Memorandum

To: American Institute of Marine Underwriters

From: Wiggin and Dana LLP

Date: January 31, 2018

Re: Updated Responses to AIMU’s Cuba Questions

In January 2015, The American Institute of Marine Underwriters (“AIMU”) asked us to consider certain questions which may arise relating to risks involving Cuba due to rule changes regarding the embargo. This memo updates the information provided in response to those questions from the baseline assumption that AIMU and its members were previously aware of restrictions with regard to Cuban risks before the most recent rule changes took effect on November 9, 2017.

First and foremost, it is important to note that “the Cuba embargo remains in place” and “[m]ost transactions between the United States, or persons subject to U.S. jurisdiction, and Cuba continue to be prohibited, and OFAC [the Office of Foreign Assets Control] continues to enforce the prohibitions of the [Cuban Assets Control Regulations].” Frequently Asked Questions Related to Cuba, Office of Foreign Assets Control (“November 2017 FAQ”), at p. 1 (November 8, 2017), available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf. The most recent rule changes are specifically targeted to “channel economic activities away from the Cuban military, intelligence, and security services, while maintaining opportunities for Americans to engage in authorized travel to Cuba and support the private, small business sector in Cuba.” November 2017 Fact Sheet: Treasury, Commerce, and State Implement Changes to the Cuba Sanctions Rules, Office of Foreign Assets Control, at p. 1 (November 9, 2017), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_fact_sheet_11082017.pdf. The changes thus do not implicate all areas of commerce or make sweeping changes to the embargo.

Both OFAC and the Department of Commerce have issued rule amendments to further the objectives noted above. In most cases, a determination of whether a certain risk may be insured under the rules structure will be a highly fact-specific inquiry. Generally, the answer to the following three anticipated questions is “no,” absent substantial further research on the particular insurance product for the particular risk at issue.

I. Can my company (or broker) write marine insurance on goods being shipped to or from Cuba?

In November 2017, OFAC clarified that “[w]here the provision of insurance-related services is directly incident to activity authorized by general or specific license, then the provision of such services is authorized as well.” November 2017 FAQ, at p. 27. The guidance also included the provision of cargo insurance as a specific example of a transaction that may be authorized, under certain circumstances, such as exportations and reexportations under § 515.533. November 2017
FAQ, at p. 27. However, the November 2017 guidance does caution that persons subject to U.S. jurisdiction “are prohibited from engaging in reinsurance arrangements where the underlying activity is not authorized” by the Cuba regulations. November 2017 FAQ, at p. 28.

Since September 2015, § 515.421 has authorized “any transaction ordinarily incident to a licensed transaction and necessary to give effect thereto,” with some exceptions. 31 C.F.R. § 515.421(a). Such transactions may not involve prohibited Cuban Government officials or members of the Cuban Communist Party, blocked accounts or blocked property, loans, credits, or other financing prohibited under § 515.208, unauthorized payment or financing terms for export and reexport-related transactions under § 515.533(a), or designated persons and entities under the recently added prohibition on certain direct financial transactions. 31 C.F.R. § 515.421.

Section 515.533 of OFAC’s rules regarding Cuba deals with “Exportations from the United States to Cuba,” “reexportations to Cuba,” and “importation and servicing or repair of certain items previously exported or reexported to Cuba.” That section has previously required, and still requires that the underlying activity be authorized. Thus, transactions ordinarily incident to exportations, reexportations, and importations under § 515.533, including insurance, are only authorized on licensed or otherwise authorized exportations. 31 C.F.R. § 515.533(a)(1). Further, the transaction cannot be between a U.S.-owned or -controlled firm in a third country and Cuba for the exportation to Cuba of commodities produced outside of both the U.S. and Cuba and the transaction may not be financed from any blocked account. 31 C.F.R. § 515.533(a)(2)-(3). Additionally, transactions involving agricultural commodities are limited to specific payment and financing terms. 31 C.F.R. § 515.523(a)(4). Note 1 to § 515.533(a) specifically identifies insurance and transportation of exports to Cuba as the type of transactions “directly incident to the shipping of specific exports or reexports” that are authorized by the paragraph. 31 C.F.R. § 515.533(a)

