

The logo for Hogan Lovells, consisting of the words "Hogan" and "Lovells" stacked vertically in a black serif font, set against a solid lime green square background.

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# The Shifting Legal Landscape for Doing Business with Cuba

D.C. Bar CLE

June 14, 2016

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A large, abstract graphic on the right side of the slide. It features several overlapping, semi-transparent shapes in shades of lime green and white, creating a layered, geometric effect.

# Overview of Policy and Regulatory Changes



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- Historic changes announced in December 2014 and implemented through five rounds of regulatory changes by executive authority
    - Major shift in U.S. policy, leading to direct engagement and restoration of diplomatic relations for the first time in 50 years
    - Significant easing of trade restrictions related to certain exports, imports, financial transactions, remittances and travel
    - Focus is on supporting Cuban people



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- Embargo remains in Place

- Statutory provisions mandating embargo cannot be lifted without Congressional action or major shift to democracy in Cuba
- Lifting of State Sponsor of Terrorism designation in May 2015 was a critical step toward normalization of relations, but had limited impact on commercial activities

# Easing of Trade Restrictions

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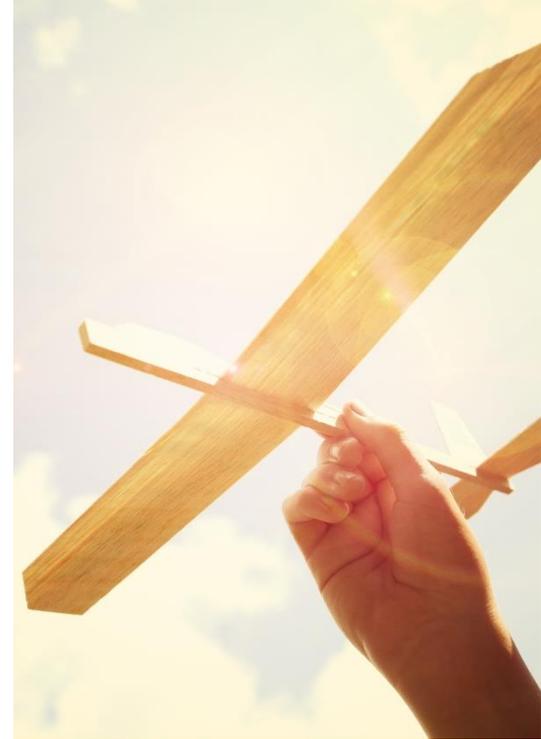
- ***Exports to Cuba:*** Expanded opportunities for exports of U.S.-origin goods, including items used for personal communications, infrastructure and residential construction, agriculture and energy production, items for domestic use and more
- ***Imports from Cuba:*** Permitted imports into the U.S. of broad categories of goods and services from private entrepreneurs
- ***Financial Transactions:*** Eased restrictions on certain transactions in the banking, finance, and insurance sectors



# Easing of Travel Restrictions

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- ***Travel:*** Authorized travel in 12 existing categories under general licenses
- ***Business and Physical Presence:*** Certain businesses/organizations may now establish legal entities and branch offices in Cuba
- ***Carrier Services:*** Reached agreement with Cuba for resumption of regularly scheduled airline flights and issued general license for passenger vessels



# Remaining Restrictions

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- Broad restrictions remain in effect for:
  - most transactions involving Cuban Government and government-owned/controlled enterprises
  - investment in Cuba
  - exports of many U.S.-origin goods, software and technology
  - exports of non-U.S.-origin goods by "persons subject to U.S. jurisdiction"
  - broad categories of financial transactions
  - entry in U.S. ports of vessels conducting unauthorized trade with Cuba
  - "tourist travel" (i.e., travel for any purposes not covered under 12 authorized categories)

# History of Embargo and Legal Framework



# History and Statutory Framework

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- Complex legal framework has evolved over last 50 years
- Originally established by President Kennedy in early 1960s
- Through a series of subsequent actions, Congress has established statutory mandates for Cuba sanctions
  - Helms-Burton "codified" sanctions as of March 1, 1996
  - Sanctions may not be terminated or suspended until transition to democracy is underway

# Structure of the U.S. Export Control and Sanctions Laws

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*Commerce Department*  
Bureau of Industry and  
Security (BIS)

