

## **Presidential Authority To Modify Economic Sanctions Against Cuba**

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By Stephen F. Propst, Partner  
Hogan Lovells US LLP

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## Introduction

On January 14, 2011, President Obama announced measures to significantly loosen the U.S. sanctions against Cuba, including broad new authorizations for travel and non-family remittances to support private economic activity in Cuba. These changes were made without prior Congressional approval and are only the latest in a string of modifications to the Cuba sanctions that have been implemented solely under the President's executive authority. Along with the political and policy debates over the President's actions, there will undoubtedly be some who question whether the President had sufficient legal authority to make these changes. This paper reviews the sources of the President's authority to modify the Cuba sanctions and concludes that executive authority is broad enough to support not only the changes announced to date, but also a range of additional measures to ease restrictions.<sup>1</sup>

### I. Overview

Through a complex series of federal statutes, Congress has codified the comprehensive U.S. economic sanctions against Cuba and restricted the President's authority to suspend or terminate those sanctions until a "transition government" is in power in Cuba. Notwithstanding these statutory requirements, the President maintains broad authority and discretion to significantly ease specific provisions of the Cuba sanctions regime in support of particular U.S. foreign policy objectives recognized by Congress, including the provision of humanitarian support for the Cuban people and the promotion of democratic reforms. In fact, since Congress codified the Cuba sanctions in 1996, Presidents Clinton, Bush and Obama have each exercised this authority to ease the scope of restrictions applicable to Cuba, without action or approval by Congress. This executive authority to modify the Cuba sanctions is grounded in Constitutional, statutory and regulatory provisions that empower the President and the responsible executive branch agencies to grant exceptions to the sanctions through executive actions, regulations and licenses. The authority is particularly broad in certain areas, such as telecommunications-related transactions and humanitarian donations, where Congress has explicitly granted discretion to the President under existing statutes.

Consistent with the relevant statutory authorities and restrictions, as well as statutory statements of U.S. policy objectives, the President arguably has sufficient legal authority to make the following types of additional changes to the current U.S. sanctions against Cuba:

- Establishing "general licenses" for existing categories of travel to Cuba that are currently authorized only by specific licenses;
- Expanding existing categories of authorized travel to include new travel provisions (along the same lines as the new authorization announced on January 14, 2011 for travel related to non-academic clinics and workshops in Cuba);
- Revising existing general and specific license provisions to ease or eliminate current limitations and conditions applicable to travel and remittances to Cuba;
- Establishing a new general license for the provision of services to Cuba (along the same lines as the March 2010 revision that authorized services to facilitate Internet communications);
- Establishing a general license for entry into U.S. ports of vessels engaged in trade with Cuba;
- Permitting payment for authorized transactions with Cuba (except sales of agricultural commodities or products) to be financed through letters of credit or other financing arrangements issued, confirmed or advised by U.S. financial institutions (but subject to statutory restrictions on the extension of credit for transactions involving "confiscated property");
- Authorizing imports of certain goods and services from Cuba;

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<sup>1</sup> Stephen F. Propst is a Partner in the International Trade Group at the law firm of Hogan Lovells US LLP. The author is grateful for the contributions of others to this article, including Hogan Lovells colleagues Luis Perez, Beth Peters, Eric Gillman and Michael Ravvin.

- Modifying current export control regulations to establish more favorable licensing policies for additional categories of items that may be exported under specific licenses;
- Establishing additional license exceptions for exports of U.S.-origin goods to Cuba; and
- Expanding the availability of existing license exceptions to cover additional categories of exports and easing conditions and limitations on the use of those exceptions.

Section II of this article provides an overview of the key statutory and regulatory provisions under which the Cuba sanctions have been established. Section III then identifies those specific statutory and regulatory provisions under which the executive branch retains authority to modify restrictions under the Cuba sanctions regime. Section IV discusses examples of prior revisions to the Cuba sanctions that have been made by Presidents Clinton, Bush and Obama, and that establish precedents for executive authority to make further revisions. Finally, Section V identifies additional specific measures that the President could take to ease the Cuba sanctions, without further action or authorization from Congress.

## II. Statutory and Regulatory Framework Imposing Sanctions Against Cuba

Through the exercise of Presidential authority and statutory mandates, the United States maintains a complex framework of comprehensive trade sanctions and export control restrictions applicable to Cuba. The U.S. sanctions against Cuba are designed to isolate the Cuban government economically by prohibiting persons subject to U.S. jurisdiction from engaging in virtually all trade and investment activities involving Cuba, either directly or through third countries.

The following is a summary of the key statutes and regulations under which the Cuba sanctions have been imposed.

### A. Trading with the Enemy Act of 1917

The Trading with the Enemy Act of 1917 (TWEA)<sup>2</sup> provides discretionary authority to the President to regulate financial transactions and property transfers by any person or with respect to any property subject to the jurisdiction of the United States (except information and informational materials) during a time of war.<sup>3</sup>

In 1933, TWEA was amended to grant the President this authority during a presidentially-declared national emergency. Pursuant to the International Emergency Economic Powers Act of 1977 ("IEEPA"), this authority was again limited to times of war, but Section 101(b) of IEEPA included a grandfathering provision that allows the President to continue the embargo against Cuba without declaring a new state of emergency.<sup>4</sup> However, the President is required to extend the embargo annually. The embargo against Cuba was first extended by President Carter on September 8, 1978 and has never lapsed.

TWEA grants discretionary authority to the President to impose sanctions, rather than mandating sanctions against any particular country. The determination as to which states shall be subject to sanctions under TWEA, and what sanctions shall be imposed on such states, is a matter left to the discretion of the President.

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<sup>2</sup> Ch. 106, 40 Stat. 411; 50 U.S.C. App. § 5(b).

<sup>3</sup> Section 5(b)(1) of TWEA states: "During the time of war, the President *may*, through any agency he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—(A) investigate, regulate, or prohibit, any transaction in foreign exchange, transfers of credit or payments between, by, through or to any banking institution..., and (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest . . . ." (Emphasis added.)

<sup>4</sup> Pub. L. No. 95-223, 91 Stat. 1625 (1977). 50 U.S.C. §§ 1701 to 1706.

## **B. Proclamation 3447 and the Foreign Assistance Act of 1961**

President Kennedy established the comprehensive trade embargo against Cuba in February 1962 as a discretionary exercise of Presidential powers. Citing authority granted to him under the Foreign Assistance Act of 1961,<sup>5</sup> President Kennedy's Proclamation 3447 declared an "embargo upon trade with Cuba."<sup>6</sup> The Proclamation directed the Department of Treasury to establish regulations necessary to prohibit imports into the United States of all goods of Cuban origin, as well as goods imported from or through Cuba. Similarly, the Department of Commerce was directed to issue regulations necessary to prohibit all exports from the United States to Cuba. However, Proclamation 3447 explicitly delegated authority to the Secretaries of Treasury and Commerce to establish exceptions to the provisions of the embargo against Cuba.

