

White Collar Law

US Companies Should Proceed Cautiously Into Cuba and Iran

David M. Laigaie and Joshua Hill, The Legal Intelligencer

April 1, 2016

Over the last several decades, international trade has blossomed and the world has gotten significantly smaller. U.S. companies, however, have been effectively shut out of two foreign markets: Cuba and Iran. That is changing, and fast. Within the last several months, the Obama administration has relaxed Cuban trade sanctions and entered into a sweeping nuclear deal with Iran. U.S. businesses are wasting no time rushing into these new markets. For example, last month, in response to the U.S. Department of Treasury's Office of Foreign Assets Control's (OFAC) general license allowing for regular commercial flights from the United States to Cuba, several U.S. airlines submitted applications for approval to provide flights from the United States to Havana (Frontier Airlines has applied to begin service between Philadelphia and Varadero, Cuba). Similarly, companies like Apple, Boeing, GE and HP began aggressively researching opportunities in Iran even before the nuclear deal was struck, let alone approved by Congress. Companies anxious to enter these markets should proceed carefully, however. Despite recent easing, most of the trade restrictions remain in place and most

transactions between the United States and these two countries are prohibited. This article discusses what has been relaxed, and what restrictions remain in place.

CUBA

The first question most Americans have about the relaxed Cuban sanctions is, When can I hit the beach? While travel to Cuba has been relaxed substantially, strictly tourist travel (such as a vacation on the beach) is still prohibited. Instead, travel to Cuba is limited to 12 specific categories: (1) family visits; (2) official government business; (3) journalistic activity; (4) professional research and professional meetings; (5) educational activities; (6) religious activities; (7) public performances, clinics, workshops, athletic and other competitions, and exhibitions; (8) support for the Cuban people; (9) humanitarian projects; (10) activities of private foundations or research or educational institutes; (11) exportation, importation, or transmission of information or information materials; and (12) certain authorized export transactions. Over the past year, the Obama administration has been doing everything in its power to expand these categories. By now, it is not hard for a U.S. citizen wishing to travel to Cuba to fit a trip into one of these categories. However, absent legislation from Congress, travel that does not fit into the 12 categories remains illegal.

Business restrictions on Cuba have proven more resilient. Some businesses are now able legally to operate in Cuba. For example, law firms may now provide certain legal services to or on behalf of Cuba or a Cuban national. U.S. airlines can provide commercial flights to Cuba (previously only charter flights were allowed) and enter into code-sharing or leasing arrangements with Cuban carriers. In addition, OFAC has issued general licenses permitting certain U.S. industries (e.g., airlines, news bureaus, and providers of telecommunications services) to do business in Cuba, establish a physical presence in Cuba, open bank accounts in Cuba, and to hire Cuban nationals as well as U.S. citizens who are able to "establish

domicile in Cuba." For the rest, however, U.S. companies remain largely precluded from Cuba. OFAC has, however, expanded the "professional meetings" category of permissible travel to include any meeting that "directly relates to the traveler's profession." This expansion means that participants in any industry can travel to Cuba to explore business opportunities in anticipation of further easing of trade sanctions.

IRAN

On July 14, 2015, China, France, Germany, Russia, the United Kingdom and the United States reached an agreement with Iran to ease sanctions in exchange for a scale-back of Iran's nuclear program. U.S. sanctions relief went into effect Jan. 16, "Implementation Day." Unfortunately for U.S. businesses, Implementation Day lifted only "secondary sanctions"—sanctions directed at non-U.S. persons and transactions that occur entirely outside of U.S. jurisdiction. So far, only the U.S. aircraft manufacturing industry has received a green light to do business in Iran. Iran, whose commercial aircraft fleet is significantly outdated, has already indicated that it is ready to buy at least 100 jets from Boeing, although no specific deal has been announced. Additionally, people in the U.S. are now allowed to import Iranian-origin carpets and food (pistachios and caviar).

While Implementation Day had minimal impact on U.S. companies directly, it created opportunities for their foreign subsidiaries. On Implementation Day, OFAC issued "General License H," which allows foreign subsidiaries of U.S. companies to engage in business with Iran, but with strict limitation on the extent to which the subsidiaries' parents can be involved. General License H authorizes foreign entities owned or controlled by U.S. persons "to engage in transactions, directly or indirectly, with the government of Iran or any person subject to the jurisdiction of the government of Iran" that otherwise would be prohibited under the Iran sanctions. General License H also allows U.S. parent companies to change operating

policies and procedures to allow for foreign subsidiaries to engage in authorized transactions with Iran (a practice that would have been otherwise prohibited). While a U.S. parent company may be involved in its foreign subsidiary's decision to engage in transactions in Iran, it may not be involved in the day-to-day operations of the Iran-related transactions. General License H also authorizes, with limitations, a U.S. parent company to make available to its foreign subsidiary certain "business support systems" (e.g., email, telecommunications, accounting software and databases). For example, a foreign subsidiary engaged in a transaction with Iran could use a sales lead database maintained on a server at the U.S. parent company provided that the database is broadly available to and in general use by the U.S. parent company's other foreign subsidiaries.

Of course, with opportunity there is risk. First, the Iranian government remains as predictable as the weather. Sanctions were relaxed by way of contingent waivers. Sanctions will "snap back" if Iran breaches its obligations under the nuclear deal. How companies would deal with such a "snapback" is unclear. Second, most transactions involving Iran must be conducted without involving the U.S. financial system. This is tricky given the fluidity and interconnectedness of the international financial system and the central role that U.S. institutions play within that system. The financial logistics of Iranian transactions, therefore, will be cumbersome. Finally, while the Obama administration worked hard to reach an accord with Iran, Congress is less agreeable. The 2016 elections may markedly change the outlook for U.S. business opportunities in both Cuba and Iran.

Proceed With Caution

Cuba and Iran present huge potential markets for U.S. companies. And while smart companies will seek to maximize this potential, they must do so intelligently, being mindful to remain on the right side of the line that separates good business from criminal exposure. Given

that this line is being redrawn on virtually a weekly basis, U.S. companies should proceed with great caution. •

David M. Laigaie is a member at Eckert Seamans Cherin & Mellott and focuses his practice on internal corporate investigations, health care litigation and complex civil litigation. He handles cases involving health care fraud, securities fraud, tax fraud, export violations, pharmaceutical marketing fraud, municipal corruption, defense procurement fraud and public finance fraud. He can be reached at 215-851-8386 or dlaigaie@eckertseamans.com.

Joshua Hill is a member in the white-collar defense and internal investigations practice group at the firm. He can be reached at 215-851-8428 or jhill@eckertseamans.com.

Copyright 2016. ALM Media Properties, LLC. All rights reserved.