**Export Administration  
Regulations (EAR)**

**commercial and "dual use"**

*State Department*  
Directorate of Defense Trade  
Controls (DDTC)

**International Traffic in  
Arms Regulations (ITAR)**

**military/intelligence**

*Treasury Department*  
Office of Foreign Assets  
Control (OFAC)

**Economic Sanctions:  
Countries, entities, and  
individuals**

# Economic Sanctions

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- Administered by the Treasury Department's Office of Foreign Assets Control (OFAC)
- U.S. sanctions laws prohibit certain transactions with specific countries, entities, and individuals, including
  - Virtually all transactions by U.S. persons, wherever located, involving a sanctioned country, entity, or individual, except as licensed or otherwise authorized by OFAC
  - Exports/imports of goods, software, technology or services
  - financial transactions
  - Participation, approval or facilitation of such transactions by non-U.S. persons
  - Evasion of the sanctions regulations

# Economic Sanctions

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- OFAC maintains a List of Specially Designated Nationals (SDNs) – thousands of entities and individuals with whom transactions are prohibited, including
  - Terrorists and sponsors of terrorist activities
  - Narcotics traffickers and kingpins
  - Agents of sanctioned country governments
  - Weapons proliferators
  - All citizens of Cuba (except those lawfully in the United States) and all entities owned or controlled by the Cuban government or citizens of Cuba are considered SDNs, even though not specifically named on the SDN list, unless "unblocked" by specific or general license
- The SDN list changes frequently due to new designations by the U.S. government
- The list is not all inclusive – activities with other persons or entities could be prohibited even though their names are not on the SDN list
  - For example, entities owned or controlled by SDNs are themselves SDNs

# Economic Sanctions

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- Definition of U.S. person varies among the different sanctions programs but generally includes
  - U.S. citizens and permanent residents ("green card" holders), wherever located
  - Entities incorporated in the United States
  - Persons physically located in the United States
- In the case of Cuba, sanctions also apply to "persons subject to U.S. jurisdictions," including foreign incorporated entities that are owned or controlled by U.S. persons (i.e., foreign subsidiaries of U.S. companies)
  - Broad view of "control"
- Non-U.S. entities also may be restricted by facilitation provisions, reexport prohibitions and extraterritorial sanctions

# Economic Sanctions: Cuba

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- Cuban Assets Control Regulations (CACR), 31 C.F.R. Part 515
- Until 2015, Cuba sanctions were the most comprehensive U.S. economic sanctions program, with broad prohibitions on
  - Exporting any goods, technology or services to Cuba, directly or indirectly
    - Even if products contain no U.S.-origin content or technology
  - Importing, purchasing or transporting goods or services of Cuban-origin
  - Traveling to Cuba
  - Facilitating the export of goods, technology or services to Cuba by a third party
  - Also apply to entities owned and controlled by U.S. persons
  - Limited exemptions and general licenses

# Export Administration Regulations (EAR)

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- 15 C.F.R. Parts 730 to 774
- Administered by Commerce Department's Bureau of Industry and Security (BIS)
- Regulate commercial and "dual-use" commodities, software and technology, as well as some low-level military items
  - Examples: computers, chemicals, clothing, paper clips
- Commerce Control List (CCL)
  - Ten Categories, including
    - Telecommunications & Information Security (e.g., encryption)
    - Sensors & Lasers
    - Navigation & Avionics
    - Aerospace & Propulsion
  - Categories include commodities, as well as related software and technology

# EAR: Reasons for Control

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- Firearm Control
- Missile Technology
- Nuclear Nonproliferation
- National Security
- Regional Stability
- Short Supply
- United Nations
- Anti-Terrorism
- Chemical & Biological Weapons
- Crime Control
- Chemical Weapons Convention
- Computers
- Encryption Items

# EAR: Export Controls Applicable to Cuba

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- All items subject to the EAR are controlled for export or reexport to Cuba, unless authorized under a specific license or license exceptions, including
  - EAR99 items
  - Non-U.S.-made items with more than *de minimis* U.S. content
- Limited license exceptions are available, such as
  - Gifts
  - Agricultural commodities
  - Personal baggage
  - Aircraft (and now vessels) on temporary sojourn to Cuba
  - Consumer Communications Devices
  - Items providing Support for the Cuban People
- License applications are generally subject to presumption of denial, except in specified areas