## **C. Cuban Assets Control Regulations**

As directed by President Kennedy, the Treasury Department's Office of Foreign Assets Control ("OFAC") issued the Cuban Assets Control Regulations ("CACR") in 1963 to implement the embargo against Cuba.<sup>7</sup> Issued under the statutory authority of both the Foreign Assistance Act and Section 5(b) of TWEA, the CACR extend well beyond a simple ban on imports from Cuba to prohibit virtually all dealings in property in which Cuba or Cuban nationals, wherever located, have any interest whatsoever, including travel-related transactions, investment and other financial and trade-related transactions. Thus, the CACR constitute the primary regulatory regime under which the Cuba sanctions have been implemented. Consistent with the administrative framework and delegation of authorities set forth in Proclamation 3447, however, the Commerce Department retained authority and jurisdiction over the licensing of exports to Cuba. The CACR therefore include a "general license" authorizing exports of goods, software and technology to Cuba that have been specifically licensed or otherwise authorized by the Department of Commerce.<sup>8</sup>

## **D. Export Administration Act of 1979 and the Export Administration Regulations**

Among other provisions, the Export Administration Act of 1979 (EAA)<sup>9</sup> restricts the exportation of goods to states that are designated as sponsors of terrorism. Cuba has been designated a state sponsor of terrorism by the State Department since 1982. Under the EAA, that designation of Cuba as a state-sponsor of terrorism may not be rescinded unless the President submits to Congress a report certifying that certain conditions have been met, including a finding that there have been "fundamental changes in the leadership and policies" of Cuba.<sup>10</sup>

Pursuant to Section 6(j) of the EAA, specific export licenses are required for the export or reexport to Cuba of goods, software and technology on the Commerce Control List (CCL). The Secretary of Commerce and the Secretary of State must notify Congress at least 30 days prior to issuing such a validated license for the export of CCL-controlled items to Cuba.<sup>11</sup>

The EAA was the statutory basis for the Commerce Department's Export Administration Regulations (EAR) until the EAA was allowed to lapse in 2001. Since then the EAR has been maintained under the emergency powers granted to the President by IEEPA. Administered by the Commerce Department's Bureau of Industry and Security, the EAR prohibit exports and reexports to Cuba of virtually all U.S.-origin goods, software and technology, unless authorized pursuant to a specific license or "license exception." Applications for specific licenses generally are reviewed under a presumption of denial; however, Section 746.2 of the EAR sets forth certain categories of items for which license applications will be reviewed more favorably under a presumption of approval or on a case-by-case basis, provided certain specified conditions are satisfied:

- Medicines and medical devices (presumption of approval, except in certain circumstances);

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<sup>5</sup> P.L. 87-194, 75 Stat. 424; See 22 U.S.C. § 2370.

<sup>6</sup> Presidential Proclamation 3447 (Feb. 3, 1962).

<sup>7</sup> 31 C.F.R. Part 515.

<sup>8</sup> 31 C.F.R. § 515.533.

<sup>9</sup> Pub. L. No. 96-72, 93 Stat. 503 (1979).

<sup>10</sup> 50 U.S.C. App. § 2405(j).

<sup>11</sup> 50 U.S.C. App. § 2405(j).

- Items “necessary to provide efficient and adequate telecommunications links between the United States and Cuba, including links established through third countries, and including the provision of satellite radio or satellite television services to Cuba” (case-by-case);
- Exports from third countries to Cuba of non-strategic foreign-made items that contain an insubstantial proportion (i.e., 20% or less) of U.S.-origin materials, parts, or components (case-by-case);
- Items intended to provide support for the Cuban people, including certain commodities and software for human rights organizations, individuals or non-governmental organizations that promote independent civil society in Cuba, when such exports do not give rise to national security or counter-terrorism concerns; commodities and software for U.S. news bureaus in Cuba; and agricultural items not eligible for export under License Exception AGR (case-by-case); and
- Aircraft and vessels on temporary sojourn to Cuba, either to deliver humanitarian goods or consistent with the foreign policy interests of the United States (case-by-case).<sup>12</sup>

In addition, Section 746.2 of the EAR identifies thirteen “license exceptions” under which specific items may be exported or reexported to Cuba in specified circumstances, provided that certain conditions are satisfied:

- (i) Temporary exports and reexports under License Exception TMP by the news media.<sup>13</sup>
- (ii) Operation technology and software under License Exception TSU for legally exported commodities or software.<sup>14</sup>
- (iii) Sales technology under License Exception TSU.<sup>15</sup>
- (iv) Software updates under License Exception TSU for legally exported software.<sup>16</sup>
- (v) Parts for one-for-one replacement in certain legally exported commodities under License Exception RPL.<sup>17</sup>
- (vi) Baggage under License Exception BAG.<sup>18</sup>
- (vii) Governments and international organizations under License Exception GOV.<sup>19</sup>
- (viii) Gift parcels and humanitarian donations under License Exception GFT.<sup>20</sup>
- (ix) Items in transit from Canada through the U.S. under License Exception TMP.<sup>21</sup>
- (x) Aircraft and vessels for certain aircraft on temporary sojourn under License Exception AVS.<sup>22</sup>
- (xi) Permissive reexports of certain spare parts in foreign-made equipment under License Exception APR.<sup>23</sup>

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<sup>12</sup> 15 C.F.R. § 746.2.

<sup>13</sup> See 15 C.F.R. § 740.9(a)(2)(viii).

<sup>14</sup> See 15 C.F.R. § 740.13(a).

<sup>15</sup> See 15 C.F.R. § 740.13(b).

<sup>16</sup> See 15 C.F.R. § 740.13(c).

<sup>17</sup> See 15 C.F.R. § 740.10(a).

<sup>18</sup> See 15 C.F.R. § 740.14.

<sup>19</sup> See 15 C.F.R. § 740.11.

<sup>20</sup> See 15 C.F.R. § 740.12.

<sup>21</sup> See 15 C.F.R. § 740.9(b)(1)(iv).

<sup>22</sup> See 15 C.F.R. § 740.15(a).

- (xii) Exports of agricultural commodities, classified as EAR99, under License Exception Agricultural Commodities (AGR) and certain reexports of U.S. origin agricultural commodities, classified as EAR99, under License Exception AGR.<sup>24</sup>
- (xiii) Commodities and software authorized under License Exception Consumer Communications Devices (CCD).<sup>25</sup>

**E. Cuban Democracy Act of 1992**

Through the Cuban Democracy Act of 1992 (“CDA”), Congress established the fundamental U.S. policies with respect to Cuba that remain in effect and continue to underlie the Cuba sanctions program.<sup>26</sup> Specifically, the CDA states that the United States is seeking “a peaceful transition to democracy and resumption of economic growth in Cuba” through (i) the careful application of sanctions directed at the Castro government, and (ii) support for the Cuban people. Consistent with these dual strategies, the CDA establishes a statutory mandate for certain sanctions against Cuba, but also grants additional discretionary authority to the President to provide humanitarian support for the Cuban people.

Among the sanctions that are statutorily required under the CDA are the following:

- Section 1706(a) specifically prohibits the Department of the Treasury from issuing a license authorizing foreign subsidiaries of U.S. companies to engage in certain trade with Cuba.<sup>27</sup> Previously, Section 515.559 of the CACR had permitted the issuance of specific licenses for transactions between U.S.-owned or -controlled firms and Cuba where local law requires, or policy in the third country favors, trade with Cuba.
- Under Section 1706(b) of the CDA, vessels that have entered a port in Cuba to engage in trade are prohibited from loading or unloading freight in the United States within 180 days, except pursuant to a license issued by the Secretary of the Treasury (but without specifying whether the license should be general or specific). In addition, this section prohibits a vessel carrying goods or passengers to or from Cuba, or carrying goods in which a Cuban national has any interest, from entering a U.S. port, except as specifically authorized by the Secretary of the Treasury.<sup>28</sup>
- The CDA also requires the President to establish strict limits on remittances to Cuba by U.S. persons for the purposes of financing the travel of Cubans to the U.S. to ensure that such remittances reflect only the reasonable costs associated with such travel and are not used by the Government of Cuba as a means of gaining access to United States currency.<sup>29</sup>

At the same time, Section 1705 of the CDA authorizes the President to approve certain exports that are necessary for “support of the Cuban people” (but subject to certain conditions and limitations), including:

- Donations of food to non-governmental organizations in Cuba;
- Exports of medicines and medical supplies (but only pursuant to specific licenses issued by the U.S. Government and subject to on-site verification requirements);
- Telecommunications facilities in such quantity and of such quality as may be necessary to provide efficient and adequate telecommunications services between the United States and Cuba;
- Direct mail delivery to Cuba; and

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<sup>23</sup> See 15 C.F.R. § 740.16(h).

