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A Flood of Dollars: Will the Thaw in US-Cuban Relations Lead to the Return of Billions of Dollars to Entities Worldwide?

Relations between the US and Cuba have been at a standstill since the Cuban embargo was implemented in 1960. However, the last two months have seen significant breakthroughs in US-Cuban relations, with the realistic potential of the normalization of relations in the months and years to come. One potential result of this thawing is a change in the long-standing sanctions program. Individuals and companies affected by these sanctions should prepare for the inevitable changes.

On December 17, 2014, President Obama signaled a new course in US-Cuban relations through amendments to the Cuban Asset Control Regulations (“CACR”) and the Export Administration Regulations (“EAR”). These regulations are administered by the Office of Foreign Assets Control (“OFAC”), a part of the US Department of the Treasury, and the US Department of Commerce’s Bureau of Industry and Security (“BIS”), respectively. Broadly speaking, under these sanctions programs – and in particular the OFAC program – US financial institutions are prohibited from processing any financial transaction involving Cuba (even if no party to the transaction is in fact Cuban). Because US financial institutions are almost invariably involved if a transaction is denominated in US dollars, this has had the effect of precluding any Cuban related transactions in US dollars. If a person attempts to complete a US dollar transaction with a connection to Cuba, the transaction will be stopped (and all funds frozen) by the US financial institution. Once frozen, the funds at issue are neither passed on to the intended recipient nor are they returned to the payer; rather, the financial institution is required to segregate the funds and hold them in an interest bearing account. Thus, for decades, such funds have been accumulating in accounts in the United States.

The President’s announcement presents the possibility that the sanctions-constructed dam which is holding these funds back may be removed in the near future, freeing billions of dollars in funds that have been blocked for decades to flow to their rightful owners. However, because of the long-term duration of the Cuban sanctions program, any claims process designed to return or allocate the funds will present several challenges. For example:

- **Identifying and Documenting Frozen Transactions:** Many of the entities that were parties to the frozen transactions may no longer be in business. Some of those companies may have gone through insolvency proceedings, merged with other companies, or otherwise changed their forms long ago. Others that continue in existence may have incomplete (or non-existent) records of transactions that occurred many years ago. Given the funds at stake, a thorough search for such transactions may yield significant funds, but such searches may not be easy.

- Identifying the Rightful Owner: Many of the transactions are decades old and identifying the person or entity that has a legal right to claim the frozen funds may be complicated. Once that person or entity is identified, establishing sufficient proof of that right may require significant cooperation between lawyers in different jurisdictions.
- Identifying the Holder: Over the decades spanned by the Cuban sanctions, the banking industry has seen a significant number of mergers, takeovers, and closings. Identifying the financial institution holding the frozen funds may not be easy. In addition, the past decades have seen considerable technological changes in record keeping and storage, so even if the financial institution (or its successor) can be identified, the institution itself may have difficulty accessing information about the transactions at issue.

Of course, some transactions will be recent, with easily identifiable documentation and parties in interest. Given the billions of dollars at stake, entities and their lawyers may wish to begin identifying transactions that may have been affected by the Cuban sanctions program and prepare for what appears to be the inevitable return of billions of dollars to the rightful owners.

We at Lewis Baach are uniquely positioned to help. We would be happy to apply our knowledge of Latin American business and our years of experience dealing with US financial institutions to help clients identify and ultimately recover these funds.

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