

**Cuba Sanctions Update:
Removal of Cuba from Terrorism List Will Result in Modest
Easing of Trade Sanctions**

*A legal analysis prepared at the request of the Cuba Study Group
9 April 2015*

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*Special thanks to Beth Peters, Haley Boyette, and
Samantha Sewall for their contributions to this analysis.*

Introduction

As part of the historic shift in U.S. policy toward Cuba announced on 17 December 2014, President Obama instructed the Secretary of State to launch a review of Cuba's designation as a state sponsor of terrorism (SSOT), and to prepare a report within six months regarding Cuba's support for international terrorism. Administration sources have indicated that the State Department has completed its review and has recommended that Cuba be removed from the list of SSOTs. The president's decision on whether to proceed with removal is expected to be announced soon.

This paper summarizes the legal restrictions resulting from the SSOT designation, the process for lifting the designation and the impact that removing the designation would have on trade with Cuba. Although the removal of Cuba from the SSOT list would be an important diplomatic step towards normalizing U.S. relations with Cuba, its immediate impact on economic activity between the United States and Cuba would be rather limited until further presidential and/or Congressional action is taken to fully lift the U.S. embargo of Cuba.

Implications of the State Sponsor of Terrorism Designation

Since 1 March 1982, Cuba has been designated as a SSOT pursuant to three federal statutes:

- Export Administration Act of 1979¹ (EAA)

- Foreign Assistance Act of 1961² (FAA)
- Arms Export Control Act³ (AECA)

The other countries designated as SSOTs under these statutes are Iran, Syria and The Republic of Sudan.

The SSOT designation triggers a range of sanctions and restrictions under these statutes, including:

1. Under the EAA, licenses are required for exports to Cuba of dual-use goods and technology that could significantly enhance Cuba's military capabilities or ability to support terrorism. The Commerce Department is required to notify Congress 30 days before granting a license for such items.
2. Under the AECA, exports of defense articles and defense services to Cuba are prohibited.
3. Under the FAA and other federal statutes, there are a range of restrictions on economic assistance, financial transactions, and other activities, including provisions
 - prohibiting U.S. persons from engaging in financial transactions with the governments of SSOT-designated countries, except as authorized by the Treasury Department;
 - prohibiting federal assistance to SSOT-designated countries under economic and humanitarian aid programs, such as the Food For Peace, Peace Corps, and Export-Import Bank programs;

¹ Section 6(j), 50 U.S.C. App. 2405(j), as amended. The provisions of the EAA have been implemented through the Commerce Department's Export Administration Regulations (EAR). Although the EAA was allowed to lapse in 2001, the EAR has been maintained under the emergency powers granted to the president by the International Emergency Economic Powers Act of 1977.

² Section 620A, 22 U.S.C. 2371, as amended

³ Section 40, 22 U.S.C. 2780, as amended.

- requiring the United States to oppose SSOT membership in and receipt of financial assistance from the World Bank, the International Monetary Fund, and other international financial institutions; and
- authorizing individual U.S. persons to pursue private claims against the governments of SSOT-designated countries in Federal courts and the attachment of blocked assets for monetary damages resulting from personal injury, property loss or death caused by acts of terrorism or the provision of material support or resources for such acts.

In addition to these legal implications, the SSOT designation has a significant practical, public relations, and symbolic impact on the willingness of private companies and financial institutions to do business with Cuba, even when the transactions are not legally prohibited. Moreover, the SSOT designation has had a significant impact on U.S. relations with Cuba, which strongly objects to the designation and has made removal of the designation a key point in the negotiations on reestablishing diplomatic relations between the two countries.

Process and Requirements for Lifting the SSOT Designation

In order for Cuba’s designation as an SSOT to be lifted, the Obama Administration will need to satisfy the requirements of all three of the authorizing statutes, the EAA, FAA and AECA. The three statutes contain virtually identical provisions setting forth two options for rescission of the SSOT designation:

- Option One requires the president to submit a report to the Speaker of the House of Representatives and the chairman of the

Committee on Banking, Housing, and Urban Affairs and the chairman of the Committee on Foreign Relations of the Senate,⁴ before the proposed rescission. The report must certify that (i) there has been a fundamental change in the leadership and policies of the government of the country concerned; (ii) that government is not supporting acts of international terrorism; and (iii) that government has provided assurances that it will not support acts of international terrorism in the future.

- Option Two requires the president to submit to the same congressional leadership, at least 45 days before the proposed rescission would take effect, a report justifying the rescission and certifying that (i) the government concerned has not provided any support for international terrorism during the preceding 6-month period; and (ii) the government concerned has provided assurances that it will not support acts of international terrorism in the future.