<sup>24</sup> See 15 C.F.R. § 740.18.

<sup>25</sup> See 15 C.F.R. § 740.19.

<sup>26</sup> Pub. L. 102-484 §§ 1701 to 1712 (1992); 22 U.S.C. §§ 6001 to 6010.

<sup>27</sup> 22 U.S.C. § 6005(a).

<sup>28</sup> 22 U.S.C. § 6005(b).

<sup>29</sup> 22 U.S.C. § 6005(c).

- Assistance through “appropriate non-governmental organizations” for the support of individuals and organizations to promote non-violent democratic change in Cuba.<sup>30</sup>

Notably, the CDA states that these statutory provisions apply, “notwithstanding any other provision of law,” including the EAA.<sup>31</sup> Accordingly, export transactions that are authorized under these provisions of the CDA arguably are thereby exempt from the requirements and restrictions of Section 6(j) of the EAA, including the restrictions on exports to Cuba of items identified on the Commerce Control List.<sup>32</sup>

In addition, despite the fact that Sub-section 1705(e)(5) of the CDA (as amended) is entitled “Prohibition on Investment in Domestic Telecommunications Services,” the actual text of this sub-section is not stated as a statutory prohibition.<sup>33</sup> Rather, this sub-section simply clarifies that the authorization related to telecommunications facilities shall not be construed to authorize the investment by any United States person in the domestic telecommunications network within Cuba.<sup>34</sup> Thus, although the CDA does not itself authorize investments in Cuba’s domestic telecommunications, it also arguably does not rule out the possibility that the President could exercise his executive authority to do so.

## F. Cuban Liberty and Democratic Solidarity Act of 1996

In 1996, Congress codified the Cuba sanctions pursuant to provisions of the Cuban Liberty and Democratic Solidarity Act of 1996 (known as “Libertad” or “Helms-Burton”).<sup>35</sup> Specifically, Section 102(h) of Helms-Burton requires that the “economic embargo of Cuba,” as in effect on March 1, 1996, including all restrictions under OFAC’s Cuban Assets Control Regulations, must remain in effect until the President determines that a transition government or a democratically elected government is in power in Cuba. For purposes of this requirement, Congress defined the “economic embargo of Cuba” to include all restrictions on trade and travel, and all restrictions on transactions involving property in which Cuba or a Cuban national has an interest, established under:

- Section 602(a) of the Foreign Assistance Act of 1961 (which provided the statutory authority under which President Kennedy originally imposed the embargo against Cuba by Proclamation 3447);
- Section 5(b) of the Trading With the Enemy Act (which was the statutory authority for issuance of the CACR);
- Cuban Democracy Act of 1992; and
- Any other provision of law.<sup>36</sup>

The Conference Report issued by the Conference Committee of Congress in connection with final passage of Helms-Burton states:

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<sup>30</sup> 22 U.S.C. § 6004.

<sup>31</sup> 22 U.S.C. § 6004(a).

<sup>32</sup> Section 1705(c) of the CDA, 22 U.S.C. § 6004(c), states that exports of medicines and medical supplies shall not be restricted, except to the extent that such restrictions would be permitted under Section 5(m) of the EAA. This CDA provision grants discretion to the President to restrict exports of certain types of medicines of medical supplies for national security reasons, without limiting the President’s discretion to authorize certain exports to Cuba that would otherwise be prohibited under the EAA.

<sup>33</sup> Section 102(g) of Helms-Burton amended the CDA to add paragraphs (5) and (6) to Section 1705(e) of the CDA. See 22 U.S.C. § 6004(e).

<sup>34</sup> In this regard, it is useful to contrast this sub-section 6004(e)(5) of the CDA with sub-section 6005(a), which states plainly and explicitly that “no license may be issued for any transaction described in section 515.559” of the CACR (which relates to certain exports of non-U.S.-origin goods by foreign subsidiaries of U.S. companies). If Congress had intended to prohibit the executive branch from issuing licenses for activities involving investments in domestic telecommunications networks in Cuba, it easily could have used language similar to that of sub-section 6005(a) of the CDA.

<sup>35</sup> P.L. 104-114 (1996); 22 U.S.C. §§ 6021 to 6091.

<sup>36</sup> 22 U.S.C. § 6023.

It is the intent of the committee of conference that all economic sanctions in force on March 1, 1996, shall remain in effect until they are either suspended or terminated pursuant to the authorities provided in Section 204 of the Act (requiring a Presidential determination that a democratic transition is under way in Cuba). It is not the intent of this section to prohibit executive branch agencies from amending existing regulations to tighten economic sanctions on Cuba or to implement the provisions of this Act.<sup>37</sup>

Section 204 of Helms-Burton provides that the Cuba sanctions may be suspended or terminated only after the President has determined that a transition government or democratically elected government is in power in Cuba.<sup>38</sup> By codifying the “the economic embargo of Cuba,” however, Congress also adopted provisions of Proclamation 3447, the CACR and the EAR that grant discretion to the Treasury Secretary and the Commerce Secretary to establish exceptions to the restrictions applicable to Cuba.

Title III of Helms-Burton provides a right of action to sue non-U.S. companies engaged in transactions with Cuba for “trafficking” in confiscated property to which a U.S. person has a claim,<sup>39</sup> and Title IV of the Act authorizes the U.S. Government to deny entry to individuals who are officers or shareholders of entities that “traffic” in such confiscated property.<sup>40</sup>

The Helms-Burton Act authorizes the President to suspend, for a period of not more than six months at a time, the right of otherwise eligible claimants to file lawsuits under the Title III provisions.<sup>41</sup> This suspension can be renewed indefinitely so long as the President determines that renewal is necessary to the national interests of the United States and will expedite a transition of democracy in Cuba. Title III came into effect on August 1, 1996, but President Clinton immediately suspended the right to bring actions under the title.<sup>42</sup> Through an unbroken series of six-month renewals, the right-to-sue provision has been in suspension since the enactment of this legislation.<sup>43</sup> Title IV has not been suspended and is currently in effect. However, the State Department has exercised considerable restraint in making determinations with respect to “trafficking” under Title IV.

## **G. Trade Sanctions Reform and Export Enhancement Act of 2000**

The Trade Sanctions Reform and Export Enhancement Act of 2000 (“TSRA”)<sup>44</sup> required the President to terminate any unilateral agricultural or medical sanctions in effect at that time, but did not modify the CDA’s provisions with respect to the licensing of medical exports to Cuba.<sup>45</sup> At the same time, TSRA’s provisions had the effect of authorizing the export of agricultural commodities to Cuba pursuant to one-year licenses.<sup>46</sup> The Commerce Department implemented this provision through the creation of a new license exception “AGR” for such exports.<sup>47</sup> TSRA also requires the Secretary of the Treasury to promulgate regulations allowing travel to Cuba under a general license for the marketing and sale of agricultural and medical goods.<sup>48</sup>

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<sup>37</sup> House Report 104-468 (March 1, 1996) at 45-46.

<sup>38</sup> 22 U.S.C. § 6064.

<sup>39</sup> 22 U.S.C. §§ 6081 to 6085.

