



US economic sanctions against Cuba

The US has maintained a broad embargo of Cuba for more than 45 years. The US takes the view that all US persons, and non-US companies owned or controlled by US persons, must comply with the embargo. The embargo is broadly drafted and actively enforced.

Who must comply with the Cuba embargo?

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. OFAC has administered the US embargo of Cuba since it began in 1963.

All 'US persons' must comply with US economic sanctions programmes, including:

- any US citizen or permanent resident alien (ie, a 'green card' holder), wherever located;
- the worldwide operations of any entity organised under US law; and
- any person located within or operating from the US.

The sanctions regulations in place against Iran, Sudan and other countries are binding upon all US persons. The Cuba sanctions, however, cast a wider net and are binding on all 'persons subject to the jurisdiction of the US'. This term includes all US persons and also includes any entity, wherever organised, that is 'owned or controlled' by any US person or resident.

Consequently, the US takes the view that non-US subsidiaries of US companies and any other entity owned or controlled by US persons or residents, must comply with the Cuba sanctions. Further complicating the picture for corporate compliance, there is no bright line test as to whether a non-US entity is owned or controlled by US persons or residents. 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 entity¹.

Many other countries take the opposite view, that companies formed or operating in their jurisdictions should not be required to comply with the US embargo of Cuba. The EU (and its member states), Canada and Mexico have enacted 'blocking' laws intended to prohibit compliance with the extraterritorial aspects of the embargo. Nationals of these countries and any other person located within their territory are prohibited from complying and may be required to make a report if they are instructed to comply. While there have been few enforcement actions in respect of the EU blocking law, in April 2007 Austria initiated an investigation of Austrian bank BAWAG P.S.K. in relation to its closure of bank accounts of Cuban nationals.

When non-US companies are caught by the conflicting requirements of the US embargo and local blocking laws, OFAC is generally willing to consider requests for a 'specific license' to resolve the conflict. For example, the BAWAG case was ultimately resolved when OFAC issued such a license. While licenses are not always granted, and often do not take the form sought, it is often possible to obtain some relief.

¹ OFAC's analysis in any given case will be highly fact-dependent and may take into account the nature of the equity interests in the non-US entity, the percentage of the equity interests held by US persons or residents and any rights they may have to direct or participate in management of the non-US entity.

What is prohibited under the embargo?

The Cuba embargo is the only remaining general embargo under the Trading with the Enemy Act of 1917 (TWEA), the older of the two core statutes underlying US economic sanctions programmes. The governing regulations are lengthy and complex, being based on this earlier statute and having been amended and modified over four and a half decades of evolving US policy towards Cuba.

The regulations generally prohibit transactions and trade with Cuba, Cuban nationals, Cuban companies, the Cuban government (and its agents) and individuals and entities in other countries that have been designated for their affiliation with the Cuban government.

The Cuba regulations are unlike all other OFAC sanctions programmes in prohibiting transactions with all Cuban nationals, wherever in the world they may be located. The term 'national' is defined broadly to include:

- Cuban citizens (including dual nationals), permanent residents and domiciliaries of Cuba;
- any entity formed under Cuban law or having its principal place of business in Cuba;
- any other entity if it is currently or has previously been controlled by Cuban persons, or if a substantial part of its equity interests or debt obligations are controlled by Cuban persons²;
- any office or branch in Cuba of a non-Cuban entity; and
- any person acting on behalf of any of the foregoing.

The other core prohibitions under the regulations, applicable to all persons subject to US jurisdiction unless express OFAC authorisation is obtained, include the following:

- Cuban assets must be blocked (frozen) as soon as they come within the possession or control of a person subject to US jurisdiction. There are limited exemptions, including for Cubans holding certain immigration statuses in the US.
- US banks, their non-US branches and their non-US subsidiaries may not finance or arrange financing for trade transactions where Cuba or a Cuban person is involved.

- Goods and services of Cuban origin and goods derived from any article grown, produced or manufactured in Cuba, may not be imported, directly or indirectly, into the US. Persons subject to US jurisdiction may not deal with any such goods or services anywhere in the world. No vessel that is carrying goods or passengers to or from Cuba, or that has taken on fuel or supplies in Cuba, may enter a US port. Even if not carrying Cuban goods or passengers, a vessel may not enter the US for 180 days after calling at a Cuban port.
- No items of US origin may be exported from the US or from any other country, directly or indirectly, to Cuba or to a Cuban national. There are limited exceptions, including for certain informational materials. Exporters may apply for US Commerce Department approval to export agricultural products and certain medical goods to Cuba. Such agricultural exports now amount to a quite substantial quantity of trade.
- Travel to and within Cuba by persons subject to US jurisdiction remains severely restricted. General licences exist for persons on official business of a government, certain academic researchers and professional journalists. Cuban family members in the US are permitted to travel on limited terms, which have recently been expanded.