Section 515.533 also references the Department of Commerce’s rules generally (15 C.F.R. §§ 730 - 774), which identify certain exports and reexports to Cuba of items subject to the Export Administration Regulations (“EAR”) that are eligible for licensing by the Department of Commerce’s Bureau of Industry and Security (“BIS”), as well as license exceptions for certain items. See the BIS Cuba policy page at https://www.bis.doc.gov/index.php/policy-guidance/country-guidance/sanctioned-destinations/cuba. Licensable items, which may be exceptions to BIS’s general policy of denial with regards to Cuba, include medicines and medical devices, items to ensure the safety of civil aviation and international air transportation, items necessary for environmental protection, telecommunications items that would improve communications to, from, and among the Cuban people, commodities and software for human rights organizations and U.S. news bureaus, certain agricultural items, and items to meet the needs of the Cuban people, as reviewed on a case-by-case basis. 15 C.F.R. § 746.2(b). BIS’s license exceptions include items related to support for the Cuban people (15 C.F.R. § 740.21), agricultural commodities (15 C.F.R. § 740.18), consumer communications devices (15 C.F.R. § 740.19), gift parcels and humanitarian donations (15 C.F.R. § 740.12), and certain temporary sojourns of aircraft and vessels to Cuba (15 C.F.R. § 740.15). See the BIS Cuba policy page, supra. As before, designation of certain items for export or reexport under BIS licenses and license exceptions may require highly fact-specific analyses. Further, BIS licenses and license exceptions contain highly specific requirements for their use and may impose additional and/or ongoing compliance obligations.
Furthermore, 31 C.F.R. § 515.550 deals specifically with vessels engaged in Cuban transactions. The section contains a number of exemptions to the prohibitions on vessels contained in § 515.207. Those prohibitions are as follows: “(a) No vessel that enters a port or place in Cuba to engage in the trade of goods or the purchase or provision of services, may enter a U.S. port for the purpose of loading or unloading freight for a period of 180 days from the date the vessel departed from a port or place in Cuba; and (b) No vessel carrying goods or passengers to or from Cuba or carrying goods in which Cuba or a Cuban national has an interest may enter a U.S. port with such goods or passengers on board.” 31 C.F.R. § 515.207. Section 515.550 meanwhile, exempts, in relevant part: 1) vessels engaging or having engaged in authorized trade with Cuba, such as trade authorized pursuant to §§ 515.533, 515.559, or 515.582, or by specific license; 2) vessels engaging in or having engaged in exempt trade with Cuba, per § 515.206; or 3) vessels engaging in or having engaged in exportation or reexportation to Cuba from a third country of certain agricultural commodities, medicine, or medical devices, that, were they subject to the EAR, would be designated as EAR99.” 31 C.F.R § 515.550(a)(10)-(3). Further, § 515.550 exempts foreign vessels that have engaged in the exportation to Cuba from a third country of only items that, were they subject to the EAR, would be designated as EAR99 or controlled on the EAR’s Commerce Control List only for anti-terrorism reasons. 31 C.F.R § 515.550(b). Again, this is a highly fact-specific analysis depending on the specific trade authorizations and types of goods being transported. The November 2017 guidance also reiterates that vessels and shipments must be separately authorized or exempted, and that authorization for one does not necessarily extend to the other. November 2017 FAQ, at p. 29.

Additionally, § 515.582 authorizes all transactions “necessary to import certain goods and services produced by independent Cuban entrepreneurs as determined by the State Department as set forth on the State Department’s Section 515.582 List, located at http://www.state.gov/e/eb/tsf/spi/.” This may or may not include insurance of those goods or services, as the general definition of “transactions” in § 515.309 does not explicitly include insurance (whereas, § 515.533 includes explicit reference to insurance).

The November 9, 2017 changes to the OFAC regulations add a new prohibition to the Cuban sanctions. The recently added § 515.209 prohibits direct financial transactions between persons subject to U.S. jurisdiction and certain designated persons “who have been identified as an entity or subentity that is under the control of, or acts for or on behalf of, the Cuban military, intelligence, or security services or personnel and with which such transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba.” 31 C.F.R. § 515.209(a). The designated persons can be found on the Cuba Restricted List maintained by the U.S. State Department. 31 C.F.R. § 515.209(a). Cuba Restricted List available at http://www.state.gov/e/eb/tsf/spi/cuba/cubarestrictedlist/index.htm. Transactions initiated prior to an entity’s designation on the Cuba Restricted List may be grandfathered pursuant to §§ 515.209(b) and (c). However, the new section does not prohibit indirect financial transactions, such as those under § 515.584, where the person does not act as the originator nor the beneficiary on a transfer of funds. 31 C.F.R. § 515.209 Note 1.

In conclusion, under the new rules most exports and reexports must still be licensed or otherwise authorized to be legally insured by U.S. underwriters. The available licenses and license
exceptions are very specific, and AIMU members may therefore wish to consult with legal counsel and/or the Department of Commerce and OFAC to ensure there is no violation of the continuing embargo.

II. Can my company insure a vessel, including a yacht, calling on Cuba?

Other than the changes noted above, there are no specific changes in the most recent rule amendments regarding the insurance of vessels themselves. Unless the vessel is dealing in licensed or otherwise authorized transactions, the prohibition on insuring vessels remains.

