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CUBA

This BNA Insights article by Carl A. Valenstein summarizes the current conditions in Cuba that U.S. companies should be aware of as they seek to do business in the country.

CUBA: A U.S. Company's Guide to Doing Business in Cuba One Year after the Announcement of a New U.S.-Cuba Policy

BY CARL A. VALENSTEIN

Introduction

In December 2015, one year had elapsed since President Barack Obama's Dec. 17, 2014, declaration of a new U.S.-Cuba policy. While there have been many changes in the past year aimed at moving toward normalization of U.S.-Cuban relations, many obstacles remain on both sides to a full normalization of diplomatic and commercial relations. Although there are and will be many new opportunities for U.S. companies to develop Cuban business strategies, many obstacles remain because of the political and legal complexity of the current state of U.S.-Cuban relations and the legal framework affecting those relations. This article provides a high-level overview of the current challenges faced by U.S. companies and offers recommendations on how to develop a Cuba business strategy.

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What has changed in the past year?

At the diplomatic level, the governments of Cuba and the U.S. have reestablished diplomatic relations and reopened their respective embassies. The U.S. government has removed Cuba from the list of state sponsors of terrorism. There have been a number of visits to Cuba of representatives of the U.S. federal and state governments. In December 2015, negotiations began over the $1.9 billion ($8 billion with interest) claims certified by the U.S. Foreign Claims Settlement Commission of U.S. persons with respect to expropriated property in Cuba and the Cuban counterclaims for the alleged damages to their economy resulting from the U.S. embargo. This promises to be a long and protracted negotiation and it is unclear how Cuba (which lacks significant revenues from, for example, natural resources such as oil) will be able to fund any claims that might ultimately be agreed.

The Treasury Department's Office of Foreign Assets Control (''OFAC'') and the Commerce Department's Bureau of Industry and Security (''BIS'') have been the federal government branches with primary responsibil-

 ISSN 0000-0000

ity for enforcing U.S. trade restrictions against Cuba. There have been three waves of regulatory liberalization by OFAC and BIS that have principally benefitted the travel, transportation, health and medical, agriculture and telecommunications industries. Large portions of the U.S. embargo, such as the prohibition on general tourism, the provision of export financing for agricultural commodities (financing for other than agricultural items have just been liberalized) and the investment in domestic Cuban infrastructure, remain codified by statute and will require either U.S. Congressional action to remove them, which is unlikely to occur until after the presidential election, or a certification by the president that there is a transitional government in place and a settlement of U.S. claims, neither of which has occurred. Most experts agree that the president has gone to the limits of his authority in liberalizing sanctions at the present time.

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For a more detailed list of what the Cuban and U.S. governments have agreed to in the past year, see the running list maintained by the U.S.-Cuba Trade and Economic Council, Inc. on their website (http://www.cubatrade.org).

What has not changed in the past year?

Much has not changed in the past year notwithstanding the liberalization of certain portions of the U.S. embargo. There has been no regime change in Cuba and the current regime is repressive in terms of human and political rights and maintains a firm grip on the Cuban economy, allowing only modest experiments in capitalism. The laws on foreign investment are not transparent, the legal and judicial system is weak and corruption is widespread. With the withdrawal of support of Russia and more recently of Venezuela, the Cuban economy has deteriorated further and its credit rating is high risk. Its business infrastructure is ill prepared for foreign investment and business travelers complain about poor quality hotels, lack of telecom and internet connectivity, poor banking services, the inability to use debit or credit cards (requiring cash transactions) and the complexity of the dual exchange rate system.

The number of Cuban refugees has increased since the announcement of the new U.S.-Cuban policy and the challenges of resolving U.S. claims for expropriated property as well as a number of lawsuits in U.S. courts seeking to attach Cuban property in the U.S. will continue to complicate the diplomatic and commercial relations between Cuba and the U.S.

Even in those areas of the U.S. embargo that have been lifted by the U.S. government, the Cuban government has been slow to grant licenses to permit liberalized activity likely out of a fear that it will be overwhelmed by foreign investment and lose control over its economy, putting further pressure on the government for market and even political reforms. For example, the U.S. government now allows cruises and ferry services between the U.S. and Cuba but none are currently operating because of the inability to obtain the necessary Cuban licenses. A further example is Florida-based Stonegate Bank's continued inability to obtain permission from the Cuban government to offer banking services in Cuba.

For a more detailed list of what the Cuban and U.S. governments have not agreed to in the past year, see the running list maintained by the U.S.-Cuba Trade and Economic Council, Inc on their website (http://www.cubatrade.org).