<sup>40</sup> 22 U.S.C. § 6091.

<sup>41</sup> 22 U.S.C. § 6085(c).

<sup>42</sup> The Helms-Burton Act also authorized the President to suspend the effective date of Title III. 22 U.S.C. § 6085(b). However, President Clinton chose not to exercise the suspension authority under 22 U.S.C. § 6085(b), thereby allowing the provisions of Title III to become effective.

<sup>43</sup> The President may terminate the suspension of the right-to-sue provision at any time. 22 U.S.C. § 6085(d).

<sup>44</sup> Pub. L. No. 106-387, 114 Stat. 1549 (2000); 22 U.S.C. §§ 7201 to 7209.

<sup>45</sup> 22 U.S.C. § 7202(b).

<sup>46</sup> 22 U.S.C. § 7205(a)(1).

<sup>47</sup> 15 C.F.R. § 740.18. TSRA did not amend or supersede the export licensing requirements for medicine and medical supplies in the CDA. Accordingly, exports of medicines and medical devices continue to be licensed under the CDA.

<sup>48</sup> 22 U.S.C. § 7209(a).

TSRA also imposed certain mandatory sanctions against Cuba, including:

- Prohibitions on the provision of U.S. government assistance to Cuba, including any U.S. Government foreign assistance, export assistance, and any U.S. credit or guarantees.<sup>49</sup>
- Prohibitions on the financing of exports of agricultural commodities or products to Cuba by any U.S. person. Any such exports must be made on the basis of payment of cash in advance or financing by third country financial institutions.<sup>50</sup>
- Prohibitions on the issuance of general or specific licenses by the Treasury Department for travel to, from, or within Cuba for “tourist” activities.<sup>51</sup> For purposes of this provision, TSRA defines “tourist activities” to be any activity with respect to travel to, from or within Cuba that is not expressly authorized under Section 515.560 of the CACR, as in effect on June 1, 2000.

### III. Statutory and Regulatory Support for Presidential Authority to Modify Cuba Sanctions

Notwithstanding this framework of successive federal statutes mandating sanctions against Cuba, the President retains broad authority to significantly modify and even ease specific provisions of the Cuba sanctions. This conclusion is supported by two separate reports prepared by the U.S. General Accounting Office (“GAO”), following detailed reviews of the statutory framework and regulatory actions taken by the executive branch since the enactment of Helms-Burton in 1996.<sup>52</sup> Specifically, the reports prepared at the behest of Congress in 1998 and in 2009 concluded that (i) the President still maintains “broad discretion” to make additional modifications to the Cuba sanctions; and (ii) prior measures, implemented by the executive branch that have had the effect of easing specific restrictions of the Cuba sanctions, have been consistent with statutory mandates and within the discretionary authority of the President.<sup>53</sup>

The statutory and regulatory provisions supporting the President’s authority to modify the Cuba sanctions include the following:

- Article II, Section 2 of the United States Constitution, which vests broad powers in the President to conduct the foreign affairs of the United States.<sup>54</sup>
- Section 602(a) of the Foreign Assistance Act and Section 5(b) of TWEA (under which the CACR was established), which grant broad authority and discretion to the President to establish and make changes to embargoes established thereunder.<sup>55</sup>
- Paragraph 2 of Proclamation 3447, which explicitly grants authority to the Secretary of Treasury to make such exceptions by license or otherwise to the prohibition on imports from Cuba as he determines to be consistent with the effective operation of the embargo.
- Paragraph 3 of Proclamation 3447, which explicitly authorizes the Secretary of Commerce to “continue, make, modify or revoke” exceptions to the prohibition on all exports to Cuba.

<sup>49</sup> 22 U.S.C. §§ 7207(a)(1)–(3).

<sup>50</sup> 22 U.S.C. § 7207(b)(1).

<sup>51</sup> 22 U.S.C. § 7209(b).

<sup>52</sup> The GAO is an independent agency that conducts investigations and audits for Congress. See <http://www.gao.gov/about/index.html>.

<sup>53</sup> United States General Accounting Office, *U.S. Embargo on Cuba: Recent Regulatory Changes and Potential Presidential or Congressional Actions*, GAO-09-951R (September 2009) (*hereinafter*, “2009 GAO Report”); and *Cuban Embargo: Selected Issues Relating to Travel, Exports, and Telecommunications*, GAO/NSIAD-99-10 (December 1998) (*hereinafter*, “1998 GAO Report”).

<sup>54</sup> See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

<sup>55</sup> 22 U.S.C. § 2370; 50 U.S.C. App. § 5(b).

- Section 515.201 of the CACR that was in effect in March 1996, which prohibits dealings in property in which Cuba or Cuban nationals have an interest, but explicitly references the authority of the Secretary of Treasury to establish exceptions to the prohibitions by means of regulations, rulings, instructions, licenses, or otherwise.<sup>56</sup>
- Section 515.533 of the CACR that was in effect in March 1996, which provides a “general license” authorizing exports to Cuba that have been specifically licensed or otherwise authorized by the Department of Commerce (but subject to certain conditions on the financing of such export transactions).<sup>57</sup>
- Section 515.801 of the CACR that was in effect in March 1996, which sets forth the authority of the Secretary of Treasury to grant general and specific licenses for transactions otherwise prohibited under the CACR.<sup>58</sup>
- Section 1703 of the CDA, which states the U.S. Government’s policy of seeking a peaceful transition to democracy and resumption of economic growth in Cuba through the careful application of sanctions directed at the Castro government and support for the Cuban people.<sup>59</sup>
- Section 1705 of the CDA, which further elaborates upon the policy of providing support for the Cuban people through specific types of authorized activities.<sup>60</sup>
- Sections 2 and 3 of Helms-Burton, which reaffirm the objective of providing support for the Cuban people.<sup>61</sup>
- Section 102(h) of Helms-Burton, which codified the CACR as it existed in March 1996, including the authority of the Secretary of Treasury to exercise licensing authority.<sup>62</sup>
- Section 109(a) of Helms-Burton, which authorizes the President to “furnish assistance and provide other support for individuals and independent nongovernmental organizations to support democracy building efforts for Cuba.”<sup>63</sup>

It is also worth noting that when Congress intended to prohibit the executive branch from authorizing particular categories of transactions with Cuba, it has included explicit statutory provisions for that purpose. For example, as noted above, Section 1706(a) of the CDA specifically prohibits the Department of the Treasury from issuing a license authorizing foreign subsidiaries of U.S. companies to engage in certain trade with Cuba.<sup>64</sup> Similarly, Section 103 of Helms-Burton prohibits U.S. persons and U.S. agencies from knowingly making a loan, extending credit or providing other financing for the purpose of financing transactions involving property confiscated by the Cuban government, with an exception only for financing by a United States national owning a claim to the property in connection with a transaction permitted under U.S. law. Section 515.208 of the CACR implements this statutory prohibition, without any language granting the Secretary of Treasury the authority to grant further exceptions to this prohibition.<sup>65</sup> The absence of such explicit statutory provisions in other areas suggests that Congress did not intend to prohibit the executive branch from issuing general or specific licenses to authorize transactions with Cuba when such licenses are deemed to be appropriate and consistent with U.S. policies.

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<sup>56</sup> 31 C.F.R. § 515.201 (1996).

<sup>57</sup> 31 C.F.R. § 515.533 (1996).

<sup>58</sup> 31 C.F.R. § 801 (1996).

<sup>59</sup> 22 U.S.C. § 6002.

<sup>60</sup> 22 U.S.C. § 6004.

<sup>61</sup> 22 U.S.C. §§ 6021 and 6022.

<sup>62</sup> 22 U.S.C. § 6032(h).

