

**Statement of Donald E. Ellison
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**Regarding Export Controls such as the Export Administration Regulations and the
International Traffic in Arms Regulations**

**Before the United States International Trade Commission
June 2, 2015**

**Investigation No. 332-552
Overview of Cuban Imports of Goods and Services and Effects of U.S. Restrictions**

Honorable Commissioners:

Introduction: Good afternoon, I am Donald E. Ellison, Founder and President of Government Relations, LLC. We are located in the Virginia suburbs of the Nation's Capital. Since 1984, Government Relations, LLC has been "helping businesses compete globally" in numerous ways. One role that we undertake is certifying Export Control Management Systems for entrepreneurs, companies, and educational institutions. Other roles we provide include Merger and Acquisition (M&A) due diligence assistance, Enterprise Risk Management, and Emerging Markets Research.

Corporate Leaders Often Forget Export Control Laws: I am a Board Leadership Fellow with the National Association of Corporate Directors (NACD) and through this role help guide companies as they expand to overseas markets. Last month, I spoke at the Annual Conference of the Association for Strategic Planning and I am amazed that leaders in corporate strategy nearly universally ignore export controls (and its effects) on various major business decisions such as M&A's, major acquisitions, and supply chain planning. It even goes so far as to being left out of M&A textbooks and standard due diligence checklists. This is shocking since export controls can significantly influence the business deal. When export controls are discussed in the boardroom, the C-suite executives and directors look at each other blankly - no joke I have seen it happen - and a sudden case of amnesia strikes the entire room. In spite of reports sitting in front of them, the whole board either points fingers of blame or shrugs and marks export controls up to an "unforeseeable" risk factor. A sad lesson that somehow is never learned. I am pleased that at least the Commissioners remembered this important aspect of commerce.

The US Public is Impatiently Expecting Regulatory Changes, However Unrealistic: If corporate governance leaders and textbooks can be confused (or ignore) export control laws and regulations, think how the “average” entrepreneur, businessperson, and educator could be frustrated? Now add on top of the existing regulatory complexity, the complications added by adjusting fundamental policy shifts, laws, and regulations such as introduced by the “Statement by the President on Cuba Policy Changes”¹. The US public hears news reports that travel and trade with Cuba is open²⁻⁴ and suddenly they think they can hop on an airplane for a business trip to Cuba next week, many failing to realize the sheer inertia of changes that need to be made by the United States Congress and the Executive Branch.

Overview of US Export Controls: For the sake of time, I have placed some of the text from a February 13th, 2015 Congressional Research Service report in the endnotes of my testimony.⁵ This report specifically addresses the US export control laws and regulations that are still in effect and will need to be changed by the Legislative Branch and the Administration. Allow me to give the Commission a brief overview of the two primary sets of regulations covering export controls, the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR).

1) ***ITAR:*** the Department of State which is responsible for the export and temporary import of defense articles and services governed by 22 U.S.C. 2778 of the Arms Export Control Act (“AECA”) and Executive Order 13637. The International Traffic in Arms Regulations (“ITAR,” 22 CFR 120-130) implements the AECA and

2) ***EAR:*** the Department of Commerce which is responsible for the Export Administration Act of 1979 which expired in August 20, 1994, and was reauthorized by Pub. L. 106-508 (November 13, 2000). During the lapse, a national emergency declared under Executive Order 12924 (August 19, 1994) and extended by annual Presidential notices, continued in effect the provisions of the Export Administration Regulations (EAR). The Act lapsed again on August 20, 2001 and the President, through Executive Order 13222 of August 17, 2001 (66 Fed. Reg. 44025 (August 22, 2001)), has continued the Regulations in effect under the International Emergency Economic Powers Act.

There are many other laws and regulations that control foreign trade such as the Foreign Corrupt Practices Act (FCPA), Anti-Money Laundering Laws (AML), Atomic Energy Act - not to mention other obvious parts of the Executive Branch such as the Department of Agriculture, Food and Drug Administration, Drug Enforcement Administration, and others, but again I am focusing on ITAR and EAR today. As a further note, I compliment the Administration and Congress on the implementation of Export Control Reform which modernized a number of categories in the ITAR and EAR. The net effect of the Export Control Reform efforts has allowed our warfighters to work more effectively with coalition forces.

