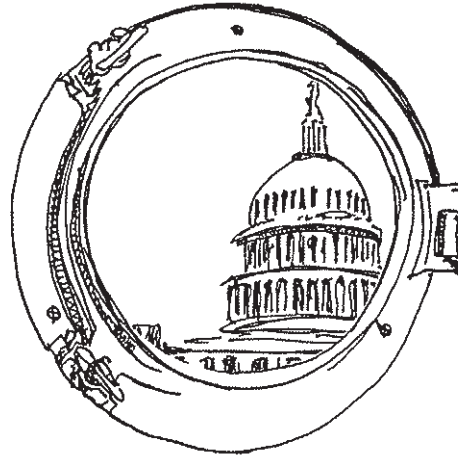


WINDOW ON WASHINGTON



HAVANA: DAY DREAMING?

By Bryant E. Gardner

The Obama Administration took significant steps to normalize relations with Cuba during 2015 that are likely to turn into concrete market opportunities for the maritime industry in the near term, particularly passenger cruise and ferry traffic. Although the embargo remains in place and many in Congress oppose the President's initiative, there seems little likelihood of meaningful legislative action to stop it. And once the door has been cracked open and commerce starts to flow between the United States and Cuba, it will take on its own momentum becoming increasingly difficult for Congress, or the next President, to undo what may become a pillar of President Obama's foreign policy legacy.

Announcing the changed policy on December 17, 2014, the President defined the embargo as a failure that has no place in the post-Cold War world where Communist China is our largest trading partner, and he further called for a reexamination of Cuba's designation as a state sponsor of terrorism amid threats from stateless fanatics such as al Qaeda and the Islamic State in Iraq and the Levant.¹ Additionally, President Obama

indicated that the initiatives to increase travel, commerce, and information flow with Cuba express his Administration's "belief in the power of people-to-people engagement," or cultural exchanges, because "[n]obody represents America's values better than the American people" and "this contact will ultimately do more to empower the Cuban people."² However, he frankly acknowledged that the statutory nature of the embargo curtails what he can do to loosen it, and committed to engage Congress seeking repeal.

In January 2015, the U.S. Treasury Department Office of Foreign Assets Control ("OFAC") and the U.S. Commerce Department Bureau of Industry and Security ("BIS"), the two main agencies responsible for administering U.S. economic sanctions against Cuba, announced that the applicable regulations³ were being amended, effective January 16, 2015, to implement the

¹ Address to the Nation on United States Policy Toward Cuba, 1 PUB. PAPERS 937 (Dec. 17, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes>.

² *Id.*

³ 31 C.F.R. Part 515 (OFAC) and 15 C.F.R. Parts 730-774 (BIS).

President's plan.⁴ Historically, travel to or trade with Cuba or Cuban nationals required persons subject to U.S. jurisdiction to obtain a specific license from BIS and OFAC. Under the new policy, the 12 categories of authorized travel which previously required specific licenses issued by OFAC became authorized by a general license such that individuals are now able to travel to Cuba without obtaining advance authorization, among other changes applicable to remittances, financial services, telecommunications, insurance, travel and air carrier services for persons authorized to travel to Cuba, and other transactions. Additionally, the changes enable the export and re-export of certain categories of items to Cuba "intended to empower the nascent Cuban private sector" including building materials for private buildings; goods for use by private sector entrepreneurs, such as auto mechanics, barbers, and restaurateurs; and tools for agricultural activity.⁵ The agencies also announced a general license authorizing foreign vessels to enter the United States after engaging in trade with Cuba.⁶

Then, in July 2015, the Administration reestablished diplomatic relations with Havana and reopened the embassy shuttered since 1961, the year President Obama was born.⁷ In making the announcement, the President again emphasized his intentions to allow greater travel and "people-to-people and commercial ties" between the United States and Cuba. Calling the softening "a choice between the future and the past" he called upon Congress to take steps to lift the embargo.⁸ Later in July, BIS issued its final rule rescinding Cuba's

designation as a "state sponsor of terrorism,"⁹ and the following month, the Obama Administration announced it was working on a deal with Cuba by year's end to permit travelers to fly on scheduled commercial flights between the United States and Cuba, which was confirmed in principle on December 16, 2015.¹⁰

On September 21, 2015, both OFAC and BIS released additional rules and guidance loosening trade restrictions with Cuba and opening opportunities for maritime trade.¹¹ Previously, the use of a vessel in trade with Cuba was deemed an export of that vessel requiring a specific license. The new rules provide a general license for vessel operators to provide carriage between the United States and Cuba and authorize the export and re-export of equipment and spare parts for use on vessels.¹² Moreover, under the September changes, providers of carrier or travel services, exporters of authorized goods, and other specified categories are

⁹ Cuba: Implementing Rescission of State Sponsor of Terrorism Designation, 80 Fed. Reg. 44,314 (BIS July 22, 2015).

