



The US embargo of Cuba: prospects for change

The US has maintained a broad economic sanctions embargo against Cuba since 1963. In recent months the US Congress and the Obama administration have moved to begin loosening the embargo. Some in Congress have called for a phased lifting of the entire embargo. While the changes to date have been modest, there are prospects for more substantial changes during President Obama's first term in office.

The US embargo of Cuba

The Office of Foreign Assets Control (OFAC), within the US Treasury Department, is the primary agency responsible for the promulgation and administration of economic sanctions regulations targeting Cuba, certain other countries and designated individuals and entities. OFAC has administered the US embargo of Cuba since its inception.

As discussed in our recent briefings¹, the US takes the view that all 'persons subject to the jurisdiction of the US' must comply with the Cuba embargo. This term captures:

- i any US citizen or resident, wherever located;
- ii the worldwide operations of any entity organised under US law; and
- iii any person located within or operating from the US.

Unlike the US sanctions in place against other countries, the Cuba sanctions are also binding on any entity, wherever organised, that is 'owned or controlled' by US persons or companies. Note that there may be ownership or control even if US persons and residents hold less than 50 per cent of the equity interests of the non-US entity.

Intense political debate has always surrounded the embargo of Cuba, but those in favour of further tightening the embargo had the upper hand during most of the George W Bush presidency. For example, in 2004, President Bush tightened the restrictions on family travel

and remittances to Cuba. While on the campaign trail in 2008, President Barack Obama indicated that these tightened restrictions should be reversed. As discussed in this briefing, this proposal is now being carried out, and it is possible that Congress or the Obama administration will further loosen the embargo in the coming months.

Initial steps in Congress to loosen the embargo

The 2009 Omnibus Appropriations Act (the Act), signed into law by President Obama on 11 March 2009, contains provisions reducing restrictions on travel to and agricultural trade with Cuba. In one provision, Congress directed that federal funds not be used to administer, implement or enforce the 2004 amendments to the OFAC regulations that limited family travel to Cuba. This provision of the Act was immediately implemented by OFAC's issuance of a 'general license' allowing travel to Cuba to visit close relatives who are nationals of Cuba. The general license can be used once in any 12-month period; for additional visits, specific licenses must be sought from OFAC on a case-by-case basis.

OFAC has indicated that, as directed by the Act, it will soon issue an additional general license authorising travel to Cuba to market and sell certain agricultural commodities and medical products. Such exports to Cuba are permitted, with prior US government authorisation, pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA). Based on statements by OFAC and letters from Treasury Secretary

¹ US economic sanctions against Cuba, May 2009; US economic sanctions compliance for non-US firms, February 2009.

Geithner to members of Congress, it appears that this general license will be narrow, permitting only a limited class of businesses to travel to Cuba. When published, the license may require advance written notice to OFAC before travelling to Cuba and the submission of a written report, when returning to the US, detailing the activities carried out within Cuba.

A difference of opinion has emerged between the Obama administration and many members of Congress over another restriction relating to the sale of agricultural and medical goods to Cuba. TSRA provides that payment for authorised agricultural and medical exports to Cuba must be made by 'cash in advance'. This was generally interpreted to mean that payment could be received after the goods left the US so long as it was received before the goods arrived in Cuba. However, in 2005, OFAC amended the Cuba regulations to state that 'cash in advance' requires payment before the goods leave the US port. Many exporters have stated that the change significantly increased their financing costs and may be significantly restricting the growth of authorised agricultural exports to Cuba.

Under the Act, Congress sought to facilitate such exports with a return to the original interpretation of cash in advance, directing that OFAC not expend funds to enforce its restrictive interpretation of that phrase. However, OFAC has taken the view that its interpretation is required by TSRA and therefore, unless TSRA is amended, OFAC must continue to apply it. Many members of Congress and affected US companies believe that OFAC's restrictive interpretation of cash in advance runs counter to the intent of Congress to facilitate agricultural and medical trade with Cuba. A bill is currently pending in Congress that seeks to amend TSRA to require a change in OFAC policy.

