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Regulatory Alert:

Déjà Vu: New Restrictions on Cuba Travel

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President Trump announced in Miami last Friday that his administration will roll back some of the steps President Obama took to ease sanctions on Cuba. The announced changes will reverse policies that have allowed Americans to travel to Cuba more freely under one especially popular category of authorized travel, apparently reviving the previous travel restrictions (or something similar). The President signed a National Security Memorandum that mandates various policy changes concerning Cuba, including directing the Office of Foreign Assets Control (OFAC) to publish new regulations. Many details have not yet been announced and they may only become clear when OFAC issues its new regulations. The changes will take effect at that time.

The announced changes will especially affect travel for people-to-people exchanges. These exchanges allow Americans to go to Cuba if they maintain a full-time schedule of educational activities and meaningfully interact with Cubans. The Trump Administration will bring back a requirement that people-to-people travel must take place in organized groups. The exchanges will have to be arranged by a U.S. organization that accompanies the travelers. In the past, OFAC issued specific licenses to organizations running people-to-people exchanges, which allowed OFAC to scrutinize sample itineraries to assure that the proposed travel met the educational requirements. The new policy seems to be aimed at bringing back this kind of scrutiny. Indeed, the President directed OFAC to “regularly audit travel to Cuba to ensure that travelers are complying with relevant statutes and regulations” and he also ordered multiple agencies to review their enforcement practices concerning Cuba travel. Notably, while the announced restrictions will not prohibit any categories of authorized travel other than “individual people-to-people travel,” all travelers to Cuba may be subject to additional scrutiny.

The National Security Memorandum also declared an important new restriction: prohibiting “direct financial transactions” with “entities and subsidiaries” on a list to be published by the State Department. This list will include entities and subsidiaries “that are under the control of, or act for or on behalf of, the Cuban military, intelligence, or security services or personnel (such as Grupo de Administracion Empresarial S.A. (“GAESA”), its affiliates, subsidiaries, and successors).” GAESA reportedly owns many hotels, restaurants, and shops catering to travelers to Cuba, so this restriction will inhibit otherwise-authorized travel – maybe even prohibitively so, depending on the regulatory details yet to come and the compliance challenges they present for travelers and businesses in or supporting the travel industry.

The implications of the new list may extend beyond travel, as GAESA affiliates (and presumably the other entities to be listed) also participate in other sectors. The National

Security Memorandum specifies, however, that the new prohibition will not affect financial transactions supporting U.S. Government activities in Cuba and various commercial activities authorized by OFAC licenses – such as air and sea operations that support permissible travel, cargo, and trade; telecommunications and internet access; sales of agricultural commodities, medical devices, and medicine; or sending authorized remittances. The Memorandum also provides a broader carve-out for transactions with listed entities that “otherwise further the national security or foreign policy interests of the United States.” Accordingly, we expect that OFAC will license (probably through a mix of general and specific licenses) financial transactions to support activities favored by U.S. policy. Again, the extent of the impact will depend on regulatory details not yet announced. Important questions to be answered include whether the new prohibition will apply either to foreign subsidiaries of U.S. businesses (we presume this will be the case, in keeping with OFAC’s traditional approach to Cuba) or to unlisted subsidiaries of listed entities (the wording of the Memorandum suggests not, in contrast with OFAC’s usual “50% rule”). OFAC has stated that the new prohibition will allow dealings with listed entities to continue when they relate to lawful commercial dealings put in place before OFAC issues its forthcoming regulations.

A sense of déjà vu also arises from the announced change to the definition of “Prohibited Officials of the Government of Cuba.” Several general licenses permitting dealings with Cuba (such as telecommunications and remittances) have carve-outs for dealings with prohibited officials. The Obama Administration narrowed these carve-outs by limiting the definition, but the Trump Administration will expand the definition.

Finally, the National Security Memorandum leaves in place many Obama-era policy changes. Notably, it does not announce any changes to the following:

- Diplomatic relations with Cuba;
- Cuba’s removal from the list of state sponsors of terrorism;
- Authorization to engage in activities to promote Cuba’s nascent private sector;
- Authorizations concerning favored sectors, such as telecommunications, agriculture, medicines, and medical devices;
- Authorization to establish physical presence in Cuba;
- Personal remittances to Cuba;
- Commercial flights and cruises to Cuba; and
- Authorization for travelers to Cuba to return to the U.S. with rum and cigars.

President Trump retains the authority to roll back more changes made by the Obama Administration. However, nothing in his announcement speech or the National Security Memorandum suggested the intent to go further. Accordingly, President Trump seems to have left many of his predecessor’s Cuba policies on a firmer political footing.

In the end, while the details of the U.S. embargo have changed yet again, there will continue to be both restrictions on and opportunities for U.S. business in Cuba. It would be prudent for businesses to continue to monitor regulatory changes and to ensure that their compliance programs are up-to-date and adequate to manage the risks of dealing with Cuba.