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Has The Obama Administration Called It Quits? Leaving United States Companies With More Than Was Expected... But Far Less Than Was Needed

U-Turns Do Not Equate With Straight Lines

Why Does The Obama Administration Want To Send Money To Panama?

From the perspective of the United States business community, that The Honorable Susan Rice, Assistant to the President for National Security Affairs, in remarks delivered on 14 October 2016 included media-friendly-headline-friendly (meaning likely to be quoted) statements about cigars and rum, reinforced a lack of focus upon what should have been priorities towards the Republic of Cuba during the remaining 95 days of the Obama Administration.

The statements by Ambassador Rice, in junction with statements by senior-level officials of the Office of Foreign Assets Control (**OFAC**) of the United States Department of the Treasury, Bureau of Industry and Security (**BIS**) of the United States Department of Commerce, and National Security Council (**NSC**) during a 14 October 2016 background conference call coordinated by The White House, re-confirmed either a lack of appreciation or a lack of comprehension as to the practical requirements of the United States business community.

During the conference call, the senior-level official from the NSC shared "*With respect to our regulatory changes, I think this -- we certainly don't rule anything out. We are mindful of the clock. And this is certainly likely the last significant tranche of changes*." That is not what the United States business community wanted to hear... The comment was astonishing- so with 97 days remaining on-the-job... the Obama Administration basically closes-up shop?

During the conference call, the senior-level official from the BIS shared "*Since the President's announcement, we at Commerce have authorized over $6 billion of potential exports to Cuba under the new policy. And that number has increased percentage-wise from 2015 to 2016 very significantly*."

Let's focus on that US$6 billion in potential exports. Since 17 December 2014, exports from the United States to the Republic of Cuba under provisions of the 2000 Trade Sanctions Reform and Export Enhancement Act (**TSREEA**) and 1992 Cuban Democracy Act (**CDA**)- agricultural commodity/food products and healthcare products (medical equipment, medical instruments, medical supplies, pharmaceuticals), respectively, total US$314,919,198.00 as of August 2016.... So, what does the remaining US$5,685,080,802.00 represent?

And, most importantly, if this value represents potential exports, all of the funds received as payment would need to be transferred through third country financial institutions because the OFAC will not permit direct correspondent banking... That's millions of United States Dollars (and other currencies) in fees for financial institutions domiciled in other countries. Which leads to the most egregious disconnect between statements and reality by the Obama Administration.

The most important, tangible, operationally significant change to OFAC regulations was, again, not included on 14 October 2016- authorizing Republic of Cuba government-operated financial institutions to have correspondent accounts with United States-based financial institutions.

Without a change to this OFAC regulation, the payment process for funds from the United States to the Republic of Cuba and from the Republic of Cuba to the United States remains triangular rather than a straight line- which would be more efficient, more timely (same day versus two or more days), and less

costly. During the 14 October 2014 conference call, the senior-level official from the OFAC refused to answer a question from a newspaper reporter as to why the regulation had not yet been changed.

An efficient means to make payment and receive payment for goods and services is a foundation of commerce and, thus of a market-based economy. The absence, by choice, of a straight line to send and receive payments for goods and services, when a straight line is available, is commercial malpractice.

In 2015, the OFAC authorized Pompano Beach, Florida-based **Stonegate Bank** (2015 assets approximately US$2.5 billion) to have an account with Republic of Cuba government-operated Banco Internacional de Comercio SA (BICSA). There is also Republic of Cuba government-operated Banco Financiero Internacional SA (BFI) which handles international payments. Unfortunately, because BICSA (and BFI) are not permitted to have an account with Stonegate Bank, funds are sent and received through Panama City, Panama-based Multibank, which has extensive dealings with the Republic of Cuba.

Additional effort. Additional time. Additional expense. And, additional reasons for the government of the Republic of Cuba to avoid United States-based companies.

Why should Stonegate Bank, which on 13 October 2016 reported having sixty (60) United States-based companies that are or would like to engage in commercial transactions with Republic of Cuba-based entities, need to share its business (and lessen benefits to its shareholders) with a financial institution located in Panama?

Perversely, and, certainly, conspiratorial, would believe that the Obama Administration is retaining the triangular payment process as a means to inject funds into those countries within which financial institutions have been subject to substantial fines by the OFAC; thus, lessening, a bit, the financial and political sting of the penalties.

For perspective, since December 2001, more than US$5.3 billion has been paid by the government of the Republic of Cuba to United States-based companies for agricultural commodities, food products, and healthcare products... and those funds had to be sent (and continue to be sent) through third countries (*Canada, France, Spain, United Kingdom, Mexico, Germany, Panama, among others*) rather than directly from the Republic of Cuba to the United States.

As a result, financial institutions in other countries gained (and continue to gain) revenues from the transfers... and the government of the Republic of Cuba has both an excuse to limit their purchases from United States-based companies and a justification for aggravation as they know the triangular requirement is a policy, subject to change, rather than a law, which the Obama Administration can do nothing about.