The November 2017 FAQ does offer some additional guidance related to the provision of insurance when interpreting the regulations. November 2017 FAQ, at p. 26-28. The November guidance notes that certain types of global group health, life, and travel insurance may be authorized pursuant to § 515.580, for individuals ordinarily resident outside of Cuba, or § 515.560, for authorized U.S. travelers. November 2017 FAQ, at p. 26-27. However, the November 2017 FAQ further clarifies, that, other than the global insurance policies for individuals authorized by § 515.580, “absent specific authorization from OFAC, U.S. insurers and their subsidiaries are not permitted to issue policies, provide reinsurance coverage, or pay insurance or reinsurance claims related to non-U.S. persons, including entities such as foreign airlines, providing goods or services that facilitate travel by third-country nationals from a third country to Cuba.” November 2017 FAQ, at p. 27.

Additionally, § 515.550(a) exempts certain vessels carrying authorized travelers or used solely for personal travel, which may include yachts, from the general prohibition under § 515.207 on vessels calling on Cuba. 15 C.F.R. § 515.550(a)(5). Specifically, § 515.550(a) exempts, in relevant part: foreign vessels entering Cuba while carrying students, faculty, and staff authorized to travel to Cuba under § 515.565(a); or vessels carrying of having carried persons between the U.S. and Cuba or within Cuba pursuant to travel authorization in § 515.572(a)(2), or pursuant to a BIS license or other authorization for vessels used solely for personal travel. 15 C.F.R. § 515.550(a)(4)-(5)

In conclusion, under the new rules most transactions must still be licensed or otherwise authorized to be legally insured by U.S. underwriters. The available licenses and license exceptions are very specific, and AIMU members may therefore wish to consult with legal counsel and/or the Department of Commerce and OFAC to ensure there is no violation of the continuing embargo.

III. Can I pay a claim that in any way involves a Cuban entity?

The baseline remains that “[p]ersons subject to U.S. jurisdiction are prohibited from doing business or investing in Cuba unless licensed by OFAC.” November 2017 FAQ, at p. 22 (November 8, 2017). However, in the November 2017 FAQ, OFAC clarified that “[w]here the provision of insurance-related services is authorized by a general license, either expressly or as a transaction ordinarily incident to a licensed transaction, this authorization extends to the payment or settlement of claims, including to a Cuban national.” November 2017 FAQ, at p. 28.

Nonetheless, the November 2017 FAQ cautions, that, other than the global insurance policies for individuals authorized by § 515.580, “absent specific authorization from OFAC, U.S.
insurers and their subsidiaries are not permitted to issue policies, provide reinsurance coverage, or pay insurance or reinsurance claims related to non-U.S. persons, including entities such as foreign airlines, providing goods or services that facilitate travel by third-country nationals from a third country to Cuba.” November 2017 FAQ, at p. 27.

When contemplating the payment of claims to a Cuban national, the recently added prohibition on direct financial transactions with certain designated persons must be considered. The new § 515.209 prohibits direct financial transactions between persons subject to U.S. jurisdiction and certain designated persons who have been identified as an “entity or subentity that is under the control of, or acts for or on behalf of, the Cuban military, intelligence, or security services or personnel and with whom such transactions would disproportionately benefit such services or personnel at the expense of the Cuban people or private enterprise in Cuba.” 31 C.F.R. § 515.209(a). These designated persons can be found on the Cuba Restricted List maintained by the U.S. State Department. 31 C.F.R. § 515.209(a). Cuba Restricted List available at http://www.state.gov/e/eb/rfs/spi/cuba/cubarestrictedlist/index.htm. Transactions initiated prior to an entity’s designation on the Cuba Restricted List may be grandfathered pursuant to §§ 515.209(b) and (e). This new section explicitly does not prohibit indirect financial transactions, such as those under § 515.584, where the person does not act as the originator nor the beneficiary on a transfer of funds. 31 C.F.R. § 515.209 Note 1.

IV. Other Potential Questions

- Will the embargo be relaxed enough to write insurance on Cuban risks? If so, when?

  - While President Obama’s statements and OFAC’s prior rule changes did signal a march toward new relations with Cuba, President Trump and OFAC’s most recent changes have slowed that process and taken steps to reverse some of the changes. Most likely, an answer on the fate of the Cuban embargo will not be clear during this administration. Moreover, the pace of rule changes related to Cuba has increased in recent years, with multiple announcements in each of the last three years. Thus, there is no clear answer on when an insurer’s approach to Cuban risks can change.

- Do the new rule changes mean my company can do business with Cuba?

  - As noted above, and despite the recent rule changes, OFAC remains adamant that just about any business with Cuba must still be licensed or otherwise authorized by OFAC. The recent changes impact very particular goods and services, and are subject to highly-specific requirements and limitations, and thus, they do not mean that Cuba is open for business.
• Will OFAC issue further guidance on Cuba?
  ○ As questions arise from certain industries, such as these presented by AIMU, OFAC may issue new FAQs and summaries regarding the Cuban rule changes. Particularized inquiries can also be direct to OFAC for further guidance on these very particular changes. Of course, should new rules further relax the embargo, OFAC will most likely update its materials and issue new FAQs on those changes.