# Sources of Presidential Authority to Modify Sanctions

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- Cuban Democracy Act (1992)
  - Articulated dual strategies for transition to democracy and resumption of economic growth in Cuba
    - Sanctions directed against the Castro government
    - Support for the Cuban people
  - Affirmed President's authority to make certain exceptions to sanctions in support of Cuban people
- Helms-Burton (1996)
  - Authorized President to furnish assistance to individuals and NGOs to support democracy-building efforts
  - Codified CACR provisions, including provisions affirming President's authority to make exceptions to restrictions

# Examples of Prior Changes Without Congressional Action

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1998: Resumption of direct flights

1998: General license for family remittances up to \$300/quarter

1999: General license for non-family remittances up to \$300/quarter

1999: Specific licenses for educational and people-to-people exchanges

2009: General licenses for family travel and unlimited family remittances

2009: General license for establishment of telecommunications facilities

2009: Export license exception for donated consumer communications devices and expanded licensing authority for telecommunications exports

2010: General license for services related to Internet communications

2011: Expanded travel and remittance authorizations, including in support of private economic activity

# December 1998 GAO Report (NSIAD-99-10)

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- At the request of Congress, GAO reviewed Clinton Administration changes and consistency with statutory mandates
- GAO confirmed President's authority to make changes that effectively loosen sanctions in furtherance of humanitarian considerations
- Attached OFAC letter stating: Helms-Burton does not "rule out reasonable adjustments to the licensing regime consistent with the limitations on suspension or termination" of sanctions

# 2009 GAO Report (GAO-09-951R)

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- Concluded that President has "broad authority" to modify sanctions
- Identified additional changes President could make at his discretion, without congressional action
- Noted that its conclusions were verified with government lawyers and policy officials

# What are the limits of Presidential Authority?

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- Statutory provisions explicitly prohibit:
  - Termination or suspension of embargo, unless certain conditions have been met
  - Financing of transactions involving confiscated property
  - Exports to Cuba by foreign companies owned or controlled by U.S. persons
  - "Tourist Travel"
  - Financing of agricultural exports to Cuba
  - Emigration-related remittances beyond reasonable costs for travel
  - Provision of foreign assistance by U.S. government
  - General licenses for exports of medicines and medical supplies



Key Changes to  
Export Controls

# January and September 2015

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- New and expanded license exceptions authorizing exports and re-exports of:
  - telecommunications equipment and consumer communications devices
  - building materials, equipment, and tools for use by private sector
  - tools and equipment for private agricultural activity
  - tools, equipment, supplies, and instruments for use by private sector entrepreneurs
  - certain donated items and exports to strengthen civil society
  - items for use by news media personnel and U.S. news bureaus
  - gift parcels / humanitarian donations (GFT)
  - Aircraft and vessels on temporary sojourn
- Exports of non-U.S. origin goods from outside U.S. by "persons subject to U.S. jurisdiction" are not authorized

# January 2016

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- More favorable licensing policies, including case-by-case approvals for a wide range of exports to state-owned enterprises:
  - Wholesale and retail distribution for domestic consumption by the Cuban people
  - Agricultural production and food processing
  - Education and artistic endeavors
  - Disaster preparedness, relief and response
  - Public health and sanitation
  - Residential construction and renovation and public transportation
  - Construction of facilities for public water, energy, sports/recreation and other infrastructure that directly benefits the Cuban people
- Policy of approval of licenses for:
  - Telecommunications infrastructure equipment
  - Equipment for environmental protection

# March 2016

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- **Cargo Vessels Transiting Through Cuba**
  - Vessels departing from the United States and transiting through Cuban territory may now carry cargo bound for third countries without a license.
- **Facilitation of Cuban Private Sector Exports**
  - Specific licenses may be granted case-by-case for exports and reexports to Cuba of items that would enable or facilitate Cuban private sector exports

A close-up photograph of a person wearing a high-visibility yellow safety jacket with reflective silver stripes. The person is using a black padlock to secure a metal gate. The gate is made of a diamond-patterned metal mesh. The background shows a blurred outdoor setting with trees and a building.