The absurdity of the logic used by the Obama Administration is best expressed referencing the words of the officials who made them:

"***QUESTION:*** *The Cubans are trying to have correspondent accounts in U.S. banks, that this is not part of the regulation. I wonder if that's now legally possible, or is it risky….?*

SENIOR ADMINISTRATION OFFICIAL: *Just so I have the question clear, am I clear that you're asking about correspondent accounts opened by Cuban financial institutions?*

QUESTION: *Yes.*

SENIOR ADMINISTRATION OFFICIAL: *At the present time, our regulations don't generally authorize Cuban financial institutions to open up account relationships here in the United States. But we have authorized a tremendous amount in prior regulatory rounds that allow Cuban financial institutions to engage with the U.S. financial system. Most notably, we issued what's called the Cuban U-turn transaction, which allows the Cuban-related transaction to clear through the United States. That would be a transaction that moves offshore, to one country to another, through the United States, involving a Cuban financial institution. The only restriction is neither the beneficiary nor the originator can be a person subject to U.S. jurisdiction.*

We've issued frequently asked questions and talked at a number of banking workshops, and talked about all the availability and all the great many authorizations we've introduced so that Cuban financial institutions can engage and can offload any surplus of dollars they may have accumulated through different trade -- on your first question.

SENIOR ADMINISTRATION OFFICIAL: *The only other thing I'd add is, as my colleague mentioned, we have made significant regulatory changes over the course of the last year and a half to include the change that [was] referenced with respect to the U-turn, which allows for the use of the dollar in certain international financial transactions. At the same time, what we've seen with regulatory changes is it takes time for businesses and firms and individuals to fully understand the scope of what the authorized activity is. And so we've seen over time the impacts grow with time as people gain a better understanding of what is now indeed authorized*."

Yes, that is a transcript… and it was painful to read… Simply put, the Obama Administration believes that United States companies have not, in 670 days, had time to fully appreciate, fully comprehend, "*fully understand*" the non-impact of not having direct correspondent banking agreements- because there are U-turn transactions… which do not address the issue.

One reason, although not offered during the 14 October 2016 conference call, is funds sent from a Republic of Cuba government-operated financial institution to its account at a financial institution in the United States could be subject to efforts by attorneys representing clients with Florida-granted civil judgements (approximately US$4 billion at last count) to seize funds in the account.

Legal counsel for United States-based companies are generally unified in their position that the private sector should sort out any issues- it is not for the United States government to prevent normal bilateral financial activities. If the OFAC authorizes the accounts and for whatever reason(s) financial institutions and United States-based companies do not choose to engage, that's not helpful, but it should not be because the OFAC says it should not be.

On 14 October 2016, the Obama Administration reinforced, again, to the government of the Republic of Cuba that "*choices*" remain rather than "*prohibitions*." The Obama Administration can change regulations; it cannot change statutes- the government of the Republic of Cuba understands the difference and responds accordingly.

Note- A surcharge (approximately 13%) placed by the government of the Republic of Cuba during the George W. Bush Administration (as a response to OFAC actions restricting the government of the Republic of Cuba from using United States Dollars for international transactions) upon converting United States Dollars into Convertible Pesos for travelers visiting the Republic of Cuba remains in place…many months after the OFAC changed regulations to permit the government of the Republic of Cuba to again use United States Dollars for international transactions and engage in U-turn transactions. The government of the Republic of Cuba maintains that financial institutions outside of the United States are not complying with the new OFAC regulations. This too is a problem that makes easier for the government of the Republic of Cuba to avoid engagement with United States-based companies.

The CDA's 180-day provision relating to vessels visiting the Republic of Cuba becoming a general license for all vessels is immensely helpful to the US$682 million **Port at Mariel** in the Republic of Cuba; and will further develop the normal (and essential) competitive relationship between United States ports, ports in the Republic of Cuba, and ports within Caribbean Sea-area countries. That's overdue.

The new regulations relating to healthcare products are of value, but they are not landscape-changing. They do, however, prepare a foundation for a visit (cancer treatment products and research cooperation) to the Republic of Cuba by the Honorable **Joseph Biden**, Vice President of the United States.

What has yet to be accomplished:

1) No expansion of agricultural imports from the Republic of Cuba;

2) No significant expansion of exports to the Republic of Cuba where the focus is not upon licensed independent businesses, but to government-operated companies;

3) Nothing on certified claims- announcing a focus on the issue;

4) Nothing on seeking the dismissal of certain civil judgements;

If the last 670 days has been President Obama adding layers to a cake, the cake representing changes to the relationship with the Republic of Cuba, then on 14 October 2016 he added more layers.... the final part, the tough part, is knowing when to add the frosting... that completes the cake... This cake needs more layers… with 95 days remaining in office, the frosting can wait.

The Obama Administration has again chosen a less-then-dynamic regulatory path, and, as a result, challenged his **legacy-building efforts** with the Republic of Cuba. Legacy is about doing what's difficult, and the Obama Administration has, thus far, decided to leave, yet again, "*choices*" for its successor rather than only statutes that need be changed.