¹⁰ Felicia Schwartz et al., Obama Administration Pushes for Deal to Start Flights to Cuba by Year's End, WALL ST. J., Aug. 17, 2015, <http://www.wsj.com/articles/obama-administration-pushes-for-deal-to-start-flights-to-cuba-by-years-end-1439860422> (last visited January 25, 2016).

On December 16, 2015, the State Department announced that the United States and Cuba reached a bilateral civil aviation agreement to establish scheduled air services between the countries. U.S.-Cuba Technical Talks Yield Civil Aviation Arrangement, Dec. 17, 2015, <http://www.state.gov/r/pa/prs/ps/2015/12/250733.htm1439860422> (last visited January 25, 2016). The countries, however, have not yet formalized the agreement in writing.

¹¹ Cuban Assets Control Regulations, 80 Fed. Reg., 56,915 (OFAC Sept. 21, 2015); Enhancing Support for the Cuban People, 80 Fed. Reg. 56,898 (BIS Sept. 21, 2015); U.S. Department of Treasury, Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations, Sept. 18, 2015, <https://www.treasury.gov/press-center/press-releases/Pages/jl0169.aspx%201439860422> (last visited January 25, 2016); Department of Commerce, Bureau of Industry and Security, Cuba Frequently Asked Questions, Sept. 21, 2015, <https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/sanctioned-destinations/cuba%201439860422> (last visited January 25, 2016); Department of the Treasury, Office of Foreign Assets Control, Guidance Regarding Travel Between the United States and Cuba, Sept. 21, 2015, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/guidance_cuba_travel.pdf (last visited January 25, 2016).

¹² Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations, Sept. 18, 2015, <https://www.treasury.gov/press-center/press-releases/Pages/jl0169.aspx> (last visited January 25, 2016); Enhancing Support for the Cuban People, 80 Fed. Reg. 56,898 (Sept. 21, 2015).

⁴ Cuba: Providing Support for the Cuban People, 80 Fed. Reg. 2,286 (BIS Jan. 16, 2015); Cuban Assets Control Regulations, 80 Fed. Reg. 2,291 (OFAC Jan. 16, 2015); U.S. Department of the Treasury, Fact Sheet: Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions, Jan. 15, 2015, <https://www.treasury.gov/press-center/press-releases/Pages/jl9740.aspx> (last visited January 25, 2016).

⁵ Cuba: Providing Support for the Cuban People, 80 Fed. Reg. 2,286 (BIS Jan. 16, 2015).

⁶ U.S. Department of the Treasury, Fact Sheet: Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions, Jan. 15, 2015, <https://www.treasury.gov/press-center/press-releases/Pages/jl9740.aspx> (last visited January 25, 2016).

⁷ Remarks on the Reestablishment of Diplomatic Relations and Permanent Diplomatic Missions by the United States and Cuba, 1 PUB. PAPERS 474 (July 1, 2015), *available at* <https://www.whitehouse.gov/the-press-office/2015/07/01/statement-president-re-establishment-diplomatic-relations-cuba> (last visited January 25, 2016).

⁸ *Id.*

now permitted to maintain a physical presence and operations in Cuba, including the employment of U.S. and Cuban persons in Cuba and the maintenance of Cuban bank accounts.¹³ The changes further permit close relatives to accompany authorized travelers, certain exports for authorized end-uses in support of the Cuban people, banking services for authorized travelers, and parcel service within Cuba by U.S. entities.¹⁴ Lastly, of sure importance to our readership, the prior authorization permitting the provision of certain legal services to Cuban nationals has been expanded to allow the receipt of payment for such services.¹⁵

Despite the gradual opening, which will likely continue through the Obama Administration's final days, operators should bear in mind that the trade embargo with Cuba remains in place, and either general or specific licenses are still required by the U.S. Government for transactions involving Cuba or Cuban nationals. Persons may travel to Cuba if they fit within one of the 12 general license categories, including: family visits, official business of the U.S. Government, journalistic activity, educational activities, religious activity, public performances and exhibitions, "support for the Cuban people," humanitarian projects, activities of private foundations or research or educational institutes, transmission of "information or informational materials," and "certain export transactions."¹⁶ Tourism is *not* one of the general licenses available, and the provision of carrier services to tourists or others lacking a license is not authorized.

