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## Regulatory Update

# New US Sanctions Against Cuba Expand Sanctions Risks for Global Multinationals

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In a move that signals a fundamental change in the U.S. regulatory and enforcement risk calculus for multinational companies and financial institutions that operate in or facilitate transactions with the Cuban economy, the Trump administration on May 1 issued a new executive order titled "[Imposing Sanctions on Those Responsible for Repression in Cuba and for Threats to United States National Security And Foreign Policy](#)" (the New EO).

As its title suggests, the New EO targets Cuba for the imposition of new primary blocking sanctions, in particular the government of Cuba and persons working with the government of Cuba. The New EO also imposes sanctions risks for any person who operates in specified sectors of the Cuban economy, including energy, mining, financial services, defense and security, while also allowing for sanctions on any sector of the Cuban economy that may be targeted at a later date. The New EO also authorizes the imposition of secondary sanctions — that is, blocking or other sanctions on non-U.S. persons engaged in transactions without any nexus to the U.S. that would have otherwise subjected them to U.S. jurisdiction — on foreign financial institutions determined to have “conducted or facilitated any significant transaction or transactions for or on behalf of any person” designated a sanctioned person under the order.

The issuance of this executive order marks a shift in U.S. sanctions policy with respect to Cuba, as historically the U.S. government had prohibited U.S. persons and persons subject to U.S. jurisdiction (i.e., the non-U.S. subsidiaries of otherwise U.S.-domiciled companies) from operating in the country, but had largely not sought to impose the chilling effect of sanctions designations on others doing business there.

The implications of this change for non-U.S. companies operating in Cuba are significant, and multinationals will be re-assessing the risk profile of their operations in light of these developments.

### The New EO Explained

Primary sanctions, implemented by the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC) through U.S. trade embargoes (such as the existing embargos on Cuba and Iran) as well as listings on the Specially Designated Nationals and Blocked Persons (SDN) List, prohibit U.S. individuals and entities from dealing with, or in the property of, sanctioned persons. The New EO authorizes the U.S. State and Treasury departments, in consultation with one another, to institute blocking sanctions on a broad swathe of to-be-named individuals or entities associated with the government of Cuba or operating in the above-named sectors of the Cuban economy.

Secondary sanctions, on the other hand, target non-U.S. persons whose conduct has no nexus to the U.S., but who are nevertheless deemed to have engaged in transactions contrary to specified U.S. foreign policy interests. As has been the case previously in similar executive orders, the New EO authorizes such sanctions against non-U.S. financial institutions (i.e., “Foreign Financial Institutions” or FFIs) that conduct or facilitate “any significant transaction” involving persons blocked pursuant to the New EO. The term “significant transaction” has only been used in limited instances to date and depends on enumerated “factors” laid out in the implementing regulations for each applicable sanctions program, which consider “the totality of the facts and circumstances” (31 CFR § 561.404; 31 CFR § 562.407; OFAC FAQ 1151). These factors include the size and frequency of the transactions involving sanctioned persons, the nature and complexity of the transactions, the transactions’ impact on the U.S. government’s foreign policy objectives, whether they were entered into for deceptive purposes and other factors. Practically speaking, OFAC has broad discretion in deploying secondary sanctions against FFIs on the basis of targeting persons engaged in “significant transactions,” and the net effect of including such provisions in this New EO is to raise the risk profile for FFIs currently doing business in Cuba.

Secondary sanctions imposed pursuant to the New EO may consist of prohibitions on opening correspondent or payable-through accounts in the United States (that is, cutting off the designated institution from direct access to U.S. dollars, making international business much more difficult or even impossible for many financial institutions), or even full blocking sanctions against the institution itself. In other words, the New EO elevates the severity of the consequences for FFIs engaged in transactions involving Cuba.

### **Implications for US Sanctions Policy and Non-US Businesses**

This New EO marks a shift in legal regimes to impose sanctions on Cuba, with the net effect that risks are heightened for non-U.S. persons doing business lawfully in the country. It may also signal a new, potentially more aggressive phase by the U.S. government in attempting to impose additional costs on the Cuban regime and its individual members, in addition to the longstanding U.S. embargo to which the island has been subject for decades. The traditional Cuba sanctions were promulgated under the Trading with the Enemy Act, while the New EO is issued under the more widely used International Emergency Economic Powers Act (IEEPA). The use of IEEPA brings this round of Cuba sanctions in line with other sanctions regimes, which may lead to parallels in OFAC’s enforcement and raises secondary sanctions risks. That said, the U.S. government has been reluctant in other sanctions programs to impose the most severe secondary sanctions on FFIs (or any other parties for that matter) for engaging in so-called “significant” transactions.

While OFAC has yet to issue any Frequently Asked Questions (or designate sanctioned persons under the New EO), we expect to see guidance published in short order given how active OFAC has recently been in doing so. As such, it is important for multinational companies, particularly financial institutions and other actors operating in the specified sectors of the Cuban economy, to note that continued operations in the country carry heightened risk. We expect to see shifts in both enforcement and compliance costs for multinationals, with some companies dealing with recurring issues involving the navigation of blocking statutes while managing the risk associated with these new U.S. sanctions.

As always, Paul Hastings attorneys stand ready to assist our clients in navigating the increasingly complex regulatory and geopolitical environment.



*If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings lawyers:*

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