<sup>63</sup> 22 U.S.C. § 6039(a).

<sup>64</sup> 22 U.S.C. § 6005.

<sup>65</sup> 31 C.F.R. § 515.208.

#### IV. Precedents Based on Prior CACR and EAR Revisions

In a number of instances since the enactment of Helms-Burton in 1996, Presidents have exercised their discretion to ease CACR and EAR restrictions without specific authorization from Congress. Prior executive branch revisions to the CACR and EAR, including the following examples, establish precedents that support Presidential authority, pursuant to the statutory provisions cited above, to ease sanctions against Cuba.

##### A. Clinton Administration Changes to Travel and Remittances Provisions Between 1996 and 1999

At the time of the 1996 enactment of the Helms-Burton statute codifying the CACR, direct flights to Cuba had been suspended following the downing of two civilian aircraft by the Cuban military. Moreover, the provisions of the CACR in effect at that time authorized family remittances only pursuant to specific licenses and only when circumstances of “extreme humanitarian need” had been demonstrated. In 1998, however, the Clinton Administration adopted several changes to the travel and remittances provisions of the CACR that eased the restrictions applicable to Cuba. Among other things, the 1998 revisions authorized the resumption of direct flights by authorized travel carriers to Cuba and authorized individuals in the United States to send cash remittances of up to \$300 per quarter to close family members in Cuba under a general license. (The general license for such remittances previously had existed prior to 1994, but the Clinton Administration had tightened the regulations in August 1994 to require a specific license for such family remittances.<sup>66</sup>) Notably, the President authorized these changes to the CACR’s remittances provisions, despite Section 112 of Helms-Burton, which stated the “sense of Congress” that such general licenses for remittances to Cuba should be reinstated only after the Cuban government had granted certain freedoms to Cuban people.

Following these Clinton Administration changes to the CACR in 1998, the House Committee on Government Reform and Oversight requested that the GAO examine the changes to determine whether they were consistent with U.S. statutes requiring the Cuba sanctions. In a December 1998 report to the House Committee, the GAO determined that the changes were consistent with U.S. law, including provisions giving the President discretion to authorize transactions in support of humanitarian assistance to Cuba. Citing Section 5(b) of TWEA, the GAO concluded that the President has “a great deal of discretion in making changes to embargo restrictions.”<sup>67</sup>

The 1998 GAO report also cites an October 16, 1998 OFAC letter (co-signed by the State Department’s Office of Cuban Affairs) stating that “OFAC interprets Section 102(h) of [Helms-Burton] to permit the continued exercise of reasonable licensing authority in OFAC’s implementation of the prohibitions contained in the CACR as of March 1, 1996, and in the CDA and [Helms-Burton].” After acknowledging the Conference Report language quoted above with respect to Congress’ intent in codifying the CACR, the OFAC letter further states that Helms-Burton does not “rule out reasonable adjustments to the licensing regime consistent with the limitations on suspension or termination as described above.” By way of explaining its decision to reinstitute the general license for remittances, in spite of the “sense of Congress” provisions in Helms-Burton relating to prior conditions for doing so, the OFAC letter concluded that such decisions remain “subject to Presidential discretion in weighing the humanitarian purpose of allowing U.S. residents and citizens to support family members in Cuba against the resulting flow of hard currency to Cuba.”<sup>68</sup> In its conclusions, the GAO agreed with OFAC’s position and found that OFAC has the authority to make changes to specific provisions of the CACR, including changes that effectively loosen the sanctions in furtherance of humanitarian considerations, under its general licensing authority.<sup>69</sup>

In 1999, the Clinton Administration implemented further revisions to the CACR to expand the flow of humanitarian assistance to Cuba and strengthen independent civil society. Among other things, the 1999 revisions included broad new provisions authorizing remittances to support Cuban families (up to \$300 in any consecutive three-month period to the household of any individual in Cuba, except senior government and communist party

<sup>66</sup> 59 Fed. Reg. 4884 (August 30, 1994).

<sup>67</sup> 1998 GAO Report at p. 2.

<sup>68</sup> Letter dated October 16, 1998 from Office of Foreign Assets Control to United States General Accounting Office, as reproduced in 1998 GAO Report at p. 30.

<sup>69</sup> 1998 GAO Report at pp. 18-19.

officials) and expanded travel authorizations to support people-to-people exchanges among academics, athletes, scientists and others.<sup>70</sup>

## B. September 2009 Changes to CACR Restrictions on Family Travel, Remittances and Telecommunications Services

The CACR in effect in March 1996, and as codified by Helms-Burton, included a general license authorizing U.S. persons to travel to Cuba to visit “close relatives,” but only once per year and only under circumstances of extreme humanitarian need.<sup>71</sup> Additional family travel was only permitted under specific licenses.<sup>72</sup> Moreover, Section 112 of Helms-Burton stated the “sense of Congress” that general licenses for additional family travel to Cuba should be reinstated only after the Cuban government had granted certain freedoms to the Cuban people.<sup>73</sup> Further, Section 202(b)(2) of Helms-Burton states that the freedom of individuals to travel to visit their relatives without any restrictions shall be permitted only after a transition government in Cuba is in power.<sup>74</sup>

In April 2009, President Obama directed his administration to make a number of changes to the U.S. sanctions against Cuba under the CACR, including the lifting of restrictions on transactions related to travel of family members to Cuba.<sup>75</sup> The Treasury Department amended the CACR in April 2009 to implement the President’s directive. Specifically, a September 8, 2009 Federal Register notice reinstated the general license for family travel that had existed prior to 2004 and removed restrictions on the frequency of such visits, so that family travelers may now visit their close relatives as often as they wish.<sup>76</sup> This President’s decision to remove frequency restrictions from the family travel provisions was not specifically approved or directed by Congress, and it represents a significant easing of travel restrictions of the CACR that had been in place in March 1996.<sup>77</sup>

Further, in accordance with President Obama’s April 2009 directive, OFAC’s September 2009 amendments included a number of additional revisions to the CACR that significantly eased restrictions on travel and remittances to Cuba, as well as telecommunications-related transactions, including:

- Expanding the scope of U.S. persons eligible to travel under the family travel authorization to include those visiting “close relatives” in Cuba, defined to include those related by blood, marriage or adoption up to three generations removed from the traveler.<sup>78</sup> This change reversed a Bush Administration measure implemented in 2004 that restricted the family travel exception to those visiting “immediate family,” which was defined more narrowly. While the term “close relatives” had been used in the CACR prior to 2004, the current definition of this term is broader than it was under the 1996 regulations when Helms-Burton was passed.
- Further expanding the scope of U.S. persons eligible to travel under the family travel authorization to include individual family members of the authorized traveler who share a dwelling with the traveler.
- Increasing the cap on authorized daily expenditures for family travelers from \$50 to \$179, which was the State Department’s maximum per diem allowance for other types of authorized travelers to Havana.

<sup>70</sup> 64 Fed. Reg. 25808 (May 13, 1999). Certain CACR provisions established under this May 1999 rule formed the basis for authorizations “restored” by President Obama in January 2011, including the non-family remittances.

<sup>71</sup> 31 C.F.R. § 515.560(a)(1)(iii) (1996).

<sup>72</sup> 31 C.F.R. § 515.560(b) (1996).

<sup>73</sup> 22 U.S.C. § 6042.

<sup>74</sup> 22 U.S.C. § 6062(b)(2)(A)(iii).

<sup>75</sup> The White House, *Memorandum for the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce: Promoting Democracy and Human Rights in Cuba (April 13, 2009)*.