Untangling Cuban Export Control Policy Will Be A Herculean Task: Will untangling Cuba from the myriad of laws and regulations that have expanded over the past half a century be easy? Clearly not. As an example, Cuba is listed eighty-three times in a paper titled “Legal Authority Export Administration Regulations (as of January 21, 2015)” prepared by The Office of Chief Counsel for Industry and Security, U.S. Department of Commerce.

Assume An Arms Embargo Remains Against Cuba: Clearly the Commission did not ask me to come here to index the ITAR and EAR, so I am going to start making some simplified assumptions. It was Government Relations, LLC's prediction that the State Department would rescind Cuba's designation as a "State Sponsor of Terrorism", but we presume that an arms embargo will remain in effect against Cuba. This embargo has been in place since December 6th, 1984 (49 FR 47682) and keeping it would be consistent with the Administration's comparison of Cuba with China. China and the US maintain a well-respected trading partnership in spite of the fact that China remains on the arms embargo list. If, as expected, Cuba remains on the arms embargo list, articles included in the United States Munitions List (USML) would have a "presumption of denial". It would be my expectation that the Department of State would be very conservative in their approval of any export licenses for articles covered by the International Traffic in Arms Regulations (ITAR).

The Structure of the Commerce Control List: Typically trade becomes much more complex when we move to the exports controlled by the Department of Commerce on the Commerce Control List (CCL). These articles are known as "dual use" items, because they may have two applications - both military and civilian. As the Commission is aware, the CCL further controls items in eight broad categories: chemical and biological weapons, nuclear non-proliferation, national security, missile technology, regional stability, firearms convention, crime control, and anti-terrorism. There are further sub-classifications, but these general areas are sufficient for our discussion. The civil servants within the Bureau of Industry and Security (BIS) at the Department of Commerce spend a great deal of time understanding the complexities within these eight categories. We cannot approach a topic of this length here. However allow me to address some issues that may be of interest to the Commission.

Easing Encryption Technology Controls Is Essential for US Security in Cuba: Encryption technology is in almost everything the average American touches and uses in the digital age...from software, to cellphones, to banking, to wireless routers. In spite of the 2010 relaxation of encryption rules (75 FR 36481), enforcement of these rules would still be onerous to Cuba. Why? Whereas China had the internal capability and financing to develop encryption protocols that protect its growing industries from cyber threats, Cuba is both underfunded and behind the technology curve. Unfortunately, Cuba is unlikely to develop sufficient encryption protocols necessary to protect the influx of US information, money, and resources - without US assistance. The net effect of "protecting" American encryption technology from being exported to Cuba, would have the reverse effect by exposing US money, information, and digital services to easy attack from anywhere in the world. As an example, a US military contractor vacationing in Havana, who - without a second thought checks his work email from his hotel room - could be wide open to hackers quickly downloading military secrets from the unsecure network. There are no easy answers here, but it is certainly a discussion worth having.

The CCL's Nuclear Proliferation Strategy Will Affect Medical Treatment in Cuba: For historic reasons, nuclear and missile technology are likely to be controlled in Cuba. However again the devil is in the details. Cuba's medical system would benefit from the latest advances in radiotherapy and more sophisticated imaging systems that rely on radiation. Admittedly, the

radiotherapy in Cuba is good enough for Venezuelan President Hugo Chávez, and the US already has an existing exemption for a number of medical devices. However this is not likely to be sufficient to accommodate Cuba's aging population and the expected increase in tourism. Allowing medical specialists and patients access to a much broader range of treatments is going to be a balancing act between security, cost, and humanitarian efforts.

