

## SPECIAL REPORT CUBA



## FCPA Compliance in Cuba—Regulatory Hurdles Remain

Commentary by Richard Montes de Oca and Steven Neuman

In June, the Trump administration announced its new Cuba policy, which was presented as a cancellation of the Obama administration's agreement to normalize U.S. relations with "the island." This new policy tightens restrictions on U.S. persons who wish to travel to Cuba and limits the ability of U.S. businesses to engage in commerce with GAESA (Grupo de Administración Empresarial S.A.), the Cuban military's business and commerce division.



De Oca

One specific consequence of Trump's new policy will be the prohibition of U.S. companies to establish new relationships with certain tourism-related enterprises, including hotels, many of which are run by GAESA's subsidiary, Gaviota. It will also limit foreign investment in Cuba's Special Economic Development Zone of Mariel (Zona de Desarrollo Integral



Neuman

de Mariel), since it is controlled by another GAESA subsidiary. Notwithstanding the new policy, which becomes effective following the adoption of regulations by the Treasury Department, Cuba remains open for business. Specifically, U.S. businesses can pursue ventures in industries that are not controlled by the Cuban military and intelligence services, including telecommunications, airports, cruise ports and agriculture.

However, U.S. companies interested in pursuing any such business must still be prepared to extend their compliance programs with U.S. regulations when dealing with Cuba. Implementing an effective compliance program, including training and due diligence, presents various unique challenges because the Cuban government controls and operates virtually every business on the island through its various government-owned business enterprises and ventures, not just those affiliated with GAESA. Consequently, the government directly or indirectly employs essentially all Cuban persons facilitating business with U.S. companies through such entities, which are deemed "government

officials" for purposes of the Foreign Corrupt Practices Act (FCPA), and presents considerable risks for U.S. companies to comply with such anti-corruption laws and regulations.

### KNOW YOUR BUSINESS PARTNERS

The first, and critical, step in extending your compliance program to Cuba is to know your business partners (i.e., any agents, intermediaries or consultants) and their level of understanding with respect to applicable regulations, anti-bribery laws and compliance requirements, including the FCPA. Companies should issue an FCPA questionnaire and conduct due diligence with respect to such partners to identify and address any potential specially designated nationals (SDNs), conflicts of interest and/or politically exposed persons (PEPs) who have government ties. It's also important to confirm that such persons and entities are in compliance with the FCPA and other applicable U.S. regulations. In addition, any agreement for advice, services and business should contain provisions

for such business partners to fully comply with FCPA and other applicable U.S. regulations as a condition to conducting business.

### **SPEAKING THE LANGUAGE**

After you've completed satisfactory due diligence, employees at all levels, as well as agents and brokers acting on the company's behalf, must agree and adhere to the proper policies and procedures to ensure that compliance standards are set before any transaction occurs. They must also be trained to ensure they understand the concepts, risks and consequences that are not customary in a culture where the government controls everything. Beyond the day-to-day operations, there are language, cultural and political challenges that affect business expansion and compliance programs in Cuba. Not only must compliance policies, procedures and training be available and delivered in Spanish, they will require additional content and time to ensure the conceptual foundations are communicated. In addition, helplines and guidance on any such policies and procedures should be available in Spanish.

### **SYSTEMS AND CONTROLS**

Once appropriate due diligence is performed, policies are adopted and training has been conducted, it is critical to implement appropriate business and accounting systems and controls to ensure compliance with the books and records provisions of the FCPA. There are likely to be technological restrictions and limitations on being able to use the entity's standard accounting systems already used in the U.S., which means a local nonintegrated set of accounting

records may be required. This will add a significant transaction and regulatory risk element that will need to be closely controlled and monitored, as the proper recording of transactions requires integrity and accuracy throughout the process.

One of the key challenges for U.S. companies in establishing appropriate business/accounting systems and controls in Cuba is that most consumer transactions are conducted in cash. While at least one bank (Stonegate Bank, an American bank headquartered in Florida), now offers credit cards for merchant and ATMs, the availability of credit and debit cards in Cuba is very limited. This limited access to local capital shifts the burden to U.S. companies to provide funding for their Cuban counterparts. Furthermore, the Cuban economy operates with more than one currency—the Cuban convertible peso, which is fixed to the U.S. dollar at a rate of 1:1, and the Cuban peso, which is generally used for local transactions. Currency conversions could prove problematic when determining or reconciling exchange rates. All of these foregoing challenges come into play when considering compliance with the books and records provisions of FCPA and ensuring proper accounting records are maintained to accurately depict transactions.

### **MANAGE AND MONITOR**

Once the compliance program has been implemented in Cuba, it is important to continue to closely manage and monitor it to ensure the integration is effective or make appropriate modifications as needed. For example, companies can update their due

diligence of business partners, conduct compliance site visits and assessments, and monitor helpline awareness and activity.

Regular payment monitoring and sampling of transactional data should be performed to ensure legitimacy of the expenditure, accuracy of record-keeping and compliance with the books and records provision of the FCPA. For example, payment terms and vendor transactions should be benchmarked to verify that the terms are in line with industry standards and amounts are consistent with other interactions with the vendor. Internal controls can be introduced to flag any irregular activity within vendor accounts.

### **CONCLUSION**

Despite the restrictions imposed by the Trump administration's new Cuba policy, the opening of the Cuban market to U.S. business provides companies with interesting opportunities for expansion. The proper planning, development and implementation of compliance programs is a necessary step in such expansion. Companies that intend to comply with the U.S. regulations, including FCPA, must set the tone by adopting effective policies and procedures, conducting adequate training, engaging in thorough due diligence and monitoring transactions throughout the course of their business operations in Cuba.

**Richard Montes de Oca is the founder and managing partner of MDO Partners, a boutique law firm with a focus on global compliance and business ethics, and Steven Neuman is a managing director with StoneTurn, a forensic accounting, corporate compliance and expert services firm.**