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Changes in US Sanctions on Cuba Present Opportunities and Challenges

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The Obama Administration's recent loosening of trade restrictions on Cuba has the potential to open new opportunities for US businesses. However, there are several obstacles to be overcome before US companies may access Cuba's economy and realize those opportunities:

- **Cuban law currently restricts entrepreneurs from engaging directly with US suppliers**
- **US regulations still prohibit transactions with a significant number of Cuban government officials**
- **The Helms-Burton Act requires outstanding claims against Cuba to be resolved before sanctions are lifted**
- **The Helms-Burton Act limits the President's ability to fully lift sanctions until Cuba has elected democratically a government**

Restoring Economic and Diplomatic Ties

In the past few months, the United States and Cuba have made historic gestures toward re-establishing economic and diplomatic ties. On January 15, the US Treasury Department and US Commerce Department issued amendments to the Cuban Assets Control Regulations (CACR) and the Export Administration Regulations (EAR), respectively. The amended regulations were the first implementation of President Obama's announced policy of loosening travel and economic prohibitions against Cuba and became effective on January 16.

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On April 14, the White House announced that it intends to remove Cuba from the list of state sponsors of terrorism, which Cuba has been on for over 30 years. The announcement followed a meeting between President Obama and President Raúl Castro of Cuba during the Summit of the Americas meeting in Panama. However, the removal will likely not occur until late May, as Congress has a 45-day review period during which time it could vote to block the measure.

Cuban Market Potential

Despite its modest size, the Cuban economy remains a considerable untapped market for certain United States businesses. With a GDP of $128.5 billion,[1] Cuba's economy is roughly the size of Nevada's. This puts Cuba behind larger Latin American economies such as Venezuela and Chile, but ahead of the smaller Dominican Republic and Guatemalan economies. Even with the trade embargo, the United States has already become Cuba's fourth-largest trading partner since 2007,[2] boosted almost exclusively by President Bush's 2003 decision to reauthorize the export of US agricultural products. The United States exported close to $300 million last year, mostly in food products.

The Cuban private sector is largely a self-contained service economy. According to the Cuban Ministry of Labor, the most popular activities are selling and preparing food, transportation of cargo and passengers, renting homes, and selling agricultural products. Although individual savings in the country are virtually non-existent, the Cuban government does issue modest credit from the central bank to individuals who are licensed to be self-employed. Cuba's de-listing as a state sponsor of terrorism could also expand its access to international capital markets, increasing the country's lending capabilities. From 2011 to 2014, the Cuban government loaned some $122 million to its private sector. The majority of those loans went to finance construction and small farming operations—two of the areas US regulators are hoping to revitalize with the recent reforms. Furthermore, there remains considerable growth potential to expand telecommunications services in Cuba. According to the UN International Telecommunication Union's latest report, 25% of Cubans have access to the internet, but only about half of those own home computers, and less than 1% have internet subscriptions. Less than 18% of Cubans currently have cellular-phone subscriptions. The recent reforms are intended to allow US providers to eventually help fill this gap.

However, the embargo prohibits most other exports, and the US International Trade Commission conservatively estimates the embargo costs the US $1.2 billion annually in lost export revenue. In 2012, Cuba's total imports were around $6.02 billion.[3] Excluding agricultural products, Cuba's major imports include products such as refined petroleum, automobiles and automotive parts, and infrastructure parts like liquid pumps. In 2012, Cuba's total exports were around $1.76 billion with the top exports being raw sugar, refined petroleum, and nickel. Cuba's top three trading partners are China, Spain, and Brazil.[4]

Currently, Cuba imports a majority of the petroleum products consumed in the island from Venezuela at a subsidized rate.[5] Although it currently produces almost 50,000 barrels per day, Cuba likely has a rich petroleum potential, which presents a complex challenge since prospective off-shore resources are located along a maritime border whose boundaries are disputed by countries like the United States and Mexico. In 2012, the United States and Mexico signed a treaty regarding the exploitation of transboundary reserves along other parts of the continental shelf, which led to significant leasing opportunities for energy companies. The gap in the eastern gulf between the United States, Mexico, and Cuba is a resource-rich area of the extended continental shelf that remains to be negotiated among the three countries.

Potential Cuban Regulatory Hurdles

The US regulatory reforms are explicitly aimed at helping a budding private sector in Cuba, which has been fostered by a series of legal reforms passed by the Cuban government five years ago in an effort to reenergize their economy. As part of these reforms, the Cuban government began to grant self-employment licenses across almost 200 occupational categories. So far, about 420,000 such licenses have been granted, and about 20% of Cuba's workforce is reported to be self-employed.

Important changes are affecting the labor market, characterized by a contraction of social spending, a contraction in the percentage of employees working for the state sector (dropping from 90% in 1999 to 73% in 2013), an expansion of the Foreign Investment Law (see http://www.cubagov.cu/rel_ext/cpi/oportunidades.htm), and a measure of decentralization of decision-making to municipal levels and of economic planning for state enterprises. A new Labor Code was adopted in 2014, which introduced certain flexibility in labor relations. Cuba abandoned its labor policy of full employment in 2010.

Despite these developments, Cuban law still restricts its entrepreneurs from contracting directly with foreign suppliers or wholesalers; instead they must contract from state agencies, which have a monopoly on Cuba's imports and exports. This control by the Cuban government poses significant obstacles to the efficacy of the new US regulations, which aim at opening the door for US exporters to sell their goods directly to the Cuban private sector. According to the US Bureau of Industry and Security, "[c]ompanies and corporations that are government owned, operated or controlled are not considered private sector" for purposes of the new regulations. Nonetheless, if the new regulations are to have practical effect, either the Cuban government must relax its controls over the private sector, or US authorities must allow exporters to transact through intermediaries such as Cuban import agencies.

