

# Client Alert

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## Cuba's Removal from List of State Sponsors of Terrorism

Following President Obama's announcement on December 17, 2014 of a policy to normalize relations with Cuba, the Department of Commerce's Bureau of Industry and Security (BIS) amended its Export Administration Regulations (EAR) and the Department of the Treasury's Office of Foreign Assets Control (OFAC) amended its Cuban Assets Control Regulations (CACR) on January 16, 2015, to implement the policy change. Consistent with this policy of normalization of relations between the two countries, President Obama announced on April 14, 2015 that Cuba was being removed from the list of "State Sponsors of Terrorism," which triggered a 45-day review period during which Congress could try to block Cuba's removal from the list via a joint resolution. Congress failed to act during the prescribed period and Cuba was officially removed from the list on May 29, 2015.

Cuba's removal from the list of State Sponsors of Terrorism ends the ban on arms-related exports and sales, controls on "dual-use" exports that could have military and civilian applications, the prohibition on economic assistance to the island and the requirement that the United States oppose loans to Cuba by the World Bank and other international financial institutions in place as a result of that regulation. Removal from the list also ends the denial to companies and individuals of tax credits for income earned in the island and the denial of duty-free treatment of goods exported to the United States.

*BUT*, most of these bans and restrictions remain in place under other overlapping sanctions and regulations, however. OFAC's Cuban Assets Control Regulations continue to prohibit most transactions with Cuba unless the transaction falls within one of few general authorizations under the changes made to the regulations in January or is permitted by a specific license, despite Cuba's removal from the list. Although removal from the list of State Sponsors of Terrorism may make private companies and banks more open to doing authorized business with Cuba, it does not substantially abridge the ongoing embargo against the island, which is codified in federal statutes.

Removal from the list does have at least one legal implication for Cuba and US businesses. In 1996 Congress created a "state sponsor of terrorism exception" to the Foreign Sovereign Immunities Act (FSIA), codified as Section 1605A of Title 28 of the US Code, that allows causes of actions against terrorist states by their US victims. Because a prerequisite for a US court to be able to hear a claim under that section requires the foreign state to be designated as a state sponsor of terrorism at the time the terrorist act took place, Cuba's removal from the list eliminates the federal private right of action against the Cuban government as a foreign state sponsor of terrorism in claims that may arise after May 29, 2015. The removal of this designation may also have effects on the ability to continue collecting judgments already entered against Cuba.

An additional implication of Cuba's removal from the list of State Sponsors of Terrorism is that President Obama may, consistent with his policy of normalizing relations with the island, allow his authority under the Trading with the Enemy Act of 1917 to lapse by not electing to renew his authority under the act before September 14, 2015. If the President decides not to renew his authority under the act before such time, many of the prohibitions currently implemented by the Cuban Assets Control Regulations could be challenged in court as lacking statutory authority to be implemented. This would not affect the application of regulations and sanctions in place as a result of the Helms-Burton Act of 1996 or other congressional laws that codify the Cuban embargo.

In conclusion, Cuba's removal from the list of State Sponsors of Terrorism is more a symbolic gesture of progress in the normalization of relations between the two countries than a substantial change allowing investment and economic activity in the island. Those changes require congressional action to repeal or amend the laws that compose the Cuban embargo and that continue to restrict most private sector transactions there.

The Latin America Group at Hunton & Williams will continue to closely monitor related developments. Please contact us if you have any questions or would like further information regarding Cuba's removal from the list of State Sponsors of Terrorism or any other change to the regulations and sanctions governing the Cuban embargo.

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