



For more information, please contact:

[D. Edward Wilson, Jr.](#)

202.344.4819

[dewilson@Venable.com](mailto:dewilson@Venable.com)

[Lindsay B. Meyer](#)

202.344.4829

[lbmeyer@Venable.com](mailto:lbmeyer@Venable.com)

[Michael D. Sherman](#)

202.344.4558

[mdsherman@Venable.com](mailto:mdsherman@Venable.com)

[Ashley W. Craig](#)

202.344.4351

[awcraig@Venable.com](mailto:awcraig@Venable.com)

[David G. Dickman](#)

202.344.8026

[dgdickman@Venable.com](mailto:dgdickman@Venable.com)

[Richard Y. Hegg](#)

202.344.4417

[ryhegg@Venable.com](mailto:ryhegg@Venable.com)

[Andrew B. Bigart](#)

202.344.4323

[aebigart@Venable.com](mailto:aebigart@Venable.com)

## The Present and Future of U.S./Cuba Relations

For over 40 years, the U.S. has maintained a comprehensive trade embargo against Cuba. No U.S. citizen, company, or foreign subsidiary, wherever located, or person in the U.S., may have any financial or commercial relations with Cuba or individuals in Cuba without U.S. permission, and this permission has been given very sparingly. No goods or services may be exported to, or imported from Cuba, with narrow exceptions as described below. Very detailed regulations, administered by the Office of Foreign Assets Control, U.S. Treasury, control every aspect of U.S. financial and commercial contact with Cuba.

Recently the Obama Administration eased some restrictions on the embargo, sparking a national debate on the fate of the trade embargo.

This client alert focuses on the changes President Obama made to the Cuban embargo, provides an overview of the sanctions as recently amended, and, finally, discusses the future of the Cuba sanctions. It is critical for readers to understand that the sanctions are imposed by statute – the Cuban Liberty and Democratic Solidarity Act (LIBERTAD) of 1996 (known as the Helms-Burton Act) – not by presidential order. Therefore, President Obama's ability to relax the embargo without Congressional approval is both limited and politically difficult.

### Obama Administration Changes in Sanctions Against Cuba

On April 13, the President directed the executive branch to license:

1. U.S. persons (Cuban-Americans) to visit close family members without limit on frequency or duration, to authorize travel-related expenditures, and remove limitation on accompanied baggage;
2. Unlimited remittances to close family members (except for certain government officials and members of the Communist Party in Cuba);
3. Expanded telecommunications with Cuba, including establishment of fiber-optic cable and satellite communications linking Cuba and the U.S., and provision of radio, television, and telecommunications services to Cuba (including donation of mobile phones, computers and satellite receivers to Cubans); and
4. Increased value and scope of humanitarian gifts allowed to permissible individuals and groups in Cuba.

These are all actions the President could take on his own authority, without Congressional approval.

### Previous Exceptions to the Embargo

The government has always allowed export of publications, informational materials, artwork, and humanitarian donations. Beginning in 2000, the Trade Sanctions and Export Enhancement Act of 2000 (TSRA) created an exception for the export of agricultural and medical products. Under this program, the Commerce Department authorizes the sale and export or re-export of medicine and medical supplies, food and agricultural commodities to Cuba.

On March 11, 2009, Congress passed the 2009 Omnibus Appropriations Act, which directed OFAC to: (1) Implement a General License for travel to Cuba for purposes of the marketing and sale of agricultural and medical goods; and (2) Reverse a 2005 regulation that requires the payment of TSRA exports to Cuba to be "cash in advance."

These "relaxations", however, have been interpreted narrowly by the Treasury. On March 9, 2009, Secretary Geithner explained that the general license would be limited to "representatives of only a narrow class of businesses" and that any "business using the general license would be required to provide both advance written notice outlining the purpose and scope of the planned travel and, upon return, a report outlining the activities conducted, including the person with whom they met, the expenses incurred, and business conducted in Cuba."

Similarly, OFAC stated that the "cash in advance" restriction will remain in effect because "because the Omnibus Act does not amend the requirement in TSRA that agricultural exports to Cuba be either paid for by 'cash in advance' or financed using a third-country bank ...."

## What Will it Take to Lift the Embargo?

It is essential to understand that there are only two ways to lift the embargo: (1) Congress can pass legislation overturning the embargo (repealing Helms-Burton), or (2) the President can certify to Congress that Cuba has transitioned to a democratically elected government pursuant to standards outlined by the Helms-Burton Act.

Several bills have been introduced in Congress to repeal all or some of the statutory embargo. (H.R. 188, H.R. 332, H.R. 874, H.R. 1528, H.R. 1530, H.R. 1531, H.R. 1737, H.R. 2005, & S. 428). Until Congress enacts such a bill, Helms-Burton will control the lifting of the embargo.

Helms-Burton allows the President to suspend the Cuba embargo by certifying to Congress that Cuba is transitioning to a government that has, among other things,

- legalized all political activity;
- released all political prisoners;
- dissolved certain government agencies;
- made public commitments to organizing free and fair elections for a new government;
- made demonstrable progress in establishing an independent judiciary and respecting human rights; and
- **does not include Fidel Castro or Raul Castro.**

Helms-Burton requires the President to consider additional factors, including whether the Cuban government has taken appropriate steps to return to U.S. citizens and entities property taken by the Cuban Government on or after January 1, 1959, or to provide equitable compensation to such citizens and entities for such property. (A major issue to be resolved regardless of how the embargo is removed.)

Helms-Burton allows the President to terminate the embargo by certifying to Congress that a democratically elected government in Cuba is in power, i.e., a government which (in addition to the above)

- results from free and fair elections;
- is substantially moving toward a market-oriented economic system based on the right to own and enjoy property;
- is committed to free and fair elections, basic civil liberties, and human rights;
- has made demonstrable progress in establishing an independent judiciary; and
- has made demonstrable progress in returning to U.S. citizens and entities property taken by the Cuban Government or providing full compensation for such property.

## Cuba Trade Going Forward

As noted, the only goods that may be exported to Cuba are (1) informational materials, (2) certain types of humanitarian donations, and (3) agricultural and medical goods. Although the Obama Administration has directed the executive branch to license expanded telecommunications services, to date, the federal government has not responded with any specific guidance or information.

Anyone interested in travelling to Cuba to explore the export of such goods, or interested in seeing if a certain type of transaction is now permitted, should contact legal counsel to ensure compliance with OFAC requirements. In particular, those travelling in pursuit of agricultural and medical sales must "provide both advance written notice outlining the purpose and scope of the planned travel and, upon return, a report outlining the activities conducted, including the person with whom they met, the expenses incurred, and business conducted in Cuba."

CALIFORNIA MARYLAND NEW YORK VIRGINIA WASHINGTON, DC

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