

President's Cuba Announcement Presents Commercial Opportunity, Test of Executive Power

Article By:

Kimberly Strosnider

Peter Lichtenbaum

Brian D Smith

President Obama's announcement that the United States is "changing its relationship with the people of Cuba" has been welcomed by many in the business community, who continue to await regulatory amendments that will implement the new policy. In the meantime, lawmakers, the Administration, and others are focusing on a unique aspect of the U.S. embargo against Cuba: statutory constraints on the President's authority to liberalize economic and diplomatic relations with Cuba. Reactions in Congress to the President's announcement have been mixed, with some lawmakers questioning the President's authority to dismantle the embargo and pledging to review whether the Administration's actions are "prevented by existing laws."

The power to modify trade sanctions is usually within executive authority, as administered by the Treasury Department's Office of Foreign Assets Control ("OFAC"). Unlike many other sanctions regimes, however, Congress has enacted several statutory provisions that may constrain the President's ability to modify the Cuba embargo.

The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 ("Helms-Burton") is the most significant legislation related to Cuba. Enacted at a low point in U.S.-Cuba relations following the downing of civilian aircraft, Helms-Burton states that the Cuba embargo as of March 1, 1996 "shall remain in effect" until certain statutory criteria are satisfied for the termination of the embargo. The Act's list of benchmarks that Cuba must meet before the President can lift or even unwind the embargo is extensive, including free and fair elections, release of all political prisoners, and establishment of a government that does not include the Castro brothers. Obviously, many of these conditions are absent in Cuba today.

In addition to Helms-Burton, the Cuban Democracy Act of 1992 (the "CDA") and the Trade Sanctions Reform and Export Enhancement Act of 2000 ("TSRA") constrain OFAC's ability to authorize travel to or business with Cuba. The CDA bars OFAC from licensing transactions by U.S.-owned or -controlled foreign subsidiaries in third countries with Cuba. TSRA prohibits OFAC from authorizing travel to Cuba outside of 12 categories; among the types of travel that TSRA prohibits is tourism

travel to Cuba by persons subject to U.S. jurisdiction.

Despite these statutory restrictions, successive administrations have maintained and exercised significant authority to expand and contract the embargo as conditions warranted. Importantly, Presidents Clinton, George W. Bush, and Obama each made changes in the embargo notwithstanding Helms-Burton's apparent freezing of the embargo as of March 1, 1996. These actions were premised on the conclusion that Helms-Burton, in addition to codifying the embargo, codified the President's licensing authority under the OFAC regulations. This interpretation of Helms-Burton was endorsed by the U.S. Government Accountability Office in 1998.^[1]

In the December announcement, President Obama pledged to "chart a new course" in U.S.-Cuba relations, a bold policy change compared to past executive action. However, it remains to be seen — in regulations to be issued by OFAC and the Commerce Department, which regulates U.S. exports to Cuba — precisely how the President's plan will be implemented, and which elements of it will be challenged on statutory grounds. The key elements of reforms that relate to commercial interests will focus on:

1. Authorizing certain exports to Cuba, including certain building materials for private residential construction, goods for use by Cuban entrepreneurs in the private sector, and agricultural equipment for small farmers. In addition, the term "cash in advance" as required for authorized exports to Cuba will be revised to mean cash prior to transfer of title (as opposed to prior to shipment of goods), which should streamline authorized U.S. trade with Cuba.
2. Authorizing the sale to Cuba of certain consumer communications devices, related software, applications, hardware, and services, as well as items to update and establish communications-related systems and mechanisms to provide commercial telecommunications and internet services.
3. Easing restrictions on Cuba-related dealings by or in third countries: In particular, U.S.-owned or -controlled entities in third countries will be permitted to provide services to and engage in financial transactions with Cuban nationals in third countries, Cuban nationals who have relocated outside of Cuba can have U.S. bank accounts unblocked, and U.S. persons can participate in Cuba-related professional conferences in third countries.
4. Expanding travel within the previously authorized 12 categories. Authorized travelers will be permitted to use any travel service provider that complies with OFAC Cuba regulations (not just those that have been specifically licensed by OFAC), and travelers will be authorized to import into the United States \$400 worth of goods from Cuba, including up to \$100 of tobacco products and alcohol.
5. Permitting U.S. banks to provide certain financial services related to Cuba: Authorized travelers will be permitted to use U.S. credit and debit cards in Cuba, and U.S. financial institutions will be permitted to open correspondent accounts at Cuban banks to process authorized transactions.
6. Increasing the permitted remittance levels from \$500 to \$2,000 per quarter for general donative remittances to Cuban nationals (except to certain officials of the Cuban government or the Communist party). Donative remittances for humanitarian projects, support for the Cuban people, and support for the development of private businesses in Cuba will no longer require a specific license.

These changes appear to be expansions of OFAC and Commerce Department licensing within areas that the embargo statutory scheme has not specifically prohibited, a zone in which the President may

retain discretion to modify the embargo consistent with the Cuba statutes. Nonetheless, the President has acknowledged that there are limits to the Executive Branch's power to end the embargo, and some in Congress have indicated they believe he is approaching or even crossing over those limits. He specifically noted that the embargo "is now codified in legislation," and he pledged to work with Congress in a "debate about lifting the embargo."

[1] The agency was then known as the U.S. General Accounting Office.

© 2025 Covington & Burling LLP

National Law Review, Volume V, Number 8

Source URL: <https://natlawreview.com/article/president-s-cuba-announcement-presents-commercial-opportunity-test-executive-power>