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PERSPECTIVE

Tips for lawyers looking to land in Havana

By William Hochberg

Americans seeking to cash in on Cuba in light of President Barack Obama's recent relaxation of U.S. embargo regulations should heed Teddy Roosevelt's advice and speak softly (preferably in Spanish) while carrying a big stick (USB, that is, as Wi-Fi access is scarce on the island).

President John F. Kennedy's 1960 executive order imposed the general embargo shortly after Cuba nationalized oil refineries, and about six months before the failed invasion at the Bay of Pigs.

Five decades later Cubans of all ages, from the generation that won the Revolution to the smart and ambitious younger crowd, express hunger for change, but their government remains cautious. So should Americans planning to transact business there.

For example, a lawyer, entrepreneur or manager attempting to conduct deals in Cuba without first obtaining a special license from U.S. Treasury's Office of Foreign Assets Control and sometimes also permission from the U.S. State Department, could still face penalties. And U.S. anti-bribery laws must be carefully understood.

Nonetheless, Obama's four rounds of reforms enacted between Dec. 17, 2014, and March 16, 2016, are sweeping and greatly relax the embargo, encouraging Americans to visit and do business on the island. For instance, the new embargo rules allow:

- U.S. citizens to profit from entertainment and sports ventures in Cuba, like the Rolling Stones concert promoted by a U.S. com-



New York Times

Obama and Cuban President Raul Castro at the Palace of the Revolution in Havana, Cuba, on Monday.

pany, AEG Concerts West, as well as recent and future concerts by a host of U.S.-based artists. Previously, any profit had to be given to charity;

- Cubans to make money in the U.S., including baseball players who will no longer be required to either turn over most of their income to the Cuban government or defect in order to take a lucrative U.S. team's offer. Time will tell whether Cubans will one day take up more dugout space than their Dominican compadres who have had this financial freedom for decades;

- Banks to conduct transactions involving Cuban goods, services or entities to be conducted in U.S. dollars, whereas before investors and banks could only base transactions on Euros or other foreign currencies. U.S. banks are now authorized to process U-turn transactions in which Cuba or a Cuban national has an interest, allowing transfers from a bank outside the U.S. that pass through one or more U.S. financial institutions before being transferred

to a bank outside the U.S., where neither the originator nor the beneficiary is a person subject to U.S. jurisdiction;

- Anyone to visit the country on their own "people-to-people" exchange. While the tourist market is still closed, some hope Obama will open up U.S. tourism soon. In the meantime, the new reforms allow anyone to go to Cuba without an expensive tour offering so-called "people-to-people exchanges," as long as the visitor (1) has a "general license," which is a simple document drafted by the visitor herself or her lawyer (or a knowledgeable travel agent) and (2) keeps records of all financial transactions for five years; and

- U.S. attorneys to represent Cuban nationals in a matter before a tribunal anywhere in the world. While the new rules allow attorneys to go before courts, arbitrators and other tribunals on behalf of Cubans, the law is unclear as to whether a U.S. attorney could be retained for commercial, entertainment, sports or

other transactional matters without a special license, which entails an application process and sometimes lengthy bureaucratic delays.

Another key embargo reform that predates Obama's latest executive orders is the so called "Berman Amendment," a 1988 reform that allows U.S. citizens to purchase Cuban artwork, musical recordings and other "information" in Cuba. Named for its sponsor former Rep. Howard Berman (D-CA), the Berman Amendment defines "information" broadly. However, it appears that such transactions may only involve artwork or "information" that was fully in existence at the time of the transaction. So, a U.S. citizen or company may not commission a Cuban national to create artwork, books, or musical recordings under the Berman Amendment.

Overall, the embargo appears to be slowly sinking into the Straits of Florida somewhere between Key West and Havana, thanks to Obama, Berman and others. But while Obama's actions push the envelope, he is still restrained from terminating the embargo, which requires a repeal of the legislation by Congress.

The U.S. presidential election raises questions about the durability of the Cuban-American détente. Could a new president opposed to ties with Cuba build a sea wall? And who would pay for it?

"If a democrat is in the White House, then we won't see any changes to these executive actions," says Lee Ann Evans, senior policy advisor at Engage Cuba, a coalition of private companies and organizations working to end

the travel and trade embargo on Cuba. “Ted Cruz has said he will reverse all of the Obama reforms, but what we are trying to do now is to get so much engagement with Cuba by U.S. businesses and people that even if someone like Ted Cruz got into the White House, the momentum and support for lifting the embargo will make it virtually impossible to reverse course.”

On the Cuban side, President Raul Castro has in recent years enacted surprisingly liberal changes, as private citizens may now buy homes and open private businesses. Reportedly, there are about 20 top notch private restaurants in Havana today. The author visited some recently and found them to be excellent by world standards. Most hotels and restaurants are still owned by the government.

The laws of the U.S. and Cuba regarding sanctions and the embargo are complex. The original Kennedy embargo of 1960 focused on banning most exports from Cuba, and a series of later acts added more restrictions, in-

cluding the Foreign Assistance Act of 1961, the Cuban Assets Control Regulations of 1963, the Cuban Democracy Act of 1992, the Helms-Burton Act of 1996, and the Trade Sanctions Reform and Export Enhancement Act of 2000. Other statutes that are not aimed specifically at Cuba but can come into play for the unwary entrepreneur doing business there include the Trading with the Enemy Act of 1917 and the Foreign Corrupt Practices Act of 1977. In addition to compliance with all required State, Treasury and Commerce department regulations and protocols, full compliance with the FCPA is an absolute and obvious requirement of any business activity in Cuba. The FCPA is known primarily for two of its main provisions, one that addresses accounting transparency requirements under the Securities Exchange Act of 1934 and another concerning bribery of foreign officials. Failure to meticulously and systematically comply with the FCPA can result in not only civil but criminal penalties.

In a recent appellate case, *U.S. v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014), the court affirmed 15- and seven-year jail sentences for two Florida entrepreneurs whose US company purchased phone time from foreign vendors and resold the minutes to U.S. customers. The trial court determined their offering of a side payment to a Haitian telecommunications company constituted an illegal bribe. Although the Haitian company was not owned outright by the Haitian government, it was deemed an “instrumentality” of the Republic of Haiti.

In Cuba, even more than in Haiti, businesses that may seem to be privately held are often in some degree under the control of, or owned by, the Republic of Cuba. While there has been a chronic history of corruption at many levels of government and in the private sector, Cuba is making efforts to prevent corruption. Any activity or even communications concerning Cuban business with even an appearance of impropriety is to be absolutely avoided.

The American entrepreneur or lawyer trying to conduct business in Cuba should strategize carefully, like Teddy Roosevelt who led the Battle of San Juan Hill near Santiago de Cuba in 1898, liberating the island from Spanish dominion. Careful attention to developments in U.S. and Cuban law is a must. Speaking a bit of Spanish and carrying some high density USB sticks can also help you go far in Cuba..

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