to impact dramatically U.S. involvement in the development of the telecommunications and internet sectors in Cuba. The rule changes that were announced in January 2015 expanded the ability of persons subject to U.S. jurisdiction to enter into commercial transactions to provide certain telecommunications services in and to Cuba, as well as export and re-export certain telecommunications items and related services.¹

The new rules go a step further by allowing persons subject to U.S. jurisdiction to establish a business presence on the island through the establishment of subsidiaries, branches, offices, joint ventures, franchises, agencies or other business relationships with Cuban nationals or entities, including state-owned companies, for the purpose of engaging in authorized telecommunications and internet-based activities. The new rule changes are designed to create new opportunities for U.S. telecommunications companies and internet-based businesses to participate in the development of Cuba's telecommunications sector.

For example, under the new rules a U.S. telecommunications company may now enter into a joint venture agreement or become the co-owner of a separate Cuban entity (an "empresa mixta") with Empresa de Telecomunicaciones de Cuba, S.A. (ETECSA), the state-owned telephone company in Cuba, for the provision of authorized telecommunications services on the island. The question that remains to be answered is whether and to what extent the Cuban government will allow U.S. companies to play a meaningful role in that development.

Physical Presence in Cuba. Among the most important of the changes announced by the administration, the new rules now allow certain U.S. entities to establish a physical presence in Cuba under a general license. These entities will now be able to lease office space, warehouses, retail outlets and other facilities in Cuba; employ Cuban nationals, as well as U.S. citizens, for their Cuban operations; open and maintain bank accounts at Cuban financial institutions; and market their physical presence in Cuba.²

The following types of entities may establish a physical presence in Cuba for the purpose of carrying out activities otherwise permitted under the CACR and the EAR:

- news bureaus;
- exporters of certain goods (e.g., food, medicines and medical devices, building materials, telecommunications devices, and aviation and vessel safety equipment);
- providers of mail and parcel delivery services and cargo transportation services;
- providers of certain telecommunications and internet-based services;
- educational organizations;
- religious organizations; and
- travel and carrier service providers.³

¹ See 31 CFR § 515.542 and 515.578.

² See 31 CFR § 515.573.

³ See 31 CFR § 515.573(b).

Under the new rules, a U.S. exporter that is permitted to export products to Cuba under a license from the Department of Commerce would be able to establish an office in Havana, lease a warehouse in which to store its products on the island, hire a Cuban accountant to work in its office and purchase supplies from Cuban vendors.

Under the new rules, U.S. exporters of food, telecommunications providers, mail and parcel delivery services, universities, airlines and cruise lines, among others, will similarly be able to establish a physical presence and engage in a variety of economic transactions within Cuba. As discussed more fully below, however, these companies will still be limited in terms of the kinds of activities that they may engage in directly in Cuba.

Banking. The new rules increase the availability of banking among U.S. and Cuban nationals and financial institutions in the two countries. Under the January 2015 rule changes, U.S. banks were permitted to enter into correspondent banking relationships with Cuban banks. Now, U.S. banks may open accounts for Cuban nationals while present in the United States,⁴ and U.S. persons may open accounts at Cuban banks for permitted travel to Cuba.⁵ U.S. businesses authorized to establish a physical presence in Cuba may also open bank accounts at Cuban banks.⁶

Although the January 2015 rule changes permitted U.S. financial institutions to establish correspondent banking relationships with their Cuban counterparts, only one U.S. bank—Stonegate Bank in Florida—took advantage of the rule change. It will remain to be seen whether the new rule changes will encourage U.S. financial institutions to begin to explore engaging in permitted financial interactions involving Cuban nationals. Those that choose to participate will need to carefully review their compliance programs, including their "know your customer" policies, to ensure that they do not violate the myriad regulations that will continue to apply to them.

Remittances. Under the rule changes that were announced in January 2015, the maximum amount that U.S. persons could remit to Cuban nationals per consecutive three-month period was raised from \$500 to \$2,000. Under the new rules, that limit has been removed entirely. Now, U.S. persons may make unlimited donative remittances to Cuban nationals, so long as they are not prohibited officials of the Cuban government or prohibited members of the Cuban Communist Party.⁷ U.S. financial institutions, including registered broker-dealers and registered money transmitters, will continue to be authorized to collect, forward and receive authorized remittances. U.S. financial institutions will also be permitted to unblock funds that had been frozen previously due to the limitations that existed under the prior rules.⁸

Cuba has a population of more than 11 million people,⁹ including an estimated 500,000 self-employed entrepreneurs called "cuentapropistas." The elimina-

⁴ See 31 CFR § 515.571(a)(5) and (b).

⁵ See 31 CFR § 515.560.