Other restrictions are still in place with respect to sailings between the United States and Cuba. The transportation of authorized persons can only be conducted between the United States and Cuba,¹⁷ without stops in third countries. Although vessels now enjoy a general license permitting their use in connection with authorized

passenger or cargo transportation, such vessels are only permitted a "temporary sojourn" to Cuba of up to 14 days.¹⁸ In view of the current infrastructure in Cuba, the U.S. regulations do permit the provision of vessel accommodation service to passengers while in Cuba.¹⁹ However, carriers subject to U.S. jurisdiction providing authorized services must obtain a certification from each customer indicating the section of the regulations pursuant to which the customer has a general license, and retain that certification for at least five years.²⁰ OFAC officials have advised that carriers are not required to investigate or otherwise verify the accuracy of the certification.

Although the Obama Administration is moving quickly to cement the policy change in its waning days, the Cuban Government is not breathlessly jumping into the relationship. Those interested in providing service to Cuba should keep in mind that Cuba remains committed to the socialist model, and a wide variety of activities require government involvement and approval. Ambassador Jose Cabanas, former chief of Cuba's *de facto* embassy in the United States (called the Cuban Interest Section in Washington, D.C.) and current Cuban Ambassador to the United States, stated in August that it "will take time" to review each proposal for service.²¹ Speaking before a Florida conference in May 2015, Mr. Cabanas indicated: "These companies have to go to our authorities, they have to introduce their ideas," and "[s]ome of them we already know, but they are not all equal. Some of them have just a license, not the capital, not the ships."²² To establish operations in Cuba, American businesses should be prepared to demonstrate how their proposal benefits the Cuban people, environment, and economy, as defined by the Cuban state, not the consumer or private enterprise. Furthermore, smaller projects of less than several million dollars have generally not received priority status for review by Cuban authorities.

During an October 2015 interview, Mr. Oscar Ruana Baqueiro, Director General of Baja Ferries, which has

¹³ Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations, Sept. 18, 2015, <https://www.treasury.gov/press-center/press-releases/Pages/jl0169.aspx> (last visited January 25, 2016).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 31 C.F.R. § 515.60 (2015); Department of the Treasury, Office of Foreign Assets Control, Guidance Regarding Travel Between the United States and Cuba, Sept. 21, 2015, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/guidance_cuba_travel.pdf (last visited January 25, 2016).

¹⁷ 31 C.F.R. § 515.572(a) (2015).

¹⁸ 15 C.F.R. § 740.15 (2015).

¹⁹ 31 C.F.R. § 515.572(a)(4) (2015).

²⁰ 31 C.F.R. § 515.572(b) (2015).

²¹ Nick Gass, Ferry service to Havana could take time, Cuban official cautions, POLITICO, May 12, 2015, <http://www.politico.com/story/2015/05/cuba-ferry-service-official-response-117852> (last visited January 25, 2016).

²² *Id.*

obtained a U.S. license to operate between the United States and Cuba, reported: "Although we hoped to receive approval from the Cuban Government immediately, the reality is different. As the re-opening of the embassies is a quite recent milestone, there are a lot of topics in the Cuban Government's agenda before the ferry, we understand it and will be patient until all parties are ready and feel comfortable with the proposed operation of the service."²³ Speaking in New York later that month, Mr. Alex Lee, the U.S. State Department's Deputy Assistant Secretary for South America and Cuba, indicated that the Cuban Government still clearly "prefers to channel all business opportunities to state-run enterprises" and indicated that "American businesses will face challenges operating in Cuba."²⁴ Lastly, American companies interested in serving Cuba should keep in mind it is not virgin territory – European, Chinese, Canadian, and other competitors have long served the market, and have developed trusted relationships with Cuban authorities deeply involved in almost every major transaction.

Nor is congressional sentiment universally aligned with President Obama's initiative. Powerful legislators rooted among the Cuban exile community, such as Rep. Ileana Ros-Lehtien (R-FL) and Sen. Marco Rubio (R-FL), are vehemently opposed to President Obama's unilateral détente with Cuba despite existing statutory prohibitions.²⁵ And Sen. Bob Menendez (D-NJ) accused President Obama of trying to burnish his foreign policy legacy at the expense of the Cuban people: "Our demands for freedoms and liberty on the island will continue to be ignored and we are incentivizing a police state to uphold a policy of brutality." He continued, "The message is democracy

and human rights take a back seat to legacy initiative."²⁶ Moreover, even without targeted congressional resistance, repealing the embargo in the near term will be a real challenge, given the deep partisan divisions which have hobbled regular order and introduced brinksmanship to the relatively uncontroversial task of just keeping the Federal Government open. Additionally, billions of dollars in civil judgments levied against Cuba in connection with the nationalization of U.S. assets remain outstanding and may complicate any effort by Cuban actors, many of whom may be viewed as arms of the Cuban state, from operating within U.S. jurisdiction without having their assets seized to satisfy those judgments.

