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Improved U.S. - Cuba Relations Create Potential FCPA Risks for U.S. Companies Looking to Do Business There

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By: ***Jeffery B. Vaden***

The normalization of relations between the United States and Cuba offers potential lucrative business opportunities for companies that are prepared to meet Cuba's unique corruption risks. On December 17, 2014, President Barack Obama and Cuban President Raul Castro announced the restoration of full diplomatic relations between the United States and Cuba; an act which President Obama stated was aimed at ending "an outdated approach that for decades has failed to advance our interests" and that would instead begin to "normalize relations between our two countries." In furtherance of that goal, on January 16, 2015, the U.S. Government eased travel restrictions between the U.S. and Cuba and, perhaps more importantly, reduced certain obstacles that prevented American companies from doing business on the island. For example, U.S. businesses will be allowed to provide financing to Cuban small businesses and sell communications devices, software, and hardware services among other things. Indeed, American companies in the aviation, telecommunications, or financial industries stand to gain a substantial foothold in a burgeoning new – and potentially lucrative – Cuban market.

Before diving in head first, however, American companies must recognize and prepare for the significant Foreign Corrupt Practices Act ("FCPA") risks inherent in doing business in Cuba. But first, a quick refresher on the FCPA. Generally speaking, the FCPA prohibits bribing foreign officials for the purpose of obtaining or retaining business. ***The term "foreign official" is broadly defined*** and includes, among other things: (i) officers or employees of a foreign government or any department, agency, or instrumentality thereof; or (ii) anyone acting in an official capacity for or on behalf of said foreign government or any department, agency, or instrumentality thereof.

Doing business in Cuba presents a host of unique FCPA risks, three of which are particularly worth highlighting. First, while the Cuban government has taken steps to permit its citizens to open small businesses, the vast majority of Cuba's economy remains government-owned and controlled. Former economist for the International Monetary Fund, Ernesto Hernandez-Cata, ***estimated that the Cuban government, directly and through state-owned businesses, accounts for more than 75% of Cuba's total economic activity***. Essentially, the state is involved in virtually all of the island's major businesses, including services typically run by the private sector in the U.S. In other words, American companies will almost certainly deal with foreign officials when doing business in Cuba.

Second, Cuban government officials are notoriously undercompensated. On average, government officials earn between $20 and $40 per month while, in some cases, being tasked with administering Cuba's multi-million dollar business ventures. Unsurprisingly, low wages and extensive state involvement in business matters have incentivized some Cuban officials to solicit bribes (and, occasionally, have tempted foreign companies to offer them). For example, in September 2014, Cy Tokmakjian, Claudio Vetere, and Marco Puche, executives at Tokmakjian Group, a Concord, Ontario, Canada-based company, were convicted of using bribery and other means to avoid paying taxes. They received sentences of 15, 12, and 8 years respectively as part of President Raul Castro's crack down on graft and other forms of corruption. Tokmakjian, Vetere, and Puche may not be subject to the FCPA, but similar payments by American companies in Cuba would likely expose the companies and employees to FCPA liability.

Third, and finally, Cuba suffers from a widespread lack of transparency. The ***2015 Transparency International Corruption Perceptions Index*** ranked Cuba 56th out of 168 countries surveyed, tied with Ghana. American companies may find themselves in the dark with respect to Cuban regulations and procurement practices. As a result, companies may not be aware of inconsistent and/or improper application of Cuban regulations. Worse still, American companies may be unaware of the true purposes for certain payments. For example, a company may be informed that a particular payment is required to obtain a specific license but find out that the money was directed to a foreign official.

Note that the FCPA does have a knowledge requirement; however, knowledge may be demonstrated by establishing awareness of a *high probability* of impropriety, unless the person actually believed that there was nothing improper in that instance. *See* 15 U.S.C. § 78dd-1(f)(2). The "high probability" standard was intended to ensure that the FCPA's "knowledge" requirement included instances of "conscious disregard" and "willful blindness." H.R. Rep. No. 100-576, at 919 (1988) (*citing United States v. Bright*, 517 F.2d 584 (2d Cir. 1975)); *see also United States v. Kozeny*, No. 09-cr-4704, 2011 WL 6184494 (2d Cir. Dec. 14, 2011). Furthermore, the vast majority of FCPA cases settle before trial which means that there is little case law that speaks specifically to the FCPA's scienter requirement. As a result, the DOJ and SEC have broad discretion to attempt to settle cases based on facts that may be out of tune with a strict interpretation of the FCPA's scienter requirement.

At a minimum, reducing FCPA risks in any foreign country requires that companies take a few basic, but important, steps: conduct a risk assessment of the country, the industry, and the market; use the assessment to prepare a potent anti-bribery policy aimed at both prevention and remediation; implement the policy and disseminate it to all employees; adequately train employees and company agents; and modify the policy when necessary to ensure adequate protection in a changing market.

More specifically, doing business in Cuba – a market with which few American companies are deeply familiar – requires a thorough risk assessment. The quality of the analysis can mean the difference between a deficient anti-bribery policy and one that adequately shields the company from risk exposure. Accordingly, American companies should seek the advice of counsel before, during, and after the assessment. Counsel with experience in dealing with FCPA issues will be well-equipped to make sure the risk analysis is efficient, comprehensive, and targeted. This information will prove invaluable when designing an anti-bribery policy. Furthermore, experienced counsel can assist in implementing the policy, modifying the policy to ensure ongoing effectiveness, and representing the company should any FCPA-related issues arise.