Export Controls Make All Trade Safer: Encryption and radiation-based medical devices are just two of the many examples of the export controls that would have significant and far-reaching effects on Cuba. I know that the US is buzzing with talk about tourism and agriculture in Cuba, but I urge the Commission to take the time to examine the underlying systems that support a modern economy. These underlying systems entail both digital security and medical technologies - most of which are controlled by some form of an export license. Making appropriate decisions now could vastly improve the protection of US commercial and/or military items necessary to function in a modern economy such as using the GPS on your rental car, to making cellphone calls back home, to sending emails, to buying that Cuban cigar with your credit card...or even god forbid...receiving appropriate emergency medical care should a US family suffer an accident on the roads in Cuba.

I commend the ITC for paying attention to these important matters and making trade and tourism with Cuba safer for everyone. Thank you.

End of Statement.

Delivered June 2, 2015 by Donald E. Ellison of Government Relations, LLC.

References:

1. The White House, Office of the Press Secretary, December 17, 2014.
2. New York Times, "U.S. to Restore Full Relations With Cuba, Erasing a Last Trace of Cold War Hostility" by Peter Baker, December 17, 2014. NOTE: There were 2,170 comments when the digital comments section closed.
3. Washington Post, "U.S. eases Cuban trade and travel rules as it moves toward restoring full ties" by Karen DeYoung, January 15, 2015.
4. Washington Times, "Obama set to ease Cuba sanctions Friday" by Dave Boyer, January 15, 2015.
5. Congressional Research Service, "Cuba Sanctions: Legislative Restrictions Limiting the Normalization of Relations" by Dianne E. Rennack and Mark P. Sullivan. Quoting from the report:

President John F. Kennedy proclaimed an embargo on trade between the United States and Cuba in February 1962, citing Section 620(a) of the Foreign Assistance Act of 1961 (FAA), which authorizes the President "to establish and maintain a total embargo upon all trade between the United States and Cuba." At the same time, the Department of the Treasury issued the Cuban Import Regulations to deny the importation into the United States of all goods imported

from or through Cuba. The authority for the embargo was later expanded in March 1962 to include the Trading with the Enemy Act (TWEA).

In July 1963, the Treasury Department revoked the Cuban Import Regulations and replaced them with the more comprehensive Cuban Assets Control Regulations (CACR)—31 C.F.R. Part 515— under the authority of TWEA and Section 620(a) of the FAA. The CACR, which include a prohibition on most financial transactions with Cuba and a freeze of Cuban government assets in the United States, remain the main body of Cuba embargo regulations, and have been amended many times over the years to reflect changes in policy. They are administered by the Treasury Department's Office of Foreign Assets Control (OFAC), and prohibit financial transactions as well as trade transactions with Cuba. The CACR also require that all exports to Cuba be licensed by the Department of Commerce, Bureau of Industry and Security, under the provisions of the Export Administration Act of 1979, as amended. The Export Administration Regulations (EAR) are found at 15 C.F.R. Sections 730-774.

Congress subsequently strengthened sanctions on Cuba through provisions in such legislation as the Cuban Democracy Act of 1992 (CDA, P.L. 102-484, Title XVII), the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (P.L. 104-114), and the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA, P.L. 106-387, Title IX).

- i. Among its sanctions, the CDA prohibits U.S. subsidiaries from engaging in trade with Cuba and prohibits entry into the United States for any sea-borne vessel to load or unload freight if it has been involved in trade with Cuba within the previous 180 days.
- ii. The LIBERTAD Act codified the economic embargo, including all restrictions under the CACR, although the President retains broad authority to amend the regulations. Nevertheless, as set forth in the LIBERTAD Act, the President cannot eliminate the embargo regulations without making a determination that a transition government is in power in Cuba. The LIBERTAD Act also requires the President to end the embargo if he determines that a democratically elected government is in power.
- iii. While TSRA authorizes U.S. commercial exports to Cuba, it also includes prohibitions on U.S. assistance and financing and requires "payment of cash in advance" or third-country financing for the exports. The act also prohibits tourist travel to Cuba.

In addition to these key acts that constitute the economic embargo, there are numerous other provisions of law that impose sanctions on Cuba, including restrictions on trade, foreign aid, and support from international financial institutions. The government of Cuba also was designated by the State Department as a state sponsor of international terrorism in 1982 under Section 6(j) of the Export Administration Act and other laws because of its alleged ties to international terrorism.