The maritime sector is moving quickly to take advantage of the new market and the liberalization has the support of the powerful U.S. Chamber of Commerce. Key operators, including Carnival Cruise Lines, have announced plans for regular service to Cuba from the United States. Under its Fathom brand, Carnival will provide trips which it claims will "focus on supporting cultural exchange and economic development for the Cuban people and include a variety of artistic, educational, and humanitarian activities."²⁷ The cruises will call at Havana, Cienfuegos, and Santiago de Cuba, and preliminary itineraries include meetings with entrepreneurs, artists, school children, and others in settings ranging from colonial heritage sites to Cuba's Afro-Cuban community in Havana's Muraleando neighborhood.²⁸ These itineraries are required by the "people-to-people" general license authorization upon which Fathom relies for its U.S. authorization, which lies at the heart of the initiative as described by President

²³ Rebecca Gibson, Planning new passenger ferry services to Cuba, *CRUISE & FERRY*, Oct. 21, 2015, <http://www.cruiseandferry.net/articles/planning-new-passenger-ferry-services-to-cuba#.Vo060q-FOPo> (last visited January 25, 2016).

²⁴ Elizabeth Llorenta, Cuba's desire to open its economy is stymied by refusal to cede control, U.S. officials say, *FOX NEWS LATINO*, Nov. 2, 2015, <http://latino.foxnews.com/latino/politics/2015/11/02/cuba-desire-to-open-its-economy-is-stymied-by-refusal-to-cede-control-us/> (last visited January 25, 2016).

²⁵ Marco Rubio, Obama's Faustian Bargain with Cuba, *N.Y. TIMES*, July 8, 2015, http://www.nytimes.com/2015/07/08/opinion/marco-rubio-obamas-faustian-bargain-with-cuba.html?_r=0 (last visited January 25, 2016).

²⁶ Magaret Talev & Indira Lakshmanan, Obama Urges Congress to Take Next Step, Lift Cuba Embargo, *BLOOMBERG*, July 1, 2015, <http://www.bloomberg.com/politics/articles/2015-07-01/obama-urges-congress-to-lift-cuba-embargo-after-embassy-opened>.

²⁷ Associated Press, Carnival announces ports of call for planned Cuba cruises, *FOX NEWS*, Sept. 30, 2015, <http://www.foxnews.com/travel/2015/09/30/carnival-announces-ports-call-for-planned-cuba-cruises/> (last visited January 25, 2016). See also Fathom Cuba Page, <https://www.fathom.org/cuba-expand-your-horizons> (last visited January 25, 2016) (offering trips "for mindful travelers" starting at \$1,800).

²⁸ Associated Press, Carnival announces ports of call for planned Cuba cruises, *FOX NEWS*, Sept. 30, 2015, <http://www.foxnews.com/travel/2015/09/30/carnival-announces-ports-call-for-planned-cuba-cruises/> (last visited January 25, 2016).

Obama.²⁹ The general license requires travel under the auspices of an organization that is a person subject to U.S. jurisdiction and sponsors such exchanges.³⁰ Furthermore, the sponsor must ensure the full-time schedule for educational exchange activities and that the predominant portion of the activities not be with individuals acting for the Government of Cuba.³¹ Last fall, Carnival indicated these educational people-to-people exchanges cruises would begin as soon as May 2016.³²

The idea, according to Administration officials, is that like the Iran and the health care law initiatives, the Cuba opening will become so embedded in American policy over President Obama's final eighteen months that they will become politically difficult to reverse.³³ If Carnival and other operators invest in the trade, and begin to accumulate a real economic stake in doing it, they will not easily give it up and will push for more.

Additionally, President Obama is betting that as more and more people travel to Cuba, meet its people, and enjoy its culture, they will see that there is a lot to be gained from cultural, educational, and commercial openness and exchange. And once that happens, even a future President Marco Rubio would have real difficulty battling an increasingly well-funded and organized lobby in favor of keeping open the Cuba-U.S. trade.

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²⁹ Fathom Cuba Page, <https://www.fathom.org/cuba-expand-your-horizons> (last visited January 25, 2016).

³⁰ Department of the Treasury, Frequently Asked Questions Related to Cuba, Nov. 25, 2015, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf (last visited January 25, 2016); 31 C.F.R. § 515.565 (2015).

³¹ *Id.*

³² Associated Press, Carnival announces ports of call for planned Cuba cruises, FOX NEWS, Sept. 30, 2015, <http://www.foxnews.com/travel/2015/09/30/carnival-announces-ports-call-for-planned-cuba-cruises/> (last visited January 25, 2016).

³³ Felicia Schwartz et al., Obama Administration Pushes for Deal to Start Flights to Cuba by Year's End, WALL ST. J., Aug. 17, 2015, <http://www.wsj.com/articles/obama-administration-pushes-for-deal-to-start-flights-to-cuba-by-years-end-1439860422> (last visited January 25, 2016).