The Cuba sanctions regulations do not contain an express 'facilitation' prohibition as in several other sanctions programmes. However, the regulations contain densely worded prohibitions on dealing in property in which Cuba or Cuban nationals have at any time 'had any interest of any nature whatsoever, direct or indirect'. As a result, a person subject to US jurisdiction would likely violate the sanctions by participating, supporting or engaging in any other activity in connection with the Cuba-related activities of a non-US person.

The Helms-Burton Act

The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (the Helms-Burton Act), broadened the US embargo against Cuba and sought to discourage non-US persons from trading with and investing in Cuba. The Helms-Burton Act provides that US citizens and corporations whose property was confiscated by Cuba since 1959 may bring suits for damages in the US federal courts against anyone who traffics in their former property. A broad range of transactions and commercial

² The regulations suggest that if Cuban persons own, in the aggregate, 25 per cent or more of either the equity or debt securities issued by a non-Cuban entity, then that entity is itself a 'national' of Cuba.

activity that involves or benefits from such confiscated property may form the basis for such lawsuits.

Giving a sense of the potential scope of such litigation, thousands of US nationals believing they have a claim against Cuba for confiscation of property have filed their claim with the Foreign Claims Settlement Commission (FCSC). The FCSC is a US government agency that adjudicates claims of US nationals against foreign states. In 1996, the FCSC estimated that over 20,000 US national claims exist for property confiscated by Cuba, and just under 6,000 claims had been adjudicated and 'certified' to the US Department of State, totaling \$1.9bn.

However, since the enactment of the Helms-Burton Act, successive US presidents have exercised their authority to suspend, for successive six-month periods, the effective date of the litigation-related provisions of the Act. The overall effect has been to allow US citizens and companies to file with the FCSC their claims from the confiscation of property, while continuously suspending the right of such claimants to file lawsuits in the US courts against persons who traffic in such property.

Title IV of the Helms-Burton Act seeks to further discourage trade and investment in Cuba by barring entry into the US of non-US persons (and their families) designated by the US Secretary of State as persons who traffic in confiscated property as to which a US national has a claim. Where the trafficker is a corporation, this prohibition extends to the corporate officers, principals, controlling shareholders and their agents and families. Title IV has not been suspended and occasional visa denials have been reported over the years.

Enforcement

OFAC may impose a civil penalty for any violation of the Cuba regulations of up to \$65,000 per violation or up to twice the amount of any funds that were not blocked when required. For many years OFAC has expended considerable resources to enforce the Cuba embargo, imposing civil penalties on numerous companies and individuals. In recent months many in Congress have criticised OFAC's dedication of a large portion of its enforcement resources to Cuba.

OFAC has imposed substantial penalties on several companies under the Cuba sanctions. For example, in July 2008 Minxia Non-Ferrous Metals remitted \$1.2m

to settle allegations of purchasing or otherwise dealing in Cuban metals, outside the scope of a license it had received from OFAC. Several US companies have been penalised for Cuban transactions carried out by their non-US subsidiaries. In August 2007 Travelocity.com remitted \$182,750 to settle violations apparently committed when its non-US subsidiaries or branches arranged numerous air travel and hotel reservations to, from, with or within Cuba. OFAC has imposed smaller fines on numerous individuals for visiting Cuba without a license or for relatively minor violations such as the purchase of Cuban cigars over the internet.

Criminal penalties are also possible for violations of the embargo. Available penalties range up to 10 years in prison and fines of up to \$250,000 for an individual and \$1m for an entity. Willful violations carry heavier penalties for individuals and any officer, director or agent of a legal entity who knowingly participates in a violation may be imprisoned or individually fined. As discussed in our separate briefing³, US prosecutors have recently brought a number of major criminal enforcement actions against non-US banks and import-export companies that allegedly violated the US sanctions against Iran. One of these actions resulted in a \$350m criminal forfeiture penalty imposed on Lloyds TSB in January 2009.

³ Criminal enforcement of US economic sanctions against non-US entities, April 2009.

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