President Obama's April policy changes

On 13 April 2009, President Obama announced several more small steps to loosen the Cuba embargo, with the stated goal of encouraging Cuban democracy and furthering human rights. The President has directed the Secretaries of State, Treasury and Commerce to take the following actions:

- expand on the 11 March OFAC general license to allow travel to Cuba for family members of Cuban nationals

without limitations on the frequency or duration of visits or on baggage weight and to increase the allowed expenditure amounts;

- remove restrictions on remittances to family members, including restrictions on the amount and frequency of the remittances, and create a general license for US banks to forward remittances;
- authorise US telecommunications service providers to enter into agreements to establish networks linking the US and Cuba and to enter into agreements to provide service to customers in Cuba;
- allow the export to Cuba of cell phones and other personal communications devices, and allow US persons to activate and pay for telecommunications services on behalf of individuals in Cuba, excluding certain senior communist party and Cuban government officials; and
- increase the types and value of gifts allowed as humanitarian donations.

Many of these changes are expected to have a substantial effect on Cuban-Americans and on the flow of remittances to their relatives in Cuba. On the other hand, the telecommunications provisions may have limited immediate impact. Any expansion in direct US telecommunications services to Cuba will require the approval of the Cuban government, as well as the interest and engagement of US-based telecommunications companies. Neither is assured, particularly given the existing availability of cable and satellite links to Cuba through other countries.

Future changes to US policy towards Cuba

Several influential business groups have advocated either immediate or phased lifting of the Cuba embargo. For example, in December 2008, a collection of 12 business and industry groups wrote an open letter to President-elect Obama urging that he appoint a bipartisan commission to look at US policy towards Cuba. These organisations, including the National Foreign Trade Council and US Chamber of Commerce, stated that they support the removal of all trade and travel restrictions on Cuba.

On 5 March 2009, Senator Dick Lugar, a respected senior senator and the leading republican member of the Senate Foreign Relations Committee, announced a report

recommending that the US take initial steps towards removing the embargo, as part of a phased strategy of increasing engagement with Cuba. On 9 April 2009, the Cuban American National Foundation (CANF), a US organisation that historically was a strong supporter of the embargo, encouraged the US government to increase communication and interaction between people in the US and Cuba, to increase direct aid to Cuba and to resume limited diplomatic engagement.

There are a number of bills currently pending in Congress that would relax or lift the Cuba embargo. Several bills that would effect major changes do not appear likely to pass at this stage. However, several other bills could potentially be enacted. For example, HR 874 and S 428, which seek to lift restrictions on travel to Cuba for all Americans, as of May 1 were co-sponsored by 132 members of the House of Representatives and 26 Senators, respectively. A separate bill, HR 1737, seeks to expand authorised agricultural and medical exports to Cuba and is finding substantial support in Congress.

Conclusion

While the recent policy changes by the US government regarding Cuba are limited, they signal a new willingness to consider further steps should Cuba make a constructive response. On 16 April 2009, Cuban President Raúl Castro offered to discuss any issue with President Obama, subject to certain conditions, and the Obama administration indicated that it views this statement in a positive light. However, apart from the possibility of increased agricultural exports and personal travel to Cuba, the US is unlikely to further loosen the embargo until Cuba starts taking the steps called for by the Obama administration to lift restrictions on the liberties and individual rights of the Cuban people.

For further information please contact

NEW YORK
Matthew F. Herman
Partner
T +1 212 277 4037
E matthew.herman@freshfields.com

Matthew Jacobson
Partner
T +1 212 284 4919
E matthew.jacobson@freshfields.com

LONDON
Nigel Rawding
Partner
T +44 20 7832 7322
E nigel.rawding@freshfields.com

Sarah Parkes
Partner
T +44 20 7832 7630
E sarah.parkes@freshfields.com

WASHINGTON
Glen Kelley
Counsel
T +1 202 277 4570
E glen.kelley@freshfields.com

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales with registered number OC334789. It is regulated by the Solicitors Regulation Authority. For regulatory information please refer to www.freshfields.com/support/legalnotice. Any reference to a partner means a member, or a consultant or employee with equivalent standing and qualifications, of Freshfields Bruckhaus Deringer LLP or any of its affiliated firms or entities.