Although US regulations still forbid transacting with a wide swath of "prohibited government officials" in Cuba, the latest regulatory changes arguably leave room for such arrangements so long as they can be shown "to support the Cuban people" rather than the Cuban government. Indeed, regarding the telecommunication-related reforms, OFAC published guidance specifically allowing US persons to "pay the bills of [Cuban residents] directly to a telecommunications operator located in Cuba, such as ETECSA"—referring to Empresa de Telecomunicaciones de Cuba S.A., the government-owned telecommunication service provider.

The Helms-Burton Act Restricts the Lifting of Sanctions

Despite the recent changes, the Helms-Burton Act requires that the "economic embargo of Cuba," including OFAC regulations, must remain in effect until the President determines that a transition government or a democratically elected government in Cuba is in power.

Further, the Helms-Burton Act requires that outstanding claims and awards against Cuba be settled before normalizing diplomatic relations between the United States and Cuba. Approximately $7.5 billion (including interest) in nationalized US property claims against Cuba remain outstanding; awards from three terrorism cases against Cuba with damages ranging from $49 million to $1 billion must also be negotiated. Recently, the US Court of Appeals for the Second Circuit decided that plaintiffs cannot attach blocked assets under the Cuban Assets Control Regulations to satisfy a judgment against Cuba. Currently, there are $270 million blocked Cuban assets in the United States, with six properties in New York and Washington, D.C.

Individuals and corporations may choose to request to have a claim certified by the FCSC, which is authorized to negotiate with foreign governments on behalf of claimants. To date, the FCSC has completed two programs for claims related to Cuba. The First Cuba Program, which ended in 1972, had 8,816 certified claims and awards totaling $1,902,202,285. The Second Cuba Program, which ended in 2006, had two out of five claims certified with awards totaling $67,128,926. While individual awards have ranged from $0 to $323 million, approximately 90% of awards were between $0 to $11,000. Under applicable regulations, a buyer of a certified claim cannot receive more than what it paid for the claim, which has eliminated the possibility of a secondary market for claims.

While the Helms-Burton Act also provides a claim to use non-US companies engaged in transactions with Cuba for “trafficking,” the Helms-Burton Act historically has not provided a viable claim for claimants. The act authorizes the President to suspend, for six months at a time, the right of otherwise eligible claims under Title III, and the President may renew the suspensions indefinitely. Every president since President Clinton, who immediately suspended the right of action after the Helms-Burton Act came into effect, has suspended the right to sue under Title III.

Given the conditions required to lift sanctions on Cuba and to normalize diplomatic relations under the Helms-Burton Act, an amendment to the act is likely required. While the President is able to exercise some discretion to ease specific provisions of sanctions on Cuba, the Helms-Burton Act not only establishes the framework for sanctions but also limits the President’s ability to modify sanctions unless particular political and legal conditions are met.

Conclusion

While the recent changes in Cuba sanctions indicate further opportunities for US businesses in Cuba, further loosening of Cuba sanctions and progress toward normalizing economic and diplomatic relations is likely to be a slow and uneven process shaped by how the Cuban government responds to these changes. The full lifting of sanctions on Cuba will not occur over the course of a few months; as with previous sanctions on Myanmar (Burma) or Vietnam, the loosening of sanctions on Cuba will likely happen in a piecemeal fashion. As a result, US businesses should continue to monitor how changes in Cuba sanctions shape future trade with Cuba with the expectation that the regulatory landscape will continue to evolve for the time being.

Summary of Notable US Regulatory Changes

Financial Amendments:

- The limits on periodic remittances that may be sent to Cuban nationals have been raised from $500 per quarter to $2,000 per quarter.
- Under the new general licenses, banking institutions are permitted to process authorized remittances to Cuba without having to obtain a specific license.
- US banking institutions may confirm or advise a banking institution in a third country on the financing of exports from the United States to Cuba.
- Depository institutions are permitted to open correspondent accounts at banks in Cuba. However, Cuban banks are still not generally licensed to open such accounts at US banks.

Communications Services:

- Certain consumer communications products and software (such as computers, mobile phones, televisions, radios, digital cameras and certain telecommunications and information security-related software) can now be exported or re-exported under Commerce's Consumer Communication Devices (CCD) license exception to eligible recipients in Cuba. Eligible recipients are individuals in Cuba, other than certain Cuban Government and Communist Party officials, and independent non-governmental organizations in Cuba.
- OFAC is generally authorizing commercial telecommunications services linking the United States and Cuba, as well as such services in Cuba.

Commercial Businesses:

- US persons may now export or re-export for commercial sale, without a license, building materials, equipment and tools for use by the Cuban private sector to construct or renovate privately-owned buildings and residences.
- US persons may now export or re-export for commercial sale, without a license, tools and equipment for private sector agricultural activity.
- US persons may now export or re-export for commercial sale, without a license, tools, equipment, supplies and instruments for use by private sector entrepreneurs, such as auto mechanics, barbers and hairstylists and restaurateurs.

Travel Amendments:

- Travel agents and airlines will be able to provide authorized travel and carrier services without seeking specific licenses.
- Twelve categories of travel to Cuba by US citizens, US residents and individuals located in the United States which were previously permitted only with special licenses and under certain restrictions will now be permitted by general license. General tourist travel will remain prohibited.

[1] US Central Intelligence Agency, World Fact Book – Cuba, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/cu.html.

[2] MIT Observatory of Economic Complexity, Country Profile: Cuba, *available at* https://atlas.media.mit.edu/en/profile/country/cub/.

[3] *Id.*

[4] *Id.*

[5] US Energy Information Administration, Country Profiles: Cuba, *available at* http://www.eia.gov/countries/country-data.cfm?fips=cu.

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