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Maritime

New Regulations Further Ease Maritime Transport and Travel Restrictions on Cuba

Action Item: The Administration further implemented its new Cuba policy facilitating passenger vessel service to Cuba and opening opportunities in Cuba’s maritime, telecommunications, and construction sectors. Considering the rapidly-developing opportunities in Cuba for U.S. businesses, entities that think they may benefit from doing business with Cuba should examine their strategic plans for entering the Cuban market and consult counsel to optimize opportunities with Cuba while maintaining compliance with U.S. laws.

New Developments

On Friday, September 20, 2015, President Obama’s administration announced its most recent steps in expanding relations with Cuba. Following this announcement, the Treasury and Commerce Departments each published new regulations (collectively, the “Regulations”) on Monday, September 21, 2015. The new Regulations largely focus on fostering U.S. business growth in sectors of Cuba’s economy, particularly in the maritime, telecommunications, and construction industries.¹

Notably, the Regulations represent a watershed moment for passenger carrier service between the United States and Cuba. Under the Regulations, persons under U.S. jurisdiction no longer need a specific license from either the Department of Treasury (issued by Office of Foreign Assets Control (“OFAC”)) or the Department of Congress (issued by Bureau of Industry and Security (“BIS”)) to operate a passenger carrier between the United States and Cuba, with certain restrictions. Restrictions on cargo vessels, physical offices and employees, and various other activities in Cuba also have been liberalized.

Background

As described in our December 2014 Advisory (available [here](#)), the Administration has turned a corner on 50 years of U.S. sanctions against Cuba. In January, amidst the restoration of diplomatic relations, the Administration lifted various restrictions on the free flow of people, money, merchandise, and information. For example, OFAC amended the Cuba Sanctions Regulations (30 C.F.R part 515) to allow U.S. institutions to work

with financial institutions in Cuba, authorize a broader range of remittances, and allow travelers in approved categories to visit Cuba without individual licenses. In the maritime industry, cargo vessels were allowed to call on the United States after port calls for a broader range of purposes in Cuba, and OFAC and BIS adopted a new policy of licensing passenger services on a case-by-case basis.

The Regulations recently promulgated by the Administration signal a broader policy shift in relations and trade with Cuba. The Regulations did away with the agencies' prior policy that vessel operators under U.S. jurisdiction must apply for an OFAC-issued specific license and a BIS-issued vessel export license to operate passenger carrier service to and from Cuba. The new changes put maritime transport back on a level playing field with air carriers, who were authorized by general license to offer regularly-scheduled services to Cuba in January of this year.

Analysis

Department of Treasury, OFAC Licenses

Under the newly published OFAC regulations, passenger carrier operators subject to U.S. jurisdiction no longer need a specific license from OFAC to provide ferry services to, from, or within Cuba, in connection with passengers who are authorized to travel. See 31 C.F.R. § 515.572. In other words, the new regulations grant blanket authorization for persons subject to U.S. jurisdiction providing passenger carrier services to Cuba. The authorization to provide carrier services is limited to direct travel between the United States and Cuba and does not allow for stops in a third country.

Passenger carrier operators are also now authorized to provide lodging services onboard passenger carriers during travel to, from, or within Cuba as well as when docked at a Cuban port (subject to the 14-day limit in the BIS export regulations described below). The authorization to provide lodging is a nod by the Administration to the currently constrained state of Cuba's hotel sector, which at this point is not well-positioned to absorb a substantial increase in U.S. travelers.

The OFAC general license for passenger carrier services is limited to the transportation of authorized travelers as defined by OFAC regulation. Authorized travelers include, among others, (i) persons traveling under one of the 12 categories of travel provided under 31 C.F.R. § 515.560 (note that general tourism is not one of the twelve approved categories) or under a specific license from OFAC; (ii) some Cuban nationals applying for admission to, present in, or taking up residence in the United States; and (iii) foreign nationals traveling on official business of the U.S. government.

Passenger carrier operators must receive a certification from each passenger indicating the provision of the regulations that authorizes the passenger to travel to Cuba. OFAC officials have advised that unless confronted with reason to believe that a passenger's certification is falsified, carrier operators do not have a duty to independently verify such certification (e.g., by policing travelers' itineraries). Operators must retain, however, the name and address as well as said certification for each passenger for at least five years from the date of the transaction. In the case of a customer traveling under a specific license, a copy of the license must be maintained on file.

In addition, U.S. carriers, travel providers, and some shippers and charterers for the first time are now permitted to open physical offices and employ staff in Cuba, eliminating another obstacle to establishing operations in that market. OFAC's new regulations provide that persons subject to U.S. jurisdiction will be allowed to establish and maintain a physical presence (e.g., an office, retail outlet, or warehouse) in Cuba if they are operating in the following sectors: news bureaus; exporters of goods authorized for export or re-export to Cuba by BIS and OFAC (including agricultural products and construction materials for privately owned buildings); entities providing mail or parcel transmission services and certain cargo transportation services; providers of telecommunications or Internet-based services; entities organizing or conducting educational activities; religious organizations; and providers of carrier and certain travel services. These individuals and entities will also be authorized to employ

Cuban nationals, open and maintain bank accounts in Cuba, and employ persons subject to U.S. jurisdiction in Cuba.

Department of Commerce, BIS Licenses

Under new BIS regulations, a much broader range of vessels are now exempt from the requirement that they obtain an export license from BIS prior to sailing to Cuba. Specifically, the new regulation applies to vessels conducting temporary sojourns for (i) cargo vessels for hire for use in the transportation of items; (ii) passenger vessels for hire for use in the transportation of passengers and/or items; and (iii) recreational vessels that are used in connection with travel authorized by OFAC. *See* 15 C.F.R § 740.15

A vessel operator, however, must submit a license application to BIS if the vessel would remain in Cuba for longer than 14 days before departing a country to which the vessel could be exported without a license to the U.S.

In addition, passenger carriers used to transport both passengers and items to Cuba may transport automobiles only if the export or re-export of the automobiles to Cuba would have been authorized by a separate license issued by BIS.

Continuing Role of Cuban Authorities

While the U.S. progressively relaxes its requirements for travel and transport providers, it is important to underscore that Cuba maintains its own regulatory processes for evaluating new entrants. Prior to last week's policy shift, Cuban authorities required that any new provider of passenger services be fully licensed by OFAC and BIS prior to formal application for

operating authority from Cuba. Notwithstanding the new blanket authorization given by the U.S. side, the Cuban authorities likely will continue to carefully screen new entrants on a case-by-case basis. Presentation of proposed new services and business plans, and efforts to construct new relationships with Cuban marine terminals, agents, and other local partners will still need to be carefully coordinated with relevant Cuban authorities. To date, there have been no public announcements of any U.S. passenger operators receiving approval from Cuban regulators to commence service.

Conclusions and Recommendations

The policy shift reflected by the Regulations provides an opportunity for a variety of industries, including, in particular, the maritime industry and passenger carriers. Changes in Cuba policy and opportunities to enter the Cuba trade are evolving quickly, especially in light of the past half-century's dearth of trade and diplomatic relations. Parties that stand to gain from these developments should consult with counsel sooner than later to ensure opportunities do not pass them by.

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1. See <http://www.treasury.gov/press-center/press-releases/Pages/jl0169.aspx>.