⁶ See 31 CFR § 515.573(a)(5).

⁷ See 31 CFR § 515.570(b).

⁸ See 31 CFR § 515.570(h).

⁹ <http://data.worldbank.org/indicator/SP.POP.TOTL>.

tion of limits on donative remittances to Cuba could have a dramatic effect on the flow of U.S. dollars directed toward the island. Increased levels of remittances to Cuba's expanding corps of cuentapropistas could have an important effect on the growth of small businesses on the island. U.S. financial institutions, such as money transmitters, involved in the collection, transmission and receipt of remittances also stand to benefit from increased activity under the new rules.

Opportunities, Limitations. The new rules promulgated by the Obama administration create a number of opportunities for U.S. companies to play a significant role in Cuba's economic transformation. The fact that they are now allowed to conduct certain activities in Cuba does not, however, mean that U.S. entities will immediately avail themselves of the Cuban market. Many observers have noted that Cuba still represents a very limited market for U.S. businesses due to the continuation of most aspects of the U.S. trade embargo, including the travel ban and restrictions on financing of U.S. exports to Cuba, as well as the limited buying power that exists on the island.

It is important to note, for example, that for years U.S. news organizations have been permitted to engage in many of the same kinds of activities now being expanded to apply to other types of U.S. businesses, yet to date few U.S. news organizations have chosen to do so.

Similarly, although U.S. banks were permitted to establish correspondent banking relationships with Cuban banks commencing in January of this year, we are aware of only a single bank that has taken advantage of that opportunity to date. It will remain to be seen how quickly other U.S. businesses will move to take advantage of the new rules.

It is also important to note that real limitations exist, both in terms of the kinds of U.S. entities that may establish a physical presence in Cuba and the kinds of activities in which those U.S. entities may engage in Cuba. These limitations exist under U.S. law, as well as the internal laws of Cuba. For example, the universe of U.S. companies that are permitted to establish a physical presence in Cuba is limited to those that are expressly identified in 31 CFR § 515.573(b) (i.e., news bureaus, exporters of authorized goods, mail and parcel carriers, cargo transporters, telecommunications and internet companies, entities engaged in educational activities and religious organizations).

Even those U.S. companies that are permitted to do business in Cuba must be careful not to engage in activities that may be specifically prohibited under U.S. law. For example, U.S. exporters that are authorized to sell food to importers in Cuba, including Empresa Cubana Importadora de Alimentos, S.A. (Alimport), the Cuban state-owned food importer, are still limited in their ability to provide financing terms to those Cuban

importers.¹⁰ Many observers have noted that, in recent years, this limitation has become a real obstacle to U.S. exporters' ability to compete with exporters from other countries that are not subject to a similar limitation.

U.S. companies doing business in Cuba will also be subject to other legal limitations that exist under Cuban law. The Cuban foreign investment law that was enacted in 2014 generally allows foreign businesses to operate in Cuba under: (i) joint ventures consisting of foreign and Cuban persons or entities (called "asociaciones económicas internacionales"); (ii) as shareholders of Cuban entities (called "empresas mixtas") in co-ownership with one or more Cuban persons or entities; or (iii) through subsidiaries, affiliates, branches, agencies or other similar structures which are wholly-owned by the foreign business.

The law also requires that foreign businesses seeking to engage in business activity in Cuba be approved by the Cuban government in accordance with procedures established under the law. Accordingly, there is no guarantee that a U.S. business that is authorized to establish a physical presence in or otherwise transact with Cuba under U.S. law would be permitted to do so under Cuban law.

U.S. companies that choose to enter into business relationships with state-owned Cuban entities must also consider the litigation risk of claims or attachment actions that may be filed by holders of default judgments against the Cuban government. In the past, holders of such default judgments (based on claims against Cuba for alleged acts of terrorism) have sought to attach the assets of state-owned companies in order to satisfy their claims.

In addition, the Cuban government is heavily involved in commercial activity on the island through its vast network of state-owned entities. Inevitably, U.S. companies seeking to do business in Cuba will be required to engage with Cuban state-owned entities and officials of the Cuban government who represent them. These companies are well advised to ensure that their Foreign Corrupt Practices Act compliance programs adequately address the risks inherent in doing business in such an environment.

Although the Obama administration's most recent regulatory changes regarding Cuba are designed to expand opportunities for engagement by U.S. individuals and companies in a variety of activities in Cuba, legal and practical hurdles remain. These will require careful analysis and consideration before U.S. companies commit significant resources to the island.

¹⁰ See 31 CFR § 515.533, which requires that U.S. exporters of authorized items to Cuba either (i) receive cash in advance of title transfer of those items or (ii) obtain financing from certain financial institutions located in third countries.