<sup>76</sup> 74 Fed. Reg. 46000 (Sept. 8, 2009).

<sup>77</sup> Although Congress authorized some easing of the CACR’s family travel restrictions pursuant to Section 621 of the Omnibus Appropriations Act of 2009, the Congressionally authorized changes merely returned the CACR provisions to family travel policies, including a once-per-year frequency restriction that had been in place prior to July 2004 when the Bush Administration changes tightened the family travel restrictions.

<sup>78</sup> 74 Fed. Reg. 46000, 46003 to 46004 (Sept. 8, 2009).

- Authorizing remittances under a general license to close relatives, with no limits on the amounts or frequency of such remittances.
- Authorizing family travelers to Cuba to carry up to \$3000 in remittances.<sup>79</sup>
- Establishing a general license for transactions incident to the establishment of facilities to provide telecommunications services linking the United States and Cuba, including but not limited to fiber-optic cable and satellite facilities.<sup>80</sup>
- Authorizing the issuance of specific licenses on a case-by-case basis for transactions incident to the establishment of facilities to provide telecommunications services linking third countries and Cuba, provided that such facilities are necessary to provide efficient and adequate telecommunications services between the United States and Cuba.<sup>81</sup>
- Creating two general licenses within existing categories of authorized travel to permit travel related to the provision of telecommunications products and services to Cuba.<sup>82</sup>

### C. September 2009 Changes to EAR Restrictions on Exports to Cuba

In addition, the Commerce Department amended the EAR pursuant to a September 8, 2009 Federal Register notice to ease export restrictions applicable to Cuba in a number of respects.<sup>83</sup> Most significantly, the September 8, 2009 revisions established a completely new license exception that authorizes “the export and reexport to Cuba of donated consumer communications devices that are necessary to provide efficient and adequate telecommunications services between the United States and Cuba.” The items eligible for export under this new License Exception Consumer Communications Devices (“CCD”) include personal computers, disk drives, printers, modems, mobile phones digital cameras, television and radio receivers (most of which are classified on the Commerce Control List, rather than under the basket category of EAR99). Similarly, the Commerce Department amended its licensing policies with respect to Cuba to state that specific licenses may be granted on a case-by-case basis for items that are “necessary to provide efficient and adequate telecommunications links between the United States and Cuba, including links established through third countries, and including the provision of satellite radio or satellite television services to Cuba.”<sup>84</sup>

The September 2009 revisions to the EAR also eased certain other restrictions on exports to Cuba, pursuant to existing license exceptions. For example, the 44-pound limit of personal baggage that can be carried to Cuba by authorized travelers was lifted. In addition, certain limits on gift parcels under License Exception GFT were loosened.

In making the revisions to the EAR, the Commerce Department stated that it “administers export and reexport restrictions on Cuba consistent with the goals of the embargo and with relevant legislation, including [Helms-Burton]. Accordingly BIS may issue specific or general authorizations for limited types of transactions that support the goals of United States policy while the embargo remains in effect.” More specifically, the Commerce Department justified the specific changes to the regulations as consistent with the U.S. Government policies under the CDA and

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<sup>79</sup> 74 Fed. Reg. 46000, 46001 to 46002 (Sept. 8, 2009).

<sup>80</sup> 74 Fed. Reg. 46000, 46005. See 31 C.F.R. § 515.542(d)(1).

<sup>81</sup> 74 Fed. Reg. 46000, 46005. See 31 C.F.R. § 515.542(d)(2).

<sup>82</sup> 74 Fed. Reg. 46000, 46005 and 46006. See 31 C.F.R. §§ 515.533(f) and 515.564(a)(3).

<sup>83</sup> 74 Fed. Reg. 45985 (Sept. 8, 2009).

<sup>84</sup> 74 Fed. Reg. 45985, 45990 (Sept. 8, 2009). See 15 C.F.R. § 746.2(b)(2).

Helms-Burton of “promoting democracy and human rights in Cuba” and decreasing “dependency of the Cuban people on the Castro regime.”<sup>85</sup>

#### **D. March 2010 Amendment to CACR to Facilitate Internet Communications**

In March 2010, OFAC amended the CACR to establish an entirely new general license for authorizing the exportation to persons in Cuba of certain services incident to the exchange of personal communications over the internet. The Federal Register notice justified this new provision, which effectively further loosens sanctions against Cuba, as consistent with the recognized U.S. policy objectives of promoting human rights and democracy in Cuba.

#### **E. January 2011 Amendments Related to Travel and Remittances**

On January 14, 2011, President Obama announced broad revisions to CACR designed to enhance people-to-people exchanges between the United States and Cuba by easing certain restrictions on travel and remittances.<sup>86</sup> These changes converted certain existing specific licensing authorizations to general licenses and expanded regulatory support for the issuance of more specific licenses.

Most notably, President Obama restored a Clinton-era provision that authorizes individual U.S. persons to send remittances of up to \$500 per quarter (\$2,000 per year) to non-family members in Cuba for various purposes, including the support of private economic activity in Cuba, provided that no such funds are delivered to senior members of the Cuban government or the Communist Party of Cuba. In addition, the President eased restrictions on travel to Cuba by authorizing a range of travel-related activities for educational and religious purposes, pursuant to general and specific licenses, and he authorized eligible educational and religious entities to open accounts at Cuban financial institutions in support of covered activities. The travel provisions included a new authorization for travel related to the provision of non-academic clinics and workshops in Cuba for the Cuban people. The January 2011 revisions to the CACR also include a new general license authorizing U.S. persons to engage in transactions with Cuban nationals who have established permanent residence outside of Cuba. Finally, the President authorized all U.S. international airports to apply to provide services to authorized charter flights to and from Cuba, provided that appropriate customs and immigration capabilities are in place and that an authorized travel service provider has expressed an interest in offering such flights from applicant airport.<sup>87</sup> Until this change was made, only the New York, Miami and Los Angeles airports were authorized to offer such services for flights between the United States and Cuba.

#### **V. Additional Modifications to Cuba Sanctions That Could be Made by Executive Action**

Notwithstanding the codification of the Cuba sanctions and the complex series of federal statutes imposing sanctions against Cuba, the President maintains significant authority and discretion to modify specific provisions of the Cuba sanctions regime in support of particular U.S. foreign policy objectives recognized by Congress, including the provision of humanitarian support for the Cuban people and the promotion of democratic reforms. Presidential authority is particularly strong in (but is not limited to) certain areas specifically identified by Congress under statutory provisions, such as the establishment of telecommunications facilities and the provision of related services supporting communications links between the United States and Cuba; and donations of items in support of the Cuban people and pro-democracy groups.

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<sup>85</sup> Notably, sub-section 515.533(d) of the 1996 CACR explicitly limited the goods that were eligible for export to Cuba under the EAR license exception for gifts to a specific list of items. That list of eligible gift items was subsequently narrowed by revisions to the regulations between 1996 and 2009. Interestingly, the September 8, 2009 amendments to the EAR restored the full list of items eligible for export to Cuba under the EAR license exception for gifts, but did not extend the list beyond the text of the 1996 CACR provision. Instead, the Obama Administration simply created an entirely new license exception that is not subject to the limitations set forth in the 1996 CACR to authorize the donations of additional items.

<sup>86</sup> The changes set forth in the President’s announcement were implemented through revisions to the CACR, published in the Federal Register on January 28, 2011. See 76 Fed. Reg. 5072 (Jan. 28, 2011).

<sup>87</sup> This policy was implemented by the Department of Homeland Security, U.S. Customs and Border Protection, through a Final Rule published in the Federal Register on January 28, 2011. See 76 Fed. Reg. 5058 (Jan. 28, 2011).

