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Franchising in Cuba – The Next Frontier?

On Jan. 16, 2015, following an announcement made by President Obama on Dec. 17, 2014 of a plan to ease the U.S. trade embargo and restore diplomatic relations between the U.S. and Cuba, the U.S. Department of Commerce's Bureau of Industry and Security (the Commerce Department) and the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) amended the existing U.S. sanctions on trade with Cuba. The amendments revise the Cuban Assets Control Regulations (CACR), and Export Administration Regulations (EAR), administered by OFAC and the Commerce Department, respectively. Further, effective May 29, 2015, Cuba was officially removed from the list of State Sponsors of Terrorism (SSOT) by the U.S. Secretary of State, and on July 20, 2015, the embassies in Washington and Havana were re-established after more than 50 years, following an announcement by President Obama in early July that the United States will restore formal diplomatic relations with Cuba. Secretary of State John Kerry is currently expected to visit the U.S. embassy in Cuba on Aug. 14, 2015, and his visit will mark the first visit to Cuba by a U.S. Secretary of State in over 50 years. These recent developments signal a new direction for diplomatic and economic relations between the nations.

At first glance, the potential business opportunities seem limitless: Cuba is already a popular Caribbean destination for travelers from Canada and the European Union, and if travel restrictions are further lifted, U.S. tourists are certain to be drawn to Cuba's beaches and rich culture. Franchisors are among the many types of businesses starting to envision how they might expand into Cuba in hope of attracting both tourists and Cuban consumers alike. Industries of particular interest include hospitality, restaurants (including quick-service and fast casual), and personal care services. As the easing of the economic sanctions on Cuba is still limited and very new, uncertainty about franchising and other business opportunities remains under the current U.S. trade restrictions and the laws of Cuba. While Cuba currently does not have any published laws specifically regulating franchising, as a communist state, the economy is effectively entirely run by the government and not by private individuals or entities. Furthermore, even activities that might be permissible or specifically authorized from the U.S. perspective will likely face hurdles on market entry on the Cuban side, such as operating permits, business licenses, and import regulations.

Private sector business represents a small but growing part of the overall Cuban economy, and legal and practical restrictions notwithstanding, franchising could offer Cubans opportunities to develop businesses of their own. While current U.S. policy is favorable toward empowering Cuban private entrepreneurs, many legal and practical hurdles prevent U.S. franchisors from entering Cuba in the way they might enter any other new market.

Under the current U.S. sanctions against Cuba, and in particular OFAC's jurisdiction over activities of U.S. persons, entry into a franchise agreement by a U.S. company (or a foreign wholly-owned subsidiary) with a Cuban entity (directly or indirectly) could be considered an impermissible dealing in property in which Cuba has an interest (even if with a private individual in Cuba). Primarily, OFAC could view the franchise agreement as, among other things, the export of services to Cuba, dealing in property (such as intellectual property licensing rights), and possibly also an investment in Cuba as a result of the franchisor's receipt of ongoing royalty payments. All of these activities are impermissible without specific OFAC authorization. The services provided by a franchisor (such as training and other ongoing support) also would be prohibited as impermissible export of services to Cuba (unless they were provided on a humanitarian/donation basis and not as part of a commercial arrangement). Further, for franchisors that require franchisees to purchase (and import) proprietary products, equipment, supplies, or other tangible goods from the U.S. franchisor, its affiliates, or another U.S. supplier, exports by the franchisor or any U.S. supplier (or a foreign supplier re-exporting products containing de minimis U.S. content) will be subject to export and re-export restrictions administered by the Commerce Department. Thus, in order to lawfully enter and implement a franchise agreement with a Cuban entity or individual, a U.S. franchisor would be required to obtain authorizations from both OFAC and the Commerce Department, depending upon the circumstances. All requests for specific authorizations are reviewed on a case-by-case basis and are highly fact-specific depending upon the parties involved, the nature of the underlying business, and the related services and goods, technology or software to be supplied to Cuba.

While at present, the U.S. sanctions on Cuba remain in effect, with only certain limited exceptions, the Obama administration continues to push toward freer economic and diplomatic activities between the two countries. Franchisors who are interested in exploring opportunities in Cuba should consult with counsel experienced in interpreting OFAC and Commerce Department regulations and guidance, particularly in the context of the Cuba sanctions, to determine whether the desired activities are permissible. Even if certain activities are not generally authorized under the regulations, in certain circumstances, OFAC and the Commerce Department may issue specific licenses to permit such activities. Franchisors should continue to monitor the interesting legal and policy developments related to U.S. relations with Cuba, and the possible opportunities that may result.

Greenberg Traurig's Franchise & Distribution Practice represents domestic and international mature and emerging franchisors, licensors, and distributors in all aspects of their businesses. With franchise and distribution-focused transactional, regulatory, M&A, and litigation experience, the team has a thorough understanding of the legal and business issues involving franchise, license, and distribution companies.

Based in Washington, D.C., our Export Controls team advises and represents clients on the full range of international goods, software and technology transfer issues. We have broad experience providing export controls and related regulatory counsel to both U.S. and foreign businesses. Our industry-specific experience includes assisting companies in a wide range of industries such as aerospace, defense, firearms and ammunition, electronics, software and information technology, financial services, food, consumer products, biotechnology, medical device, and engineering services.

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