Only the AECA provides an express procedure for Congress to follow in order to block a proposed rescission. According to the statute, Congress may, within 45 days after receipt of the president’s report, enact a joint resolution prohibiting the proposed rescission. The AECA also establishes an expedited framework for the consideration of such a joint resolution. If Congress does not move affirmatively to block the removal of the SSOT designation, the removal would become effective upon expiration of the 45-day period.

⁴ The statutes vary in the congressional bodies that must be notified, but each requires notification to the Speaker of the House of Representatives and the chairman of the Senate Committee on Foreign Relations.

Immediate Impact of Rescission

Although the removal of Cuba from the SSOT list could play a key role in advancing efforts to restore diplomatic relations between Cuba and the United States, this action will not significantly ease the scope of U.S. economic sanctions and export controls applicable to Cuba. Rather, the key provisions of the U.S. embargo against Cuba, including virtually all of the restrictions on investment, trade, and financial transactions with Cuba, will remain in place after the SSOT designation has been lifted. Those restrictions are mandated by separate federal statutes enacted by Congress and are not tied to the SSOT designation. In particular, the primary restrictions on investment, trade and financial/banking transactions, as well provisions blocking all assets in which Cuba or any Cuban national has an interest, are part of the “economic embargo of Cuba” that was codified by the Cuban Liberty and Democratic Solidary Act of 1996 (Libertad or Helms-Burton).⁵ The statutory embargo cannot be lifted until either (i) certain statutory requirements have been met; or (ii) Congress passes new legislation to lift the embargo. (The Executive branch, however, does have authority to make exceptions to these restrictions, consistent with other provisions of U.S. law.)

That said, the removal of SSOT designation will result in the following:

- *Eligibility for a wider range of exports of dual-use items:* Relieved of the restrictions under Section 6(j) of the EAA, the Commerce Department will have discretion to authorize exports to Cuba of a broader range of goods, software and technology on the Commerce Control List without having to notify Congress in advance. However, the Commerce

Department would need to amend its Export Administration Regulations before any such easing of the export control restrictions would take effect. Moreover, any such exports authorized by the Commerce Department will need to be consistent with the policy objectives established in the statutory framework, which allows exports to Cuba only for limited purposes, such as the provision of support for the Cuban people. Accordingly, exports of highly-controlled dual-use items and military items to Cuba will remain highly restricted, but certain items controlled for national security reasons such telecommunications equipment could be authorized in some cases by specific licenses or license exceptions.

- *Eligibility for Foreign Assistance and Humanitarian Aid:* The statutory restrictions on the provision of certain federal assistance to Cuba will no longer be applicable. Again, however, the provision of any such assistance to Cuba will need to be consistent with other provisions of U.S. law, and regulatory amendments may be required. Moreover, Section 104 of Helms-Burton, which will survive the removal of the SSOT designation, requires the administration to oppose the admission of Cuba to international financial institutions such as the World Bank and the International Monetary Fund, and requires a reduction in U.S. funding for such institutions if Cuba is admitted as a member despite U.S. opposition.
- *Elimination of Private Right Action:* The statutory authorization for individual U.S. citizens to pursue private claims against Cuba in U.S. court will be eliminated, as that right of action is tied to the SSOT designation. As a practical matter, this could facilitate additional trade with Cuba (within the scope of the existing authorizations) by easing concerns over the perceived risk that assets tied to trade

⁵ Pub. L. 104-114 (1996); 22 U.S.C. §§ 6021 to 6091.

with Cuba could be seized for payment of awards to private claimants.

- *U.S. Securities and Exchange Commission (SEC) filings:* The SEC, through its Office of Global Security Risk, periodically queries publicly traded companies about their activities involving SSOTs, and has required companies to disclose such information in public filings when they believe such activities could be material to investors. The SEC can require companies to disclose activities involving Cuba, even when they are legal or authorized (e.g., sales of medical devices, agricultural products or telecommunications services to Cuba pursuant to valid U.S. government authorizations). Removal of the SSOT designation for Cuba presumably would ease or eliminate the need for such disclosures in SEC filings.
- *State Divestment Laws:* Similarly, a number of states and investment funds have adopted laws or policies prohibiting investments in companies doing business with SSOTs. The State of Michigan for example, has enacted legislation which very broadly prohibits investment of state pension funds in companies engaged in business with an SSOT. Removal of Cuba from the SSOT list would significantly ease the impact of these state measures.

Aside from these limited changes, the primary trade sanctions against Cuba will survive the removal of Cuba's SSOT designation and will remain in place until the statutory embargo has been lifted. Accordingly, companies and individuals considering transactions involving Cuba, or travel to Cuba, will need to review the remaining restrictions and carefully consider whether all of the contemplated activities would be authorized.

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