Based on the legal framework and regulatory precedents discussed above, the President arguably has sufficient legal authority to make the following types of additional modifications to the current U.S. sanctions against Cuba, without further action by Congress.

## A. CACR Restrictions

Helms-Burton, the CDA and TSRA impose certain statutory restrictions on travel-related transactions and other specific trade and investment activities, and prevent the President from suspending or lifting the sanctions under certain conditions have been satisfied. Nonetheless, the President has broad discretion to modify the provisions of the CACR, including the following types of changes.

### 1. Modify Travel Provisions to Grant General Licenses for Categories Currently Authorized Only Under Specific Licenses

The CACR currently require specific licenses issued by OFAC in order to engage in a number of categories of non-tourist travel. The President has discretion to modify those provisions of the CACR to authorize those categories of travel pursuant to general licenses, such that travelers would not be required to obtain specific written authorization before traveling. President Obama made this type of change in 2009 and again in 2011, when his administration revised the CACR to authorize certain types of family, educational and religious travel by general licenses rather than by specific licenses. The categories of travelers that currently require specific licenses, but that could be changed to general licenses include:

- Freelance journalists;<sup>88</sup>
- Professional researchers undertaking research or for professionals attending professional meetings and not qualifying for the general license;<sup>89</sup>
- Amateur and semi-professional athletes selected by U.S. sports federations to participate in competitions under the auspices of international sports federations, where the competition is open for attendance and, where relevant, participation by the Cuban public; for participation in public performances, athletic, and other competitions and exhibitions, which must be open for attendance and, in relevant situations, participation by the Cuban public and any profits must be donated to independent Cuban NGOs or U.S.-based charities;<sup>90</sup>
- Recognized human rights organizations; activities of independent organizations designed to promote the transition to democracy; and activities of individuals and NGOs that promote independent activity intended to strengthen civil society in Cuba;<sup>91</sup>
- Persons engaged in humanitarian projects in, or related to, Cuba (and not otherwise covered by the CACR), such as medical and health-related projects, environmental projects, projects involving non-formal educational training, community-based grassroots projects, projects suitable for development of small-scale enterprise, projects related to agriculture and rural development, and projects to meet basic human needs;<sup>92</sup>
- Private foundations and research or educational institutes with established interest in international relations to collect information related to Cuba for noncommercial purposes;<sup>93</sup>

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<sup>88</sup> 31 C.F.R. §§ 515.560(a)(3) and 515.563.

<sup>89</sup> 31 C.F.R. §§ 515.560(a)(4) and 515.564.

<sup>90</sup> 31 C.F.R. §§ 515.560(a)(7) and 515.567.

<sup>91</sup> 31 C.F.R. §§ 515.560(a)(8) and 515.574.

<sup>92</sup> 31 C.F.R. §§ 515.560(a)(9) and 515.575.

<sup>93</sup> 31 C.F.R. §§ 515.560(a)(10) and 515.576.

- Persons engaged in travel-related transactions incident to the exportation, importation, or transmission of information or informational materials;<sup>94</sup> and
- Persons involved in travel-related transactions in connection with the marketing, sales negotiation, accompanied delivery, or servicing of exports to Cuba authorized by the Commerce Department (beyond those travel-related transactions already authorized pursuant to general licenses).<sup>95</sup>

## **2. Modify Specific Requirements and Limitations Under Existing CACR Authorization Provisions**

The President also has authority to alter the specific requirements and conditions applicable to each of the existing general and specific license provisions of the CACR. In fact, Presidents Clinton, Bush and Obama each have made these types of changes to specific CACR provisions, such as the broadening of the family travel exemption to cover “close relatives” instead of only “immediate family” and the removal of the caps on family remittances. Examples of additional changes to the CACR’s authorization provisions that could be made by regulatory amendments, without Congressional action, include the following:

- Increase or eliminate the cap on daily living expenses for authorized travelers in Cuba under Section 515.560(c)(2).
- Modify or remove certain eligibility conditions for travel related to athletic events under Section 515.567, such as the requirement that travel for amateur and semi-professional sporting events must be for athletic competitions sponsored by the international federation for the sport and that the U.S. participants must be selected by the U.S. federation for the sport.
- Modify or remove certain eligibility conditions for travel related to public performances under Section 515.567, such as the requirement that all profits from the event must be donated to a Cuban NGO or a U.S.-based charity.
- Increase the current \$3000 limit on family remittances that can be carried to Cuba by authorized travelers under Sub-section 515.560(c).
- Increase the authorized emigration-related remittances sent to Cuba above the current limit of two one-time payments of \$1000, provided that the new limit must reflect “reasonable costs” for travel to the United States, in accordance with Section 1706(c) of the CDA.
- Revise Sub-section 515.533(f) of the CACR, related to the general license for travel-related transactions incident to sales of telecommunications-related items, to expand or remove provisions limiting such travel to “regular employees” of “telecommunications services providers” (e.g., it could be expanded to employees of telecommunications equipment manufacturers, third-party consultants and agents, outside counsel and/or others with an interest or potential role in the underlying telecommunications transactions).
- Revise Sub-section 515.542(d)(2) to authorize by general license, rather than the currently specified specific licenses, transactions incident to the establishment of facilities to provide telecommunications services linking third countries and Cuba (provided that such facilities are necessary to provide efficient and adequate telecommunications services between the United States and Cuba.)

## **3. Expand Existing Categories of Travel To Include New Authorizations**

In September 2009, OFAC amended the CACR to include two new authorizations for telecommunications-related travel that had not previously existed, but that fell within the existing broader categories of authorized travel.

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<sup>94</sup> 31 C.F.R. §§ 515.560(a)(11) and 515.545, implementing Section 5(b)(4) of TWEA, 50 U.S.C. App. § 5(b)(4).

<sup>95</sup> 31 C.F.R. §§ 515.560(a)(12), 515.533(g) and 515.559(b).

Specifically, Section 515.564 relating to travel for “professional meetings” was amended by adding a new paragraph (a)(3) to authorize travel-related transactions incident to professional meetings for commercial marketing of, sales negotiations for, or performance under contracts for the provision of telecommunications services and facilities. Moreover, Section 515.533, which relates to transactions incident to authorized exports of products to Cuba, was amended to include new paragraph (f) to authorize travel-related transactions incident to professional meetings for commercial marketing, sales negotiations, accompanied delivery and servicing of telecommunications-related products authorized for export to Cuba. Similarly, President Obama’s January 2011 revisions included new licensing authority for travel related to provisions of non-academic clinics and workshops in Cuba. The President has authority and discretion to add such new authorizations within the existing travel categories discussed above, provided that such new authorizations are consistent with U.S. foreign policy objectives, such as promoting democracy and human rights.

#### **4. Establish New General Licenses for Provision of Services**

As noted above, President Obama established a new general license under Section 515.578 of the CACR for the provision of certain services related to Internet-based communications. The President has authority and discretion to establish additional new authorizations, provided that such new authorizations are consistent with U.S. foreign policy objectives, such as promoting democracy and human rights. For example, the President could authorize the provision of certain consulting or marketing services to individuals or small private businesses, or the provision of services to Cuban musicians and artists related to the creation or recording of their works (beyond those services related to information and information materials that are currently exempt or authorized under Sections 515.206, 515.545 or 515.577).<sup>96</sup>

#### **5. Establish a General License for Entry of Vessels Engaged in Trade with Cuba**

Section 515.207 of the CACR currently prohibits vessels that have entered ports in Cuba from entering U.S. ports for the purpose of loading or unloading freight for a period of 180 days, except as specifically authorized by the Treasury Department “by means of regulations, rulings, licenses or otherwise.” This prohibition is statutorily required by Section 1706(b) of the CDA, but the CDA does not prohibit the use of general licenses to authorize such vessels to enter U.S. ports. Accordingly, OFAC could amend the CACR to include a general license for this activity.