Notwithstanding all of these challenges, Cuba has a magic allure for U.S. travelers and companies because it only 90 miles from Florida and has, in many respects, been frozen in time since the early 1960s. Travel to Cuba under the various authorized travel licenses, including the people-to-people travel licenses, is at an all-time high and Cuba has become a very popular travel destination. A number of state governors have hosted trade delegations to Cuba. The first deal just announced is that a U.S. company will now be authorized to manufacture or assemble small tractors in the Mariel Special Development Zone for sale to private farmers in Cuba. President Obama has announced plans to visit Cuba in March as part of a broader trip to Latin America.

How should U.S. companies develop a Cuba strategy?

When it comes to developing a Cuba strategy, there is a division between those U.S. companies that are in industries subject to liberalization of the U.S. embargo on Cuba (travel, transportation, health and medical, agriculture and telecommunications) and those that are not (energy, mining, port and hotel infrastructure). Most of the liberalization has been focused on promoting activities that would enhance interaction between U.S. and Cuban people with the hope that such interaction will have a positive influence on the Cuban people.

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Consequently, liberalization has not focused on infrastructure development. Infrastructure development and financing will require removal of the statutory embargo, which will likely not occur until 2017-2018 at the earliest. While some have speculated that a Republican victory in the presidential election might cause a roll back in the current liberalization, many believe that the liberalization is inevitable and that a Republican president, notwithstanding the campaign rhetoric, will be in a better position to normalize relations completely as Richard Nixon did with China. Indeed, there are some Republicans in the U.S. Congress who support liberalization of U.S. relations with Cuba (and some Democrats who oppose liberalization), so it is possible that the political dynamic will not follow the normal pattern

  ITD ISSN 0000-0000

with all Republicans on one side of the issue and all Democrats on the other side of the issue.

U.S. companies benefitting from liberalization are already pursuing opportunities in Cuba by sending people to Cuba through authorized travel licenses, engaging local lawyers and accountants, networking with government officials and making preparations to establish operations.

U.S. companies not yet benefitting from liberalization of the U.S. embargo are gathering information on potential market opportunities, attending frequent conferences on Cuba and exploring third-country investment opportunities through European and Canadian firms who have been active in Cuba to position themselves better for a market opening.

Although Cuba is a small market with limited resources (albeit the biggest in the Caribbean), because of its proximity to the U.S. and the colorful history of U.S.-Cuban relations and Cold War drama it is a country that has been extensively studied and written about, so there is an abundance of information available.

Any U.S. company interested in pursuing opportunities needs to be mindful of the following:

1. The liberalization of the U.S. embargo on Cuba is a statutory and regulatory minefield and U.S. companies are well advised to seek the advice of experienced trade compliance counsel. There have been many enforcement cases against U.S. companies for violations of the U.S. embargo on Cuba, including companies that have undertaken steps in anticipation of liberalization but have engaged in activities that have not yet been legally authorized. It is important to bear in mind that U.S. law does not allow U.S. companies to enter into executory contracts involving prohibited activity that only spring into effect upon the lifting of the embargo. Also, licenses for travel to Cuba are limited to specific authorized activities, and companies need to be careful not to abuse the authorized travel licenses to engage in prohibited commercial business development opportunities.

2. Given the firm grip maintained by the Cuban government on the economy, most commercial activity requires licenses from the Cuban government. Because of a significant amount of corruption in Cuba, the process of obtaining licenses can create a potential risk of exposure under the U.S. Foreign Corrupt Practices Act (FCPA). U.S. companies are well advised to maintain a robust FCPA compliance program. Particular care needs to be exercised when engaging either Cuban or third-country agents and intermediaries who might engage in behavior that creates FCPA risks.

3. While international accounting firms have maintained offices in Cuba to service Canadian and European companies investing in Cuba during the U.S. embargo, there are only a few private Cuban law firms with international experience. Because many experienced Cuban lawyers left Cuba shortly after the current Cuban government assumed power or have retired, the level of international experience of these remaining lawyers is limited to what they have been doing for non-U.S. foreign investors and is, in many cases, not up to U.S. standards. Understanding and navigating the complex and opaque Cuban laws and regulations is challenging. Recommendations concerning suitable Cuban counsel should be sought from Canadian and European law firms who have represented clients in Cuba during the U.S. embargo.

4. U.S. companies whose business is dependent upon intellectual property protection should seek to protect such property in Cuba now. Cuba is a ‘‘first to file’’ system for trademarks and, as interest in the Cuban market expands, the increase in applications for trademark registration will likely put stress on the system and create backlogs.

5. U.S. companies need to monitor U.S. legislative and regulatory developments continuously because change could come fast and open up new opportunities currently closed.