## Key Changes to Sanctions

# Banking and Financial Transactions (March 2016)

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- U.S. financial institutions are now permitted to process "U-turn" transactions (US\$-denominated payments between non-U.S. parties)
- U.S. banks are now permitted to process monetary instruments (checks, money orders, travelers checks) presented by Cuban banks, but only indirectly through third-country banks
- U.S. banks may now open accounts for Cuban nationals located in Cuban to receive payments for authorized transactions

# Banking and Financial Transactions (Prior Changes)

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- U.S. banks permitted to open and maintain correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions
- U.S. financial institutions allowed to enroll merchants and process credit and debit card transactions for transactions incident to authorized travel in Cuba
- Definition of "cash in advance" revised to mean cash before transfer of title and control
- U.S. banks are now permitted to simply reject (rather than freezing) unauthorized transfers involving Cuba where originator and recipient are outside the United States
- "Cash in advance" payment requirements removed for non-agricultural products
- U.S. banks authorized to provide financing for non-agricultural exports

# Insurance

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- Authorization to provide health, life or travel insurance to U.S. persons on authorized travel to Cuba, including making payments related to emergency medical services
- Authorization to offer global health, life, or travel insurance policies for third country nationals traveling to Cuba who are ordinarily resident outside of Cuba

# Travel

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- "General licenses" for 12 categories of travel:
  - Family visits
  - Official business of the U.S. government, foreign governments, and certain intergovernmental organizations
  - Journalistic activity
  - Professional research and professional meetings
  - Educational activities
  - Religious activities
  - Public performances, clinics, workshops, and exhibitions
  - Support for the Cuban people
  - Humanitarian projects
  - Activities of private foundations or research or educational institutes;
  - Exportation, importation, or transmission of information or information materials
  - Certain authorized export transactions consistent with BIS licensing policy
- Expanded authorizations for provision of travel and carrier services

# Business Presence and Physical Presence

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- Certain businesses are now authorized to establish legal entities (subsidiaries, JVs, franchises) in Cuba
  - Telecom and Internet services providers
  - Exporters of authorized products
  - Travel and carrier services providers
  - Mail, parcel and cargo carriers



# Physical Presence Only

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- Certain organizations are authorized to establish representative offices, lease space and hire employees
  - New bureaus
  - Religious and educational organizations
  - Private foundations and research/educational institutes
  - Entities engaged in humanitarian projects
  - Entities engaged in other non-commercial activities to provide support for Cuban people



# Transactions with Cuban Nationals

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- U.S.-owned or controlled entities in third countries, including banks, authorized to provide goods and services to Cuban nationals outside of Cuba
- Expanded types of documents acceptable for unblocking of Cuban nationals permanently resident in a third country



# Telecommunications

# Export Controls

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- License Exception Support for the Cuban People (SCP) authorizes exports of telecommunications items
  - Access to the Internet, use of Internet services, infrastructure creation, and upgrades
- License Exception Consumer Communications Devices (CCD) authorizes commercial sales and donations of consumer communications devices
  - Personal computers, mobile phones, televisions, memory devices, recording devices, and consumer software
- Both SCP and CCD items must be EAR99 or under a classification controlled only for anti-terrorism reasons
- Policy of approval of licenses for more highly controlled items

# Sanctions

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- Expanded licenses for telecommunications services and transactions, including facilities linking third countries and Cuba
- New license authorizing services incident to Internet-based communications



# Outlook and Practical Considerations

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- U.S. statutory embargo remains in place
  - Bipartisan proposals in Congress to further ease or lift sanctions
  - Small but powerful group of Congressional members still oppose further easing of embargo
  - U.S. and Cuban government negotiations face major challenges
    - Compensation for expropriated property
    - Human rights
    - Guantanamo Bay Naval Base
    - Law enforcement and extradition

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- Financial transactions remain a challenge
  - Cuban government will need to make further political, social and economic changes
    - Cuban government is hugely in debt
    - Reunification of currency poses a major challenge
    - Restrictions on private business, commercial property ownership and labor arrangements continue to discourage foreign investment
    - Individuals have little private property or capital for purchase of foreign goods and services
    - Critical infrastructure is badly deteriorated or out of date and requires significant investment

# Questions?

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Stephen Propst's practice focuses on U.S. export control laws, economic sanctions, and international trade policy issues. He provides firm clients with advice and representation before the U.S. Departments of State, Treasury, and Commerce.



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