#### **6. Authorize Financing Through Letters of Credit or Other Financing Arrangements Issued, Confirmed or Advised by U.S. Financial Institutions**

Currently, Section 515.533 of the CACR requires that authorized exports of items to Cuba must be paid for through (i) cash in advance; or (ii) financing issued by a third-country financial institution. Section 908(b)(1) of TSRA requires this restriction on payment only for exports of agricultural commodities and products. There is no statutory provision that mandates the application of this restriction on payment terms for other authorized exports to Cuba. Moreover, the provision of the CACR that was in effect on March 1, 1996 and that was therefore codified by Helms-Burton authorized payment by letters of credit issued, confirmed or advised by U.S. financial institutions. Accordingly, the President could amend Section 515.533 of the CACR to authorize payment for exports to Cuba through financing issued by U.S. banks. Similarly, the President could permit U.S. banks to offer financing for transactions incident to the provision of authorized services to Cuba, such as those covered under the new general license related to Internet communications. Any such authorizations, however, would be subject to the prohibitions set forth in Section 103 of Helms-Burton and Section 515.208 of the CACR on the provision of financing for transactions involving property confiscated by the Cuban Government.

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<sup>96</sup> See 31 C.F.R. §§ 515.206, 515.545 and 515.577. Notably, Example #3 under Section 515.206 states the provision of studio recording services to a Cuban musician would be prohibited under the current provisions of the CACR.

## **7. Authorize Imports of Certain Goods and Services From Cuba**

The provisions of the CACR in effect in March 1996 and codified by Helms-Burton prohibit imports of Cuban-origin goods into the United States, except as “specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses or otherwise.”<sup>97</sup> Accordingly, the President could exercise executive authority to allow limited types of Cuban-origin goods into the United States under general or specific licenses, particularly when such authorizations could be justified as providing support for the Cuban people or democratic change in Cuba. For example, just as the January 2011 revisions to the CACR implemented by the Obama Administration authorized non-family remittances to individuals in Cuba to support private economic activity, the President could authorize the importation of certain types of goods produced by individuals and small private businesses in Cuba.

Similarly, the President could authorize imports of certain services from individuals and small private businesses in Cuba pursuant to general or specific licenses. For example, the CACR could be amended to allow U.S. person to purchase services from individual professionals and web-based entrepreneurs in Cuba, such as graphic designers, freelance writers, composers, architects and consultants.

Again, such authorizations would need to be consistent with the U.S. foreign policy objectives set forth in the CDA and Helms-Burton, and subject to certain statutory limitations, such as the prohibition on trafficking in confiscated property.

### **B. EAR Restrictions on Exports to Cuba**

Consistent with Proclamation 3447, the President and the Commerce Department maintain executive branch authority to enforce restrictions on exports of U.S.-origin goods to Cuba, and to establish exceptions to such restrictions, pursuant to the EAR. Similar to the types of CACR modifications discussed above, the President and the Commerce Department have sufficient legal authority to make the following types of changes to the EAR to ease export restrictions applicable to Cuba.

#### **1. Modify Existing Licensing Policy to Establish a Presumption of Approval for Additional Categories of Items Exported under Specific Licenses**

As discussed above, the Commerce Department amended the EAR’s statements of licensing policy toward Cuba in September 2009 to establish a case-by-case review policy for “items necessary to provide efficient and adequate telecommunications links between the United States and Cuba.” The President and the Commerce Department retain authority to make similar modifications to establish more favorable export licensing policies for other types of products, provided that such additional exceptions can be justified as supporting U.S. policy interests, including support for the Cuban people and the promotion of democracy. (Notably, the President does not have such discretion with respect to medicines and medical products, because the CDA explicitly requires that such medical items must be authorized pursuant to specific licenses, in accordance with the provisions of the CDA). For example, the President could establish more favorable licensing policies (e.g., case-by-case or presumption of approval) for additional categories of “EAR99” items to be exported to Cuba (e.g., school supplies, athletic equipment, art supplies, food preparation equipment, water purification systems, etc.). To the extent that the additional categories fall within the specific provisions of Section 1705 of the CDA (which are exempt from the provisions of Section 6(j) of the EAA), the more favorable licensing policies also could apply to items classified on the Commerce Control List.

#### **2. Establish Additional License Exceptions for Exports to Cuba**

As discussed above, the Commerce Department established an entirely new license exception under the EAR in September 2009 for exports of Consumer Communications Devices, including specific items classified on the Commerce Control List. The President and the Commerce Department retain authority to establish additional license exceptions for other types of products (e.g., school supplies, athletic equipment, art supplies, food preparation equipment, water purification systems, etc.), but not including medicines and medical products, which must be authorized pursuant to specific licenses, in accordance with Section 1705(d) of the CDA.

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<sup>97</sup> 31 C.F.R. § 515.204(a) (1996).

### 3. Expand the Availability of Existing License Exceptions to Cover Additional Categories of Exports

Currently, existing license exceptions under the EAR are available only in limited circumstances, and are subject to certain conditions and limitations. The Commerce Department also has discretion to modify such conditions on the use of license exceptions or to expand the availability of existing license exceptions to cover additional categories of exports. The Obama administration made such a change to the EAR in September 2009 when the Commerce Department lifted the 44-pound limitation on accompanied baggage for authorized travelers to Cuba. The following are examples of additional changes the President could make with respect to the use of license exceptions for exports to Cuba.

- Currently, License Exception TMP, which authorizes temporary exports and reexports of EAR-controlled items without a specific license, can be used for Cuba travel only by members of the news media.<sup>98</sup> The Commerce Department could amend the EAR to make this license exception available for additional categories of authorized travelers to Cuba.
- The Commerce Department could modify the conditions and limitations on the use of License Exception GFT for sending gifts and humanitarian donations to Cuba (such as the current provision limiting the number of non-food gift parcels that may be sent by the same donor to the same donee in Cuba to one per month).<sup>99</sup>
- The Commerce Department also could modify the conditions and limitations on the use of License Exception AVS for temporary exports of aircraft and vessels on temporary sojourn to Cuba. For example, this license exception could be expanded to include a Cuba-specific authorization for individually-owned private aircraft that are not operating under an Air Carrier Operating Certificate, Commercial Operating Certificate, or Air Taxi Operating Certificate issued by the Federal Aviation Administration.<sup>100</sup>

## VI. Conclusion

The President maintains broad authority and discretion to significantly ease specific provisions of the Cuba sanctions regime in support of particular U.S. foreign policy objectives recognized by Congress, including the provision of humanitarian support for the Cuban people and the promotion of democratic reforms. Presidents Clinton, Bush and Obama each have exercised that authority to ease certain provisions of the regulations implementing the Cuba sanctions program. As indicated above, however, there remains a wide range of specific actions that the President could take to further ease specific provisions of the Cuba sanctions, consistent with statutory mandates.

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<sup>98</sup> See 15 C.F.R. § 746.2(a)(1)(i).

<sup>99</sup> See 15 C.F.R. 740.12(a)(2)(iii).

<sup>100</sup> See 15 C.F.R. § 740.15(a).

**Stephen F. Propst, Partner**  
**Hogan Lovells US LLP**  
**555 13<sup>th</sup> Street NW**  
**Washington, DC 20004**  
**202-637-5600**  
**stephen.propst@hoganlovells.com**

**www.hoganlovells.com**

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